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Childist Objections, Youthful Relevance, and Evidence Reconceived

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ABSTRACT

Evidence rules are written by and for adults. As a result, they largely lack the vantage point of youth and are rooted in arm's-length assumptions about the lives and legal interests of young people. Moreover, because children have been mostly treated as evidentiary afterthoughts, they have been patched into the justice system and its procedures in a piecemeal fashion. Yet, to date, there has been no comprehensive scholarly critique of evidence principles and practices for failing to meaningfully account for youth. And the evidentiary intersection of youth and race has been almost entirely overlooked in legal scholarship. This Article, in part drawing from a range of contemporary examples including the Derek Chauvin trial, begins to provide such analysis. It suggests that evidence law and practice are not only steeped in gender and race bias but unduly adult-centric—and childist—in their orientation. Further, it recommends a more humanist reconception of court proceedings to account for all individuals as whole persons with strengths, weaknesses, vulnerabilities, and complexities in the here and now—regardless of their age or stage in life.

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INTRODUCTION

Evidence rules are written by and for adults. As a result, they largely lack the vantage point of youth and are rooted in arm's-length assumptions about the lives and legal interests of young people. Moreover, because children have been mostly treated as evidentiary afterthoughts, they have been patched into the justice system and its procedures in a piecemeal fashion. The framework that has emerged advances a range of false binaries about young people. For instance, children are treated as either completely unbelievable or automatically creditworthy; addressed as entirely helpless or without the need for any special help at all; seen as adults in court or not even allowed to be seen. In addition, the law of evidence as it relates to young people is confusing, sometimes conflicting, and often works to traumatize youth. These concerns are especially acute for youth of color. And they can be discerned across all of evidence doctrine—whether youth are trial witnesses, out-of-court declarants, or actual litigants.

The recent murder trial of Derek Chauvin provides one particularly troubling example. Chauvin, a white police officer, faced criminal charges for heinously killing George Floyd, an unarmed Black man, while he begged for his life. Several Black girls—rang-

ing in age from 17 to 9 years old—were called as witnesses by the prosecution to recount their personal observations of Chauvin's horrifying acts. The children thus had to face the officer in court and describe how he killed Floyd, disregarded their own pleas for mercy at the scene, and intimidated them on the day Floyd was killed. All this occurred, it seems, without counsel being provided for the youth, and with little regard for their own ongoing trauma, fear, and possible danger. Indeed, the sentencing judge in Chauvin's case entirely discounted the idea that they were in any way victims of Chauvin's inhumanity and cross-racial homicidal acts. According to the court, their testimony belied any "objective indicia of trauma."[1]

Over the last two decades, commentators have taken evidentiary rules and doctrine to task for failing to sufficiently consider race and gender.[2] To date, however, there has been no comprehensive scholarly critique of evidence principles and practices for failing to meaningfully account for youth. And the evidentiary intersection of youth and race has been almost entirely overlooked in legal scholarship. This Article begins to provide such analysis. It suggests that evidence law and practices are not only steeped in gender and race bias but unduly adult-centric—and childist—in their orientation.[3]

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1. *See* Janelle Griffith, *Children Saw George Floyd's Murder—But Judge Didn't Consider that in Chauvin's Sentencing*, NBC NEWS (July 2, 2021, 4:30 AM), https://nbcnews.to/3Eeo1hL [https://perma.cc/VNE6-S4GB].

2. *See, e.g.*, Julia Simon-Kerr, *Relevance Through a Feminist Lens*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364, 366 (Christian Dahlman, Alex Stein & Giovanni Tuznet eds., 2021); ANDREA DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 79–81, 97–98 (2019); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2243–44 (2017); Isabelle R. Gunning, *An Essay on Teaching Race Issues in the Required Evidence Course: More Lessons from the O.J. Simpson Case*, 28 SW. U. L. REV. 355, 355, 362–64 (1999); Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CALIF. L. REV. 159, 190–95 (1997); Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 127–29 (1996); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 413–14 (1991).

3. As discussed further below, consistent with the work of Elisabeth Young-Bruehl, "childism" or "childist" is used in this Article to describe adult-centered thinking that disempowers children or obscures their experiences. *See* Elisabeth Young-Bruehl, *Childism—Prejudice Against Children*, 45 CONTEMP. PSYCHOANALYSIS 251, 254–55, 264–65 (2009). *See generally* Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex-Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51 (2014) [hereinafter Quinn, *Trot to Twitter*] (using "childism" to critique paternalistic policing practices harmfully visited upon youth historically and today). Others have used the term "childism" in a more "positive" sense—like "feminism"—to urge consideration of the views and interests of youth. *See, e.g.*, John Wall, *From Childhood Studies to Childism: Reconstructing the Scholarly and*

Critiquing courts as adult-focused venues, this Article calls for all young people—especially BIPOC youth—to be more meaningfully included in modern understandings of evidence law and justice more generally. Proceeding in five parts, it examines how childism is at play in evidence law and recommends a humanist reconception of court proceedings in our justice system, to account for all individuals as whole persons with strengths, weaknesses, vulnerabilities, and complexities, in the here and now.

Part One provides a brief history of the Federal Rules of Evidence (FRE), which have been adopted and used in courts around the country. In part, it describes how the drafting and promulgation process has historically included primarily white men and exclusively adults. It further explains that these rules, oriented towards those who have reached the age of legal majority, have been embraced by most state court systems, too. Youth have been left out of those drafting and implementation processes as well.

In Part Two, this Article provides an overview of how critical legal scholars and others have deconstructed rules of evidence using feminist and racial justice theories. These critiques have focused on a range of ways in which evidence rules advance the cis white male experience as the norm, excluding the concerns and experiences of others, including men of color, women of all races, and non-binary persons.

Part Three explains the concept of childism. It builds upon critical legal studies discussions in the United States, focused on the areas of gender and race. In doing so, it draws upon non-legal literature concerned with the marginalization of children, including scholarly work in the fields of medicine, psychology, and children's studies. It further describes how even "child-centered" legal scholarship and advocacy approaches have failed to fully account for the phenomenon of childism in our evidentiary and court practice norms.

Part Four applies the lens of childism to the law of evidence, identifying specific ways in which the Rules and their application fail to meaningfully consider children as litigants, witnesses, and out-of-court declarants. Through this analysis, it concludes that not only have youth been excluded from the process of helping to make

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Social Imaginations, 20 CHILD.'s GEOGRAPHIES 257, 257 (2019). Further, this set of concerns is sometimes referred to as "adultism," particularly outside of the United States. *See, e.g.*, ADAM FLETCHER, FACING ADULTISM 7 (2015); *see also* Brenda A. LeFrancois, *Adultism*, *in* ENCYCLOPEDIA OF CRITICAL PSYCHOLOGY 47, 47 (2013) (noting the word "adultism" was first used in the field of psychology in the 1970s with particular salience in Europe).

evidence laws but in many instances they are also being harmed by our white, male, adult-centric system. In some cases, they are essentially erased as whole citizens and persons with complex capacities and needs. Consistent with this country's continued top-down, arm's-length relationship with young people, evidence law advances largely disempowering practices and disconnected snapshots of young people that are not rooted in their realities or diverse experiences. Youth of color are especially impacted and too frequently traumatized by these approaches.

Evidence law, Part Five argues, can and should better incorporate the needs, contributions, and lived experiences of young people. Building upon a range of authorities—including international movements and norms, in addition to calls from the social science and medical communities—it offers suggestions for including youth in drafting, comment, and amendment processes. Courts, too, should interpret evidence rules to account for the vulnerabilities, capacities, and expressed desires of young people. A more modern understanding of youth would also account for this country's history of racial bias and harms visited upon youth of color.

In the end, this Article concludes with a recommendation for reconceiving evidence doctrine so that it is far less childist and much more mindful of the wide range of experiences of people impacted by our courts—regardless of their age or stage in life.

I. EVIDENCE LAW: ANOTHER WHITE[4] MAN'S LEGAL AFFAIR

Like so much about law in the United States—from criminal law, to torts, to civil procedure, to most written legal history and theory—evidentiary rules and standards were conceptualized by and for white male adults.[5] Prominent legal academics, judges, and

4. My use of the term "white man" could be seen as recommitment to, and further instantiation of, "white identity." *See* Sam McKenzie Jr., *Why I No Longer Refer to "White People,"* MEDIUM (Feb. 7, 2021), https://bit.ly/3e59bzc [https://perma.cc/29TS-E6E8]. That is not my intent or desire. Instead, race is a social construct that still exists and impacts our world. Ongoing and very real consequences that flow from this construct, including concrete benefits for some and harms for others, is what I seek to signal. *See, e.g.*, Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCH. 16, 24 (2005) ("Race is a means of creating and enforcing social order, a lens through which differential opportunities and inequality are structured.").

5. *See* Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOW. L.J. 99, 101 (2005) ("[R]ace has mattered in torts in ways that have resulted in categorization of harm to black plaintiffs as in some instances necessarily less than to whites."); Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1266 (2004) ("[T]he 'reasonable person' test has not changed and is still, essentially, the

attorneys—none of whom were women of any race, men of color, or youth of any background—shaped norms for trial evidence in this country since its early years until the modern era.[6] Even the drafting of the FRE, a project started in the 1960s and seen as a "radical departure from the general form and content of the common law,"[7] was dominated by white men alone. And little has changed over time, even as individual states have embraced the FRE starting in the 1980s.

Before the FRE were adopted in 1975, expert-written academic treatises, which supposedly synthesized common law concepts, constitutional doctrine, and a small number of relevant statutes, were largely relied upon for resolving evidentiary issues in U.S. courts.[8] For instance, in the early 20th century, John Henry Wigmore—a name well-known to most lawyers, judges, and legal scholars today—emerged as the nation's leading evidence law authority.[9]

Wigmore, the son of wealthy Anglo-Irish immigrants, attended private schools as a boy and graduated from Harvard Law School in 1887.[10] He ultimately became the Dean of Northwestern School of Law and wrote a multi-volume treatise on evidence in 1904 that "became the standard American reference work on evidence."[11]

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reasonable [w]hite man in disguise."); Masai McDougall, *Understanding Bias in Civil Procedure: Towards an Empirical Analysis of Procedural Rule-Making's Role in Continuing Inequality*, 74 RUTGERS L. REV. (forthcoming 2022); *see also* Mae C. Quinn, *Feminist Legal Realism*, 35 HARV. J.L. & GENDER 1, 2, 4–5 (2012) (arguing the traditional account of Legal Realism has been written as an "androcentric" "master narrative" that centers white men affiliated with elite institutions, to the exclusion of women of all races and men of color).

6. *See* Federal Judicial Center, *Rules: Federal Rules of Evidence*, FED. JUD. CTR., https://bit.ly/3SvDkGV [https://perma.cc/V7YV-YBME] (last visited Nov. 7, 2022) ("Beginning in the late nineteenth century, a group of leading lawyers and evidence scholars attempted to more clearly define the common law of evidence.").

7. David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 312 (1995).

8. Federal Judicial Center, *supra* note 6; *see also* U.S. JUD. CONF. COMM. ON RULES OF PRAC. & PROC., *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 82–89 (1962) (describing early standards, statutes, and other authorities relied upon in federal courts depending upon whether an evidence issue was presented in the context of civil, criminal, admiralty, or bankruptcy proceedings).

9. *See* Federal Judicial Center, *supra* note 6 (referring to Wigmore as the country's "leading authority"); *see also* JOHN HENRY WIGMORE, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904).

10. Richard D. Friedman, *John Henry Wigmore*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 587, 587 (R.K. Newman ed., 2009).

11. *Id.* at 588.

What many do not know is that Wigmore's ten-volume text relied heavily on the work and ideas of his Harvard Law School mentor, Professor Simon Greenleaf. Greenleaf, another well-to-do white man, published his own evidence treatise in the mid-1800s.[12] Wigmore worked with Greenleaf to update this text in the late 1800s.[13] And Greenleaf himself acknowledged that this publication expanded upon the existing "excellent treatises of Mr. [Thomas] Starkie and Mr. [Samuel March] Phillipps on Evidence," English barristers and scholars whose works were published in the early 1800s.[14]

Moreover, Greenleaf dedicated his 1842 text to United States Supreme Court Justice Joseph Story.[15] In doing so, he praised Justice Story for helping found Harvard Law School, to allow a "multitude of young men" to "dr[i]nk at this fountain of jurisprudence" to become "inculcated" in their shared views on legal doctrine.[16] Thus, lest there was any doubt, Greenleaf made plain evidence law's jurisprudential lineage as an entirely adult male affair—white men, to be sure.

After the Federal Rules of Civil Procedure were adopted in 1938, numerous law professors, lawyers, and judges then turned their attention to the question of whether evidence principles should be codified.[17] For instance, in 1940, the American Legal In-

12. *See generally* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (Boston, Charles C. Little & James Brown 1842).

13. Friedman, *supra* note 10, at 588 ("In 1899, [Wigmore] published the 16th edition of Simon Greenleaf's treatise on evidence," considered "[t]he dominant nineteenth-century American work on the subject."); *see also* Nancy J. Kippenhan, *Seeking Truth on the Other Side of the Wall: Greenleaf's Evangelists Meet the Federal Rules, Naturalism, and Judas*, 5 LIBERTY U. L. REV. 2, 2 (2010) (declaring Greenleaf "one of the nineteenth century's most noted scholars in the field of evidence"); Corydon Ireland, *Turning Over a New Leaf*, HARV. L. BULL. (Oct. 5, 2015), https://bit.ly/3C3nsnV [https://perma.cc/JQ64-6J29] (noting Greenleaf was one of Harvard Law School's first law professors, joining the faculty in 1833).

14. 1 GREENLEAF, *supra* note 12, at vii–viii (advertising the first edition, dated February 23, 1842); *see also* 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE (London, J. & W.T. Clarke 1833); 1 SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE (London, J. & W.T. Clarke 1824). A comprehensive history of evidence law, going back to English common law and before, is beyond the scope of this paper. For more on this earlier period, see, e.g., GEOFFREY GILBERT, THE LAW OF EVIDENCE (Dublin 1754); 7 JEREMY BENTHAM, *Rationale of Judicial Evidence*, *in* THE WORKS OF JEREMY BENTHAM (London, William Tait 1843); EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, KNT. IN THIRTEEN PARTS (London, Joseph Butterworth & Son 1826).

15. 1 GREENLEAF, *supra* note 12, at iii–v (beginning with dedication from Greenleaf to Supreme Court Justice Joseph Story, dated February 23, 1842).

16. *Id.* at iv.

17. *See* Federal Judicial Center, *supra* note 6 (describing how in 1938 the American Bar Association called for the creation of a "practicable" and "short

stitute (ALI) led by Model Code Reporter Edmund Morgan, another Harvard Law Professor, began trying to distill and simplify the principles included in Wigmore's expansive body of work.[18] And in the 1950s, the American Bar Association (ABA) produced its own model evidence code, drafted by the Conference of Commissioners on Uniform State Laws.[19] This group included Dean Mason Ladd of Iowa Law School, Professor Charles McCormick of the University of Texas, and Attorney General Robert Woodside, all of whom were white men.[20]

Finally, in the 1960s, the federal system took up the question of whether United States district courts should have a uniform set of evidence rules.[21] At least two different groups were involved in this effort, one of which was comprised of members hand-selected by Supreme Court Chief Justice Earl Warren.[22]

Thus, numerous elite jurists and legal professionals participated in this multi-year project which resulted in the adoption of the Federal Rules of Evidence in 1975,[23] including Professor Ed-

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code" containing "wise essentials" relating to evidence principles); *see also* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1901 (1989) (providing a brief procedural and historical account of the adoption of the Federal Rules of Civil Procedure in 1938).

18. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1735–38 (1995); *see also* Charles E. Wyzanski, Jr., *Edmund M. Morgan, 1878–1966*, 79 HARV. L. REV. 1537, 1537–40 (1966) (memorializing the life and legal contributions of Professor Morgan).

19. *See* Leo H. Whinery, *The Uniform Rules of Evidence and the North Dakota Law of Evidence*, 32 N.D. L. REV. 205, 207–09 (1956) (describing the efforts of the ABA's Conference of Commissioners to produce a Model Code of evidence with input over many years from lawyers and law professors).

20. *Id.* at 208 n.28.

21. *See* Federal Judicial Center, *supra* note 6 (documenting the creation of at least two different committees tasked with considering federal rules of evidence); Thomas F. Green, Jr., *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 177 (1967).

22. *See* Federal Judicial Center, *supra* note 6.

23. In-depth treatment of the many controversies surrounding adoption of the Federal Rules of Evidence, including whether the Supreme Court is correctly part of the promulgation process, is beyond the scope of this Article. *See* U.S. JUD. CONF. COMM. ON RULES OF PRAC. & PROC., 92D CONG., MINUTES OF THE COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE 2 (1972), https://bit.ly/3CtYsHX [https://perma.cc/QXG5-M467] (documenting concerns raised by Judge Henry Friendly that the Court was overstepping its role); Warren Weaver Jr., *Senate Puts Off Evidence Rules*, N.Y. TIMES, Feb. 8, 1973, at 13 (calling "controversial" the "new evidence rules for the Federal court system"); *see also* Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539, 1567–76 (1999) (recounting the unusual back and forth over several years between Congress and the Court's Advisory Committee before the FRE were finalized).

ward Cleary of the University of Illinois College of Law, Yale Law Professor James Moore, Professor Thomas Green of the University of Georgia School of Law, Third Circuit Judge Albert Maris, and well-known Chicago attorney Albert Jenner.[24] Here again, there was no prominent role in the process for men of color, women of any race, or youth of any background.

Since the FRE became law, many states have adopted their own evidence codes, often borrowing language verbatim from the FRE.[25] Individuals involved in modern state-level efforts have looked a lot like those who shaped evidence law decades and centuries before. For instance, in 1988, the Alabama Supreme Court appointed a committee of 23 bar members to help draft the Alabama Rules of Evidence.[26] It is true a few persons of color, including at least one Black woman, and some other non-male representatives were included in this effort.[27] But Alabama evidence codification conversations were overwhelmingly dominated by white male attorneys, scholars, and jurists. And to be clear, youth were entirely excluded.

In 2013, Georgia became the 44th state to adopt an evidence code that largely tracks the FRE.[28] Several study groups played a role in the process, led almost exclusively by white men including Georgia Bar President Bob Brinson, State Representative Wendell Willard, and attorney Frank C. Jones.[29] Apparently different from earlier evidence codification efforts, "younger litigators" did come

24. *See* Federal Judicial Center, *supra* note 6; U.S. JUD. CONF. COMM. ON RULES OF PRAC. & PROC., *supra* note 23, at 1; *see also* Weaver, *supra* note 23 (naming Judge Maris, Jenner, and Cleary as among those "chiefly responsible for drafting the new rules"); Verner F. Chaffin, Dedication, *A Tribute to Professor Thomas F. Green, Jr.*, 23 GA. L. REV. i, i–ii (1988) (noting Green's role in creating the FRE); Wolfgang Saxon, *James W. Moore, 89, Legal Scholar and Teacher*, N.Y. TIMES, Nov. 1, 1994, at B8 (memorializing Moore's contributions).

25. *See, e.g.*, L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315, 1319–20 (1985).

26. Charles W. Gamble, *Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective*, 47 ALA. L. REV. 1, 2–3 (1995).

27. *Id.* at 2 n.5 (providing list of the Court's appointees). Ernestine Sapp, an African-American leader in the state bar, and Judge Sarah Greenhaw, apparently a white jurist, were among the only women involved in the project. *Id.* In addition, Rosa Davis submitted comments relating to Alaska Rule of Evidence 609 on behalf of Attorney General Jimmy Evans. *Id.* at 48.

28. Paul S. Milich, *Georgia's New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379, 380 n.6 (2012).

29. *Id.* at 380–82; *see also* David N. Dreyer et al., *Dancing with the Big Boys: Georgia Adopts (Most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 11–15 (2011) (describing different committees and efforts that unfolded over approximately 25 years).

out to share their views in support of a uniform evidence code.[30] But clearly such attorneys were at least in their 20s. And, as might be expected given all that came before in the evidence arena, the voices and views of younger persons were not part of the process. The Georgia story is somewhat surprising, however, given its leadership decades earlier to become one of the first states to lower the voting age from 21 to 18, as will be further described below.

II. FEMINIST AND ANTI-RACIST CRITIQUES OF EVIDENCE LAW

In recent decades, numerous scholars have criticized the FRE and similar evidence codes as being sexist and racist. Their work uses feminist and critical race theory to unpack assumptions embedded in evidence rules as written and to consider the implications of such rules as applied. Most of these important contributions have not, however, focused a great deal on the history outlined above.[31] Moreover, no scholars have used critical legal theory to comprehensively analyze the ways in which evidence law's past, the promulgation of existing rules, or the ongoing application of FRE-based principles impact youth as litigants, participants in court practices, or legally relevant subjects.

Starting in the early 1990s, scholars began applying a feminist legal perspective to specific evidence principles, concluding that they discounted women's lived experiences. For instance, Kit Kinports noted that expert testimony doctrine often worked to exclude testimony of "importance to women"—such as expert accounts of battered women's syndrome—"on the ground that it was not sufficiently reliable."[32] Rosemary Hunter added that character evidence rape-shield provisions developed under FRE 412 and 413, as well as state analogs, did not go far enough to protect women's privacy and continued to embrace outdated assumptions about sex and sexuality.[33]

Later that decade, Aviva Orenstein argued, among other things, that "the excited utterance exception stems from overly narrow and gendered assumptions of how 'normal' people react to stress."[34] And in 2021, Julia Simon-Kerr synthesized and expanded

30. Milich, *supra* note 28, at 382.

31. To be sure, some critical scholars have addressed some of this history. *See, e.g.*, Simon-Kerr, *supra* note 2, at 346–66.

32. Kinports, *supra* note 2, at 445.

33. *See* Hunter, *supra* note 2, at 133–40.

34. Orenstein, *supra* note 2, at 164; *see also* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 664 (1998).

upon many of these earlier works to focus on the limitations of relevance doctrine. Simon-Kerr notes that relevance—perhaps one the legal system's most basic evidentiary principles—remains "socially-constructed" in such a way that the positionality, rationality, and lived reality for many women is discounted to this day in courts around the country.[35]

Feminist scholars have also gone beyond critiquing individual rules, rulings, and doctrines to contest the FRE as a system that advances invisible preferences. For instance, Kinports points out that hierarchy and elitism is baked into evidence law through a complex system of technical rules geared towards attorneys alone. And its embrace of adversarialism in our courts has worked to advance competition and gamesmanship,[36] values that run contrary to feminism's reported concern for inclusivity, equity, and collaboration.[37]

Many scholars have, however, pushed back against such feminist legal analyses, pointing out tensions and limitations in these ways of thinking. For instance, some have noted traditional feminist legal approaches oversimplify identity and often overlook the experiences of persons of color.[38] Thus, a separate body of critical work addressing the FRE has also emerged, evaluating the rules in light of the social construct of race.

More than 20 years ago, in part using the trial of O.J. Simpson as a point of departure, Isabelle Gunning implored law students and colleagues to see the FRE as more than "merely dry and abstract rules."[39] Instead, she urged readers to consider how the subject of race and racial bias may be analyzed within our evidentiary system.[40] Since that time, others have responded to the call in a number of ways.

Some scholars have addressed specific kinds of courtroom evidence, like rap music, and its impact on Black Americans. Andrea Dennis has called out courts for allowing rap lyrics to be used against Black defendants in criminal trials, noting a range of false assumptions inherent in such rulings, including a presumption "that music lyricists accurately convey truthful self-referential narra-

35. Simon-Kerr, *supra* note 2, at 369.

36. *See* Kinports, *supra* note 2, at 423–30.

37. *See id.*

38. *See, e.g.*, Kinports, *supra* note 2, at 431; DENNIS, *supra* note 2, at 35–43; Simon-Kerr, *supra* note 2, at 372–73.

39. Gunning, *supra* note 2, at 365.

40. *Id.* at 355, 365.

tives."[41] Donald Tibbs similarly challenges rap music evidence rulings for suggesting a propensity towards violence and criminality on the part of accused persons, noting such determinations are "grounded in the history of policing and anti-Blackness in American law."[42]

Mikah Thompson has pointed out how racial bias more generally undermines supposed protections provided by the FRE.[43] For example, propensity evidence is usually not permitted at trial. Thus, a prosecutor should not be allowed to point to prior actions to try to prove a defendant's behavior on the day in question. Yet, Thompson points out, prosecutors routinely use stereotypes—subtly and not so subtly—to advance theories relating to Black Americans and their likely actions.[44]

Jasmine B. Gonzales Rose examines other categories of evidence that historically have been used against defendants of color, including proof of flight as consciousness of guilt and stand-your-ground defense evidence.[45] Gonzales Rose urges reassessment of the entire evidentiary canon through a "critical race theory of evidence" to shed light on "racialized realities" and "make evidence law more equitable."[46] Beyond helping "to uncover racial subordination imbedded in evidence law," she argues that such a shift in thinking may serve as a "starting point" for dismantling structural inequity more generally to help us move closer to "full justice" for all.[47]

III. CHALLENGING CHILDISM: NOT JUST A THOUGHT EXPERIMENT

Like feminist and critical race theory, childism seeks to pull back the curtain on unspoken norms in our world that work to exclude and erase young people. Its orientation, however, centers on the experience of children, a group that, in the United States, is

41. Andrea Dennis, *Poetic (In)justice? Rap Music as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 15 (2007); *see also* DENNIS, *supra* note 2, at 13–21, 76–81.

42. Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L & POL'Y 33, 39 (2016).

43. *See* Mikah Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 322–23 (2015).

44. *See id.* at 343.

45. *See* Gonzales Rose, *supra* note 2, at 2245.

46. *See id.* at 2245.

47. *See id.* at 2311.

often expected to be "seen and not heard."[48] Indeed, in our court system, youth are not only expected to remain silent in many instances—but also, as will be further described below, to remain unseen.

First used in other fields such as psychology, medicine, and childhood studies,[49] the term childism was powerfully advanced by Canadian psychologist Elisabeth Young-Bruehl in her 2012 posthumously published book, CHILDISM: CONFRONTING PREJUDICE AGAINST CHILDREN.[50] But Young-Bruehl began using the childism framework some years earlier as a means of better understanding youth as an outgroup in our society who have suffered stereotyping, abuse, neglect, and marginalization.[51]

Others, such as theoretical ethicist and childhood studies scholar John Wall, have also contributed greatly to the conversation about childism. Wall, however, uses the term in a more "positive" sense—like the term feminism—to offer a "critical lens for deconstructing adultism across research and societies and reconstructing more age-inclusive scholarly and social imaginations."[52] That is, "[b]eyond including children and young people as active social participants, childism also challenges and transforms the historically ingrained adult-centered assumptions that underlie children's systemic marginalization."[53]

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48. *Cf.* JANA MOHR LONE, SEEN AND NOT HEARD: WHY CHILDREN'S VOICES MATTER 95–96 (2021) (calling for rejection of traditional approaches that devalue the thoughts, ideas, and experiences of children); *see also* Quinn, *From Turkey Trot to Twitter*, *supra* note 3, at 95–96 (critiquing United States policy and other initiatives that fail to allow for youth input and recommending greater engagement with youth in political and other domains).

49. *See* Claudia M. Gold, *Child Protection and Infant Mental Health: An Essential Partnership*, 115 W. VA. L. REV. 1127, 1130–34 (2013) (urging better understanding of "childism" in the context of child protection efforts); *see also* Hiroharu Saito, *Bargaining in the Shadow of Children's Voices in Divorce Custody Disputes: Comparative Analysis of Japan and the U.S.*, 17 CARDOZO J. CONFLICT RESOL. 937, 939, 939 n.1 (2016) (noting that "childism" is a "recently minted word" that was brought into more popular parlance in the United States by the work of psychologist Elisabeth Young-Bruehl).

50. *See generally* Margalit Fox, *Elisabeth Young-Bruehl, Who Probed Roots of Ideology and Bias, Dies at 65*, N.Y. TIMES, Dec. 5, 2011 (noting that Young-Bruehl's intersectional writings, like CHILDISM, crossed the fields of philosophy, psychotherapy, and biography).

51. Young-Bruehl, *supra* note 3; *see also* Elisabeth Young-Bruehl, *Childism: The Unacknowledged Prejudice Against Kids*, TIME (Apr. 26, 2012), https://bit.ly/3YiZfn4 [https://perma.cc/5DSE-KD4J].

52. Wall, *supra* note 3, at 259.

53. *About Us*, CHILDISM INST., https:/bit.ly/3y5KAkI [https://perma.cc/4GWP-VM9Z] (last visited Nov. 9, 2022) (providing this description on the website of the Childism Institute, where Wall serves as director).

Yet, as I have noted elsewhere, only a handful of legal scholars or practitioners have used the terms "childist" or "childism" in connection with adult-centered thinking and analyses that tend to disempower children, or to advocate for youth empowerment.[54] And to date, not a single reported court opinion in the United States includes the words "childism" or "childist," or the related terminology of "adultism" or "adultist."[55]

To be sure, many attorneys and academics have advanced legal representation standards for youth, particularly in the context of juvenile court prosecutions. Their work urges respect for the personal wishes of the child, rather than single-minded deference to what parents or other adults might think is best for youthful clients.[56] In the last few decades, the National Juvenile Defender Center (NJDC) has been a key player in helping to educate justice stakeholders about the importance of this "expressed interests" model in the context of juvenile court.[57] That is, because accused youth in these settings have an individual constitutional right to representation akin to the right afforded adults in criminal court cases,[58] NJDC and others have long argued that youth rights and

54. *See generally* Quinn, *From Turkey Trot to Twitter*, *supra* note 48, at 136 (using the term "childism" to critique paternalistic over-policing efforts used against youth historically and today); Molly Smolen, *Redressing Transgression: In Defense of the Federal Sentencing Guidelines for Child Pornography Possession*, 18 BERKELEY J. CRIM. L. 36, 56 (2013) (applying Young-Bruehl's terminology and analysis in the context of child pornography cases to explain that abusers may "view children as possessions, naturally subservient beings, existing to serve").

55. *Cf.* Mae C. Quinn et al., *Youth Suffrage: In Support of the Second Wave*, 53 AKRON L. REV. 445, 476 (2019) (noting that the term "childism" is not generally used or taught in law school—or elsewhere—unlike the concepts of "feminism" or "racism").

