EXPANDING THE SCOPE OF CHILD HEARSAY EXCEPTIONS

Archita Dwarakanath[*]

ABSTRACT

Child abuse is a serious problem in the United States. Very few cases are reported and even fewer are prosecuted because usually the only evidence is the child's statements and the defendant's statements. Cases that are prosecuted present several problems, including the retraumatization of children who testify and a jury's potential disbelief of children. While testimonial aids alleviate some of the stresses of testifying, they still require the child to testify and may be counterproductive to improving children's credibility in the eyes of juries.

Children's hearsay statements may also be presented in child abuse prosecutions under the child hearsay exceptions of several states. Although these laws may appear to alleviate the stresses of testifying, upon closer examination, they generally do not, presumably because they are structured to comply with the Sixth Amendment's Confrontation Clause. However, the Confrontation Clause should not be interpreted as requiring such rigid impediments to the admissibility of children's hearsay statements. This Note will propose that child hearsay exceptions are necessary and that states' child hearsay exceptions should not depend on either the child testifying or the production of corroborative evidence.

Some states' child hearsay exceptions are also problematic because they only apply in cases of sexual abuse despite the bulk of psychological research suggesting that both physical abuse and sexual abuse are equally traumatic. Given that research, this Note proposes that states' child hearsay exceptions should be applicable both in cases of sexual abuse and in cases of physical abuse to be consistent with the research and the current practices of many other states.

[*] J.D., Boston University School of Law, 2022; B.S., Applied Mathematics, University of California, Los Angeles, 2018. I would like to thank Professor Julie Dahlstrom for her invaluable guidance and support throughout this process; my Note would not have been in the shape it is today without her advice. I would also like to thank the *Boston University Law Review* editors for their tireless effort in making this Note publishable. I would especially like to thank Seth Montgomery for his encouragement. I would also like to thank Maanasa Humchad for reviewing my Note and letting me know how much it meant to her and impacted her. Finally, I would like to thank my biggest supporter—my mom, Latha Dwarakanath—who has always been there for me and encouraged me and who continues to support me so that I can achieve all my goals.

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Abuse manipulates and twists a child's natural sense of trust and love. Her innocent feelings are belittled or mocked, and she learns to ignore her feelings. She can't afford to feel the full range of feelings in her body while she's being abused—pain, outrage, hate, vengeance, confusion . . . . [A]ny expression of feelings, even a single tear, is cause for more severe abuse . . . . [T]he only recourse is to shut down. Feelings go underground.

—Laura Davis[1]

The child trapped in an abusive environment is faced with formidable tasks of adaptation. She must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a situation of helplessness. Unable to care for or protect herself, she must compensate for the failures of adult care and protection with the only means at her disposal, an immature system of psychological defenses.

—Judith Herman[2]

INTRODUCTION

No child should ever be abused. Unfortunately, child maltreatment is a sad reality for many children every day. Child maltreatment consists of "violent or other abusive actions by parents or other caregivers, causing physical and mental harm."[3] Child maltreatment can include sexual abuse, physical abuse, neglect, and emotional abuse.[4] Generally, children experience only one form of maltreatment.[5]

[1] LAURA DAVIS, ALLIES IN HEALING: WHEN THE PERSON YOU LOVE WAS SEXUALLY ABUSED AS A CHILD 19 (1991).

[2] JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 96 (1997).

[3] Jiaxu Zhao, Xin Peng, Xiaomei Chao & Yanhui Xiang, *Childhood Maltreatment Influences Mental Symptoms: The Mediating Roles of Emotional Intelligence and Social Support*, 10 FRONTIERS PSYCHIATRY 1, 2 (2019).

[4] CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2019) ("Some States also provide definitions in statute for parental substance use and/or for abandonment as child abuse.").

[5] *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018, at 21 (2020) ("The [federal fiscal year] 2018 data show 84.5 percent of victims suffered from a single maltreatment type and the remaining 15.5 percent have two or more maltreatment types (multiple maltreatment types). . . . 10.7 percent are physically abused only, and 7.0 percent are sexually abused only."); David D. Vachon, Robert F. Krueger, Fred A. Rogosch & Dante Cicchetti, *Assessment of the Harmful Psychiatric and Behavioral Effects of Different Forms of Child Maltreatment*, 72 JAMA PSYCHIATRY 1135, 1136 (2015) ("Worldwide prevalence estimates suggest that child physical abuse (8.0%), sexual abuse (1.6%), emotional abuse (36.3%), and neglect (4.4%) are common.").

Child maltreatment is a pervasive problem in the United States that often goes unreported.[6] Approximately one in seven children are victims of maltreatment every year,[7] meaning that over ten million children in the United States are abused annually.[8] About five children die daily from maltreatment.[9] Approximately 12.5% of all children are victimized by age eighteen.[10]

Despite the prevalence of child maltreatment, only about four million reports (concerning a little under eight million children) are reported to Child Protective Services ("CPS") yearly.[11] More than half of all reports are screened in as "'appropriate' for CPS response and receive[] either an investigation or alternative response," and approximately one-fifth of children who received an investigation are substantiated as victims.[12]

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[6] Approximately "one in four children will experience child abuse and neglect at some point in their lifetime," but most cases of child maltreatment "go[] unreported." Elizabeth T.C. Lippard & Charles B. Nemeroff, *The Devastating Clinical Consequences of Child Abuse and Neglect: Increased Disease Vulnerability and Poor Treatment Response in Mood Disorders*, 177 AM. J. PSYCHIATRY 20, 20-21 (2020).

[7] *See Fast Facts: Preventing Child Abuse & Neglect*, *Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html [https://perma.cc/5QCG-UV4A] (last updated Apr. 6, 2022); Lippard & Nemeroff, *supra* note 6, at 20 (reporting that "one in seven children . . . experienced abuse" in 2019).

[8] *See Pop1 Child Population: Number of Children (in Millions) Ages 0-17 in the United States by Age, 1950-2020 and Projected 2021-2050*, CHILDSTATS.GOV: F. ON CHILD & FAM. STAT., https://www.childstats.gov/americaschildren/tables/pop1.asp [https://perma.cc/LG6F-6P6J] (last visited Sept. 15, 2022) (showing that child population in United States has been greater than 70 million since mid-1990s).

[9] *See Child Abuse Statistics*, CHILDHELP, https://www.childhelp.org/child-abuse-statistics/ [https://perma.cc/6G9J-8KRP] (last visited Sept. 15, 2022) (reporting 1,840 estimated fatalities in 2019 caused by abuse and neglect); *Fast Facts: Preventing Child Abuse & Neglect*, *supra* note 7.

[10] Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid, & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 274 (2017) (cautioning that this figure is derived only from children who were substantiated as victims by Child Protective Services).

[11] *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 2 (2021) [hereinafter SUMMARY OF KEY FINDINGS 2019] ("During [federal fiscal year] 2019, CPS agencies received an estimated 4.4 million referrals involving the alleged maltreatment of approximately 7.9 million children."); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018: SUMMARY OF KEY FINDINGS 2 (2020) [hereinafter SUMMARY OF KEY FINDINGS 2018] ("During [federal fiscal year] 2018, CPS agencies received an estimated 4.3 million referrals involving the alleged maltreatment of approximately 7.8 million children.").

[12] SUMMARY OF KEY FINDINGS 2019, *supra* note 11, at 2 ("Approximately one-fifth (16.7 percent) of the children investigated were found to be victims of abuse or neglect—a rate of 8.9 per 1,000 children in the population."); SUMMARY OF KEY FINDINGS 2018, *supra* note 11,

Prosecuting child abuse cases presents even more challenges. Often the only evidence to prosecute these claims is the abused child's testimony.[13] However, children either fail to step forward or cannot fully participate because the investigation and prosecution processes can be retraumatizing.[14] Even when children are competent to testify, juries may not believe their testimony.[15] Prosecutors and courts employ many testimonial aids to limit the negative effects of testifying on children, such as using comfort dogs[16] and testifying through closed-circuit television.[17] However, the use of such aids further compounds the negative perception that juries already have of children who testify.[18] Juries' reluctance to believe children's testimony decreases rates of conviction[19] against perpetrators and increases retraumatization of children who must testify.

at 2 ("Approximately one-fifth (16.8 percent) of the children investigated were found to be victims of abuse or neglect—a rate of 9.2 per 1,000 children in the population.").

[13] *See* Thomas D. Lyon, Nicholas Scurich, Karen Choi, Sally Handmaker & Rebecca Blank, "*How Did You Feel?": Increasing Child Sexual Abuse Witnesses' Production of Evaluative Information*, 36 LAW & HUM. BEHAV. 448, 448 (2012) ("The child and the suspect are usually the only potential eyewitnesses . . . and physical evidence is often lacking." (citation omitted)).

[14] *See* Gail S. Goodman, Elizabeth Pyle Taub, David P.H. Jones, Patricia England, Linda K. Port, Leslie Rudy & Lydia Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y FOR RSCH. CHILD DEV. 1, 126 (1992) (concluding that testifying is "associated with adverse emotional effects for at least some children").

[15] *See, e.g.*, Emily Denne, Colleen Sullivan, Kyle Ernest & Stacia N. Stolzenberg, *Assessing Children's Credibility in Courtroom Investigations of Alleged Child Sexual Abuse: Suggestibility, Plausibility, and Consistency*, 25 CHILD MALTREATMENT 224, 225 (2020) ("The age of the victims, lack of evidence, and fears of false reports can leave jurors . . . wary of children's reports."); C.J. Brainerd & V.F. Reyna, *Reliability of Children's Testimony in the Era of Developmental Reversals*, 32 DEVELOPMENTAL REV. 224, 224 (2012) ("A hoary assumption of the law is that children are more prone to false-memory reports than adults, and hence, their testimony is less reliable than adults'.").

[16] *See* Robert H. Pantell, *The Child Witness in the Courtroom*, 139 PEDIATRICS 1, 2 (2017).

[17] *See* Maryland v. Craig, 497 U.S. 836, 855-56 (1990) (requiring case-specific showing of necessity to be made prior to use of closed-circuit television).

[18] *See* Rachael Sophia Mickelson Hendrickson, Juror Perceptions of Child Witness Testimonial Aids 16 (Dec. 2018) (M.S. thesis, University of North Dakota) (available at https://commons.und.edu/cgi/viewcontent.cgi?article=3420&context=theses [https://perma.cc/6HCH-W3B4]) ("CCTV's and hearsay testimony have achieved the goal of improving children's accuracy and reducing trauma. However, . . . [t]hese testimonial supports tend to help the defendant and may not get the child justice."). *But see id.* at 38-39 (suggesting that "emotional support animals may reduce negative perceptions of child witnesses").

[19] Stephen J. Ceci & Eduardus de Bruyn, *Child Witnesses in Court: A Growing Dilemma*, 22 CHILD. TODAY 5, 6 (1993) (indicating that younger child victims are less likely to be believed, resulting in fewer convictions).

The rule against hearsay also poses a problem in child abuse prosecutions. Hearsay is "a statement . . . other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[20] Evidentiary rules often require judges to exclude hearsay.[21] Every state has some form of the Federal Rules of Evidence ("FRE") Rule 802, making hearsay generally inadmissible.[22] In the criminal procedure context, which is the primary focus of this Note, the Confrontation Clause compounds the general rule of hearsay exclusion by requiring that a defendant "be confronted with the witnesses against him."[23]

There are many exclusions and exceptions to the general rule against hearsay admissibility.[24] Hearsay exceptions are crucial in the context of child abuse because they allow otherwise inadmissible evidence into the record without the risk of retraumatizing children through testimony. For example, suppose a child reports abuse to seek help. In that case, prosecutors may introduce the child's statement as hearsay evidence of the abuse in any subsequent proceeding against the abuser,[25] which keeps the child from risking further traumatization by having to testify in court while facing the abuser.

Generally applicable hearsay exceptions, however, are not enough because they do not consider the differences between children and adults, including children's greater vulnerability[26] and the greater difficulty children experience in accurately remembering events.[27] States must include child-specific hearsay exceptions, at the very least, to account for instances where a child is incompetent to testify but where the child's hearsay statements (e.g., reports of the abuse) do not fall under any other hearsay exception.[28] While forty states[29] have explicit child hearsay exceptions,[30] the scopes of these exceptions differ significantly from state to state. For example, some states only allow the child

[20] *Hearsay*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] *See* FED. R. EVID. 802.

[22] *See id*.

[23] U.S. CONST. amend. VI; *see also infra* Section I.A.1 (discussing the Confrontation Clause in greater detail).

[24] *See* FED. R. EVID. 801(d), 803-04, 807 (listing exceptions and exclusions).

[25] *See* Ohio v. Clark, 576 U.S. 237, 241-42 (2015) (exemplifying one instance where child reported abuse and statement was introduced into evidence against his abuser).

[26] *See* Alexander Bagattini, *Children's Well-Being and Vulnerability*, 13 ETHICS & SOC. WELFARE 211, 211 (2019).

[27] *See* Daniel Goleman, *Studies of Children as Witnesses Find Surprising Accuracy*, N.Y. TIMES, Nov. 6, 1984, at C1 (explaining that main challenge with child witnesses is that they remember less).

[28] *See, e.g.*, *Clark*, 576 U.S. at 241-42 (admitting report of abuse under child hearsay exception).

[29] For purposes of this Note, Washington, D.C., will be considered a "state."