56. *See* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246–47 (2005); Eric Zogry, *The Case for Practicing Juvenile Delinquency Defense*, *in* JUVENILE CRIMINAL DEFENSE STRATEGIES 32–33 (2012).

57. *See, e.g.*, NAT'L JUV. DEF. CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 4 (Nov. 2016) [hereinafter NJDC] (noting that defense counsel in juvenile courts should be permitted to "provide client-centered and expressed-interest representation for youth"). In 2022, the National Juvenile Defender Center changed its name to The Gault Center. *History*, GAULT CTR., https://bit.ly/3XGEG3S [https://perma.cc/5GR2-H6J2] (last visited Jan. 20, 2023).

58. *See In re* Gault, 387 U.S. 1, 41 (1967); *see also* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2185–86 (2018) (arguing that whether the right to counsel in juvenile court is evaluated under the Sixth Amendment or Fourteenth Amendment, accused youth still must be provided with effective representation that is consistent with their goals).

choice in these proceedings must be respected as those of adults are in criminal cases.[59]

In this model, however, counsel is often painted as translator or guide in a system that is entirely constructed and maintained by adults. For instance, as one group of youth defenders recently noted, "all the signals suggest that [youth clients] stay silent" in juvenile court, as "the courtroom is filled with adults, and the complex legal vernacular used by the judges and lawyers is incomprehensible."[60] Although the court is supposed to be one focused on youth, "the one person that has the least (if not no) opportunity to talk directly to the judge is the child themself—the 'minor.'"[61]

Outside of the juvenile court prosecution context, "child-centered" legal representation has also been advanced in child welfare, educational rights, and other civil practice settings.[62] As one law school clinic recently explained, client-centered lawyering "serves to reframe the relationship and inherent power imbalance that has plagued the lawyer-client relationship . . . placing the client at the center of the relationship."[63] Consistent with this thinking, in 2011, the American Bar Association adopted a Model Act on Child Representation to help "reinforce the importance of quality, client-directed representation" for youth.[64]

But even while urging "lawyers to see the world through the eyes of the child," the ABA is quick to center legal counsel and system practices that silence youth by noting that "[c]hildren's attorneys are the voice for the children."[65] Moreover, the child-centered representation model, like the "expressed interests" approach, mostly takes as given existing legal constructs—including

59. *See* NJDC, *supra* note 57, at 10–11 (lamenting that many attorneys charged with defending youth do not do enough to meaningfully counsel their clients or discern their desires); Zogry, *supra* note 56 (expressing interest model ensures protection of the juvenile's procedural and substantive rights).

60. Rosa Bay et al., *A Voice of Their Own: Youth-Centered Representation at EBCLC*, 106 CALIF. L. REV. 565, 567 (2018).

61. *Id. But see* Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1483–84 (questioning existing approaches and suggesting greater use of procedural justice methods to account for youthful notions of justice and fairness in the juvenile justice system).

62. *See, e.g.*, *Interdisciplinary Child Advocacy Clinic Focuses on Client-Centered Lawyering for the Most Vulnerable*, PENN CAREY L. (July 9, 2020), https://bit.ly/3Cn7eXc [https://perma.cc/9ES2-DHPM].

63. *Id.*

64. Andrea Khoury, *ABA Adopts Model Act on Child Representation*, ABA (Sept. 1, 2011), https://bit.ly/2Y37rJB [https://perma.cc/88V9-74XB].

65. *Id.*

the text and application of the FRE—without fundamentally seeking to displace them.

And this is, on a certain level, entirely understandable. Here I confess my own complicity in these approaches.[66] For years I have represented youthful clients in existing systems. And I have done so without challenging at every turn the adult-centered assumptions baked into these structures, knowing they have been entirely built and maintained without the input of, or sufficient consideration for, the youth they process and punish. Nor have I sought to address at every court appearance, in every matter, the racist and sexist foundations of the justice system in which my youthful clients find themselves.

But in the context of a single case for a justice system-involved teen client, disproportionately a young person of color, it may not serve their individual interests to file motions that disavow and seek to deconstruct the justice system from top to bottom.[67] In my experience, most youth clients want to escape the clutches of the government—frequently having become involved in the justice system for some minor alleged misdeed—with as little surveillance, shaming, and indignity as possible visited upon their person.[68] Moreover, affirmative systemic litigation advancing claims of childism, structural bias, and exclusion within the very childist, biased, and exclusionary system being challenged would be ironic and a longshot at best.[69]

That does not mean we should abandon efforts to imagine more thorough-going youth-informed justice practices for children as parties, witnesses, and out-of-court declarants. Nor is such crea-

66. My confession here may be seen as a continuation of an earlier and still unresolved mea culpa. *See* Mae C. Quinn, *Against Professing: Practicing Critical Criminal Procedure*, 60 ST. LOUIS U. L. REV. 515 (2015).

67. Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 532 (1980) (describing, among other things, retaliation experienced by Black school children whose families sought the benefit of desegregation remedies); *see also* Annette Appel, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L. REV. 692, 721 (2006) ("We should also question ourselves when we seek to fit [child] clients into our legal strategies rather than use legal strategies that fit our clients.").

68. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983) (describing duties of counsel to advance client goals); *see also* MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 1983) (explaining lawyers should not discount wishes of clients with diminished capacity); Mae C. Quinn & Candace Johnson, *Chaining Kids to the Ever Turning Wheel: Other Contemporary Costs of Juvenile Court Involvement*, 73 WASH. & LEE L. REV. ONLINE 159, 163 (2016).

69. *See, e.g.*, Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 YALE L.J.F. 917, 935 (2018) (describing a range of very practical problems inherent in trying to deploy new child law frameworks by way of constitutional claims within the context of the existing legal system).

tive thinking intended to be a mere thought experiment. Instead, like Professor Gonzales Rose and others applying critical legal theories to evidence doctrine[70] and scholars and practitioners who have sought to improve youth and family law,[71] I see this as one humble contribution towards a new way forward.[72]

My goal here is simple: to name and acknowledge what operates in plain sight every day in our courts—the phenomenon of childism. Cataloging its features and some of its implications within the context of trial courts and evidence law, I hope to advance the project of accounting for the dignity and humanity of all persons, regardless of their various identities, including sex, gender, sexual orientation, race, ethnicity, disability status—or youth.[73]

Youth, often described as minors, should not be a minor concern.[74] Indeed, according to recent United States Census numbers, youth under the age of 18 represent more than one-fourth of those who live in this country.[75] By sheer mass they are a substantial group. Beyond their numbers, youth as a population are significant for other reasons, too. As a matter of constitutional law, the United States Supreme Court has acknowledged that persons under the age of 18 may require specialized analysis.

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70. *See, e.g.*, Gonzales Rose, *supra* note 2, at 2244.

71. *See, e.g.*, Appel, *supra* note 67 at 694 ("[A]lthough children's lawyers do what we do to help children, the natural dominance and myopia of lawyers is exacerbated when representing children in ways that can easily mask children's disparate identities, needs, and desires.").

72. *See* Barbara Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1000 (1992) (noting that "I do not pretend, at least in this Article, to present definitive answers" and instead am "presenting a more panoramic, and perhaps, more skeptical tale" of children in the law); *see also* Melissa Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 RICH. L. REV. 1039, 1083 (2019) (contributing to the conversation about implicit bias on the bench and noting that further "[r]esearch awaits").

73. Bell, *supra* note 67, at 533 ("Criticism . . . is a synonym for neither cowardice nor capitulation. It may instead bring awareness, always the first step toward overcoming still another barrier in the struggle for racial equality.").

74. If young people are minors, does that mean the "grown-ups" in the room are majors? If not, to what does the term minor stand in contrast? According to the Merriam-Webster dictionary, the term "minor" is defined as "a person who is not yet old enough to have the rights of an adult." *Minor*, MERRIAM-WEBSTER, https://bit.ly/3foslAo [https://perma.cc/QCT3-BUT8] (last visited Nov. 9, 2022). Its antonyms include: "greater," "higher," "more," "primary," and "superior." *Id. See generally* Sheena Scott, *From Major to Minor: An Historical Overview of Children's Rights and Benefits*, J.L. & SOC. POL'Y 9 (1993) (Canadian Law Review article discussing the history of children as property).

75. *2019 Population Estimates by Age, Sex, Race and Hispanic Origin*, U.S. CENSUS BUREAU (June 25, 2020), https://bit.ly/3E9oPnJ [https://perma.cc/9BTA-LGGF] (estimating a total U.S. population of 328,239,523 with those under the age of 18 making up 73,039,150 people).

Youth have fewer life experiences from which to draw and may be more vulnerable than adults to outside influences, peer pressure, and impetuosity. As a result, the Court has made clear young people generally should not be held to the same standards as fully grown persons when it comes to appreciating long-term consequences and culpability.[76] Thus, they may not be subjected to the death penalty,[77] cannot receive life without parole in most cases,[78] and in homicide matters may not receive life without parole as a sentence without individualized consideration and evaluation of youth as a mitigating factor.[79]

Even outside of the sentencing context, the Supreme Court has indicated that youth demand specialized legal analysis. Specifically, the Court has imposed a different standard for children and adults when it comes to police interrogations.[80] Recognizing that a youth placed in the same setting as an adult might feel more confined and intimidated, the Court established a "reasonable child" standard.[81] It stands in contrast to the long-standing "reasonable person" standard that was historically applied to determining whether someone was in formal custody of law enforcement.[82] And now it must be used in the cases of young people for evaluating proper protections under *Miranda v. Arizona*.[83]

The Supreme Court came to these doctrinal conclusions after considering modern studies and findings about adolescent development.[84] Indeed, behavioral psychologists, neurobiologists, and others have concluded that adolescence itself is a period of great change and may result in heightened stress as compared to the lived experiences of adults.[85] For this reason, among others, youth may

76. *See* Jones v. Mississippi, 141 S. Ct. 1307, 1325 (2021).

77. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).

78. *See* Graham v. Florida, 560 U.S. 48, 60–61 (2010).

79. *See* Miller v. Alabama, 567 U.S. 460, 487 (2012).

80. *See* J.D.B. v. N.C., 564 U.S. 261, 276 (2011).

81. *Id.* at 271–72.

82. *See* Marsha L. Levick & Elizabeth-Ann Tierney, *United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503 (2012).

83. *Id.*

84. *See* Roper v. Simmons, 543 U.S. 551, 579 (2005) (relying on the social science research of Lawrence Steinberg and Elizabeth Scott). *See generally* Brief for Am. Psych. Ass'n as Amicus Curiae Supporting Respondents, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447.

85. B.J. Casey et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOBIOLOGY 225, 226 (2010); *see* NAT'L ACADS. SCIS., ENG'G & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 17 (Richard Bonnie & Emily P. Backes eds., 2019) [hereinafter PROMISE OF ADOLESCENCE).

both perceive situations differently from fully mature persons and react differently to them.[86] Thus, youth may at times require protection from negative influences or peer pressures and special care in relation to risk taking.[87]

But like women, people of color, or any category of persons, youth should not be overly essentialized or reduced to helpless subjects without agency.[88] Indeed, the American Psychological Association and other research groups agree that youth may possess sufficient capacity to make meaningful determinations in a range of settings, including about medical and other choices.[89] More than this, the adolescent mind can be a place of creative exploration and flexible thinking that allows for innovative problem-solving and imaginative analysis.[90]

Youth, in fact, have been responsible for all manner of social justice movements over the course of time—from developing popular dance crazes and social media practices[91] to successfully advancing voting and other rights.[92] For instance, in the 1970s, NAACP youth member Philomena Queen argued before Congress that the national voting age should be lowered from 21 to 18—as was already the case in some states, like Georgia. She told the mostly white male audience to whom she spoke, youth "see in our society wrongs which we want to make right; we see imperfections we want to make perfect; we dream of things that should be done but are

86. *See* Kayla Pope et al., *Developmental Neuroscience and the Courts: How Science Is Influencing the Disposition of Juvenile Offenders*, 51 J. AM. ACAD. CHILD ADOLESCENCE PSYCH. 341, 341 (2017). *See generally* Dustin Wahlstrom, *Developmental Changes in Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment*, 72 BRAIN & COGNITION 146 (2010) (studying the incentive-driven behavior of adolescents).

87. Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?*, 64 AM. PSYCH. 583, 583–84 (2009).

88. *See* PROMISE OF ADOLESCENCE, *supra* note 85, at 296 (recognizing that while youth generally are categorically less culpable, "not all teens are the same" and must be seen as individuals).

89. *See id.* at 217 (summarizing views around youth medical decision-making).

90. *See* Laura Partridge, *Do Creative Adolescents Hold the Key to Developing Flourishing Communities?*, RSA (Nov. 1, 2017), https://bit.ly/3dVjgPo [https://perma.cc/4QN9-GJS5] ("We will explore the relationship between young people's creative confidence and their likelihood to make a difference in their local community."); Steven Johnson, *What Teenage Brains Can Teach Us About Thinking Creatively*, WASH. POST (Mar. 4, 2020, 11:00 AM), https://wapo.st/3G0E0k7 [https://perma.cc/6C4N-6G39] (finding the adolescent mind has a propensity for "skill acquisition and creativity").

91. Quinn, *From Turkey Trot to Twitter*, *supra* note 3, at 79.

92. Mae C. Quinn, *Black Women and Girls and the Twenty-Sixth Amendment: Constitutional Connections, Activist Intersections, and the First Wave Youth Suffrage Movement*, 43 SEATTLE L. REV. 1238, 1244 (2020).

not; we dream of things that have never been done and wonder why not."[93] And her advocacy, in part, helped lead to the ratification of the Twenty-Sixth Amendment.[94]

More recently, 11-year-old Naomi Wadler addressed activists on the National Lawn during the March for Our Lives rally. Disavowing claims that she was not thinking and speaking for herself, she powerfully recounted how she led a walk-out at her elementary school in Alexandria, Virginia. To the cheers of thousands of attendees, she lifted up the names of Black women and girls who were victims of gun violence in this country but whose "stories don't make the front-page news," and she urged everyone within the sound of her voice: "Join me in telling the stories that aren't told . . . help me write the narrative for this world."[95]

IV. CHILDISM IN EVIDENCE LAW, DOCTRINE, AND SYSTEMS

Yet, as described above, youth have been entirely excluded from contributing to practices and processes within our court system.[96] This includes exclusion from creating or interpretating rules of evidence, which are all about legal storytelling. This is true on both the federal level, for the drafting and use of the FRE, and the state level as individual jurisdictions have modernized their evidence codes. What's more, as written and now applied, evidence rules largely fail to account for the experiences of young people in the courts in a meaningful way.

A. In-Court Testimony of Youth

To be sure, courts and commentators have paid a great deal of attention to the subject of child witnesses over the decades.[97] And

93. *Id.* at 1269.

94. *Id.*

95. Fenit Nirappil, *The Story Behind 11-Year-Old Naomi Wadler and Her March for Our Lives Speech*, WASH. POST (Mar. 25, 2018, 7:52 PM), https://wapo.st/2GeO8nP [https://perma.cc/4WH7-3F5R]; *see* Quinn et al., *supra* note 55, at 463.

96. *See* Appel, *supra* note 67, at 693 ("Children do not have strong voices in matters of policy . . . even in matters regarding their own legal interests.").

97. *See, e.g.*, Desiree Walden-Chastain, Comment, *The Child as Witness*, 30 J. AM. ACAD. MATRIMONIAL L. 559 (2018); Ashley Fansher & Rolando V. del Carmen, *"The Child as Witness": Evaluating State Statutes on the Court's Most Vulnerable Population*, 36 CHILD.'s LEGAL RTS. J. 1 (2016); ABA, *Assessing Children's Competency to Testify*, AM. BAR ASS'N (Oct. 1, 2013), https://bit.ly/3SMi5QN [https://perma.cc/SH3T-FQGK]; Sandra Norman-Eady, *Children as Witnesses in Civil Cases*, OLR RSCH. REP. (Mar. 2, 2001), https://bit.ly/3EbheVP [https://perma.cc/9TP7-RMZP]; Barry Nurcombe, *The Child as Witness: Competency and Credibility*, 25 J. AM. ACAD. CHILD PSYCHIATRY 473 (1986); *see also Legislation and Case Law Regarding the Competency of Child Witnesses to Testify in Criminal*

yet, as the following account suggests, evidence law in this country still lacks a nuanced and coherent approach to youthful personhood in the context of child testimony. In fact, at least three approaches can be discerned for testifying youth.

Under the first approach, children are presumed incompetent as compared to evidence law's primary subject (adults). Under a second approach, usually followed in cases involving claims of abuse by a private person, they are presented as fragile beings whose claims deserve automatic acceptance because they have been "damaged" by abuse or could be by the testimony process. Thus, the picture presented of these testifying youth is that they are less than whole people on par with the rest of the world. In a third category of case, child witnesses tend to be adultified such that they are presumed to be without any need for special protections at all when testifying. The treatment of the child witnesses in the trial of Derek Chauvin for the murder of George Floyd offers one such example.

Yet, while youth witnesses have inherent capacities of equal value to those over age 18, they might also have vulnerabilities that require special attention. Before the FRE were promulgated, children often were lumped in with others who were dismissed as incredible and immoral, including "atheists, agnostics, convicted felons."[98] As Greenleaf explained in his treatise from the 1800s, "[a]t the age of fourteen, every person is presumed to have common discretion and understanding; but under that age it is not so presumed."[99] For those under age 14, courts generally inquired into "the degree of understanding . . . the child offered as a witness" and whether they "comprehend[ed] the nature and effect of an oath."[100] Judges also took care to determine whether the child swearing on the Bible was doing so based on authentic "religious feelings of a permanent nature" rather than cursory instruction by an adult.[101]

As compared to the common law, a good deal has changed under the FRE when it comes to witness capacity. Today, courts generally evaluate competency in two ways: competency to recollect and recount under FRE 601 and ability to abide by a promise to tell the truth under FRE 603.[102] And by its terms, FRE 601

Proceedings, NAT'L DIST. ATT'YS ASS'N (2011), https://bit.ly/3fAsGQL [https://perma.cc/UL9L-4TNE] (providing a compilation of laws across the country relating to children testifying in criminal matters).

98. Walden-Chastain, *supra* note 97, at 560 (citing SYDNEY BECKMAN ET AL., EVIDENCE: A CONTEMPORARY APPROACH 397–82 (2d ed. 2012)).

99. 1 GREENLEAF, *supra* note 12, at 414.

100. *Id.*

101. 1 GREENLEAF, *supra* note 12, at 414 n.4.

102. *See, e.g.*, ABA, *supra* note 97.

presumes all witnesses are competent to testify, including children.[103] However, a lot remains the same—including many childist assumptions.

For instance, while FRE 603 retains traditional pre-testimony ceremonies before allowing a witness to speak at trial, the Rule also allows for affirmations, rather than swearing on a Bible, as a means of promising to testify truthfully.[104] However, the Rule's comments expressly reference child witnesses as one category the drafters had in mind when allowing modern flexibility, comparing youth to "mental defectives."[105] Moreover, in civil matters, the FRE defer to state law governing witness competency for state law claims or defenses.[106]

Some states do follow the FRE's modern approach to presumed competency regardless of childhood status—albeit against the backdrop of comments or history suggesting children are not ordinary witnesses.[107] However, other jurisdictions continue to utilize bright-line age-based rules for children. For instance, in places like Colorado, Idaho, Minnesota, Missouri, and Ohio, youth under the age of ten undergo special scrutiny to ensure they have "the capacity to remember" or provide "just impressions" of facts, with Idaho courts expressly requiring an "in chambers" hearing "to determine whether the child qualifies as a witness."[108] Thus, in many state courts, and federal court proceedings where state rules apply, presumptions of youthful incredibility still apply when it comes to in-court testimony.

But there is no rational basis for assuming that all children of a certain age are less reliable than all adults, regardless of the subject or nature of the testimony. And while the expansive common law presumption against testimonial capacity is no longer the norm, there does not appear to be any analytical rationale for moving the bright line from age 14 to 10—or for any bright line at all in the context of child witness testimony.

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103. FED. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise.").

104. FED. R. EVID. 603.

105. FED. R. EVID. 603 advisory committee's note.

106. FED. R. EVID. 601.

107. *See, e.g.*, ARK. R. EVID. 601; 725 ILL. COMP. STAT. 5 / 115-14 (1988); KAN. STAT. ANN. § 60-417 (1964); KY. R. EVID. 601.

108. *See* COLO. REV. STAT. § 13-90-106 (2003); IDAHO CODE § 9-202(2) (1985); MINN. STAT. § 595.02(n) (2020); MO. REV. STAT. § 491.060(2) (2020); OHIO REV. CODE ANN. § 2317.01 (West 1989); *see also* TEX. R. EVID. CODE ANN. § 601(a)(2) (West 2015) (discussing child witnesses under the subheading "Persons Lacking Sufficient Intellect" and suggesting pre-testimony examination may be needed to determine if a child is intellectually fit to testify).

Developmental studies scholars have reported that, consistent with the findings discussed in *Roper v. Simmons* and other Supreme Court cases, "abstract thinking and moral development continues throughout childhood and adolescence and into adulthood."[109] But the same could be said of teens and young adults. Other studies have found that youth can be confused during a courtroom-like give-and-take and are open to sway or strong suggestions.[110] Though here, too, many persons—including those of advanced age—may get confused by fast-paced, jargon-filled court proceedings. And none of these things point to age ten as a particularly significant moment for purposes of a witness's ability to recollect and recount events at a trial. Instead, a bright-line rule carries negative connotations and advances notions of youths as incapable.

More than this, child and behavioral psychologists have noted that "highly negative views about children's abilities as witnesses . . . are not justified."[111] There are "growing doubts" in the social science community about the use of youth witness "competency requirements" at all.[112] In fact, this literature turns the competency question away from child witnesses and back on adult, court-system stakeholders, suggesting these adults may lack capacity to pose meaningful questions to test youth reliability and fail to understand children more generally.[113] Researchers also point to practices in other countries like Scotland, England, and Canada, where competency requirements rooted in an expression of the duty to tell the truth have been largely abandoned.[114]

The bright-line presumption against in-court testimony for children under ten in state courts, which may apply in federal court in civil cases in which state law governs, becomes especially curious when considered alongside other evidence rules and principles. Indeed, taken as a whole, child witness practices frame youth as

109. *See* Robert H. Pantell, *The Child Witness in the Courtroom*, 139 AM. ACAD. PEDIATRICS 1, 3 (2017).

110. *Id.* at 3–4 (citing to the work of several social scientists assessing youth suggestibility).

111. Judy Cashmore & Kay Bussey, *Judicial Perceptions of Child Witness Competence*, 20 L. HUM. BEHAV. 313, 341 (1996).

112. *See, e.g.*, Angela Evans & Thomas Lyon, *Assessing Children's Competency to Take the Oath in Court: The Influence of Question Type on Children's Accuracy*, 36 L. HUM. BEHAV. 195, 203 (2012).

113. *See* Cashmore & Bussey, *supra* note 111, at 314 ("Children's competence . . . depends on the competence of the adults with whom they interact" in the courtroom setting).

114. *See* Evans & Lyon, *supra* note 112, at 195; John E. B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, 189 (1996) ("In England, Ireland, Scotland and civil law countries, children may testify unsworn.").

highly unusual and outside the human norm. Sometimes they are specially addressed in a way that is marginalizing and discounting. At other times they are reduced to vulnerable subjects in need of high levels of protection whose accounts are privileged over other witnesses' and the rights of an accused. And sometimes evidence law does both at once, which is especially confounding.

For instance, Colorado is one of the states that identifies children under age ten as being part of a special category of witnesses who should be carefully evaluated. There, younger children are screened to ensure they can relate facts truthfully and provide "just impressions" of the events in question.[115] The apparent assumption underlying this rule is that adults can be counted on to provide "just impressions" and children under ten years of age cannot.

Yet, Colorado goes on to provide a different rule for cases involving sexual abuse. In such matters, child witnesses under age ten apparently are not required to meet the standards of other witnesses. For instance, their testimony can be elicited and presented "in language appropriate for a child of that age."[116] Other states, like Georgia, also provide special admissibility privileges for the testimony of children who have been victims of or witnesses to sexual or physical abuse, indicating that in criminal cases their testimony will be permitted even if they do not understand the nature of the oath.[117] Thus, they are treated as competent witnesses in criminal prosecutions even when a similarly situated adult would not be.[118]

Beyond all of this, in child abuse and neglect prosecutions in both state and federal court, youth witnesses often are afforded physical accommodations and protections greater than those provided to other testifying victims and witnesses. The federal laws outside of the FRE set forth a range of special procedures that federal prosecutors may invoke to shield child witnesses—up to age 18—from having to face the accused directly.[119] These accommodations include examination by way of video monitor and an ap-

115. COLO. REV. STAT. § 13-90-106 (1)(b)(I) (2003).

116. *Id.*

117. GA. CODE ANN. § 24-6-603(b) (2013).

118. *Id.*

119. *See* Victims of Child Abuse Act of 1990 § 225, 18 U.S.C. § 3509; *see also* U.S. DEP'T OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 386 (Chad Bash ed., 1998) (describing the "innovative child witness reforms" established under the Victims of Child Abuse Act, including presumption of witness competency, courtroom closure provisions, authority for appointments of guardians ad litem, and provisions for accompanying support during court appearances).

pointed "adult attendant" "who accompanies a child throughout the judicial process for the purpose of providing emotional support."[120] Several states have adopted similar provisions.[121]

Interestingly, these protections and relaxed courtroom protocols for child witnesses in child abuse matters suggest that their testimony is so important that it will not be subject to the same procedural requirements as the testimony of other witnesses. Thus, children at once exist under a cloak of assumed incompetence and have their accounts deemed more important than other victim-witnesses who do not receive the same special accommodations. This framework also assumes the truth of their victimhood even before conviction, working to elevate their accounts and well-being as witnesses above the interests of the accused—regardless of the accused's age.

The trial of Derek Chauvin demonstrates another approach to child witnesses. Chauvin, a white police officer, was charged with murdering George Floyd, a Black man who Chauvin asphyxiated by intentionally keeping his knee on his neck during an arrest. In that case, several Black youth were called as witnesses by the prosecution, including a 17-year-old and a 9-year-old girl.[122] These children heard Floyd begging for his life and witnessed his death at the hands of law enforcement in an episode steeped in racial animus and violence. Indeed, the youngest child tragically recounted that the experience made her "sad and kind of mad because it felt like [Chauvin] was stopping his breathing and he was kind of hurting him."[123] The 17-year-old witness described the hostility and anger Chauvin displayed towards the youth when they asked him to get off Floyd, which left her feeling threatened.[124]

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120. 18 U.S.C. §§ 3509 (a)(1), (b)(2).

121. *See, e.g.*, CONN. GEN. STAT. § 54-86g (1994) (allowing testimony from victims of child abuse outside a courtroom); FLA. STAT. § 92.54 (2016) (allowing closed circuit television in proceedings with witnesses under the age of 18); *see also* Pantell, *supra* note 109, at 2 ("[A]ll states have laws to minimize the impact on children of appearing in court through allowing support people or comfort objects or provisions for excluding the press.").

122. Walter Ray Watson, *Judge in Chauvin Trial Rules that Underage Witnesses Can Testify*, NPR (Mar. 30, 2021, 1:07 PM), https://n.pr/3UVkwCM [https://perma.cc/46Z4-TFFB]; Timothy Bella, *9-Year-Old Says Paramedics Asked Chauvin 'Nicely' to Get off Floyd, but He Stayed: 'I Was Sad and Kind of Mad,'* Update to *Teen Who Recorded Viral Video, Other Young Witnesses Dominate Second Day of Derek Chauvin Trial*, WASH. POST (Mar. 30, 2021, 6:26 PM), https://wapo.st/3e04p6c [https://perma.cc/LV4S-B3SK] [hereinafter *Chauvin Coverage*].

123. Bella, *supra* note 122.

124. Hannah Knowles & Paulina Villegas, *'Why Are You Guys Still on Top of Him?' Teen Witness Recalls Asking Officers*, Update to *Chauvin Coverage*, *supra* note 122.

The youth cried during their testimony and reported losing sleep as a result of what they witnessed, feeling "emotionally numb," and avoiding the location of the murder because it was too difficult to return to the area.[125] Yet it does not appear that they were appointed any kind of supportive adult or provided with the opportunity to testify from a remote location against Chauvin. Instead, these children were made to face a law enforcement agent who they saw take the life of a Black man who reminded them of their own family members.[126] And while the trial court did bar the press from filming the children while they gave their accounts from the witness stand, it allowed their voices to be recorded and shared by television media.[127] The press were also allowed to share images of the children from pictures taken on the day of the homicide and to refer to the children by first names in publications "if the witnesses [were] comfortable with that."[128]

Perhaps most telling was that, at sentencing, the trial judge declined to impose a sentencing enhancement based upon the crime being committed in front of children. Discounting the harms experienced by these Black children, the white judge in the Chauvin trial determined they were not true victims "in the sense of being physically injured or threatened with injury" and "were free to leave the [murder] scene whenever they wished."[129] And although the prosecution urged the court to recognize that the youth "were traumatized by witnessing this incident," the court claimed that "the evidence at trial did not present an objective indicia of trauma."[130]

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125. Tasneem Nashrulla, *A Child and Three Teens Testified About the Traumatic Details of Seeing George Floyd Struggling to Breathe*, BUZZFEED NEWS (Mar. 30, 2021, 5:32 PM), https://bit.ly/3Ru4qwV [https://perma.cc/R4CY-Z72S].

126. *See* Celine Castronuovo, *9-Year-Old Witness Says Medics Asked Chauvin to Get off of Floyd*, HILL (Mar. 30, 2021, 3:10 PM), https://bit.ly/3DYSpeh [https://perma.cc/LEU3-8V34] (recounting how an 18-year-old witness, who is the cousin of the 9-year-old witness, testified: "I have a Black brother. I have Black friends. And I look at that, and I look at how that could have been one of them.").

127. Watson, *supra* note 122 ("[N]o television images would be allowed during the testimony of people who were under 18 at the time they saw Floyd die, but audio of their testimony would be allowed.").