[30] *See infra* note 205 and accompanying text.

hearsay exception to be used in cases involving sexual abuse.[31] In contrast, others allow the child hearsay exception to be used in cases involving other forms of maltreatment.[32] Nevertheless, the traumatic effects of physical and sexual abuse are similar[33] and support the idea that child hearsay statutes should be applicable in both physical and sexual abuse cases. The differences in applicability are especially astonishing when we examine the results of prosecutions for physical abuse and sexual abuse cases, leading to more convictions for sexual abuse but not for physical abuse.[34]

Another problem is that almost every state that has a child hearsay exception requires that the child either be available to testify or, if the child is unavailable to testify, that there be corroborative evidence to support the child's hearsay statement.[35] Such conditions, however, are not very practical because there is usually not much evidence aside from the child's statements and the defendant's statements.[36] Furthermore, this is inconsistent with similar hearsay exceptions in the federal system that don't require testimony or corroborative evidence to admit hearsay statements.[37]

This Note seeks to contribute to the important, emerging dialogue regarding children's testimony and hearsay by proposing ways to expand child hearsay statutes. Much of the literature on child testimony discusses a few interrelated topics: the psychological impacts on children caused by testifying,[38] psychological research on children's accuracy and susceptibility to suggestion when testifying,[39] judges' and jurors' negative perceptions of children's

[31] *See infra* note 216 and accompanying text.

[32] *See infra* note 215 and accompanying text.

[33] *See infra* Section I.B.1 (analyzing and comparing psychological effects caused by physical and sexual abuse).

[34] *See infra* Section I.B.2 (examining two Alaska cases, one regarding physical abuse and one regarding sexual abuse, where sexual abuse perpetrator was convicted but physical abuse perpetrator was not); *see also infra* Section III.A (analyzing how same physical abuse fact pattern would allow for child's hearsay statement to be admitted in Ohio but not in Massachusetts, where child hearsay statute is only applicable in sexual abuse cases).

[35] *But see* DEL. CODE ANN. tit. 11, § 3513 (2015) (omitting requirement of corroborative evidence if child is unavailable to testify).

[36] *See* Lyon et al., *supra* note 13, at 448.

[37] *See* discussion *infra* Section II.C (comparing requirements for hearsay admissibility through FRE 807 with requirements for hearsay admissibility through state child hearsay exceptions).

[38] *See generally, e.g.*, Goodman et al., *supra* note 14 (discussing effects of testifying on child sexual abuse victims); DEBRA WHITCOMB, GAIL S. GOODMAN, DESMOND K. RUNYAN & SHIRLEY HOAK, THE EMOTIONAL EFFECTS OF TESTIFYING ON SEXUALLY ABUSED CHILDREN 2-5 (1994) (discussing results of studies that "examine[d] . . . the emotional effects of the court process on sexually abused children").

[39] *See generally, e.g.*, Denne et al., *supra* note 15 (discussing plausibility, consistency, and suggestibility in children's testimony); Barry Nurcombe, *The Child as Witness: Competency*

testimonies,[40] techniques for prosecutors and attorneys to elicit accurate information from child victims and witnesses,[41] and in-court solutions for the issues presented in these contexts.[42] While this Note builds on this literature and acknowledges the limited usefulness of in-court solutions to testifying, this Note is one of the first to go beyond in-court solutions to suggest ways to expand and restructure state child hearsay exceptions.[43]

This Note proceeds as follows: Part I provides background information to contextualize why more robust child hearsay exceptions are necessary and possible. This Part elaborates on the rule against hearsay and the Confrontation Clause to suggest that the Confrontation Clause should not bar child hearsay statutes, child hearsay statements are reliable, and child hearsay exceptions are necessary. By comparing physical and sexual abuse, this Part also suggests that the rationales for including sexual abuse offenses in child hearsay statutes are equally applicable for including physical abuse offenses. Finally, Part I

and Credibility, 25 J. AM. ACAD. CHILD PSYCHIATRY 473, 473-75 (1986) (discussing child witnesses' accuracy, competency, and credibility).

[40] *See, e.g.*, Gail S. Goodman, Ann E. Tobey, Jennifer M. Batterman-Faunce, Holly Orcutt, Sherry Thomas, Cheryl Shapiro & Toby Sachsenmaier, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165, 197 (1998); Hendrickson, *supra* note 18, at 6-8 (discussing the impact of testimonial aids on juror perception of child witnesses).

[41] *See generally, e.g.*, Lyon et al., *supra* note 13 (suggesting interviewers ask children how they feel instead of asking them otherwise direct or suggestive questions); Martine B. Powell, Kimberlee S. Burrows, Sonja P. Brubacher & Kim P. Roberts, *Prosecutors' Perceptions on Questioning Children About Repeated Abuse*, 24 PSYCHIATRY PSYCH. & L. 74, 79-86 (2017) (explaining feedback received from prosecutors on questioning methods and techniques in aiding children describe events); Jennifer Lewy, Mireille Cyr & Jacinthe Dion, *Impact of Interviewers' Supportive Comments and Children's Reluctance to Cooperate During Sexual Abuse Disclosure*, 43 CHILD ABUSE & NEGLECT 112, 112 (2015).

[42] *See, e.g.*, Pantell, *supra* note 16, at 2 (discussing "modifications of courtroom procedures" used to limit "the stress experienced by children appearing in courts"); N. Bala, R.C.L. Lindsay & E. McNamara, *Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes*, 44 CRIM. L. Q. 461, 463 (2001) (discussing impact of using testimonial aids on jurors' perceptions of child witnesses and proposing changes "to make better use of these technological aids").

[43] There is an article that discusses similar proposals for a child hearsay exception in military courts. *See generally* M. Arthur Vaughn II, *Children Are Speaking. It's Time We Listen: The Case for a Child Hearsay Exception in Military Courts*, 78 A.F. L. REV. 169 (2018). However, there are significant differences between the proposals and arguments in this Note and those in Vaughn's Article. For example, this Note emphasizes the need for a child hearsay exception in cases involving sexual and physical abuse, whereas Vaughn's Article does not. *See generally id.* In making my arguments, I also compare the present sense impression exception to explain the need for child hearsay exceptions, which Vaughn does not discuss in his Article. *See generally id.* Finally, I discuss the amended FRE 807 at length, which was amended after Vaughn's article was published. *See* FED. R. EVID. 807.

highlights the problems caused by child testimony, namely prosecutorial dilemmas and retraumatization.

Part II illustrates the inadequacies of currently existing solutions[44] to the problems described in Part I by examining the issues with closed-circuit television and current child hearsay exceptions. Part III proposes ways to create broader child hearsay exceptions by arguing that states' child hearsay exceptions should be applicable in both physical abuse and sexual abuse cases, corroboration of child hearsay statements should not be required, and admission of a hearsay statement through child hearsay exceptions should not depend on the child's availability to testify. While I address and alleviate critiques throughout this Note, I explain more succinctly and concretely why certain critiques are invalid in Part IV.

I. REASONS FOR BETTER CHILD HEARSAY EXCEPTIONS

This Part provides information on the problems that arise in prosecuting child abuse cases, which necessitate more appropriate child hearsay exceptions. Problems occur for several reasons. First, the Confrontation Clause and evidentiary rules themselves are barriers to the admittance of many hearsay statements. However, as I will argue in Section A, the Confrontation Clause's scope is much more flexible and should allow for the admissibility of many children's hearsay statements. Section A also shows the reliability and necessity of child hearsay exceptions. Second, while both physical and sexual abuse are pervasive and emotionally scarring, some states' child hearsay exceptions only apply in sexual abuse cases.[45] Section B compares the psychological impacts caused by physical abuse and sexual abuse to argue for the inclusion of physical abuse offenses (in addition to sexual abuse offenses) in child hearsay exceptions. Finally, despite the prevalence of child abuse, very few cases go to trial because of few reports, children's inability or unwillingness to testify, and lack of other physical or corroborative evidence. Even when cases go to trial and children testify, problems arise in convicting defendants because juries typically disbelieve children and children may be further traumatized. Section C discusses these trial-related issues regarding in-court testimony to establish that better child hearsay exceptions will solve some of these problems, particularly retraumatization.

A. *Rule Against Hearsay and the Confrontation Clause*

In this Section, I will explain what hearsay is, what the Confrontation Clause is, and the rationale behind the Confrontation Clause. By analyzing various

[44] While I do not directly address the inadequacies of testimonial aids other than closed-circuit television, I do imply that other aids are similarly inadequate. *See infra* note 195 and accompanying text.

[45] *See* ALASKA STAT. § 12.40.110 (1998); ARK. R. EVID. 803(25), 804(7); MASS. GEN. LAWS ch. 233, §§ 81-83 (1990); MICH. R. EVID. 803A; MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27); N.D. R. EVID. 803(24).

Supreme Court cases, I will also explain how the Court has mandated the Confrontation Clause due process guarantee only where testimonial statements are involved.[46] I will show that the scope of the Confrontation Clause is much more limited than child hearsay exceptions would seem to suggest.[47] Many child hearsay statutes require the child to either testify, or, if the child is unavailable to testify, for corroborative evidence to be presented.[48] But the rationales behind the Confrontation Clause and the Supreme Court's interpretation of the Confrontation Clause do not dictate such rigid impediments to child hearsay admissibility.

I will then examine the rationales behind the rule against hearsay and the exceptions to that general rule, focusing mainly on FRE 803 (which does not require the declarant to be unavailable).[49] I will demonstrate how the rationales behind some of the exceptions in FRE 803 are similarly applicable to child hearsay exceptions. In addition to the exceptions in FRE 803, I will also explain why child hearsay statements are needed.

1. Defining the Confrontation Clause and the Rationales Behind It

Hearsay is "a statement . . . , other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[50] Every state's evidentiary code includes some form of FRE 802 that makes hearsay generally inadmissible.[51] The rule against hearsay in American criminal jurisprudence is grounded in the Constitution's Confrontation Clause.[52] The rationale behind the Confrontation Clause is to ensure that criminal defendants are granted due process by requiring the witnesses against them to be presented at trial.[53] The presence of witnesses at trial is necessary to ensure that defendants have the opportunity to cross-examine

[46] *See infra* notes 58-80 and accompanying text (deriving the meaning of a "testimonial statement").

[47] Many child hearsay statutes effectively preserve face-to-face confrontation by requiring child witnesses to either testify or provide corroborative evidence. *See* ARIZ. REV. STAT. ANN. § 13-1416 (1987); CAL. EVID. CODE § 1360 (West 1995); COLO. REV. STAT. § 13-25-129 (2019); CONN. CODE EVID. 8-10; FLA. STAT. § 90.803(23) (2014); 725 ILL. COMP. STAT. 5/115-10 (2017); KY. R. EVID. 804A; MINN. STAT. § 595.02, subdiv. 3 (2020); MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27); N.D. R. EVID. 803(24); OKLA. STAT. tit. 12, § 2803.1 (2013); OR. REV. STAT. §§ 40.460(18a), (24) (2017); S.D. CODIFIED LAWS § 19-19-806.1 (2009); VA. CODE ANN. § 19.2-268.3 (2021); WASH. REV. CODE § 9A.44.120 (2019).

[48] *See supra* note 47; *see also infra* Section II.C.

[49] *See* FED. R. EVID. 803.

[50] *Hearsay*, BLACK'S LAW DICTIONARY, *supra* note 20.

[51] FED. R. EVID. 802.

[52] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[53] *See id.*; *see also* California v. Green, 399 U.S. 149, 156-57 (1970).

them and, thus, are not impeded from receiving a fair trial.[54] These witnesses were historically the defendant's coconspirators, associates, and others with motives to implicate the defendant.[55]

But a witness is not simply anyone with a motive to implicate the accused or someone who makes any statement regarding a crime. A witness is "[s]omeone who gives *testimony* under oath or affirmation . . . in person, . . . by oral or written deposition, . . . or by affidavit."[56] Therefore, only statements deemed as testimony come within the ambit of the Confrontation Clause.[57] Thus, it is critical to understand what statements are considered testimonial.

The Supreme Court determined what statements are considered testimonial in *Crawford v. Washington*[58] and its progeny. In *Crawford*, the defendant's wife, Sylvia, was interrogated at the police station and made incriminating statements against the defendant.[59] Sylvia asserted spousal privilege, and the State of Washington sought to use a new hearsay exception to introduce her statements from the interrogation in a prosecution against her husband.[60] The Supreme Court found that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is . . . confrontation."[61] The Court, however, still concluded that the Confrontation Clause does not need to apply to nontestimonial statements.[62] The Court found that testimonial statements referred, at the very least, to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[63] However, the *Crawford* Court refused to elaborate further on what constituted a testimonial statement.[64]

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[54] *See, e.g.*, The Trial of Sir Nicholas Throckmorton, *in* 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 869, 883-84 (London, R. Bagshaw 1809) (describing Throckmorton's resistance to Duke of Suffolk's deposition being read against him).

[55] *See id.* at 884 (suggesting deponent, Duke of Suffolk, was known to have previously made misrepresentations regarding defendant); *see also Green*, 399 U.S. at 156-57 ("The proof was usually given by reading depositions, confessions of accomplices, litters, and the like . . . .").

[56] *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

[57] *See supra* notes 52-56 and accompanying text (establishing that Confrontation Clause only reaches witnesses and witnesses are only those who give testimony, meaning that Confrontation Clause only reaches those who give testimony).

[58] 541 U.S. 36 (2004).

[59] *Id.* at 39-40 (providing transcript of Sylvia's interrogation).

[60] *Id.* at 40-41 ("Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest . . . .").

[61] *Id.* at 68-69.

[62] *Id.* at 68.

[63] *Id.*

[64] *Id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

However, in *Davis v. Washington*,[65] the Court clarified the distinction between testimonial and nontestimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[66]

The Court in *Michigan v. Bryant*[67] extended the primary purpose test outlined in *Davis* to include an objective determination of the circumstances, including whether there was an ongoing emergency.[68] Thus, a nontestimonial statement is one made without the expectation that the statement could be used in a criminal prosecution.[69]

The notion of what distinguishes nontestimonial statements lays the groundwork for the Supreme Court's subsequent decision regarding child hearsay. In *Ohio v. Clark*,[70] a three-year-old boy, L.P., was physically abused by his mother's boyfriend.[71] The next day at school, L.P.'s teachers repeatedly asked him what had happened and who had hurt him.[72] L.P. eventually explained that "Dee" (his mother's boyfriend) had hurt him.[73] The Court deemed L.P. incompetent to testify, so the prosecution sought to introduce L.P.'s statements to his teacher under Ohio's child hearsay statute.[74] However, the defendant argued that the introduction of L.P.'s statements violated his Sixth Amendment rights because Ohio law required teachers to report suspected abuse; thus, the defendant argued L.P.'s statements were testimonial.[75] Despite the mandated reporting, the Supreme Court determined that the statements L.P. made to his teacher were nontestimonial[76] because the questions that elicited the statements were asked "in the context of an ongoing emergency involving suspected child

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[65] 547 U.S. 813 (2006).