128. *See id.*; *see also, e.g.*, Holly Bailey, *Prosecutors Challenge Chauvin Trial Judge's Assertion that Children Who Witnessed George Floyd's Death Weren't Traumatized*, WASH. POST (July 8, 2021, 4:43 PM), http://wapo.st/3CnutBC [https://perma.cc/VH4V-TFRB] (sharing an image of children from the day of Floyd's death).

129. Griffith, *supra* note 1.

130. *Id.*; *see also* Gabriel Elizondo, *Child, Teen Witnesses Relive Trauma of Floyd's Killing in Court*, AL JAZEERA (Apr. 5, 2021), https://bit.ly/3fBTuzR [https://perma.cc/726B-CWC4] (quoting law professor Mark Osler as criticizing the prosecution for "re-traumatising a child in that way when it isn't necessary"); *Prosecutors Ask Judge in Derek Chauvin Trial to Change 'Trauma' Wording in Sentencing*

Thus, child witnesses in the United States frequently encounter standards that fail to fully account for their personhood and actual experiences. Generally, they are evaluated in contrast to the hypothetical trustworthy adult and often presumed to fall short. In cases of child abuse, however, their exceptional nature as innocent and vulnerable subjects may elevate their worth as witnesses. In such matters, their testimony is presumed to be important proof that should be admitted against an alleged perpetrator—even when similar testimony by an adult would not be allowed. In the latter cases, the justice system goes to great lengths to enfold the child so that they can recount these accusations, in some ways that feel utilitarian and dehumanizing. The child becomes a container filled with information needed at trial to convict the person who damaged them and, like other important objects, must be protected at all costs.[131]

In contrast, however, some child witnesses—like the Black youth who were called to testify in the Derek Chauvin trial—are treated the same as adults. They are made to face government wrongdoers in open court. Even though these children, whether over or under age ten, may have witnessed horrific acts and racial violence, they are made to give those accounts before the accused. No effort is made to reduce such further trauma as a courtroom experience might entail. Indeed, their trauma may be entirely discounted and their victimization ignored.

B. Children and Hearsay

Historically, in-court testimony has been the preferred method of receiving witness accounts at trial.[132] As such, out-of-court statements offered for their truth—otherwise known as hearsay evidence—are generally inadmissible.[133] The FRE provide various

Order, CBS MINN. (July 8, 2021, 6:59 PM), https://cbsn.ws/3SE1wGS [https://perma.cc/J6H5-C4GE] (recounting Attorney General Keith Ellison's objection to the court's "adultification" of the girls who testified and warning that "[d]iscounting the trauma of the children who testified at trial—in an authoritative judicial opinion, no less—will only exacerbate the trauma they have suffered").

131. *See* Quinn, *From Turkey Trot to Twitter*, *supra* note 3, at 51; *see also* Woodhouse, *supra* note 72, at 1001 (noting that family law's historic handling of children often reduces them to property to be controlled, resulting in their "objectification").

132. 1 GREENLEAF, *supra* note 12, § 98, at 114 (stating that where "first degree moral evidence" or "direct evidence" cannot be presented to the senses, "the law requires the next best evidence, namely, the testimony of those who can speak from their own personal knowledge").

133. *See id.* § 99, at 115 (stating that hearsay evidence "is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being

hearsay exemptions and exceptions, however, to the "no hearsay" rule.[134] This allows introduction of out-of-court witness statements under a range of circumstances, generally based upon a great need for the evidence or its special reliability.[135] The same holds true in most state courts.[136]

So, for instance, if an adult son is struck by his father and reports the same to a friend, that friend generally cannot testify at trial about the incident based upon the report made by the son-victim. Such testimony would be considered inadmissible hearsay if admitted for the truth of the matter—that is, that the father struck the adult son. Absent the statement satisfying an exemption or exception to the hearsay rule, it could not be considered by the factfinder.[137] One hearsay exception that might apply is the excited utterance rule, if the victim made the report in the very near aftermath of the incident while still startled and excited by the event.[138] Alternatively, it might be admitted as part of a present sense impression if the son reported the physical assault as it was occurring or immediately thereafter.[139]

If the victim in this hypothetical case were a child, however, in some jurisdictions the friend could testify about the statement—regardless of whether it met any traditional hearsay exceptions. For instance, in Illinois, a child hearsay exception has been established for civil abuse and neglect proceedings where the child victim is under 13 years old at the time of the out-of-court statement and there is some form of corroboration.[140] And at least some courts

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proved by a witness, who can speak from their own knowledge"); *see also* FED. R. EVID. 802 (providing that "[h]earsay is not admissible" unless an exception is created by other federal rules of evidence, federal statutes, or rules of the United States Supreme Court).

134. *See generally* FED. R. EVID. 801 (non-hearsay or exemptions), 803, and 804 (exceptions).

135. *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 483 (4th ed. 2018) (describing the "two axioms" upon which most hearsay exceptions rest—reliability and necessity).

136. *See, e.g.*, WASH. R. EVID. 803 (describing exceptions to the rule against hearsay in the state of Washington that apply regardless of whether the declarant is available as a witness); IDAHO R. EVID. 803 (same rule for Idaho courts).

137. *See, e.g.*, United States v. Docampo, 573 F.3d 1091, 1097 (11th Cir. 2009) (finding witness testimony inadmissible hearsay).

138. *See* FED. R. EVID. 803(2).

139. *See* FED. R. EVID. 803(1); *see also* Davis v. Washington, 547 U.S. 813, 820 (2006) (recounting that the victim relayed details of her assault to a 911 operator as the defendant was assaulting her).

140. *See* ILL. CODE CIV. P. § 8-2601; *see also* Katherine J. Strle, *Use with Caution: The Illinois Hearsay Exception for Child Victims of Sexual Abuse*, 60 DEPAUL L. REV. 1229, 1231–33 (2011).

have allowed for additional hearsay to serve as corroboration to allow admission of the child's out-of-court statements.[141]

Out-of-court statements by children are also allowed in many criminal cases to prove the truth of the matter asserted, even when similar statements would not be admissible if made by adult witnesses. In Massachusetts, hearsay statements of children under the age of ten that describe sexual contact, the circumstances, or the perpetrator of the abuse are fully admissible in criminal proceedings if the statements are considered reliable and the child is unavailable as a witness.[142] However, somewhat ironically, one of the grounds of unavailability allowing for the admission of such out-of-court statements is that the child-declarant is not competent to testify as an in-court witness.[143]

In California, out-of-court statements by a child under the age of 12 describing child abuse or neglect may be admitted during a criminal prosecution if they are found to have "sufficient indicia of reliability."[144] In Georgia, the child hearsay statute was recently amended to allow admission of out-of-court statements of a child up to age 16, even if such statements do not relate to their own abuse but to the abuse of another person.[145] Indiana's child hearsay statute is extremely complicated and allows out-of-court statements of youth up to age 18 when not otherwise admissible at criminal trials, so long as a range of prerequisites are met, to include the same reliability requirement as in California.[146]

Interestingly, even social scientists who support more child-friendly procedures within courtrooms have raised serious concerns about the prevalence of child hearsay evidence in abuse and neglect matters.[147] They warn that "[c]hildren's hearsay may be unfairly overused by prosecutors," as in many cases they are presenting hearsay evidence to simply bolster in-court testimony of youth.[148]

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141. *See* Strle, *supra* note 140, at 1249 (referencing Illinois cases where further hearsay served as corroboration).

142. MASS. ANN. LAWS ch. 233, § 81(a) (LexisNexis 2022).

143. *Id.* § 81(b)(6).

144. CAL. EVID. CODE § 1360 (West 2022) (providing for hearsay to be admitted in both cases where the child testifies and even if the child does not testify, when there is corroboration for the statement).

145. *See* Murray v. State of Georgia, 856 S.E.2d 765, 767 (Ga. Ct. App. 2021) (allowing out-of-court statement of a victim's son where he reported an attack on his mother by the defendant and noting that Georgia's Child Hearsay Statute was amended in 2019).

146. IND. CODE § 35-37-4-6 (2022).

147. *See* Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 L. & CONTEMP. PROBS. 209, 229 (2002).

148. *Id.*

The Georgia child hearsay statute, for instance, generally requires the child to testify.[149] Moreover, in some jurisdictions there are no clear limits on the number of hearsay statements that may be admitted.[150] And some studies suggest that juries are more likely to find guilt when a child's hearsay statements are recounted by an adult witness than when the child testifies in court, especially when multiple hearsay witnesses are allowed to testify.[151]

Beyond this, sometimes the in-court witnesses who recount the out-of-court statements of children are the ones asked to offer views on the reliability of the child's out-of-court statement. But such witnesses—often parents or professional child interviewers—may be biased towards the child or otherwise skew the stories of children.[152] Indeed, studies show that such in-court witnesses are actually very bad at recalling basic details from these out-of-court conversations, including what they themselves said to the children.[153]

The special child hearsay rules and rulings that apply in the context of abuse and neglect cases also stand in stark contrast to ordinary hearsay rules, which fail to account for youth or their experiences in other kinds of cases. In fact, none of the ordinary hearsay exemptions or exceptions under the FRE mention children as deserving of any special consideration as out-of-court declarants. It is almost impossible to find reported cases involving out-of-court child declarants outside of abuse or neglect matters—for instance, in negligence or police brutality cases. And the very limited number of hearsay decisions that discuss youthful out-of-court statements in the context of traditional hearsay exceptions do not allow for automatic admission of youth statements. Nor do they apply any kind of special analysis or lower the bar for admissibility based upon the special status or vulnerability of youth.[154]

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149. *See* GA. CODE ANN. § 24-8-820 (West 2022).

150. Marsil et al., *supra* note 147, at 229–30.

151. *Id.* at 229–35.

152. *Id.* at 236–37 (reporting that "interviewers failed to report about twenty-five percent of the relevant details" and "almost never reported incorrect or false information" provided by the child).

153. *Id.* at 238 ("[A]dults . . . are not very good at recalling the details of their conversations with children.").

154. *See, e.g.*, Mayer v. Self, 341 S.E.2d 924 (Ga. Ct. App. 1986) (barring, in a negligence action from a trial court, a mother as witness from testifying that her son said he had been hit by another child with a golf club, as the statement did not satisfy any of the res gestae hearsay exceptions); Lawrence v. Our Lady of the Lake Hosp., 48 So. 3d 1281 (La. Ct. App. 2010) (excluding in a medical malpractice matter an affidavit of a minor child from the record as hearsay without any discussion of special consideration for the child as an out-of-court declarant).

Similarly, hearsay rules generally are not applied in any special manner to protect the rights or interests of youth as litigants. And particularly in the context of youth prosecuted for crimes, it seems that the notion of youth declarants as vulnerable subjects or presumed incompetents wholly disappears. This has been true even in juvenile court delinquency proceedings and juvenile court transfer matters to determine whether a child will be treated as an adult for purposes of prosecution or sentencing.[155]

For instance, high school student M.T.V. was adjudicated delinquent in an Indiana juvenile court for alleged conspiracy to commit aggravated battery based upon statements that he and another boy, B.E., made in the school lunchroom. They reportedly claimed they were going to bring guns to school and that another boy was "first on the list." In support of the charges, the prosecution sought to introduce Facebook posts from B.E. to M.T.V., which talked about knives and guns. Defense counsel argued they were hearsay.[156]

The Indiana Court of Appeals upheld their introduction, however, as statements of a co-conspirator. It noted that statements overheard by other children at the lunch table worked to corroborate the alleged conspiracy, and the Facebook messages could be read as being in furtherance of the boys' plans, satisfying Indiana's evidentiary rule for co-conspirator statements.[157] In doing so, the reviewing court rejected sufficiency of the evidence claims that "there was no conspiracy brewing in the fantastical misadventures of these two teenaged boys."[158] Instead, it held that the evidence was sufficient to show that "M.T.V. and B.E. formed an agreement to inflict injury" on the other child.[159] And it did so without making any finding relating to the reliability of the out-of-court claims of the children, which apparently would have been required under Indiana's child hearsay statute.

The Montana Supreme Court similarly upheld a juvenile court's determination that various out-of-court statements could be admitted against a child defendant to prove his alleged involvement in a youth vandalism spree in Missoula. The crimes included shop-

155. *See, e.g.*, *In re* T.J.B., 233 P.3d 341 (Mont. 2010); M.T.V. v. State, 66 N.E.3d 960 (Ind. Ct. App. 2016); *see also In re* Jose M., 620 A.2d 804 (Conn. App. Ct. 1993) (applying the same hearsay rules to a delinquency transfer hearing within the juvenile court setting, including to allow out-of-court statements by adult co-defendants to be used against the child respondent).

156. *M.T.V.*, 66 N.E.3d at 962.

157. *Id.* at 965–67.

158. *Id.*

159. *Id.* at 967.

lifting spray paint, posting graffiti "tags" on property, and shooting parked cars with BB guns.[160] The juvenile defense attorney in *T.J.B.* also objected to various out-of-court statements made by third-party declarants who implicated the child in the wrongdoing.

These out-of-court statements were offered as part of a videotaped police interrogation of the child, during which time the child mostly acquiesced in the claims presented by the officers. Rejecting counsel's hearsay objections, the Montana Supreme Court treated most of the statements as non-hearsay under Montana Rule of Evidence 801 as assertions the child implicitly adopted as his own.[161] That is, consistent with FRE 801, the reviewing court treated these non-testimonial statements as admissions of a party, exempt from hearsay exclusion.[162]

Interestingly, however, the FRE comments suggest that party admissions are generously allowed at trial over traditional hearsay prohibitions "on the theory that their admissibility in evidence is the result of the adversary system."[163] Accordingly, "[n]o guarantee of trustworthiness is required in the case of an admission."[164] But of course, children in juvenile court are not ordinary parties to litigation. Instead, juvenile courts, as supposedly less adversarial venues than adult criminal courts, are supposed to care for and protect youth, beyond merely determining guilt or innocence.[165] Montana's Youth Court Act makes this plain in its Youth Court Act Declaration of Purpose.[166]

Moreover, deeming a juvenile respondent's out-of-court statements as automatically trustworthy is not wholly consistent with the way Montana treats child declarants generally. In fact, Montana's child hearsay exception—which allows for otherwise inadmissible hearsay statements of youth to be used in criminal abuse proceedings—requires not only that the child be unavailable as a witness but that the "circumstances of the statement provide circumstantial guarantees of trustworthiness."[167] And such trustworthiness determinations require express consideration of a long list of factors in-

160. *T.J.B.*, 233 P.3d at 343–48.

161. *Id.*

162. *See* FED. R. EVID. 801(2)(a)–(b).

163. FED. R. EVID. 801 (advisory committee's notes to 1973 proposed rules).

164. *Id.*

165. *See In re* Gault, 387 U.S. 1 (1967); *see also* Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979) (concerning prohibition of a juvenile's name in proceedings).

166. MONT. CODE ANN. § 41-5-102(1) (2022) (stating that the "Montana Youth Court Act must be interpreted to effectuate . . . the care, protection, and wholesome mental and physical development of a youth," amongst other goals).