[66] *Id*. at 822.

[67] 562 U.S. 344 (2011).

[68] *Id*. at 359-60, 367 ("To determine whether the 'primary source' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' . . . we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." (citation omitted)).

[69] *See supra* text accompanying notes 65-67.

[70] 576 U.S. 237 (2015).

[71] *Id*. at 241.

[72] *Id*.

[73] *Id*.

[74] *Id*. at 241-42.

[75] *Id*. at 242.

[76] *Id*. at 250-52 ("It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution.").

abuse."[77] In doing so, the Court stipulated that, while statements made to non-law-enforcement officials can be testimonial, "[they] are significantly less likely to be testimonial than statements given to law enforcement officers."[78] In dictum, the Court elaborated that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause"[79] because they do not understand how criminal justice and prosecution work.[80]

The Supreme Court's resolution of the *Clark* case is consistent with the rationales underlying the Confrontation Clause. Young children are unlike the witnesses in the cases that prompted the enactment of the Confrontation Clause. Indeed, young children are not accomplices in their abuse, and they generally lack the motivation to incriminate the defendant.[81] They will also rarely be witnesses against the accused, even as interpreted by the Supreme Court.[82] The statements referred to here are similar to those in *Clark*;[83] while these types of statements may be made in response to questioning, they will not usually be elicited by police during interrogation or be elicited to prepare for legal proceedings. The questioning, if any, will likely be conducted to deal with an ongoing emergency—the ongoing abuse of the child.[84] Thus, in general, these statements will be nontestimonial.[85] Given the important public policy of protecting child welfare,[86] the Confrontation Clause should not be a barrier to

[77] *Id*. at 246.

[78] *Id*. at 249.

[79] *Id*. at 247-48 ("Thus, it is extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony.").

[80] *Id*. at 248 ("[A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.").

[81] *Cf*. Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1213 (2012) (implying that children have motive "to keep the abuse a secret"); Edwin J. Mikkelsen, Thomas G. Gutheil & Margaret Emens, *False Sexual-Abuse Allegations by Children and Adolescents: Contextual Factors and Clinical Subtypes*, 46 AM. J. PSYCHOTHERAPY 556, 568 (1992) ("False allegations of sexual abuse by children and adolescents are statistically uncommon, occurring at the rate of 2 to 10 percent of all cases . . . ."). This is also how I interpret the Supreme Court's sentiment that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Clark*, 576 U.S. at 247-48.

[82] *See supra* notes 56-64 and accompanying text (defining witness as someone who provides testimony).

[83] *See Clark*, 576 U.S. at 241.

[84] *See supra* notes 65-69 and accompanying text (discussing implications of whether statement made during ongoing emergency).

[85] *See* Davis v. Washington, 547 U.S. 813, 822 (2006).

[86] *See* Maryland v. Craig, 497 U.S. 836, 853 (1990) (implying child welfare is important public policy).

hearsay admissibility.[87] Nonetheless, state child hearsay statutes do not appear to reflect this idea.[88]

2. Rationales Behind the Rule Against Hearsay and Its Exceptions

Even when the Confrontation Clause is inapplicable, the rule against hearsay still applies. The primary rationale behind the rule is that such a rule "promotes decisional accuracy by barring unreliable evidence from the [record]."[89] Simply put, the evidence presented in court should be reliable. The theory is that in-court testimony is more reliable than out-of-court statements because the declarant is under oath and is thus less likely to lie; they can be cross-examined, which could reveal potential flaws in the testimony; and their demeanor can be observed to determine whether they are telling the truth.[90]

However, there are exceptions to the general rule against hearsay, including those in FRE 803, which encompasses the present sense and excited utterance exceptions.[91] The primary rationale for the hearsay exceptions in FRE 803 is that statements falling within these exceptions are reliable,[92] where reliable statements are those that are "unlikely to be fabricated."[93] For present sense impressions, the theory is that such statements are reliable due to their spontaneity and contemporaneity.[94] "[T]here is no time to develop the intent to fabricate," and thus, the statement is presumably earnest.[95] In addition, because of the contemporaneity between the event and statement, no memory issue exists either.[96] For excited utterances, despite the statement not necessarily being made contemporaneously to the underlying event, the theory is that "a person under

[87] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (implying Confrontation Clause is not constitutionally required for nontestimonial statements).

[88] *See infra* Sections II.B, II.C (discussing problems with current state child hearsay exceptions).

[89] Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643, 647 (2016) (citing Edmund M. Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258, 258-59 (1938)). A secondary rationale behind the rule against hearsay is that the rule "promotes litigants' dignity interests and increases the legitimacy of the tribunal to the public." *Id*.

[90] *See id*. at 649-50.

[91] FED. R. EVID. 803.

[92] FED. R. EVID. 803 advisory committee's note on proposed rules ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

[93] *Cf*. Lust v. Sealy Inc., 383 F.3d 580, 588 (7th Cir. 2004) (finding fabrication unlikely because it "requires an opportunity for conscious reflection").

[94] RONALD J. ALLEN, ELEANOR SWIFT, DAVID S. SCHWARTZ, MICHAEL S. PARDO & ALEX STEIN, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES 529 (6th ed. 2016).

[95] *Id*.

[96] *Id*. ("Additionally, the contemporaneity of the statement and the event virtually eliminates any memory problem.").

stress is not likely to develop the intent to fabricate" and, thus, the statement is probably true.[97]

Like the reliability theory behind the excited utterance exception, children's hearsay statements are not likely to be contrived because these statements are generally not motivated by animus toward the defendant.[98] If anything, these statements are prompted by children seeking help or by caring adults seeking help for them.[99] Adding to the reliability of children's hearsay statements is that, like present sense impressions and excited utterances, these statements are made before any investigations or prosecutions.[100] In fact, young children might not even know how investigations or prosecutions work.[101] These statements, then, are also made closer to the actual time of the abuse than the child's testimony produced at trial, and they are made without any suggestive influences. Thus, children's hearsay statements are reliable.

The reliability of children's hearsay statements alone does not justify the child hearsay exception because there will always be a potential for fabrication. However, this does not imply that children's hearsay exceptions are unfounded or that the admissibility of hearsay statements should be bound to availability. Even with present sense impressions and excited utterances, there is a potential for falsification.[102] However, these exceptions are further rationalized by a substantial foundation.[103] The present sense impression and excited utterance exceptions are built upon a substantial foundation because the four elements of

[97] *Id*. at 530.

[98] *Cf*. Ohio v. Clark, 576 U.S. 237, 248 (2015); Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 CLEV. ST. L. REV. 575, 595 (2010) (juxtaposing "disgruntled business partner" with "young child" to suggest that latter "is [un]motivated by animus toward the accused"). If anything, child victims are "motivated to keep the abuse a secret." *See* Lyon & Dente, *supra* note 81, at 1213 (explaining such motivation makes overt threats unnecessary).

[99] *See supra* note 98; *cf*. *Clark*, 576 U.S. at 249 (stating teacher reporting abuse had immediate concern of protecting child). *But see* Mikkelsen et al., *supra* note 81, at 568 (stating that rates of false allegations made by children of sexual abuse may be up to 50% in "heated custody disputes"). Before admitting the hearsay statement, a determination of the statement's trustworthiness must be made, which should alleviate any concerns of false allegations or unreliable statements. *See infra* Section III.B (proposing ways to determine statement's trustworthiness that do not depend on the child testifying).

[100] *Cf*. SUMMARY OF KEY FINDINGS 2018, *supra* note 11, at 2 (implying that reports of abuse precede CPS investigations).

[101] *See Clark*, 576 U.S. at 248 (noting young children typically do not undertand criminal justice system).

[102] *See* Lust v. Sealy Inc., 383 F.3d 580, 588 (7th Cir. 2004) ("People are entirely capable of spontaneous lies in emotional circumstances.").

[103] *See* Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 FORDHAM L. REV. 1485, 1497 (2016) (contending that "necessity" and "substantial foundation" are also rationales for hearsay exceptions).

the exceptions must be shown before hearsay admittance.[104] Likewise, for child hearsay exceptions, in addition to the "testimony or corroboration requirement," most states require some form of each of the following general elements to be established prior to a statement's admittance: (1) the declarant's identity, (2) the declarant's age at the time the statement was made, (3) the acts or offenses the statement describes, and (4) the statement's inadmissibility otherwise.[105]

3. Child Hearsay Exceptions Are Needed in Addition to the Federal Rules of Evidence Rule 803 Hearsay Exceptions

Although the rationales for child hearsay exceptions are similar to those for present sense impressions and excited utterances, this does not mean that child hearsay exceptions are wholly encompassed within the other two exceptions. In addition to the present sense impression and excited utterance exceptions, child hearsay exceptions are still necessary.

First, states may not recognize either the present sense impression exception or the excited utterance exception.[106] Second, according to the language used in child hearsay exceptions, they are meant to be used in situations where other hearsay exceptions do not apply.[107] Statutory language is to be construed by courts to ensure the language is not redundant.[108] But if the excited utterance exception wholly encompassed the child hearsay exception, this would render provisions such as "not otherwise admissible" meaningless because the excited utterance exception would apply in all circumstances where the child hearsay exception applies. Third, excited utterance exceptions require the declarant to be in a stressed or excited state.[109] However, as shown by the circumstances in

[104] *See id*. at 1496-97 ("Most courts have added a fifth, a corroboration requirement, for present sense impressions.").

[105] *See, e.g*., CAL. EVID. CODE § 1360 (West 1995) ("[A] statement made [(1)] by the victim when [(2)] under the age of 12 [(3)] describing any act of child abuse or neglect . . . is not made inadmissible by the hearsay rule if . . . [(4)] [t]he statement is not otherwise admissible by statute or court rule.").

[106] *See, e.g*., *Rule 803: Hearsay Exceptions*, TN STATE CTS.: TNCOURTS.GOV, https://www.tncourts.gov/rules/rules-evidence/803 [https://perma.cc/NY6G-HN5R] (last visited Sept. 15, 2022) (indicating that present sense impression exception is not recognized in Tennessee).

[107] *See, e.g*., COLO. REV. STAT. § 13-25-129 (2019) (admitting children's out-of-court statements through child hearsay exception when such statements are "not otherwise admissible by a statute or court rule that provides an exception to the hearsay objection").

[108] *See, e.g*., Kungys v. United States, 485 U.S. 759, 778 (1988) ("[T]he cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant.").

[109] FED. R. EVID. 803(2) ("The following [is] not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . [a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.").

Clark,[110] the child declarant may not truly be in a stressed or excited state when making a statement about the abuse.

Finally, even if one concedes that in *Clark*, the child became distressed upon the teacher's questioning regarding the bruises,[111] that would not render the child hearsay exceptions needless. By that same logic, the present sense impression exception would also become virtually useless because it frequently overlaps with the excited utterance exception. Although some states do not recognize a present sense impression exception,[112] many others do,[113] suggesting that present sense impression exceptions are not redundant of excited utterances, and analogously, neither are child hearsay exceptions.

B. *Comparing Physical Abuse and Sexual Abuse*

Several states have child hearsay exceptions that are only applicable in sexual abuse offense cases.[114] These states believe that sexual abuse is more traumatizing than physical abuse.[115] However, that belief is false. This Section compares the psychological impacts of physical and sexual abuse to rebut that assumption. This comparison is not intended to convey that child physical abuse is more demoralizing than child sexual abuse but rather to show that both are equally traumatic and are causes for concern. This Section consists of two subsections. The first analyzes the results of various psychological studies to

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[110] *See* Ohio v. Clark, 576 U.S. 237, 241 (2015).

[111] *See id*. (noting teacher's observation that child "seemed kind of bewildered" when questioned about red marks on his face).

[112] *See, e.g.*, *Article VIII: Hearsay*, MASS.GOV, [hereinafter *MA Article VIII*], https://www.mass.gov/guide-to-evidence/article-viii-hearsay [https://perma.cc/CL8Z-ZJW7] (last visited Sept. 15, 2022) (establishing that Massachusetts doesn't recognize the present sense hearsay exception); *Rule 803: Hearsay Exceptions*, *supra* note 106 (establishing that Tennessee does not recognize present sense hearsay exception).

[113] *See, e.g.*, KY. R. EVID. 803(1); OHIO R. EVID. 803(1).

[114] *See* ALASKA STAT. § 12.40.110 (1998) (admitting hearsay statements "made by a child who is the victim of [a sexual] offense"); MASS. GEN. LAWS ch. 233, §§ 81-83 (1990) (admitting hearsay statements made by child describing "sexual contact performed on or with the child" if "statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence" that can reasonably be obtained); MICH. R. EVID. 803A (admitting hearsay statements about sexual assault by children under the age of ten if the statement was spontaneous, made immediately after the incident, and introduced through testimony from someone other than the declarant); MISS. R. EVID. 803(25) (admitting hearsay statements by "a child of tender years describing any act of sexual contact"); N.J. R. EVID. 803(c)(27) (admitting hearsay statements by a child under age twelve "relating to sexual misconduct committed with or against that child"); N.D. R. EVID. 803(24) (admitting hearsay statements by a child under age twelve "about sexual abuse of that child or witnessed by that child" if the statement provides "sufficient guarantees of trustworthiness").