167. MONT. CODE ANN. § 46-16-220(1)(b).

cluding the child's age, ability to communicate, ability to comprehend, mental capacity, and perhaps more additional factors than in any other state, before their out-of-court accusations will be admitted as substantive proof.[168]

Thus, while Montana is in the majority of states that provide for a child hearsay exception, it is one that appears rooted in the more traditional assumption that youth are presumed incompetent and unreliable. Once charged as wrongdoers, however, even in the context of juvenile court proceedings, it appears children in Montana are seen as wholly competent and words uttered against their own interests are reliable. In this way, Montana is a further example of conflicting and contingent understandings of youth in evidence law. And given the overrepresentation of youth of color facing charges in the justice system, such an approach negatively impacts that population disproportionately.[169]

C. Youth Parties and Litigants

While many courts and commentators have addressed questions relating to child witnesses and out-of-court declarants, less has been written about evidence law applied to children as parties. But, of course, this is an important concern for our justice system too. The "Purpose Provision" in FRE 102 provides a good example of a place where children are generally overlooked as possible parties to litigation.

Rule 102 indicates that the "rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[170] Thus, it seems courts are somehow supposed to balance these four competing concerns when deciding evidentiary questions and deciding upon admissibility.

Yet the comments provide little in the way of guidance on how courts should balance these concerns.[171] And cases that have cited this provision have done so by citing the language verbatim with almost no analysis at all, as if its meaning is self-evident and uni-

168. *Id.* § 46-16-220(3).

169. *See, e.g.*, *Montana's Disproportionate Minority Contact (DMC) Three Year Strategic Plan: 2018–2021*, MONT. BD. CRIME CONTROL 19, https://bit.ly/3RBCes8 [https://perma.cc/S5BF-3R6W] (last visited Nov. 10, 2022) ("Cases involving American Indian juveniles were more than twice (130.6%) as likely to result in a petition to adjudication as cases for White juveniles.").

170. FED. R. EVID. 102.

171. *See id.*

formly understood.[172] Thus, judges—primarily white men, all of whom are adults—are called upon to bring their own individual understandings to bear when it comes to deciding what counts as "fair" proceedings, "just" determinations, or "justified" delay.[173]

If, however, we were to envision a teenage juvenile court respondent being called upon to make such assessments, or if we were to allow each case to unfold in our courts at a pace desired by a young child as a civil plaintiff, we would begin to see how current conceptions of evidence, trials, and justice may fail to account for the views and experiences of youth as litigants.[174] The adult-centric nature of evidence law, with its inconsistent approaches to youth as a special category, becomes even more apparent when we look more carefully at cases involving children as parties to litigation.

1. Child Litigants in Brown v. Board *and* Daubert

Brown v. Board of Education, heralded as "one of the greatest Supreme Court decisions of the 20th Century," involved child plaintiffs.[175] Professor Derrick Bell raised serious ethical questions about the litigation in his seminal 1976 article, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*.[176] Based on his own experience in desegregation cases, Bell urged reform lawyers to make sure their actions are not at odds with clients' interests. Describing the plaintiffs whose interests

172. *See, e.g.*, United States v. Pizarro, No. 16-63, 2017 WL 3252656, at *1 (E.D. La. July 31, 2017); Putscher v. Smith's Food & Drug Ctrs., Inc., No. 2:13-CV-1509-GMN-VCF, 2014 WL 2835315 (D. Nev. June 20, 2014).

173. *See* Atthar Mirza & Chiqui Esteban, *Female Judges Were a Rarity when Ruth Bader Ginsberg Was Born. They Still Are.*, WASH. POST (Sept. 21, 2020), https://wapo.st/3MtdYra [https://perma.cc/8GXC-JSQW]; Democracy & Gov't Reform Team, *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020), https://ampr.gs/3WVcuKO [https://perma.cc/HK3J-79P3] (noting that nationally, a total of approximately 25% of sitting judges identify as African American, Latinx, or Asian American); Bree Burkitt, *Arizona's Judges Are Overwhelmingly White Men. What Does That Mean for Defendants?*, COPPER COURIER (May 4, 2021, 9:25 AM), https://bit.ly/3fBzfCz [https://perma.cc/G39N-TJVB]; *see also* Mae C. Quinn, *The Garden Path of* Boyles v. Kerr *and* Twyman v. Twyman*: An Outrageous Response to Victims of Sexual Misconduct*, 4 TEX. J. WOMEN & L. 247 (1995) (describing how, 25 years ago, white men dominated trial court benches).

174. *Cf.* Rebecca Brown & Harriet Ward, *Decision-Making Within a Child's Timeframe*, CHILDHOOD WELLBEING RSCH. CTR. (Feb. 2013), https://bit.ly/3A7DZY2 [https://perma.cc/L6VV-P97K] (noting in the United Kingdom a "mismatch between three timeframes: those of the developing child; those of the courts and those of local authority").

175. *See, e.g.*, Alex McBride, Brown v. Board of Education *(1954)*, THIRTEEN (Dec. 2006), https://bit.ly/2sGRxtk [https://perma.cc/QDK5-WWRJ].

176. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

might have been obscured by counsel, Professor Bell generally spoke of Black "parents and their children."[177] Presenting children as one with parents, however, might be seen as its own form of unintended erasure, eliding the interests and goals of youth as individual persons and parties to lawsuits, separate from their parents.[178]

Since Professor Bell's important critique, others have grappled with ethical and procedural concerns inherent to class actions involving child plaintiffs. Professor Martha Matthews, also writing from the perspective of scholar-litigator, unpacked the challenge of zealously representing the "interests" of children in the context of systemic reform litigation. She described the limited agency of some youth, control exercised by parents, and competing views that can exist among youth class members. Matthews noted that lawyers may, at some point, need to "make normative judgments as to the best interests of the class."[179]

Others, like John Coons, Robert Mnookin, and Stephen Silverman, have raised concerns beyond the class context for lawyers representing the interests of children.[180] Flagging potential bias and personal agendas, they warned judges and others "deciding a matter involving a child's interests" to be "very cautious about the reliability of the relevant information provided" by lawyers for children."[181]

Yet none of these critiques discuss the impact or implications of the Rules of Evidence on cases involving youth as parties—whether as defendants in criminal cases or as litigants in complex class action suits. This is not surprising given that some of the most significant cases about the Rules of Evidence, and commentary

177. *See, e.g.*, *id.* at 515 ("Effective representation of these parents and their children presents a still unmet challenge for all lawyers committed to civil rights."); *see also* Complaint at 1–2, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (Civ. No. T-316) (listing parents as "next friends" for Linda Carol Brown, Victoria Jean Lawton, Carol Kay Lawton, James Meldon Emmanuel, and other impacted schoolchildren plaintiffs who were described as "infants").

178. *Cf.* Lisa Trei, *Black Children Might Have Been Better Off Without* Brown v. Board*, Bell Says*, STAN. REP. (Apr. 21, 2004), https://stanford.io/3y4jWss [https://perma.cc/9ZTZ-KVJM] (offering remarks on *Brown* from the perspective of impacted children).

179. Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1471 (1996).

180. *See* John E. Coons, Robert H. Mnookin & Stephen D. Sugarman, *Puzzling over Children's Rights*, 1991 BYU L. REV. 307, 339 (1991) (suggesting that "in both individual cases and in class actions," lawyers for children may be representing little more than their own views on the child's needs).

181. *Id.*

about them, fail to focus on youth as litigants—even when the litigants in the case are youth.

For instance, *Daubert v. Merrell Dow Pharmaceuticals* is arguably the most important modern case relating to admissibility of expert testimony. It dealt with the "proper standard for the admission of expert testimony" under FRE 702 and whether such testimony must be based upon methods and standards "generally accepted" by other experts in the field.[182] After arguments, the Court held that the "generally accepted" test, established by the case of *Frye v. United States* 70 years earlier, no longer applied.[183] Instead, it established a more flexible admissibility standard for introduction of expert testimony where judges would serve as evidence gatekeepers.[184] In doing so, the Court sided with petitioner-appellants, who had been born with birth defects and sought to introduce expert testimony to prove the defects were caused by the anti-nausea drug Bendectin.[185]

Notably, the Court did not discuss the fact that the winning petitioners were just children when the litigation began. Named plaintiff Jason Daubert was only 10 years old when his lawsuit was filed seeking monetary damages and 13 years old at the time of the trial court's expert testimony ruling.[186] Moreover, the Court did not write its opinion in a way that was particularly child-focused or recommend youth-specific protocols when the case was remanded to the Ninth Circuit for further proceedings.

Many do not know that, on remand, Judge Kozinski again rejected plaintiffs' proffered expert proof, finding it failed to satisfy the new flexible admissibility standard instantiated by the Court, too.[187] In usual fashion, Judge Kozinski used the opinion as an opportunity to pontificate.[188] He repeatedly referred to the shortcomings of the plaintiffs' experts without any reference to the fact that the impacted parties to whom he was speaking, while young adults now, were just children at the time the experts were retained and presented to the trial court.[189] Nor was the language in the opinion

182. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 584–85 (1993).

183. *Id.* at 587.

184. *Id.* at 589.

185. *Id.* at 582, 597–98.

186. *See* Peter Andrey Smith, *Where Science Enters the Courtroom, the Daubert Name Looms Large*, UNDARK (Feb. 17, 2020), https://bit.ly/3y1TRKu [https://perma.cc/62YG-NY3U].

187. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1320–22 (9th Cir. 1995).

188. *See id.* at 1313–22.

189. *See id.* at 1314, 1319–22.

mindful of the difficulties Jason Daubert and his co-plaintiff, Eric Schuller, suffered as disabled youth or the possibility of visiting further harm upon them.

And, of course, most legal academic writings that analyze "the *Daubert* standard" do not discuss youth or youth concerns at all. For instance, they do not address the conundrum of trying to convey such complex principles to child plaintiffs. Nor do they consider the possibility of a lower bar for introduction of expert testimony when presented by child litigants.[190] Yet, as noted earlier, child witnesses are sometimes afforded a lower bar of evidentiary admissibility and other special treatment based upon their alleged vulnerability.

2. *The Current Approach to Child Litigants and Recent Examples*

Indeed, child litigant cases provide further proof of evidence law's failure to meaningfully account for youth as interested persons. In this domain, somewhat broadly divergent approaches are brought to bear, with children being either entirely adultified or, alternatively, absented from proceedings that impact their own lives. And the approach, it seems, depends on the nature of the case itself, and not on the individual impacted child.

For instance, as the Georgia Supreme Court acknowledged,

> A courtroom can be a scary place for a 13-year-old child, not to mention even younger children, when the child is required to testify and face cross-examination in front of a room full of adults, including the accused, a judge, and a dozen jurors, who scrutinize her every word about the criminal sexual or physical abuse she has witnessed.[191]

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190. *See, e.g.*, Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 JURISMETRICS 229 (2000); Nicholas Targ & Elise Feldman, *Courting Science: Expert Testimony After* Daubert *and* Carmichael, 13 NAT. RES. & ENV'T 507 (1999); Paul F. Eckstein & Samuel A. Thumma, *Getting Scientific Evidence Admitted: The* Daubert *Hearing*, 24 LITIG. 21 (1998); *cf.* J. Eric Smithburn, *The Trial Court's Gatekeeper Role Under* Frye*,* Daubert*, and* Kumho*: A Special Look at Children's Cases*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 3 (2004) (describing how behavioral science experts might be used in cases involving child victims of abuse); David Crump, *The Trouble with* Daubert-Kumho*: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1 (2003) (describing the *Daubert* case with no reference to the plaintiff being a child at trial but noting in passing how a teen might be an expert on gang testimony).

191. Bunn v. State, 728 S.E.2d 569, 575–76 (Ga. 2012) (reversing an equal protection determination that struck down child hearsay provisions and finding that out-of-court statements by child witnesses under age 14—whether they relate to their own abuse or abuse that they witness—should be permitted so long as the witness is available and the statement is otherwise reliable).

Yet in Georgia, as in most other states, special protective protocols are generally reserved for child abuse and neglect cases against private citizen perpetrators, where the child as witness delivers testimony necessary to convict or civilly sanction an abuser, or where their out-of-court statements are admitted in such matters.

However, whether class action or single plaintiff cases, civil rights matters involving aggrieved children generally do not involve the provision of an "adult attendant" "who accompanies a child throughout the judicial process for the purpose of providing emotional support."[192] Nor are special protocols put in place to ensure that, in all instances, youth plaintiffs are protected from the trauma or intimidation that might flow from encountering certain persons in the courtroom.

But, of course, child plaintiffs in civil suits alleging wrongdoing by government actors may contend with the very same kinds of trauma that are experienced by other abuse victims. Sadly, such matters abound, with countless lawsuits brought on behalf of children each year alleging police brutality,[193] wrongdoing by school officials,[194] and all manner of misdeeds by juvenile justice system staff.[195]

The child plaintiffs in these suits are likely to feel scared to be in the same room as the person against whom they have lodged a complaint or from whom they are seeking relief, sometimes in the form of money damages. Yet evidence law and court practices appear to treat such children the same as adult plaintiffs—and different from child-victim witnesses or out-of-court declarants. This is true even when the matters are brought by parents or guardians as next friends for the children.

For example, in 1989, 14-year-old Michael Crowe brought a federal lawsuit in California against Escondido Police Department

192. *See* 18 U.S.C. § 3509(a)(1) (defining "adult attendant").

193. *See, e.g.*, Eyewitness News ABC7NY, *Teen Testifies Against Police Officer Accused of Punching Him*, YOUTUBE (May 15, 2019), https://bit.ly/3E7EgwJ [https://perma.cc/67Z5-8YKM].

194. *See, e.g.*, Will Jones, *Lawsuit Claims Riverview Teacher Punched Student; Seeks $75K in Damages*, CLICKONDETROIT (Aug. 20, 2015, 5:25 PM), https://bit.ly/3BXr7Uo [https://perma.cc/GU8Q-W2PD]; Hicham Raache, *Lawsuit Filed Against School District, Former Principal Accused of Beating 2 Students with Flattened Baseball Bat*, OKLA.'S NEWS 4 (Aug. 21, 2020, 4:53 PM), https://bit.ly/3LZZuik [https://perma.cc/WCL5-JKHE].

195. *See, e.g.*, Franco LaTona & Victoria Traxler, *Employee Misconduct: The Abuse and Mistreatment of Juveniles in Lockup*, FAIRFIELD SUN TIMES (Sept. 10, 2020), https://bit.ly/3LUfC4M [https://perma.cc/DH5A-AYW5] (describing lawsuits filed all across the country on behalf of juvenile justice system-involved youth alleging neglect, physical abuse, or sexual assaults by detention center staff).

officers for falsely arresting him in connection to his 12-year-old sister's murder, holding him in custody with two other teens, and dismissing the charges six months later.[196] Ultimately, a severely mentally ill man, who was seen wandering the neighborhood and found with the sister's blood on his clothing, was arrested and prosecuted for the crime.[197]

If Crowe's civil rights claims had proceeded to trial, under current law he would have had to testify against his arresting officers in court, even though they took him away from his family just hours after he discovered that his sister was dead, subjected him to "hours of grueling, psychologically abusive interrogation," and repeatedly lied to him about his sister's murder.[198] Yet, the court system did not appoint any kind of special attendant to support Michael throughout years of legal proceedings or to ensure his emotional well-being. In the end, fortunately, the matter settled, resulting in a $7.25 million award to Michael and his family.[199] Sadly, the settlement was not reached until after nearly 14 years of litigation.[200]

More recently, 13-year-old Da'Veon Cieslak of Michigan was violently beaten and pepper sprayed by two white Albion police officers for allegedly failing to comply with orders during a call for a household dispute. At the time, the clearly distressed Black child was handcuffed with his arms behind his back, lying on his stomach in the backseat of the police car, and crying for help. Cieslak is also autistic.[201]

This incident was captured on police video footage and shared widely by the press and on social media.[202] Cieslak's civil rights suit was removed by police officials from state court to the United States District Court for the Western District of Michigan. During those proceedings, his claims were treated like those of any other

196. Crowe v. Cnty. of San Diego, 608 F.3d 406, 417 (9th Cir. 2010) (noting "[t]his civil rights case arose from the investigation and prosecution of innocent teenagers for a crime they did not commit"). It is also notable that in Michael Crowe's case and the lawsuit brought for Da'Veon Cieslak, described *infra*, both children had their full names listed in the case style and newspaper accounts.

197. *Id.*

198. *Id.* at 417, 432.

199. Amita Sharma, *$7.25 Million Settlement Reached in Stephanie Crowe Murder Case*, KPBS (Oct. 21, 2011, 12:03 PM), https://bit.ly/3LUSgfg [https://perma.cc/HW6N-UMGP].

200. *Id.*

201. *Lawsuit Filed over Albion Police Pepper Spraying Teen with Autism*, FOX 2 DETROIT (May 14, 2019), https://bit.ly/3SKsv3E [https://perma.cc/PPJ7-EQCX].

202. *Id.*; *see also* NowThis News, *Police Officer Caught Punching 13-Year-Old With Cerebral Palsy*, YOUTUBE (May 13, 2019), https://bit.ly/3GsKvwl [https://perma.cc/T62U-B8HL].

litigant—with the defendants' request to depose young Cieslak granted without any kind of restrictions or appointment of an "adult attendant" to provide support.[203] The court framed the motion as one to depose someone "confined in prison" when, in fact, the 13-year-old was housed at a juvenile detention center.[204] Interestingly, it appears the case was settled approximately two months after the deposition request was granted.[205]

Evidence rules and court practices also fail to account for the childhood status of youth transferred out of the juvenile system to stand trial in adult court for alleged crimes. Child defendants facing adult prosecution are essentially adultified for litigation purposes in state and federal courthouses across the country.[206] In juvenile court, parents are considered parties to the proceedings who are generally expected to remain in the courtroom and address the court at different junctures.[207] This is not the case once a child has been certified to stand trial as an adult—regardless of the child's age.

Thus, in transferred matters, parents and guardians are not provided notice and generally have no right to be heard or even to be present with the accused child. More than this, prosecutors may use the Rules of Evidence to try to have parents and other supportive adults removed from the courtroom while children are on trial for adult charges. Invoking "the rule on witnesses" under FRE 615 and its state analogs, government lawyers may claim that these individuals are potential witnesses who may be called by the child defendant or government. And, since they are not parties to the

203. Order Granting Motion to Take Deposition of Da'veon Cieslak, Wright v. City of Albion, No. 1:19-cv-00516 (W.D. Mich. Jan. 24, 2020). Cieslak did bring his claims by way of guardian and next friend, Tommie Wright. But Wright is not mentioned in the deposition order nor does it appear Wright was provided with any special ability to prevent the deposition.

204. *Id.*

205. *See* Docket Sheet, Wright v. City of Albion, No. 1:19-cv-00516 (W.D. Mich. Jun. 28, 2019).

206. *See* Mae C. Quinn and Levi T. Bradford, *Invisible Article III Delinquency: History, Mystery, and Concerns About "Federal Juvenile Courts"*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 71 (2020); Mae C. Quinn and Grace R. McLaughlin, *Article III Adultification of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 523 (2020).

207. *See, e.g.*, *A Guide for Parents to the Juvenile Justice System in Indiana: "Your Child and Juvenile Court"*, YOUTH L. T.E.A.M. IND. 5 (2006), https://bit.ly/3C17Hhx [https://perma.cc/P3HS-24TK] ("You [as an accused child's parent] are also a party to the proceedings and you must obey court orders."); *Juvenile Delinquency*, N.C. JUD. BRANCH, https://bit.ly/3y6NTbb [https://perma.cc/HFT5-TWTB] (last visited Nov. 11, 2022) ("A juvenile's parent or guardian is required to appear in court with the juvenile and bring the juvenile to all scheduled hearings.").

prosecution—who would be protected from exclusion—they may be removed from the courtroom.

To date, only one case appears to suggest that a certified child might be able to have a parent present throughout criminal proceedings over prosecution objection under Rule 615. In *Harris v. State*, the court held that, at least in theory, a parent could remain in the courtroom to support a child facing adult criminal prosecution.[208] It explained that one of Rule 615's exceptions—"a person whose presence a party shows to be essential to presenting the party's claim or defense"—might allow for parental presence over prosecution objection.[209]

In acknowledging this possibility, the court claimed to be drawing from caselaw where an anxious child sexual assault victim was permitted to have their mother present while they testified to help "the witness feel more comfortable."[210] However, it rejected a *per se* rule that would always permit a parent, guardian, or supportive adult to stay with the child defendant throughout the adult prosecution process. Instead, for the exception to apply, a youth would need to demonstrate that their "parent has a 'unique ability' to assist in the presentation of the defense based on the parent's intimate knowledge of the child or capacity to support the child during the proceedings."[211]

In Bryon Harris's case, involving adult prosecution of a 15-year-old Black child in a non-fatal shooting, the court concluded this burden had not been met.[212] In fact, the court found that the issue was not preserved for appeal at all, as "Harris made no showing that his mother was 'essential' under Rule 615(c)."[213] In doing so, the Indiana Supreme Court seemed to hold young Harris strictly accountable for his lawyer's failure to make an adequate record.[214] Moreover, at times it bizarrely conflated Harris, the child, and the lawyer for Harris, stating "he never argued his mother would be

208. Harris v. State, 165 N.E.3d 91, 96 (Ind. 2021). This author and her clinic law students had the privilege of supporting Byron Harris's parental presence claim in this case, including by mooting Byron's excellent appellate counsel, Elizabeth Bellin, prior to oral arguments.

209. *Id.*

210. *Id.* at 97 (citing Gov't of Virgin Islands v. Edinborough, 625 F.2d 472, 475 (3d Cir. 1980)).

211. *Id.* at 96.

212. *Id.* at 97.

213. *Id.*

214. *Id.* at 98 ("[T]here was no mention that Harris himself wanted his mother present.").

able to contribute to his defense."[215] Harris was sentenced to more than 30 years' incarceration.[216]

The recent adult prosecution of Kyle Rittenhouse stands in stark contrast. Rittenhouse, a white teen charged with murdering one man and wounding two others who were protesting the shooting of a Black teen in Kenosha, Wisconsin, was not presumptively adultified like Bryon Harris. Instead, even though Rittenhouse was 18 years old at the time of trial, his mother was allowed to remain in the courtroom during the proceedings. She apparently sat within earshot of the jurors, audibly sobbing, during her son's testimony.[217] At the same time, he was also addressed with dignity as an important part of the proceedings, directly invited by the judge to participate in the jury selection process.[218] In the end, Rittenhouse was acquitted of all charges.

Thus, it seems both children charged by the government as adults for criminal prosecution purposes, and youth plaintiffs making claims against government officials, are frequently adultified through the application of evidence doctrine and court practices. In contrast, in the family law context and in some other civil settings, youth as parties may be rendered invisible, entirely excluded from the courtroom themselves.

Going back to 1966, the Supreme Court of North Dakota suggested a trial court could exclude young children from the courtroom—even if they were interested parties in their mother's wrongful death action.[219] More recently, the Florida Supreme Court adopted a rule that prohibits children involved in family law matters "from attending any family law proceedings without prior order of the court based upon good cause shown."[220] Adopted in 1995 and most recently updated in 2018, the rule's comments claim child presence during family court proceedings is barred in order to "afford additional protection to minor children by avoiding any unnecessary involvement of children in family law litigation."[221]

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215. *Id.*

216. *Id.* at 99.

217. Stacy St. Clair & Christy Guttowsky, *'I Used Deadly Force to Protect Myself': Rittenhouse Takes Stand in His Own Defense During Trial in Kenosha*, CHI. TRIB., Nov. 11, 2021, at 1.

218. *See* David K. Li, *Kyle Rittenhouse Conducts Random Draw, Seating 7 Women and 5 Men for His Jury*, NBC NEWS (Nov. 16, 2021, 7:00 PM), https://nbcnews.to/3Rl9dRe [https://perma.cc/MW3Z-53LP].

219. *See* Bartholomay v. St. Thomas Lumber Co., 148 N.W.2d 278, 285 (N.D. 1966).

220. FLA. FAM. L. R. P. 12.407(a).

221. FLA. FAM. L. R. P. 12.407; *see also In re* Amends. to Fla. Fam. L. Rule of Proc. 12.407, 259 So. 3d 752 (Fla. 2018).

Indeed, in one recent paternity appeal, a judge from the Second District Court of Appeals in Florida took issue with a six-year-old child—who was the subject of the proceedings—being present for oral argument. Judge Kelly wrote a special concurring opinion invoking Florida Family Law Rule 12.407 to express extreme displeasure that the child "was exposed to a discussion about the parents' conduct to which no child should be privy."[222] And, even if the rule did not strictly apply to appeals, Judge Kelly asserted that "common sense, common decency, and professionalism" dictated that the attorney for the mother should have ensured the child was not present.[223]

Notably, Florida Family Court Rules do not mention the Rules of Evidence generally, or the specific provisions that indicate that "a witness may not be excluded if the witness is a party who is a natural person."[224] Nor do they suggest that evidence rules' preservation requirements, like those invoked by the Indiana Supreme Court in *Harris*, would be softened in situations where the child who is a party to the case was not even in the courtroom when her lawyer failed to raise relevant objections.

V. EVIDENCE RECONCEIVED: YOUTH RELEVANCE, TRIALS, AND JUSTICE

This discussion of evidence law provides an overview of youth as litigants, in-court witnesses, and out-of-court declarants. It does not cover every possible rule, case, and issue. Instead, it offers illustrations of how evidence law as written fails to expressly account for youth. Youth themselves have not been engaged to develop or refine trial or courtroom evidence practices. And young people have been treated as secondary considerations in evidence law's interpretation and application. As a result, a somewhat confusing and inconsistent array of approaches have emerged that may not sufficiently serve and support all young people—and in many instances may be affirmatively harmful to their development and well-being.

This Article is focused on childism. It does not, however, discount other critical analyses of evidence law. That is, childism does not trump feminist or critical race considerations.[225] In fact, when

222. A.V. v. T.L.L., 321 So. 3d 940, 942 (Fla. Dist. Ct. App. 2021).

223. *Id.*

224. FLA. STAT. ANN. § 90.616(2)(a) (West 2022); *see also* FED. R. EVID. 615(a).

225. *See* Celina Romany, *Ain't I a Feminist*, 4 YALE J.L. & FEMINISM 23 (1991) (calling out feminist legal theorists for declaring "the preeminence of gender subordination at the expense of other forms of oppression").

considered together, these critiques demonstrate the need to attend to intersectional experiences under law where marginalization and misunderstandings may be especially thick and layered.[226]

The experiences of the Black girls who were called to testify at Derek Chauvin's trial offer one especially troubling example.[227] There, it would appear that evidence law and trial court practices did not sufficiently account for youth, gender, or race. As a result, vulnerable child witnesses faced in open court a murderous white police officer who not only took the life of an innocent Black man in their presence, but also directed his rage towards them as bystander witnesses.

Unfortunately, this Article does not have all the answers. As noted at the start, this work is offered as one modest contribution, identifying and surfacing evidence law's conflicted and confounding relationship with children. A fundamental rethinking of our justice system, a totalizing reboot of sorts, might be the only way to truly upend the adult white male norms that dominate every feature of our laws and courts. In the meantime, however, lawsuits will continue to be filed, prosecutions will proceed, and children will be forced to contend with the existing legal system. Thus, for the time being, we might more meaningfully align evidence law and court practices with youthful insights, experiences, and needs.

Youth themselves can be involved in the process of revisiting existing evidence rules and practices. While children as a group are not a monolith, engagement with some young people as representatives would be an improvement over the current situation. With their insights and ideas, they may offer new thinking about court proceedings and trial practices that adults themselves have never considered.[228]

Some examples of such engagement are emerging in other contexts in this country. For instance, many local school boards now involve youth representatives in decision-making processes.[229] The

226. Amber Joy Powell & Michelle S. Phelps, *Gendered Racial Vulnerability: How Women Confront Crime and Criminalization*, 55 L. & SOC'Y REV. 429, 429 (2021) (describing how "gendered racial vulnerability to both crime and criminalization shape dual frustration toward the law" in ways not experienced by white women or men of color).

227. *See* Griffith, *supra* note 1.

228. *See* Quinn, *From Turkey Trot to Twitter*, *supra* note 3, at 93–97 (noting that young people are more knowledgeable than most adults in a range of domains, including the worlds of technology and education, and should be included in conversations about improving these and other systems).

229. *See* Jinghong Cai, *Students Serving on School Boards: Democratic Education in Action*, NAT'L SCH. BDS. ASS'N (Feb. 4, 2021), https://bit.ly/3Eeqed3 [https://perma.cc/Y2BF-2QFU] (reporting that 25 of 39 responding state school

Juvenile Justice and Delinquency Prevention Act also provides that states receiving federal juvenile justice funds must include young people as members of their statewide State Advisory Groups (SAGs).[230] And the American Bar Association's Section of Civil Rights and Social Justice has recently established a "lived experience editing team" to assist with the Section's work and ensure its positions and publications take youth perspectives into account.[231]

Unfortunately, however, serious engagement with youth continues to be seen as an unusual and outlying practice in law reform and policy efforts. For instance, the ABA's Civil Rights and Social Justice Section, along with the ABA Commissions on Youth at Risk and Immigration, recently called upon the ABA to demand more "authentic engagement in legal system reform and advocacy efforts by individuals who have experienced those systems as children and youth."[232] It requested such language become part of ABA Resolution 115, a document intended to support access to justice reforms across the country.[233] In the end, however, the ABA rejected this request and did not include proposed language relating to youth involvement in reform efforts.[234] Nor has this approach been seriously considered by federal or most other rulemaking bodies.

But the voices and views of young people like Philomena Queen, who helped advance youth voting rights in the 1970s, and Naomi Wadler, who more recently spoke to thousands at the nation's capital to urge gun reforms, surely would enrich our under-

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board associations have youth members, while states including Alabama, Arkansas, Louisiana, Mississippi, and Texas do not); *see also* HOMEROOM (Hulu 2021) (documentary chronicling the experiences of several California high school students during the pandemic, including youth members of the local school board who fought to remove police from their schools).

230. *See State Advisory Groups: Leading System Change*, COAL. FOR JUV. JUST. 16 (2019), https://bit.ly/3e4xSvD [https://perma.cc/9LBY-BJQB] (explaining that "[t]he JJDPA requires that one-fifth of each SAG's members be youth").

231. *See Meet the Lived Experience Editing Team*, 47 ABA HUM. RTS. MAG. (Oct. 12, 2021), https://bit.ly/3fxhMuX [https://perma.cc/9ZTK-WBHS].