[115] *See, e.g.*, Murray v. State, 770 P.2d 1131, 1135 (Alaska Ct. App. 1989) ("The legislature could properly conclude that testifying twice . . . places a greater burden on child victims of sexual abuse than on child victims of other crimes.").

show the similar trauma between victims of child physical abuse and child sexual abuse. The second analyzes two Alaska cases to show why treating child physical abuse victims and child sexual abuse victims differently is unwarranted. I use this Section to help preface my argument that child hearsay exceptions should be applicable in both physical and sexual abuse cases.

1. Psychological Research Regarding Traumatic Impacts of Child Physical Abuse and Child Sexual Abuse

Children who are physically abused experience similar levels of trauma to children who are sexually abused. David D. Vachon, Robert F. Krueger, Fred A. Rogosch, and Dante Cicchetti conducted a study (the "Vachon study") to determine the levels of trauma faced by children who have experienced different types of maltreatment.[116] The study was conducted at a summer camp for low-income children ages five to thirteen.[117] Of the 2,292 children who were included in the study, 54.7% were boys.[118] The children who attended the summer camp were from racially diverse backgrounds.[119] Some of these children had experienced maltreatment, while others had not.[120] The maltreated and non-maltreated children were comparable in terms of racial and family demographics.[121] The children were observed for data collection from July 1, 1986, to August 15, 2012.[122] The study showed that children who only experienced sexual abuse had higher rates of depression and withdrawal, whereas children who only experienced physical abuse had higher rates of somatic disorders, anxiety disorders, and neuroticism.[123] Thus, similar negative psychological effects were observed in children who experienced solely physical abuse and solely sexual abuse.

Other studies corroborate the Vachon study, similarly showing the negative psychological impacts caused by childhood physical abuse. Physical and sexual abuse increases "the risk of both first-onset and recurrent manic episodes independent of adulthood stressors."[124] They both also increase the risk of

[116] *See* Vachon et al., *supra* note 5, at 1136 (hypothesizing "that different forms of [child maltreatment] would have equivalent, broad, and universal consequences").

[117] *Id*.

[118] *Id*.

[119] *Id*. (noting 60.4% of study participants were Black, 31.0% were White, and 8.6% were from other racial groups).

[120] *Id*.

[121] *Id*.

[122] *Id*.

[123] *See id*. at 1138 fig.1.

[124] S.E. Gilman, M.Y. Ni, E.C. Dunn, J. Breslau, K.A. McLaughlin, J.W. Smoller & R.H. Perlis, *Contributions of the Social Environment to First-Onset and Recurrent Mania*, 20 MOLECULAR PSYCHIATRY 329, 329, 332 (2015).

suicidal ideation and attempts.[125] In fact, at least one study indicates that physical abuse causes more significant psychological disorders than sexual abuse among some youths. That study, examining 446 children ages seven to seventeen diagnosed with bipolar disorder, found that "physical abuse was independently associated with a longer duration of illness in bipolar disorder, a greater prevalence of comorbid PTSD and psychosis, and a greater prevalence of family history of a mood disorder when compared with sexual abuse, which was only associated with a greater prevalence of PTSD."[126]

The assumption that sexual abuse is more traumatizing than physical abuse[127] is plainly false. The negative psychological impacts caused by physical abuse suggest that any differences in prosecutorial and evidentiary treatment of child physical abuse victims and child sexual abuse victims are unwarranted. A proper solution to the problems associated with child witnesses must treat victims of sexual abuse and victims of physical abuse equally.

2. Comparison of Two Alaska Child Abuse Cases

We can see how treating physical and sexual abuse victims differently in terms of hearsay admissibility leads to different outcomes in prosecution by comparing two cases from Alaska. In one case, a three-year-old girl, A.W., was kicked in the face by her father, Gary Sluka.[128] About four hours later,[129] Ella Watts, A.W.'s mother, dropped A.W. off at her babysitter Maria Wiess's house and told Wiess that Sluka had accidentally kicked A.W., but that A.W. would be alright.[130] Concerned about the extent of A.W.'s bruising, Wiess, Wiess's daughter, and Wiess's daughter's friend asked A.W. about it.[131] A.W. suggested that the kicking was not accidental; she told them how "Daddy" had kicked her

[125] Stephanie H. Gomez, Jenny Tse, Yan Wang, Brianna Turner, Alexander J. Millner, Matthew K. Nock & Erin C. Dunn, *Are There Sensitive Periods When Child Maltreatment Substantially Elevates Suicide Risk? Results from a Nationally Representative Sample of Adolescents*, 34 DEPRESS ANXIETY 734, 737 (2016) (studying effects of age of child when maltreated on suicide risk).

[126] *See* Lippard & Nemeroff, *supra* note 6, at 23 (citing Soledad Romero, Boris Birmaher, David Axelson, Tina Goldstein, Benjamin I. Goldstein, Mary Kay Gill, Ana-Maria Iosif, Michael A. Strober, Jeffrey Hunt, Christianne Esposito-Smythers, Neal D. Ryan, Henrietta Leonard & Martin Keller, *Prevalence and Correlates of Physical and Sexual Abuse in Children and Adolescents with Bipolar Disorder*, 112 J. AFFECTIVE DISORDERS 144, 148-49 (2009)).

[127] *See, e.g.*, Murray v. State, 770 P.2d 1131, 1135 (Alaska Ct. App. 1989) ("The legislature could properly conclude that testifying twice . . . places a greater burden on child victims of sexual abuse than on child victims of other crimes.").

[128] Sluka v. State, 717 P.2d 394, 396 (Alaska Ct. App. 1986). While Sluka was not A.W.'s biological father, Sluka, Watts, and A.W. all lived together, and A.W. referred to Sluka as "Daddy." *Id.* at 396-97. Thus, for simplicity, I refer to Sluka as A.W.'s father.

[129] *Id.* at 398.

[130] *Id.* at 396.

[131] *Id.* at 396, 398.

because she was crying.[132] Despite A.W.'s aloofness and quiet demeanor while at Wiess's house,[133] the court found that A.W.'s out-of-court statements did not constitute an excited utterance because they were made several hours after the incident, in response to questioning, and while A.W. did not appear "'emotionally engulfed' by the situation."[134] A.W.'s hearsay statements were inadmissible, and the court reversed Sluka's conviction.[135]

However, the same court affirmed the admissibility of a child's hearsay statements in a factually similar sexual abuse case six years later.[136] In that case, a two-year-old girl, S.F., was left in her mother's ex-boyfriend Donald Dezarn's care.[137] While driving several hours later, S.F.'s mother noticed that S.F. was unusually quiet and asked her if something was wrong, to which S.F. replied, "Mommy, Don licked my vagina."[138] Despite the length of time between the incident and the statement and despite her mother's questioning,[139] the court found that S.F.'s hearsay statement constituted an excited utterance because her mother's question was not suggestive, S.F. appeared emotionally distressed, and "an act of cunnilingus was the type of event that would put a two-year-old in a state of emotional excitement or stress."[140] S.F.'s hearsay statement was admissible, and the court upheld Dezarn's conviction.[141]

Both cases involved extremely young children. Both cases involved instances of child abuse. Both cases involved statements made in response to questioning. And both cases involved statements made several hours after the incident. Yet only one child's statements were admitted into evidence. That result is incongruous with the factual similarities between the two cases.

Although the Alaska Court of Appeals analyzed the statements under the excited utterance exception,[142] the results would have been the same even if the

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[132] *Id*. at 397.

[133] *Id*. at 398.

[134] *Id*.

[135] *Id*. at 398, 401 ("We believe that A.W.'s statements . . . could have had a powerful impact on the jury in reaching its verdict that Sluka had abused A.W.").

[136] Dezarn v. State, 832 P.2d 589, 589, 592 (Alaska Ct. App. 1992) (finding child's statement to her mother about sexual assault was admissible as an excited utterance, upholding defendant's conviction).

[137] *Id*. at 590.

[138] *Id*.

[139] *Id*. at 591 ("The evidence at trial shows that as many as ten hours may have elapsed between the act of cunnilingus and S.F.'s statement to her mother in the car.").

[140] *Id*. at 592.

[141] *Id*.

[142] The statements were likely analyzed under the excited utterance exception because, at the time, the prevailing law regarding the Confrontation Clause was *Ohio v. Roberts*, which specified that a statement "fall[ing] within a firmly rooted hearsay exception," like the excited utterance exception, could be considered ipso facto reliable. Ohio v. Roberts, 448 U.S. 56, 66 (1980). However, the Alaska child hearsay exception would not have been considered "firmly

court had analyzed the statements under the child hearsay exception. Alaska's child hearsay statute only applies in sexual abuse cases[143] because of the false assumption that testifying "places a greater burden on child victims of sexual abuse than on child victims of" physical abuse.[144] So, even if S.F.'s statements did not qualify as excited utterances, because they relate to sexual offenses, they could still be admissible under Alaska's child hearsay exception, provided the other requirements of the hearsay exception were met.[145] A.W.'s statements, however, would still be inadmissible under Alaska's child hearsay exception because the child hearsay exception would not apply to her statements regarding physical abuse.

The Alaska child hearsay statute discriminating between child victims of different crimes was challenged as unconstitutional in *Murray v. State*.[146] However, the court in *Murray* found that "[t]he legislature could properly conclude that testifying twice . . . places a greater burden on child victims of sexual abuse than on child victims of other crimes."[147] But the notion that child sexual abuse victims would be more traumatized by testifying than child physical abuse victims conflicts with the data showing no fundamental difference in trauma between the two types of child abuse victims.[148] Therefore, child hearsay statutes must apply in both sexual abuse and physical abuse cases.

C. *In-Court Challenges to Child Abuse Prosecutions*

Prosecuting child abuse cases is complex. To begin with, very few instances of child abuse are reported.[149] Even fewer result in formal charges.[150] Prosecutors cite "perceived incompetency" and "lack of child credibility" as reasons for not initiating adversarial proceedings.[151] However, the two main

rooted" because it was not enacted until 1985, just one year before *Sluka* was decided. *See* ALASKA STAT. § 12.40.110 (1998).

[143] *See* ALASKA STAT. § 12.40.110 (indicating in title that hearsay exception applies only in prosecutions of sexual offenses).

[144] Murray v. State, 770 P.2d 1131, 1135 (Alaska Ct. App. 1989).

[145] For a discussion of some of the general requirements for child hearsay admissibility across various states, see *infra* Section II.B.

[146] *Cf. Murray*, 770 P.2d at 1135 (summarizing defendant's argument that admitting children's hearsay statements in sexual abuse cases but rejecting such statements in non-sexual abuse criminal cases violates equal protection for sex offenders).

[147] *Id.* (dismissing defendant's equal protection violation argument).

[148] *See supra* Section I.B.1.

[149] *See* Lippard & Nemeroff, *supra* note 6, at 20-21 (noting that child emotional abuse and neglect are particularly unreported); *see also* Jacquelynn F. Duron, *Legal Decision-Making in Child Sexual Abuse Investigations: A Mixed-Methods Study of Factors That Influence Prosecution*, 79 CHILD ABUSE & NEGLECT 302, 302 (2018) (estimating that only 10% of child sexual abuse offenses are disclosed).

[150] *See* Duron, *supra* note 149, at 303 (stating that charging rates for reported child sexual abuse offenses vary between 28% and 94%).

[151] *Id.*

reasons why prosecutors choose not to initiate proceedings is a lack of corroborative evidence and the child being unable to "emotionally withstand testifying in court."[152]

Even where charges are initiated by the government, challenges arise because "[t]he child and the suspect are usually the only potential eyewitnesses and physical evidence is often lacking."[153] Thus, often, the only evidence is the child's testimony.[154] When children testify, they are often deemed not to be credible, leading to fewer provictim verdicts than other crimes generally.[155] To combat this, prosecutors spend significant amounts of time in court simply proving that the child is credible.[156]

One reason that juries tend to view children as not credible is that repeated, ongoing abuse can lead to confusion and inconsistencies in children's reporting.[157] Another reason is that children may remember less information than adults.[158] Juries also view children as not credible because of children's susceptibility to influence.[159] There is usually a delay of several months, or even years, between a child's initial report of abuse and the trial.[160] During this time, children will often disclose the abuse to multiple people, which creates ample opportunity for such people to influence the child.[161] Leading questions may also

[152] *Id*.

[153] Lyon et al., *supra* note 13, at 448 (citation omitted).

[154] *See id*.

[155] *See* Denne et al., *supra* note 15, at 225 (stating jurors often do not perceive children as reliable witnesses). In fact, only about 10% of child sexual abuse reports result in a successful prosecution. *See id*. at 224.

[156] *See id*. at 225 (stating attorneys must overcome jurors' preexisting ideas about children and child sexual assault to establish credibility).

[157] *See id*. at 226 (discussing plausibility of inconsistencies in reporting, including effects of numerous interviews and multiple instances of abuse on children's consistencies).

[158] *See* Nicholas Bala, Karuna Ramakrishnan, Roderick Lindsay & Kang Lee, *Judicial Assessment of the Credibility of Child Witnesses*, 42 ALTA. L. REV. 995, 999 (2005) ("[C]hildren's memories are less well developed than adult memories."). *But see* Ohio State Univ., *Children Can Have a Better Memory than Adults (At Least Sometimes)*, SCIENCEDAILY (July 22, 2004), https://www.sciencedaily.com/releases/2004/07/040722085301.htm [https://perma.cc/6STW-66TC] (observing in one study, children were accurate 31% of the time in identifying pictures they had previously seen while adults were only accurate 7% of the time); *but cf*. Jodi A. Quas, William C. Thompson & K. Alison Clarke-Stewart, *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 LAW & HUM. BEHAV. 425, 439, 444 (2005) (describing test results suggesting more jurors understand that children "can remember events well enough to be reliable witnesses").

[159] Denne, et al., *supra* note 15, at 225 ("[R]esearchers have observed that during children's courtroom testimony about alleged sexual abuse, children are asked about an average of five prior-disclosure recipients, suggesting that the potential for influence is of great concern." (citation omitted)).

[160] *See id*.

[161] *See id*. ("[C]hildren often disclose to between one and six people.").

affect the way a child testifies.[162] However, children's susceptibility to influence is debated,[163] with some suggesting that even very young children can navigate leading questions and remember impactful events well.[164]

Moreover, testifying face-to-face can retraumatize children because they are forced to relive their trauma as they face their abusers in court.[165] Several reasons explain why testifying exacerbates children's trauma more than adults' trauma. Because children generally do not disclose as much information per interview, they are subjected to more interviews and court appearances throughout the prosecutorial process than adults are.[166] It sometimes takes years to determine whether a child will have to testify in court, and that lack of predictability adds to the stress of testifying.[167] Furthermore, children do not understand the legal system as well as adults do.[168] Finally, the child's relationship with the defendant can add additional stress to the event of testifying.[169] The stress, in turn, affects children's ability to provide complete and accurate testimony,[170] which furthers juries' negative pre-conceived notions of child witnesses.

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[162] *See* Ginger C. Calloway & S. Margaret Lee, *Using Research to Assess Children and 'Hear' Their Voices in Court Proceedings*, 31 AM. J. FAM. L. 140, 141 (2017) (noting children's recall and narrative they produce comes from their understanding of the social world and their vulnerability responding to adults' cues); Bala et al., *supra* note 158, at 1000-01 (discussing children's suggestibility to various questioning techniques).

[163] *Compare* Denne et al., *supra* note 15, at 225 (noting children are "resilient to suggestive questioning" and tend to have accurate memories), *with* Quas et al., *supra* note 158, at 441 (implying that children are more susceptible to influence by leading questions than adults).

[164] *See, e.g.*, Bala et al., *supra* note 158, at 999 ("Even children as young as four years can provide accurate information about what happened to them one or even two years earlier.").

[165] *See* Dawn Hathaway Thoman, *Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses*, 14 NEV. L.J. 236, 240 (2013) ("Trials can intimidate and traumatize children. Trial-based sources of their anxiety include . . . potential contact with the opposing party . . . ."); *see also* Goleman, *supra* note 27, at C4 ("The courtroom exposes [the child] to a psychological threat by virtue of the physical presence of the defendant a few feet away, and the defense lawyer who does his best to make the child look like a liar or otherwise discredit him." (quoting psychiatrist Dr. Spencer Eth)). *But see* Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCH. PUB. POL'Y & L. 392, 400, 406 (2012) (suggesting that adverse effects may be exaggerated or only occur in certain circumstances).

[166] *See* Goodman et al., *supra* note 14, at 7 (stating children are likely to be interviewed by multiple sources, including social workers, police officers, and attorneys).

[167] *See id.* (recognizing that young children's ability to gauge passage of time can also add to their sense of uneasiness); Thoman, *supra* note 165, at 240 (defining anxiety caused by waiting for trial as "anticipatory stress").

[168] *See* Goodman et al., *supra* note 14, at 7.

[169] *See id.* (recognizing defendants are often adults known to the child, like a relative, teacher, or neighbor).

[170] *See* Thoman, *supra* note 165, at 241-44 (discussing how anxiety inhibits performance, memory, and credibility); Kristin Chong & Deborah A. Connolly, *Testifying Through the Ages: An Examination of Current Psychological Issues on the Use of Testimonial Supports*

While some argue that "testifying may be cathartic or empowering for children,"[171] evidence suggests that the rates at which children who testify overcome their trauma are diminished compared to children who do not testify. In one study, researchers observed a group of testifiers at different points in the prosecutorial process: three months after testimony, seven months after testimony, and after prosecution.[172] Children's trauma was measured through courtroom observations, interviewing the children (without discussing the abuse itself), and discussing the process with their parents.[173] The study found that children who testified were more emotionally traumatized seven months into the process than were children who did not.[174] This emotional disturbance was exacerbated if the child had to testify multiple times or was more scared of the defendant.[175]

In short, children's testimony creates multiple problems: accuracy problems, credibility problems, and the potential for retraumatization. We do not want children to be retraumatized or discredited, but we also do not want the testimony at trial to be unreliable.[176] The whole reason for the rule against hearsay in the first place is the lack of reliability.[177] But when it comes to children, testimony may be just as unreliable as hearsay, if not more so, because they are susceptible to influence and undergo multiple interviews.[178] An appropriate solution must balance the need to protect and believe children and to produce reliable evidence at trial. Child hearsay exceptions reflect this balance

by Child, Adolescent, and Adult Witnesses in Canada, 53 CANADIAN PSYCH. 108, 112 (2015) (implying that stress prevents witnesses from "provid[ing] a full and candid account of the allegation").

[171] *See* Goodman et al., *supra* note 14, at 8; *see also* Jana Robinson, *The Experience of the Child Witness: Legal and Psychological Issues*, 42-43 INT'L J.L. & PSYCHIATRY 168, 173 (2015) (recognizing children benefit through empowerment and opportunity to be heard from testifying); Quas & Goodman, *supra* note 165, at 402-03 (explaining that not testifying may actually be adverse to children in "case[s] involv[ing] less severe abuse").

[172] Goodman et al., *supra* note 14, at 16 (observing 218 children through criminal legal process over two years).

[173] *Id*. at 36 (noting information was also obtained from the prosecutor's files).

[174] *Id*. at 62.

[175] *Id*. at v (noting additional exacerbation if child lacked material support and corroboration of their claims).

[176] *See supra* notes 89-90 and accompanying text (implying that we want reliable evidence at trial in discussing rationale behind rule against hearsay).

[177] *See supra* notes 89-90 and accompanying text.

[178] *See* Calloway & Lee, *supra* note 162, at 141 (noting how children's memory and their ability to recall situations depends on "developmental ages of children at time of incident and evaluation or interview"); Goodman et al., *supra* note 14, at 7 (noting significant frequency of interviews before court appearances, uncertainty about whether courtroom testimony will be needed, and "poor understanding of the legal system" may impact children in abuse cases).

because child hearsay statements are reliable,[179] and they can be drafted in ways that do not require the child to testify and be retraumatized.[180]

II. INADEQUACY OF CURRENT SOLUTIONS

Although the problems discussed in Part I remain, solutions designed to mitigate some of these issues already exist, including the use of testimonial aids and child hearsay exceptions.[181] However, this Part discusses why the existing solutions are insufficient to address the problems involved in prosecuting child abuse cases and getting children's hearsay statements into court. Section A describes the ineffectiveness of testimonial aids, specifically closed-circuit television's ineffectiveness in preventing retraumatization and leading to decreased conviction rates. I do not analyze the ineffectiveness of other in-court testimonial aids in-depth because most of the problems associated with closed-circuit television are also problems of other testimonial aids, given they all still require the child to testify.[182] Section B describes the inconsistencies in state child hearsay statutes, leading to inconsistent results in prosecutions of similar offenses in different states. Section C explains how most states' current child hearsay exceptions are virtually useless because they are more restrictive than necessary. In analyzing the inadequacies of testimonial aids and child hearsay exceptions, I examine all current solutions to the problems discussed in Part I.

A. *Inefficacy of Using Closed-Circuit Television as a Testimonial Aid*

Procedures currently in place to combat the negative effects of testifying on children do not go far enough to achieve their goals effectively. For example, courts employ various testimonial aids to combat some traumatic effects that children may face when testifying in front of their abusers. "Testimonial supports are aids that are used to distance the child from the defendant."[183] Courts may allow a testifying child to hold a comforting object or be accompanied by a support person.[184] Courts also allow testifying children to be accompanied by emotional support animals.[185]

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[179] *See supra* Section I.A.2 (establishing that children's hearsay statements are reliable).

[180] *See infra* Section III.B (proposing ways in which child hearsay exceptions can be amended to eliminate need for children to testify).

[181] *See infra* notes 186, 205 and accompanying text.

[182] *See infra* notes 195-97 and accompanying text (noting how some aids do not relieve certain stressors associated with recalling traumatic events through testimony).

[183] *See* Hendrickson, *supra* note 18, at 12.

[184] *See* Pantell, *supra* note 16, at 2.

[185] *See* Hendrickson, *supra* note 18, at 17.

One of the most common aids is closed-circuit television.[186] In *Maryland v. Craig*,[187] the Supreme Court found that the use of closed-circuit television was constitutional.[188] In *Craig*, the Court emphasized that "the Confrontation Clause [does not] guarantee[] defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."[189] The Court found that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to" face-to-face confrontation with the child abuse victim.[190] Nevertheless, the Court held that a denial of face-to-face confrontation may be appropriate only where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[191] In a situation where a child testifies through closed-circuit television, a case-specific determination needs to be made to ensure that the use of closed-circuit television "is necessary to protect the welfare of the particular child witness who seeks to testify."[192] This determination can be made through expert testimony regarding the child's mental state, observing how the child behaves in front of the defendant, and exploring other options for providing the testimony.[193]

Although the Supreme Court implies that child welfare protection is a significant public policy[194] and allowing children to testify through closed-circuit television is a step toward protecting child welfare, there are two significant problems with the use of closed-circuit television. Unlike other testimonial aids, testifying through closed-circuit television may relieve

[186] Indeed, much scholarly attention has focused solely on the use of closed-circuit television in children's testimony during child abuse cases. *See generally, e.g.*, Patricia A. Cleaveland, *Use of Closed Circuit Television for Victims of Child Abuse*, 16 LAW F. 18 (1986) (analyzing Maryland's closed-circuit television method when questioning child witnesses); Steven M. Romanoff, *The Use of Closed-Circuit Television in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919, 923 (1986) (detailing California's Penal Code section 1347 which "gives the trial court discretion to allow child testimony via two-way closed-circuit television (CCTV)").

[187] 497 U.S. 836 (1990).

[188] *Id.* at 855-57.

[189] *Id.* at 844.

[190] *Id.* at 853; *see also id.* at 852 (reiterating notion that "protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" state interest (quoting Globe Newspaper Co. v. Superior Ct. of Norfolk Cnty., 457 U.S. 596, 607 (1982))).

[191] *Id.* at 850.

[192] *Id.* at 855.

[193] *See id.* at 859-60. In this particular case, the Court determined that the expert testimony could have been enough for the trial court to determine that the child witnesses would suffer emotional distress. *Id.* at 860.

[194] *See id.* at 850-53.

children's stresses of testifying in front of their abuser,[195] but it may not relieve other fears and difficulties children face in testifying. For example, children have fears of public speaking or embarrassment[196] and do not understand the legal terms used in court.[197] With closed-circuit television, children would still have to speak in front of a camera and be subject to direct- and cross-examination. This situation creates an opportunity for lawyers to employ incomprehensible legal terms and confuse children, adding to the stress of testifying.[198]

Moreover, although children's testimony tends to be more accurate when closed-circuit television is used,[199] jurors view them as less accurate than children who do not testify using closed-circuit television.[200] In fact, studies have found that when a child testifies using closed-circuit television, the defendant is less likely to be convicted than if the child testifies in court.[201] Thus, not only does the use of closed-circuit television not eliminate all the emotional stresses caused by testifying itself, but it is also counterproductive to prosecuting the defendant. Therefore, while closed-circuit television is a step forward in relieving some of the stresses associated with testifying, particularly the stress of testifying in the defendant's presence, the flaws associated with using closed-circuit television prove that it is an inadequate alternative to children testifying in court.

B. *Inconsistencies Between States' Current Child Hearsay Exceptions*

Besides the use of in-court testimony, states can also use children's out-of-court statements to prosecute abusers if those statements are found to be

[195] Other testimonial aids do not even eliminate the stresses of face-to-face confrontation because they are used during in-court testimony. *See* Hendrickson, *supra* note 18, at 17; Pantell, *supra* note 16, at 2.

[196] *See* John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 70 (1996). Other fears children may have include going to jail for making a mistake in their testimony, being assaulted by the defendant, losing control, facing the unknown, and being yelled at in court. *See id*. at 69-70.

[197] *See id*. at 59-60.

[198] *See id*. (stressing need for lawyers to utilize comprehensible and simple language children can understand to avoid confusion).

[199] Using closed-circuit television reduces the likelihood that children are misled by intentionally misleading questions, which increases accuracy. *See* Goodman et al., *supra* note 40, at 197.

[200] *See* Hendrickson, *supra* note 18, at 14 (indicating that jurors' perceptions of accuracy of children's testimony are opposite to reality).

[201] *See* David F. Ross, Steve Hopkins, Elaine Hanson, R.C.L. Lindsay, Kirk Hazen & Tammie Eslinger, *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 LAW & HUM. BEHAV. 553, 563 (1994); Hendrickson, *supra* note 18, at 14 (implying that reason for decreased likelihood of conviction when closed-circuit television is used may be because jurors remember fewer facts when children testify in-court than when they testify using closed-circuit television).

nontestimonial and there is an applicable hearsay exception. But eleven states do not have statutory exceptions for child hearsay at all.[202] This means that in those eleven states, if children's out-of-court statements are to be introduced into evidence, they must fit the general hearsay exceptions that are also applicable to adults' out-of-court statements. If a child's out-of-court statement does not fit another hearsay exception, the child must testify or face the risk that their abuser will remain unprosecuted. But juries generally view children as less credible than adults, so prosecutors must overcome a greater hurdle to show a child witness's credibility.[203] States that do not have a child hearsay exception are thus inadvertently holding children to an untenably higher credibility standard than adults.[204] These states create a catch-22 for child abuse victims: (1) the hearsay statement is inadmissible and the risk of an unsuccessful prosecution is heightened or (2) the child testifies and the risk of an unsuccessful prosecution is heightened. Either way, the result is the same: the likelihood of an unsuccessful prosecution is heightened.