232. AM. BAR ASS'N COMM'N ON YOUTH RISK, REPORT TO THE HOUSE OF DELEGATES 1 (2020), https://bit.ly/3UVPbQk [https://perma.cc/8KQF-MD5V] (providing a 21-page report signed by the Chairperson, Judge Ernestine Gray, documenting the need for "active youth engagement" "to ensure individuals with lived experiences in child and youth oriented legal systems" have a voice in "working to effectuate system reform").

233. Thomas Baer, *ABA Adopts Resolution 115 to Promote Access to Justice*, JENKINS L. LIBR. (Feb. 25, 2020), https://bit.ly/3fo411x [https://perma.cc/FD7D-WHWL] (describing the debate over the scope of, and language to be included in, ABA Resolution 115); *see also 115 Revised with Proposed Amendment*, ABA, https://bit.ly/3SPxWOA [https://perma.cc/75S9-NY3A] (last visited Nov. 11, 2022).

234. *See* AM. BAR ASS'N CTR. FOR INNOVATION, REPORT TO THE HOUSE OF DELEGATES (2020), https://bit.ly/3RyoWwi [https://perma.cc/6FFH-SAZY].

standing of the law as experienced in the lives of young people. Such inputs should be especially attuned to the experiences of, and trauma concerns for, BIPOC and disabled youth who are already overrepresented as defendants and witnesses in juvenile justice, criminal court, and policing matters in this country.[235] Beyond the courtroom setting, such youth must contend with the ongoing history of racialized harms that play out every day on our streets at the hands of police, in our schools, and through nearly every feature of American life.[236] The cumulative effects of these experiences are real.[237] They should not be overlooked by justice system actors.

In the child welfare context, retired Judge Gray and her coauthor Brenda C. Robinson, a youth advocate with the Children's Law Center in California, have suggested reforms that create for children a "presumptive right to be present and meaningfully participate in their court hearings where life-altering decisions are being made about them."[238] At the same time, they urge stakeholders to "make the courtroom experience safe and accessible" to young people.[239]

Medical experts, social scientists, neurobiologists, and other non-legal experts have offered further support for such rethinking

235. *See, e.g.*, Robin Sterling Walker, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607 (2013); Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, SENT'G PROJECT (Apr. 2016), https://bit.ly/3fUyvZP [https://perma.cc/7BBD-78DN]; Quinn & Johnson, *supra* note 68, at 162.

236. *See* Todd Clark et al., *Meek Mill's Trauma: Brutal Policing as an Adverse Childhood Experience*, 33 ST. THOMAS L. REV. 158 (2021); *see also Children and Trauma: Update for Mental Health Professionals*, AM. PSYCH. ASS'N (2011), https://bit.ly/3rjL8zL [https://perma.cc/U5LX-FVW5] ("Race and ethnicity, poverty status, and gender affects children's risk of exposure to trauma."); NAT'L CHILD TRAUMATIC STRESS NETWORK, ADDRESSING RACE AND TRAUMA IN THE CLASSROOM: A RESOURCE FOR EDUCATORS 3 (2017), https://bit.ly/3EkPqhx [https://perma.cc/NQT8-AB8E] (informing educators that youth of color may experience racism-related traumas that "can impact the student emotionally, psychologically, and even physically").

237. *See, e.g.*, PROMISE OF ADOLESCENCE, *supra* note 85, at 6 ("Disparities in adolescent outcomes derive from the explicit and implicit (or unconscious) prejudice and bias that individuals hold against groups defined by race, ethnicity, gender, LGBTQ identity, ability status and so on."); Brief for Am. Psych. Ass'n, *supra* note 84, at 2–3 (noting that community violence and racism exacerbate other youth traumas and impact child well-being); Crystal Raypole, *How Racial Trauma Affects Your Adolescent*, PSYCHCENTRAL (Apr. 22, 2021), https://bit.ly/3SrwL8i [https://perma.cc/Y3ZE-RCK8] (describing "racism's cumulative effects on a person's emotional and mental health").

238. Ernestine Steward Gray & Brenda C. Robinson, *The Right for Children to Be Present, Be Heard, and Meaningfully Participate in Their Own Dependency Court Proceedings*, 47 ABA HUM. RTS. MAG. (Oct. 12, 2021), https://bit.ly3ClqYLs [https://perma.cc/GK2E-WSPC].

239. *Id.*

of court practices and evidence rules to better account for youth involvement.[240] For instance, although their work focuses primarily on the juvenile court system and outcomes for youth charged with crimes, Richard Bonnie and other adolescent development experts affiliated with the National Academies of Sciences, Engineering, and Medicine recently called for a "justice system centered on a developmental approach."[241] For this group, such reforms would employ "individualized, developmentally appropriate" practices that also account for generalized neuroscience findings about adolescent brains and "promote successful maturation."[242] This would include awareness of young people as public citizens who may be still forming their ideas about justice system fairness.

As it seeks to further account for youth and their experiences, the United States legal system might more meaningfully consider international human rights standards, movements, and critiques. Youthful participation is consistent with norms set forth in the Convention on the Rights of the Child, which urges governments to consider the interests and ideas of youth.[243] And in other countries, both child victims and witnesses are afforded a range of rights in a range of cases, including the option of remote video testimony or the support of an appointed intermediary to facilitate their testimony.[244]

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240. *See* PROMISE OF ADOLESCENCE, *supra* note 85, at 319 (calling for "procedural fairness" in "juvenile proceedings" where the role of counsel is described as "giving a platform to the adolescent client's voice in the courtroom").

241. *Id.* at 298; *see id.* at 330–36 (calling for a "developmentally informed criminal justice system" too, though focusing primarily on sentencing and post-dispositional practices rather than evidentiary and court procedures); *see also* Stephanie Tabashneck, *Raise the Age Legislation: Developmentally Tailored Justice*, 32 CRIM. JUST. 13 (2018) (noting that "developments in neuroscience have profoundly impacted the legal system's understanding of juvenile criminal behavior and how employing an adult approach to youth criminal justice can impede brain development").

242. PROMISE OF ADOLESCENCE, *supra* note 85, at 295–98, 317. *See generally* Birckhead, *supra* note 61.

243. PROMISE OF ADOLESCENCE, *supra* note 85, at 95–96 ("International norms, including the Convention on the Rights of the Child, have long called for greater youthful participation in governance and civic activities."); *see also* UNESCO, THE UNESCO YOUTH FORUM: CELEBRATING A DECADE OF YOUTH PARTICIPATION (Golda El-Khoury et al. eds., 2011); UNITED NATIONS SETTLEMENT PROGRAM (UN-HABITAT), YOUNG PEOPLE, PARTICIPATION, AND SUSTAINABLE DEVELOPMENT IN AN URBANIZING WORLD 3 (2012).

244. *See, e.g.*, JOYCE PLOTNIKOFF & RICHARD WOOLFSON, "EVERY REASONABLE STEP": PREPARATION FOR GIVING EVIDENCE (2015) (describing England's system); Mildred Bekink, *The Right of Child Offenders to Intermediary Assistance in the Criminal Justice System: A South African Perspective*, 24 POTCHEFSTROOM ELEC. L.J., June 21, 2021, at 1, 4.

In England, for instance, intermediaries may be used not only for prosecution witnesses in sex offense cases but also in other criminal matters. And they may be sought for child victims called by the defense, too.[245] Intermediaries provide courtroom tours, introduce child witnesses to persons involved in the court process, and assist during in-court questioning.[246] In doing so, an intermediary "takes the child's developmental and cognitive abilities into account when conveying the meaning and contents" of questions posed to the child.[247] The intermediary, also used in South Africa, is intended to help shield the child victim or witness from the alleged wrongdoer, as well as from stressful features of the court environment.[248]

Video testimony can also shield youths in this way. In England, this involves a special "Live-Link" process.[249] "Live-Link" allows the child witness to testify via a video connection that allows the defendant and courtroom actors to see the witness but does not allow the witness to see the defendant or others in the courtroom.[250]

International human rights initiatives may also help us rethink our evidence and courtroom approaches to youth as litigants and parties. For instance, the Inter-American Commission on Human Rights has criticized the ways in which U.S. criminal courts fail to account for the developmental stage of many child defendants facing adult charges. Specifically, the Commission observed criminal proceedings around the country involving youth defendants and interviewed stakeholders in several states. Thereafter, it concluded that "parents' active participation" in court proceedings "is frequently limited or obstructed when children are prosecuted as adults" and this stands "in stark contrast to the juvenile system where juvenile courts require the active participation of children's parents and family in every stage, as an essential element of the proceedings."[251]

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245. PLOTNIKOFF & WOOLFSON, *supra* note 242, at 129–30 (summarizing the British Witness Charter and steps taken by intermediaries before trial to assist child witnesses to feel comfortable with the courtroom and testimony process).

246. *Id.*

247. Bekink, *supra* note 242, at 4.

248. *Id.*

249. *Id.*

250. *See* Samantha Fairclough, *'It Doesn't Happen . . . and I've Never Thought It Was Necessary for It to Happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials*, 21 INT'L J. EVIDENCE & PROOF 209, 210 (2016); *see also* Abenaa Owusu-Bempah, *Understanding the Barriers to Defendant Participation in Criminal Proceedings in England and Wales*, 40 LEGAL STUD. 609 (2020).

251. INTER-AM. COMM'N ON HUM. RTS., CHILDREN AND ADOLESCENTS IN THE UNITED STATES' ADULT CRIMINAL JUSTICE SYSTEM 69 (2018).

In line with the arguments advanced in the *Harris* case in Indiana, the Commission recommends that "in any proceeding involving a child accused of crime, every effort must be made to secure the participation of his or her parents or legal guardians, unless it has been determined that this would be harmful to the child's best interests and contrary to an adequate defense at trial."[252] Such practices, the Commission contends, are in line with Article 40.2(b) of the United Nations Convention on the Rights of the Child.[253]

Jurists and scholars in other countries have also more fulsomely accounted for the needs of child litigants facing criminal charges. For instance, dating back to 2005, British courts have recognized that child defendants face many disadvantages as compared to adults.[254] This kind of thinking has led courts in England and Wales to establish special practices for youth defendants under age 18 who are facing criminal charges.[255] Thus, beyond merely following differentiated sentencing practices in the most serious criminal cases involving children, as in the United States, British judges are provided with a voluminous "toolkit" setting forth a range of special procedures that should be applied in Crown Court (adult court) cases involving the youthful accused.[256]

As part of this toolkit, the "Live-Link" testimony system may be employed for child defendants in criminal court matters in England, not just for child witnesses.[257] Similarly, in Northern Ireland, the intermediary system can be invoked not just for child victims and witnesses, but for youthful accused persons, too.[258] And scholars in these and other countries continue to call for expansion of

252. *Id.*

253. *Id.* at 69 n.206; *see Ladder of Participation*, ABA HUM. RTS. (Oct. 12, 2021), https://bit.ly/3ULw1LT [https://perma.cc/RS6M-B4SE] (suggesting "youth-initiated and directed" engagement based upon recommendations made over 20 years ago by UNICEF researcher Roger Hart); *see also* ROGER A. HART, CHILDREN'S PARTICIPATION: FROM TOKENISM TO CITIZENSHIP 1, 4 (1992), https://bit.ly/3YkJH2t [https://perma.cc/4E9H-4ESE] (noting that many adults "have it in their power to assist children in having a voice" in democratic and legal systems but "unwittingly or not, trivialize their involvement").

254. *See* Regina v. Camberwell Green Youth Court *ex parte* D & G, [2005] UKHL 4, (appeal taken from Eng.); *see also* Fairclough, *supra* note 248, at 6 (quoting Baroness Hale's opinion in *Regina v. Camberwell ex parte D & G* as an example of the judiciary noting concerns for child defendants).

255. *See generally* Fairclough, *supra* note 248.

256. GARETH BRANSTON & HEATHER NORTON, YOUTH DEFENDANTS IN THE CROWN COURT i (2021) (noting the toolkit has been in use since 2016).

257. *Id.* at 16.

258. JOHN TAGGART, POLICY BRIEF: DEFENDANT INTERMEDIARIES IN THE CRIMINAL JUSTICE SYSTEM: IS NORTHERN IRELAND LEADING THE WAY? 254 (2018).

child-centered supports for all youth involved in the court system—whether victim, witness, accused, or otherwise.[259]

This is not to say that all of these international features are without issue. The values and frameworks underlying our sister systems, which do not all provide a presumption of innocence to the accused, may not wholly align with our own.[260] But it may be time to look beyond our legal system's borders and history to create a future that is more humane and justice-filled for all, regardless of identity features such as race, gender, ability—or age.[261]

CONCLUSION

Evidentiary rules in the United States were written by and for white, male adults. Related legal practices and procedures have similarly developed with this population in mind. As a result, youth, who have not played any role in helping to create courtroom culture, have become litigation and evidentiary afterthoughts. Evidence law has developed through a piecemeal, patchwork approach, often advancing false binaries or myths about "minors." It thus lacks theoretical coherency and sufficient nuance when it comes to the experiences of youth—whether parties, in-court witnesses, or out-of-court declarants. This is especially true when it comes to young people of color, who too frequently find themselves harmed by trial court evidence practices.

Many of us hope for fundamental reformation of our social and justice systems, and to depart entirely from our foundations that are unquestionably rooted in oppression and exclusion. In the meantime, arrests will continue to occur, lawsuits will keep getting filed, and our court system will carry on in its efforts to deliver some semblance of fairness and meaningful process. So long as such actions and activities continue in our existing court system, we should do all we can to improve the day-to-day practices that im-

259. *See, e.g.*, Owusu-Bempah, *supra* note 248; Fairclough, *supra* note 248; Bekink, *supra* note 242.

260. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004) (establishing that out-of-court "testimonial" statements may not be admitted against an accused at trial consistent with the Confrontation Clause).

261. *See, e.g.*, Joanne Morrison, Jill Bradshaw & Glynis Murphy, *Reported Communication Challenges for Adult Witnesses with Intellectual Disabilities Giving Evidence in Court*, 25 INT'L J. EVIDENCE & PROOF 243 (2021); JOYCE PLOTNIKOFF & RICHARD WOOLFSON, INTERMEDIARIES IN THE CRIMINAL JUSTICE SYSTEM: IMPROVING COMMUNICATION FOR VULNERABLE WITNESSES AND DEFENDANTS 247 (2015) (citing to the European Convention on Human Rights as requiring "the judiciary to ensure 'by any appropriate means' that defendants understand what is happening and what has been said by those on the Bench, the advocates and witnesses").

pact those involved in such proceedings, including children of all backgrounds.

Rules of evidence apply to nearly every aspect of the court process, permeating family, civil, and criminal court cases alike. They impact youth as parties, witnesses, and out-of-court declarants. As such, they should account for the actual lived experiences and concerns of these stakeholders, more fully appreciate the complexity of childhood, and support the healthy development and life chances of all children in this country.

As we move ahead, both seeking to dismantle standing systems and doing our best to reduce the harms they currently cause, we must directly engage with young people and hear their concerns. We should also look beyond the four corners of United States legal doctrines and practices. Emerging understandings from the fields of social, medical, and other sciences can help inform the approaches taken by our courts, and promising evidence practices from other countries and international human rights initiatives can provide further lessons. While we work towards an entirely new beginning, we can also try to reconceive existing evidence laws and practices to better account for all persons, including youth. In doing so, we should object to childism in our courts in the here and now.

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