The forty other states have some form of an explicit child hearsay exception.[205] Most child hearsay exceptions have age limitations, reliability requirements, applicable offenses, and testimony requirements. However, the statements vary widely in their scopes. The children's ages applicable to these

[202] Those states are Washington, D.C., Idaho, Iowa, Louisiana, Maine, Nebraska, New Mexico, New York, North Carolina, West Virginia, and Wyoming. Idaho had a child hearsay statute that was invalidated in 1992. IDAHO CODE § 19-3024 (1986), *invalidated by* State v. Zimmerman, 829 P.2d 861 (Idaho 1992).

[203] *See* discussion *supra* notes 155-64 and accompanying text (indicating why jury might not find child witness credible and how much time and energy prosecutors must spend on establishing credibility rather than working on other aspects of case).

[204] *See* Brainerd & Reyna, *supra* note 15, at 228 ("[T]he default assumption that children's evidence is more infected by false memories than adults' is questioned by data that show clear exceptions to this rule.").

[205] ALA. CODE § 15-25-31 (2016); ALASKA STAT. § 12.40.110 (1998); ARIZ. REV. STAT. ANN. § 13-1416 (1987); ARK. R. EVID. 803(25), 804(7); CAL. EVID. CODE § 1360 (West 1995); COLO. REV. STAT. § 13-25-129 (2019); CONN. CODE EVID. 8-10; DEL. CODE ANN. tit. 11, § 3513 (2015); FLA. STAT. § 90.803(23) (2014); GA. CODE ANN. § 24-8-820 (2019); HAW. REV. STAT. ANN. § 626-1, Rule 804(b)(6) (2002); 725 ILL. COMP. STAT. 5/115-10 (2017); IND. CODE § 35-37-4-6 (2020); KAN. STAT. ANN. § 60-460(dd) (2016); KY. R. EVID. 804A; MD. CODE ANN., CRIM. PROC. § 11-304 (West 2017); MASS. GEN. LAWS ch. 233, §§ 81-83 (1990); MICH. R. EVID. 803A; MINN. STAT. § 595.02, subdiv. 3 (2020); MISS. R. EVID. 803(25); MO. REV. STAT. § 491.075 (2012); MONT. CODE ANN. § 46-16-220 (2003); NEV. REV. STAT. § 51.385 (2001); N.H. REV. STAT. ANN. § 516:25-a (1990); N.J. R. EVID. 803(c)(27); N.D.R. EVID. 803(24); OHIO R. EVID. 807; OKLA. STAT. tit. 12, § 2803.1 (2013); OR. REV. STAT. §§ 40.460(18a), (24) (2017); 42 PA. CONS. STAT. § 5985.1 (2019); 14 R.I. GEN. LAWS § 14-1-68 (1985); 40 R.I. GEN. LAWS § 40-11-7.2 (2018); S.C. CODE ANN. § 17-23-175 (2006); S.D. CODIFIED LAWS § 19-19-806.1 (2009); TENN. R. EVID. 803(25); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2011); UTAH R. CRIM. PROC. 15.5; VT. R. EVID. 804A; VA. CODE ANN. § 19.2-268.3 (2021); WASH. REV. CODE § 9A.44.120 (2019); WIS. STAT. § 908.08 (2005).

statutes range from under ten[206] to sixteen years old.[207] While most states' child hearsay statutes apply in at least some criminal proceedings,[208] some states' child hearsay statutes are only applicable in non-criminal proceedings.[209] Some states' child hearsay statements only allow out-of-court statements made on an audiovisual recording to be introduced.[210]

The statutes are also inconsistent in the requisite standard of trustworthiness for the admissibility of evidence. Some states require "sufficient indicia of reliability."[211] Some states require particularized "guarantees of trustworthiness."[212] Still, other states require some other measure of trustworthiness.[213] The inconsistency in standards of trustworthiness may lead to a hearsay statement to be trustworthy enough to be admissible in one state but not in another.

However, the most harmful aspect of these statutes is that they are not all applicable to the same child abuse offenses. For example, some states' child hearsay statutes do not explicitly reference the types of offenses to which they

[206] *See* ALASKA STAT. § 12.40.110; ARIZ. REV. STAT. ANN. § 13-1416; ARK. R. EVID. 803(25), 804(7); MASS. GEN. LAWS ch. 233, §§ 81-83; MICH. R. EVID. 803A; MINN. STAT. § 595.02, subdiv. 3; NEV. REV. STAT. § 51.385.

[207] Florida is the only state where sixteen-year-old minors count as children for child hearsay statutory purposes. FLA. STAT. § 90.803(23). Georgia's and Hawaii's child hearsay statutes are applicable to minors up to sixteen. GA. CODE ANN. § 24-8-820; HAW. REV. STAT. ANN. § 626-1, Rule 804(b)(6).

[208] *See* ALA. CODE § 15-25-31; ALASKA STAT. § 12.40.110 (applying only in grand jury proceedings); ARIZ. REV. STAT. ANN. § 13-1416; ARK. R. EVID. 803(25), 804(7); CAL. EVID. CODE § 1360; COLO. REV. STAT. § 13-25-129; CONN. CODE EVID. 8-10; DEL. CODE ANN. tit. 11, § 3513; FLA. STAT. § 90.803(23); 725 ILL. COMP. STAT. 5/115-10; IND. CODE § 35-37-4-6; KAN. STAT. ANN. § 60-460(dd); MD. CODE ANN., CRIM. PROC. § 11-304; MASS. GEN. LAWS ch. 233, §§ 81-83; MICH. R. EVID. 803A; MO. REV. STAT. § 491.075; MONT. CODE ANN. § 46-16-220; NEV. REV. STAT. § 51.385; N.J. R. EVID. 803(c)(27); OHIO R. EVID. 807; OKLA. STAT. tit. 12, § 2803.1; OR. REV. STAT. §§ 40.460(18a), (24); 42 PA. CONS. STAT. § 5985.1; S.D. CODIFIED LAWS § 19-19-806.1; TEX. CODE CRIM. PROC. ANN. art. 38.072; WASH. REV. CODE § 9A.44.120; WIS. STAT. § 908.08.

[209] *See* N.H. REV. STAT. ANN. § 516:25-a (applying only in civil cases); TENN. R. EVID. 803(25) (applying only in civil actions).

[210] *See* 14 R.I. GEN. LAWS § 14-1-68; 40 R.I. GEN. LAWS § 40-11-7.2; S.C. CODE ANN. § 17-23-175 (requiring either audiovisual recording of statement or, among other requirements, a showing that necessary equipment to make such recording was unavailable when statement was made); UTAH R. CRIM. PROC. 15.5; WIS. STAT. § 908.08.

[211] *See* ARIZ. REV. STAT. ANN. § 13-1416(A)(1); CAL. EVID. CODE § 1360(a)(2); MINN. STAT. § 595.02, subdiv. 3(a); MO. REV. STAT. § 491.075.1(1); 42 PA. CONS. STAT. § 5985.1(a)(1)(i); VA. CODE ANN. § 19.2-268.3 (2021); WASH. REV. CODE § 9A.44.120(1)(b).

[212] *See* CONN. CODE EVID. 8-10; DEL. CODE ANN. tit. 11, § 3513; KY. R. EVID. 804A; MD. CODE ANN., CRIM. PROC. § 11-304; OHIO R. EVID. 807; S.C. CODE ANN. § 17-23-175.

[213] *See, e.g.*, KAN. STAT. ANN. § 60-460(dd) (requiring simply that statement be "apparently reliable").

apply.[214] In most states that do explicitly reference the offenses that the child hearsay exception applies to, the offenses include both cases of physical and sexual abuse.[215] However, seven states with child hearsay statutes only apply the child hearsay exception to sexual offenses.[216] These states' statutes ignore the prevalence and traumatic effects of physical abuse. The same rationales for creating a hearsay exception for sexual abuse offenses justify making a similar exception for physical abuse offenses.[217]

Although state statutes can vary in scope and applicability, limiting child hearsay exceptions to only sexual abuse offenses is particularly problematic, even if this limitation is only seen in a few states' statutes. The limitation to sexual abuse offenses only makes prosecuting physical abuse offenses easier in states that admit the hearsay evidence and more difficult in those that do not.[218] This effect is troubling because it negates the seriousness of child physical abuse offenses by telling children in the states in which their hearsay statements are inadmissible that the physical abuse they endured is not serious enough to warrant admission of their testimony. Therefore, all states must expand the scope of their child hearsay statutes to include physical abuse offenses.

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[214] *See id.*; 14 R.I. GEN. LAWS § 14-1-68; 40 R.I. GEN. LAWS § 40-11-7.2; S.C. CODE ANN. § 17-23-175; UTAH R. CRIM. P. 15.5; WIS. STAT. § 908.08.

[215] *See* ALA. CODE § 15-25-31 (2016); ARIZ. REV. STAT. ANN. § 13-1416; CAL. EVID. CODE § 1360; CONN. CODE EVID. 8-10; DEL. CODE ANN. tit. 11, § 3513; FLA. STAT. § 90.803(23) (2014); GA. CODE ANN. § 24-8-820 (2019); HAW. REV. STAT. ANN. § 626-1, Rule 804(b)(6) (2002); 725 ILL. COMP. STAT. 5/115-10 (2017); KY. R. EVID. 804A; MD. CODE ANN., CRIM. PROC. § 11-304; MINN. STAT. § 595.02, subdiv. 3; MONT. CODE ANN. § 46-16-220 (2003); NEV. REV. STAT. § 51.385 (2001); N.H. REV. STAT. ANN. § 516:25-a; OHIO R. EVID. 807; OKLA. STAT. tit. 12, § 2803.1 (2013); OR. REV. STAT. §§ 40.460(18a), (24) (2017); S.D. CODIFIED LAWS § 19-19-806.1 (2009); TENN. R. EVID. 803(25); VT. R. EVID. 804A; WASH. REV. CODE § 9A.44.120. Although they do not specifically use the terms "physical abuse" or "physical violence," Colorado, Indiana, Missouri, Pennsylvania, Texas, and Virginia also allow the child hearsay statutes to be used to prosecute instances of physical violence against children. *See* COLO. REV. STAT. § 13-25-129 (2019) (stating that statute is applicable to statements describing "any act of child abuse"); IND. CODE § 35-37-4-6 (2020) (stating that statute is applicable to certain battery offenses); MO. REV. STAT. § 491.075 (2012) (stating that the statute is applicable to offenses under chapter 568, which includes abuse (MO. REV. STAT. § 568.060 (2017))); 42 PA. CONS. STAT. § 5985.1 (2019) (stating that statute is applicable to offenses "relating to assault"); TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2011) (stating that statute is applicable to "assaultive offenses"); VA. CODE ANN. § 19.2-268.3.

[216] *See* ALASKA STAT. § 12.40.110 (1998); ARK. R. EVID. 803(25), 804(7); MASS. GEN. LAWS ch. 233, §§ 81-83 (1990); MICH. R. EVID. 803A; MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27); N.D. R. EVID. 803(24).

[217] *See* discussion *supra* Section I.B.1 (arguing that traumatic effects of sexual and physical abuse are similar).

[218] *See infra* Section III.A (explaining effect of limiting use of state hearsay statutes to sexual abuse cases and arguing for inclusion of physical abuse offenses).

C. *Restrictive Language in Current Child Hearsay Exceptions*

Another issue that arises with the child hearsay statutes of several states is the prerequisite that the child either (1) testify or (2) be unavailable to testify,[219] and if the child is unavailable to testify, that there must be corroborative evidence of the abuse. This admissibility prerequisite will hereinafter be referred to as the "testimony or corroboration requirement."[220] Colorado's child hearsay statute is illustrative:

> The exceptions to the hearsay objection . . . apply only if . . .
>
> (b) The child either:
>
> (I) Testifies at the proceedings; or
>
> (II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.[221]

Sixteen other states' statutes also contain various formulations of the above requirement.[222] Yet, as restrictive as the "testimony or corroboration requirement" is, there are seven states that wholly require the child to testify for an out-of-court statement to be admissible.[223] Alaska takes it one step further by requiring both "additional evidence . . . to corroborate the statement" and for the child to either "testif[y] at the grand jury proceeding or . . . be available to testify at trial."[224]

While these states at least have an explicit child hearsay exception, they involve similar concerns as the states with no child hearsay exceptions. Most of

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[219] Different states may have different criteria for a finding of unavailability. However, the general criteria are (1) a "court rules that a privilege applies," (2) the declarant "refuses to testify about the subject matter despite a court order to do so," (3) the declarant "testifies to not remembering the subject matter," and (4) the declarant is dead or has an illness or other infirmity at the time of the proceeding, or the declarant is absent from the proceeding and the proponent has been unable to procure, "by process or other reasonable means," the declarant's attendance or testimony. FED. R. EVID. 804(a).

[220] This is a term of art that I have created and defined for the purposes of this Note.

[221] COLO. REV. STAT. § 13-25-129.

[222] *See* ARIZ. REV. STAT. ANN. § 13-1416 (1987); CAL. EVID. CODE § 1360 (West 1995); CONN. CODE EVID. 8-10; FLA. STAT. § 90.803(23) (2014); 725 ILL. COMP. STAT. 5/115-10 (2017); KY. R. EVID. 804A; MINN. STAT. § 595.02, subdiv. 3 (2020); MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27); N.D. R. EVID. 803(24); OKLA. STAT. tit. 12, § 2803.1 (2013); OR. REV. STAT. §§ 40.460(18a), (24) (2017); S.D. CODIFIED LAWS § 19-19-806.1 (2009); VA. CODE ANN. § 19.2-268.3 (2021); WASH. REV. CODE § 9A.44.120 (2019). In Ohio, there is no option for the child to testify; the child's testimony must "not [be] reasonably obtainable by the proponent of the statement" and there must be "independent proof" of the act or attempted act. *See* OHIO R. EVID. 807(2).

[223] GA. CODE ANN. § 24-8-820 (2019); MD. CODE ANN., CRIM. PROC. § 11-304 (West 2017); MICH. R. EVID. 803A; S.C. CODE ANN. § 17-23-175 (2006); TEX. CODE CRIM. PROC. ANN. art. 38.07 (West 2011); VT. R. EVID. 804A. Tennessee requires the child to testify if the child is thirteen or older at the time of the hearing. TENN. R. EVID. 803(25).

[224] ALASKA STAT. § 12.40.110 (1998).

the time, corroborative evidence does not exist because there is no physical or direct evidence from witnesses other than the child and the defendant.[225] Therefore, in most cases, child hearsay exceptions inadvertently require the child to testify for the out-of-court statements to be admissible. Furthermore, if a court determines that a child is unavailable to testify—for example, due to lack of competency—the child may unwittingly be precluded from introducing the out-of-court statements because there is no corroborative evidence, resulting in the same concerns as for the states with no child hearsay exceptions.

The "testimony or corroboration requirement" also renders current child hearsay exceptions essentially useless in resolving the problems discussed in Section I.C. First, the requirement prevents increased prosecution of child abuse cases.[226] Because the child hearsay exceptions are only applicable in cases where the child either testifies or when there is other corroborative evidence,[227] children's hearsay statements are only admitted in cases with other evidence. Instead of providing evidence for more cases by admitting hearsay statements in cases where a child does not testify and there is no other evidence (which would lead to more prosecutions), this requirement merely provides supplementary evidence in cases that are already more likely to be prosecuted.[228] Moreover, because the requirement often simplifies to requiring a child to testify, the negative psychological problems caused by testifying remain unresolved.

Furthermore, the "testimony or corroboration requirement" makes states' child hearsay exceptions more restrictive than similarly applicable federal hearsay exceptions. Child hearsay exceptions are useful when no other state-recognized hearsay exception or exemption applies. However, in the federal context, the similarly situated residual hearsay exception, FRE 807,[229] contemplates circumstances where a declarant need not testify. In relevant part, FRE 807 states the following:

> (a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances

[225] *See* Lyon et al., *supra* note 13, at 448 ("The child and the suspect are usually the only potential eyewitnesses, and physical evidence is often lacking." (citations omitted)).

[226] *See* Duron, *supra* note 149, at 303 (listing lack of corroboration as often cited reason for not prosecuting child sexual abuse cases).

[227] *See, e.g.*, COLO. REV. STAT. § 13-25-129 (2019) (requiring child to testify or for corroborative evidence to be provided).

[228] *See* Duron, *supra* note 149, at 303 (establishing that prosecutors choose not to prosecute when there is lack of corroborative evidence and child is unable to "emotionally withstand testifying in court").

[229] FRE 807 is similarly situated because it is only useful when the exemptions and exceptions in FRE 803 and FRE 804 are inapplicable. *See* FED. R. EVID. 807.

> under which it was made and evidence, *if any*, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.[230]

As evidenced by its plain text, FRE 807 does not require the declarant to testify.[231] Although corroborative evidence is relevant to whether a statement is admissible, it is not dispositive.[232] Thus, the only requirements for hearsay statements to be admissible under FRE 807 are that they contain "sufficient guarantees of trustworthiness" and are "more probative than any other evidence that the proponent can reasonably obtain."[233] The states already have similar requirements for trustworthiness.[234] Therefore, by employing the "testimony or corroboration requirement," states hold children to a higher standard than adults in the federal system.

Although FRE 807 was not intended to be used very often,[235] a comparison between FRE 807 and child hearsay exceptions is still relevant. Both FRE 807 and child hearsay exceptions are used in "exceptional" circumstances.[236] FRE 807 may be used in near-miss cases,[237] and child hearsay exceptions may be used when a child's nontestimonial statement would not fit within a recognized hearsay exception. Additionally, FRE 807 was amended in 2019 because its contradictory and vague language made the rule challenging to apply,[238] which further resulted in the rule being used less often. This comparison also enhances the idea that the language in current child hearsay exceptions is far too restrictive and unworkable. Thus, the comparison to FRE 807 is neither extraneous nor does it render child hearsay exceptions useless in practice.

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[230] *Id*. (emphasis added).

[231] *See id*.

[232] FED. R. EVID. 807 advisory committee's note to 2019 amendment.

[233] *Id*.

[234] *See supra* notes 211-13 and accompanying text; *see also* MASS. GEN. LAWS ch. 233, § 81 (1990) (articulating that child's hearsay statement is only admissible if it is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts").

[235] *See Federal Rules of Evidence: The Legislative and Drafting History*, 6 TEX. TECH L. REV. 773 app. at Rule 803 (1975) ("It is intended that the residual hearsay exceptions will be used very rarely and only in exceptional circumstances.").

[236] *See id*.

[237] FED. R. EVID. 807 advisory committee's note to 2019 amendment. Near-miss situations are those where the statement just misses meeting the requirements for an FRE 803 or FRE 804 exception. *Id*.

[238] *Id*. (discussing problems 2019 amendment was meant to address). FRE 807 was previously amended in 2011, which also sought to make the language used easier to understand. FED. R. EVID. 807 advisory committee's note to 2011 amendment.

III. BROADENING CHILD HEARSAY EXCEPTIONS

The need for states to have child hearsay exceptions is evident when we examine the ultimate consequences of not having an exception: children are held to a higher standard of credibility than adults. The necessity becomes even more apparent when considering how investigations into child abuse cases begin.[239] As explained above, simply having a child hearsay exception is not enough. The exception must advance the goal of preventing further retraumatization and be usable in practice, not simply in theory. In this Part, I propose different amendments to states' child hearsay exceptions to help prevent retraumatization and simplify their use in practice. In Section A, I propose that all states adopt or amend their existing child hearsay statutes to apply to both physical and sexual abuse offenses. In Section B, I propose that the statutes should include language that enables courts to consider, but not require, corroborative evidence when determining the admissibility of children's out-of-court statements. In Section C, I propose that the admissibility of child hearsay statements should not depend on the child's availability to testify.

A. *Child Hearsay Statutes Should Be Applicable in Both Physical and Sexual Abuse Cases*

In this Section, I propose that all states' child hearsay statutes should be applicable in both physical abuse and sexual abuse cases. This proposal is aimed primarily at states without child hearsay exceptions and states in which child hearsay statutes do not apply in physical abuse cases. Applying child hearsay statutes in both physical and sexual abuse cases is not far from what many other states are already doing.[240] Child hearsay statutes should apply to both physical and sexual abuse cases because there is no fundamental difference between the trauma of a child who experiences physical abuse and one who experiences sexual abuse.[241] As discussed above, admitting hearsay statements in cases of sexual abuse but not physical abuse can affect the outcome of prosecutions and make it easier to prosecute sexual abuse than physical abuse.[242]

The need for child hearsay statutes to be applicable in physical abuse cases is also apparent when we compare how one fact pattern can lead to a statement being admissible in one state and inadmissible in another. For example, consider a three-year-old child reporting physical abuse to a non-police entity, such as a

[239] Investigations are commenced in response to reports, the majority of which are made by professionals. *See* SUMMARY OF KEY FINDINGS 2018, *supra* note 11, at 2. Practically speaking, however, at some point a child must have made a statement or acted in a way that prompted the professional to report.

[240] *See supra* note 215 and accompanying text (listing state statutes that do not limit application to specific offenses).

[241] *See supra* Section I.B.1 (discussing research about traumatic effects from child physical and sexual abuse).

[242] *See supra* Section I.B.2 (comparing two Alaska child abuse cases to show difference in prosecution).

teacher, sometime after the abuse occurred. In Massachusetts, the statement made to the teacher would not be admissible because Massachusetts's child hearsay exception only applies to instances of sexual contact.[243] No other hearsay exceptions would apply either.[244] Thus, there would likely be little to no evidence against the child's abuser unless the child testified.

However, in Ohio, this same fact pattern resulted in the admission of the three-year-old child's hearsay statements about physical abuse to his teacher the day after the abuse.[245] Although states are legally entitled to make their own laws regarding child hearsay,[246] a child's statement should not be treated differently based on the child's jurisdiction. While states may prioritize different values in their criminal procedure or evidentiary rules,[247] such differences cannot be sustained on false presumptions, namely, the notion that sexual abuse is more traumatic than physical abuse.[248] Thus, states must similarly apply child hearsay statutes to both sexual abuse and physical abuse cases by allowing admission in both types of cases or denying admission in both types of cases. However, because children are more vulnerable than adults,[249] the correct solution is for

[243] MASS. GEN. LAWS ch. 233, § 81 (1990) (applying only to statements "describing an act of sexual contact performed on or with the child").

[244] Massachusetts does not recognize the present sense impression or residual hearsay exceptions. *See MA Article VIII*, *supra* note 112. The spontaneous utterance exception would not apply either because the statement was not a "spontaneous reaction to the occurrence or event and [was] the result of reflective thought." Commonwealth v. Santiago, 774 N.E.2d 143, 146 (Mass. 2002) ("A spontaneous utterance will be admitted in evidence if (1) there is an occurrence or event 'sufficiently startling to render inoperative the normal reflective thought processes of the observer,' and (2) if the declarant's statement was 'a spontaneous reaction to the occurrence or event and not the result of reflective thought.'"). *But see* Commonwealth v. Coleman, No. 02-P-1440, 2005 WL 1981286, at *1-2 (Mass. App. Ct. Aug. 17, 2005) (holding two-year-old child's statement implicating defendant—made prior to any questioning—was spontaneous utterance).

[245] *See* Ohio v. Clark, 576 U.S. 237, 241-42 (2015). The Supreme Court determined that the statement was nontestimonial and upheld its admissibility. *See id*. at 250-51. For a discussion of testimonial and nontestimonial statements, see *supra* Section I.A.1.

[246] *See* U.S. CONST. amend. X (reserving certain powers to the states).

[247] *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 209-13 (1983) (comparing "crime control model" and "due process model" of criminal procedure to explain how some states value speed and efficiency and others emphasize adversarial system); *see also* U.S. CONST. amend. X (entitling states to create their own laws, pursuant to constitutional limitations).

[248] For a discussion of why this assumption is false, see *supra* Section I.B.2.

[249] *See* Bagattini, *supra* note 26, at 211 (2019) ("Childhood is arguably the most vulnerable period of human life. Children are highly dependent on others to satisfy their basic needs, and this makes them particularly vulnerable."); BECKY CARTER, KEETIE ROELEN, SUE ENFIELD & WILLIAM AVIS, SOCIAL PROTECTION: TOPIC GUIDE 58 (2019); *Children in Vulnerable Situations*, CHILD RTS. INT'L NETWORK, https://archive.crin.org/en/home/rights/themes/children-vulnerable-situations.html [https://perma.cc/T8LU-FWG9] (last visited Sept. 15, 2022) ("Children . . . [are] more

states to apply their child hearsay statutes to physical abuse and sexual abuse cases.

Broader child hearsay statutes are also supported by the policy rationales behind the rule against hearsay. The principal reason behind the general rule against hearsay admissibility is to prevent the introduction of unreliable evidence.[250] However, children's hearsay statements concerning abuse are not necessarily unreliable because the child declarant produces the statement through firsthand knowledge and temporally closer to the abuse than if the statement were made in court.[251] Moreover, this potential unreliability is similar regardless of whether the incident concerns physical or sexual abuse; thus, both types of offenses should be similarly treated in child hearsay exceptions. But again, children's vulnerability points to allowing admission of child hearsay statements in the contexts of both physical and sexual abuse.

B. *Corroborative Evidence Should Not Be Required*

The proposal that states eliminate the corroborative evidence requirement when the child is unavailable reflects the reality that often, there is no physical evidence or eyewitnesses other than the defendant and the child.[252] There is an analogous exception in the federal system already, FRE 807.[253] In fact, FRE 807 applies to children *and* adults and is applicable for any number of offenses. Some of these situations are different than the offenses to which state child hearsay statutes apply because these federal offenses will often have corroborative evidence. Even in these situations, corroborative evidence is not an absolute requirement.[254] If the federal system can statutorily admit *adults'* hearsay statements *without* corroborative evidence through FRE 807, then states can also statutorily admit children's hearsay statements through child hearsay exceptions without corroborative evidence.

The idea to not require corroborative evidence or to measure trustworthiness in some other way is not entirely new; there are states that already do not require independent corroborative evidence even if the child is unavailable to testify. Missouri's child hearsay statute makes clear that "a statement by a child when

vulnerable than other people because of their young age and dependence on adults . . . ."). *But see* JONATHAN HERRING, VULNERABILITY, CHILDHOOD AND THE LAW 27-44 (2018) (challenging explicitly "the assumption that children are more vulnerable than adults").

[250] *See* Sevier, *supra* note 89, at 647.

[251] *See supra* Section I.A.2 (discussing why children's hearsay statements are generally reliable).

[252] *See* Lyon et al., *supra* note 13, at 448 (stating that in case of child sexual abuse, "[t]he child and the suspect are usually the only potential eyewitnesses").

[253] FED. R. EVID. 807. For a discussion of FRE 807, see *supra* Section II.C.

[254] FED. R. EVID. 807 (requiring instead determination that "statement is supported by sufficient guarantees of trustworthiness—after considering the totality of [the] circumstances under which it was made and evidence, *if any*, corroborating the statement." (emphasis added)).

under the age of fourteen . . . who is alleged to be a victim of a[] [qualifying] offense . . . is sufficient corroboration of a statement, admission or confession regardless of whether or not the child . . . is available to testify regarding the offense."[255] Delaware requires that when a "child is found by the court to be unavailable," the statement must have "particularized guarantees of trustworthiness"[256] The statute further provides a nonexhaustive list of factors that "the court *may* consider" in determining whether a statement possesses particularized guarantees of trustworthiness—including "[w]hether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement."[257] Delaware's statute does not require any or all of the factors to be considered nor does it state that any one factor is determinative.[258]

While we should determine the trustworthiness of hearsay statements so that only reliable statements are admitted,[259] states (aside from Missouri and Delaware) can find ways to assess the trustworthiness of a child's hearsay statement without requiring corroborative evidence or the testimony of the child. Like Missouri, states could create a rule where an out-of-court statement by a child under a certain age is sufficient corroboration of the statement. Like Delaware, states could consider age or corroborative evidence as factors in making a trustworthiness determination. Like FRE 807, states could consider the totality of the circumstances[260] or otherwise devise their own formulation to determine trustworthiness.

As exemplified above, states can validate the trustworthiness of a statement without child testimony or corroborative evidence. I urge states either to adopt a method similar to Delaware's that considers a variety of factors or to adopt a totality of the circumstances approach similar to that enacted in FRE 807. This multi-factor test ensures that (1) no single consideration is definitive of a finding of trustworthiness, (2) a court's finding on trustworthiness is more accurate, (3) the child is not harmed by employing the "testimony or corroboration requirement," and (4) the defendant is not prejudiced by admitting all child hearsay statements.

C. *Admission Should Not Depend on a Finding of Unavailability*

Even though Delaware and Missouri do not require corroborative evidence if the child does not testify, a showing of unavailability is still required to admit

[255] MO. REV. STAT. § 491.075(2) (2012).

[256] DEL. CODE ANN. tit. 11, § 3513(b)(2) (2015).

[257] *Id.* § 3513(e)(13) (emphasis added).

[258] *See id.*

[259] *See* Sevier, *supra* note 89, at 647 (arguing that primary rationale for hearsay rule is exclusion of unreliable evidence).

[260] FED. R. EVID. 807(a)(1).

the statement.[261] However, the admission of child hearsay statements should not depend on the child's availability or lack thereof. In this Section, I will explain why admission should not depend on a child's unavailability by showing the need for such exceptions and by analogizing to the present sense and excited utterance exceptions.

Necessity rationalizes the notion that child hearsay exceptions should be applicable regardless of the child's availability.[262] As discussed, children tend to remember less than adults and are more likely to provide inconsistent accounts of the abuse.[263] At the very least, child hearsay exceptions are necessary to supplement children's testimony and fill in gaps caused by inconsistencies or memory loss. But more importantly, children should not be required to testify because of the greater likelihood of retraumatization. Moreover, without such an exception, there likely would not even be a basis for investigations or prosecutions of child abuse to begin with: while professionals' and other adults' reports lead to investigations,[264] the basis for these reports are likely to come from children's out-of-court statements.

Furthermore, because the present sense and excited utterance exceptions do not depend on the availability of the declarant,[265] neither should child hearsay exceptions. As explained earlier, the present sense and excited utterance exceptions exist because such statements are reliable and built upon substantial foundation.[266] Statements falling within child hearsay exceptions are similarly reliable and built upon a substantial foundation.[267] As the rationales for all three hearsay exceptions are the same, the requirement for the declarant to be available should also be the same. Because another federal evidentiary rule depends on the declarant's unavailability, the present sense and excited utterance exceptions cannot mandate the declarant's unavailability.[268] Therefore, child hearsay exceptions should be applied regardless of the child's availability.

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[261] DEL. CODE ANN. tit. 11, § 3513(b) (requiring child's testimony to touch upon subject matter of statement or for court to find child unavailable); MO. REV. STAT. § 491.075 (2012) (requiring child to testify, be physically unavailable, or be emotionally unavailable).

[262] Saltzburg, *supra* note 103, at 1497 (contending that, in addition to reliability, "necessity" and "substantial foundation" are also rationales for hearsay exceptions).

[263] *See supra* notes 157-58 and accompanying text (describing how children have more fallible memory and are more likely to provide contradictory accounts).

[264] *See* SUMMARY OF KEY FINDINGS 2018, *supra* note 11, at 2 (noting at least 83% of reports of alleged child abuse or neglect were made by professionals or other adults such as friends, neighbors, and relatives).

[265] *See* FED. R. EVID. 803.

[266] *See supra* Section I.A.2.

[267] *See supra* Section I.A.2 (contending child hearsay statements are no less reliable or built on less substantial foundation than other hearsay exceptions).

[268] *See* FED. R. EVID. 804(b) (enumerating exceptions to "rule against hearsay if the declarant is unavailable as a witness"). Thus, had the drafters of the FRE intended for FRE 803 exceptions to depend on the declarant's unavailability, they could have enumerated FRE 803 exceptions as such.

IV. RESPONDING TO POTENTIAL CRITIQUES OF THE PROPOSAL

One potential reason for the restrictive nature of many state child hearsay statutes is the Sixth Amendment's Confrontation Clause. As illustrated in Section I.A.1, the Confrontation Clause prohibits the admission of *testimonial* hearsay statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[269] The key term is testimonial, which does not apply to the types of statements to which the expanded hearsay exceptions would apply.

The statements in question are those similar to the child's statements in *Clark*: statements preliminarily made to parents, teachers, or other adults. These statements are not made with the intent of prosecution or investigation of the abuser. Indeed, young children may not even know that these possibilities exist.[270] Instead, children's purpose in making these statements is to get help from the adult or to get away from the abuser, which is akin to an ongoing emergency[271] and is, therefore, plainly nontestimonial. Requiring compliance with the "testimony or corroboration requirement" or nontestimonial statements does nothing more than fortify the defendant abuser's Confrontation Clause right, which is not absolute.[272] Even the *Crawford* Court would agree that states have flexibility when addressing these types of nontestimonial statements, including completely exempting these nontestimonial statements from a Confrontation Clause analysis.[273]

Additionally, because states have an added interest in protecting the well-being of children that can, at least in some cases, outweigh a defendant's right to face-to-face confrontation,[274] states should admit children's nontestimonial statements whenever there is a finding of trustworthiness. Although the general procedure is to provide in-court testimony, and while defendants may not be able to confront declarants if this general procedure is not followed, the interests of children and the greater public in protecting the welfare of children far outweigh any concerns. Any reliability and accuracy concerns are alleviated because these

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[269] *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.").

[270] *See* Ohio v. Clark, 576 U.S. 237, 248 (2015) (describing children's lack of knowledge of prosecution and the criminal justice system).

[271] *See* Michigan v. Bryant, 562 U.S. 344, 359-60, 367 (2011).

[272] The defendant's Confrontation Clause right is not absolute. *See* Maryland v. Craig, 497 U.S. 836, 844 (1990) ("We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.").

[273] *See Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

[274] *See Craig*, 497 U.S. at 853.

statements are more likely to be reliable and accurate because they are made closer in time to the abuse and before any investigations.[275] Any concerns that defendants' constitutional rights would be violated are misplaced because defendants do not have a constitutional right to expect confrontation when nontestimonial statements are at issue.[276] Even though the hearsay statements are used as evidence against the defendants, the declarants of the statements are not witnesses because the statements are nontestimonial.[277] The Confrontation Clause only guarantees criminal defendants the right to be confronted with the *witnesses* against them.[278] This result is not contradictory to the policy rationales behind the Confrontation Clause as defendants' due process rights will still be preserved in other ways.[279]

Furthermore, allowing for child hearsay exceptions will not prejudice defendants because states can take other measures to ensure a fair trial. First, a determination of the statement's trustworthiness must still be made before it is admitted into the record to ensure that unreliable nontestimonial statements (e.g., those made in relation to suggestive questioning or for ulterior motives)[280] are not admitted into the record. Second, although my proposal gives children more autonomy in deciding whether to testify, states can still try to persuade children to testify by explaining the benefits of testifying. Third, even where a child does not testify, the child declarant's credibility may still be attacked in court by any impeachment evidence that would have been admissible had the child testified in court.[281] States could even consider the trustworthiness or credibility of the

[275] *See supra* Section I.A.2 (discussing why children's hearsay statements are generally reliable).

[276] *See Crawford*, 541 U.S. at 68.

[277] *See supra* text accompanying note 61; *see also supra* Section I.A.1 for a discussion of what constitutes testimony.

[278] *See supra* Section I.A.1 (describing Supreme Court jurisprudence excluding certain statements from category of testimonial statements).

[279] *See* California v. Green, 399 U.S. 149, 156-57 (1970) (implying that due process is primary rationale behind Confrontation Clause); *see also* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18 (2006) (stating Sixth Amendment grants criminal defendants due process by providing "the right to a speedy trial, the right to trial by jury, the right to assistance of counsel, the right to compulsory process, and the right to confront the government's witnesses"); *supra* Section III.B (guaranteeing due process by proposing new ways to determine trustworthiness of child's hearsay statement).

[280] *See* Calloway & Lee, *supra* note 162, at 141 (noting children may be influenced by leading questions, "social pressures, perceived authority of adult examiner/interviewer, and repeated interviews").

[281] Under FRE 806,

> When a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

witness who relates the statement in court.[282] The defendant could attack the relating witness's credibility, just like any other testifying witness. Finally, if states or courts are still worried that defendants' rights are not adequately protected, then they can mitigate any unfair prejudice against the defendant in admitting these nontestimonial hearsay statements by granting less weight or designing appropriate jury instructions.[283]

There are many benefits to my proposal. As discussed, testifying face-to-face can retraumatize children.[284] Testifying face-to-face can also produce less accurate testimony because if children are susceptible to suggestion, they may provide testimony favorable to their abusers upon seeing them in court.[285] Because these nontestimonial hearsay statements will usually predate any investigatory or prosecutorial questioning and will be temporally closer to the abuse, they will likely be more detailed and less induced by suggestibility, and should therefore be more accurate.[286] Of course, as previously mentioned, closed-circuit television also promotes accuracy in children's testimony.[287] However, my proposal eliminates one of the main drawbacks to using closed-circuit television: children's exposure to their fears of public speaking or embarrassment. Because hearsay statements are not prompted by a lawyer's questioning, as opposed to testimony through closed-circuit television, lawyers cannot confuse and embarrass children.

FED. R. EVID. 806. If a state has an evidence rule similar to FRE 806, then the declarant's credibility may be attacked under that rule. If not, a similar provision can be built into the child hearsay exception.

[282] *But see* FED. R. EVID. 807 advisory committee's note to 2019 amendment (explaining courts "should not consider the credibility of any witness who relates the declarant's hearsay statement in court" when making a determination about statement's trustworthiness).

[283] A determination of the appropriate weight or appropriate jury instructions is beyond the scope of this Note.

[284] *See supra* note 165 and accompanying text (citing scholars discussing retraumatization of minors through testifying).

[285] *See* CAROLYN COPPS HARTLEY & ROXANN RYAN, PROSECUTION STRATEGIES IN DOMESTIC VIOLENCE FELONIES: ANTICIPATING AND MEETING DEFENSE CLAIMS 62 (1998) (suggesting that victims sometimes testify unfavorably for prosecution); Goodman et al., *supra* note 40, at 1668 ("[S]tudies indicate that it may be difficult for children to recount events fully and accurately when the perpetrator is physically present. In addition, the courtroom setting and several legal practices seem to be related to heightened stress in children, which may in turn affect accuracy."); Goodman et al., *supra* note 14, at 145-46 (confirming that face-to-face confrontation negatively affects accuracy of children's testimony).

[286] *See* Denne et al., *supra* note 15, at 225-27 (explaining that there is a lot of room for "suggestive influences" between time of initial disclosure to time of trial); *see also* Bala et al., *supra* note 158, at 999 ("A major concern with child witnesses is their potential suggestibility. As a result of repeated or misleading questions, the memory of a witness may become distorted.").

[287] *See supra* note 199 and accompanying text.

No solution is complete without at least acknowledging the downsides. The biggest drawback to statutory child hearsay exceptions for physical and sexual abuse is that juries may view children's hearsay statements as less accurate or less reliable than in-court testimony, leading to decreased conviction rates of abusers.[288] Juries viewing children's hearsay statements as less accurate or less reliable is also one of the disadvantages of using closed-circuit television. Nevertheless, my proposal is still beneficial. Because hearsay statements are not the result of lawyer questioning, my proposal eliminates the other major issue with using closed-circuit television: having to face lawyer questioning.[289] By not forcing children to testify but rather letting them decide whether to testify, my proposal decreases rates of retraumatization and stress and provides children with more autonomy.

CONCLUSION

States should adopt or amend their child hearsay exceptions to apply in cases of physical and sexual abuse. There is ample evidence to suggest no substantive traumatic differences between the two types of abuse. States should also discard the requirement for corroborative evidence when the child does not testify. In its place, states should adopt a different method of assessing trustworthiness to allow for the admissibility of these statements even where there is no corroborating evidence. In general, states should create a structure of admissibility for child hearsay statements that provides more autonomy to children. While the Confrontation Clause and the current state of the law prohibit the in-court use of testimonial hearsay statements, the statements referenced in these child hearsay exception recommendations are nontestimonial and, thus, outside the domain of the Confrontation Clause. This proposal should produce statements of greater accuracy and minimize retraumatization of children who testify while mitigating unfair prejudice against a defendant. There is no reason children's out-of-court nontestimonial statements should be kept out of the record on technicalities or be limited in their applicability to different types of maltreatment when statistics and case law prove otherwise.

[288] *See supra* notes 200-01 and accompanying text (explaining how using closed-circuit television makes jurors view child witnesses as less accurate or less credible). *But see* Gail S. Goodman, John E.B. Myers, Jianjian Qin, Jodi A. Quas, Paola Castelli, Allison D. Redlich & Lisa Rogers, *Hearsay Versus Children's Testimony: Effects of Truthful and Deceptive Statements on Jurors' Decisions*, 30 LAW & HUM. BEHAV. 363, 365-66 (2006) (suggesting that children's hearsay statements have no negative effect on juror perception when compared with children's testimony and may even lead to increased rates of convictions).

[289] *See* Myers et al., *supra* note 196, at 59-60.