Law and History Review (2024), 1–30
doi:10.1017/S0738248024000099

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY
CAMBRIDGE UNIVERSITY PRESS

ORIGINAL ARTICLE

Witnesses for the State: Children and the Making of Modern Evidence Law

Laura Savarese[1,2]

[1]Department of History, Yale University, New Haven, CT, USA and [2]New York University Law School, New York, NY, USA
Email: laura.savarese@nyu.edu

Abstract

This article identifies an overlooked legacy of the child protection movement in the late-nineteenth and early-twentieth-century U.S.: transformations in evidence law and procedure that undermined common-law restrictions on children's testimony. Scholarship on the nineteenth-century modernization of evidence law argues that the rise of cross-examination allowed for the demise of common-law witness disqualification rules. The erosion of restrictions on children's testimony, however, requires an alternative or additional explanation, because cross-examination did not allay fears about children's reliability. The driving force for changes in the law governing child witnesses, I argue, was the slate of nineteenth-century child protection laws whose enforcement typically required children's testimony. The case study of Progressive-Era New York, presented here, reveals how evidence law and procedure adapted to substantive law's demand for children's evidence: reformers legislated an exception to the common-law oath requirement in children's cases, pushed trial courts to modernize their approach to examining child witnesses' competency, and expanded the state's power to detain children as material witnesses. Those reforms fostered the ends of law enforcement, but did not resolve enduring debates about the reliability risks of children's testimony and the costs of testifying for children's wellbeing.

The conviction of Antonio Blandoli for rape in 1912, in one of dozens of rape trials held in New York City that year, was not an extraordinary event in its time.[1] From a historian's vantage, though, *People v. Blandoli* reveals how intersecting changes in evidence law, criminal law, and the state's police power enabled a result that almost certainly would not have been possible even a few decades before. Prosecutors relied on the testimony of three girls, aged 11–13, to prove

[1] My description of the case is based on *People v. Blandoli*, Criminal Trial Transcript Collection case 1494 (1912), Trial Transcripts of the County of New York, 1883–1927, John Jay College of Criminal Justice Lloyd Sealy Library (hereafter TTC). For unpublished cases, I have altered the first names of the parties and witnesses.

second-degree rape, which New York law then defined as "an act of sexual intercourse with a female, not [the defendant's] wife, under the age of eighteen years," without proof that it was against her consent.[2] As scholars have observed, actions like Blandoli's would most likely not have been chargeable as a crime a quarter-century earlier.[3] Before New York joined a wave of reform around the United States and raised the age of capacity to consent to sexual intercourse, the state had followed the common-law rule fixing the age of consent at ten.[4]

Less appreciated has been the way in which important reforms in the law of evidence and criminal procedure allowed Anna and two other girls to testify against Blandoli. Before the late nineteenth century, Anna might well have been deemed too young to testify, yet too old to charge rape, at least on the facts of her case.[5] The girls' testimony, in 1912, depended on the erosion of age-based presumptions of incompetency and a relaxation of the test of oath understanding used to qualify witnesses. In addition, the prosecution relied on a late-nineteenth-century legislative reform in New York that allowed judges to dispense with the oath requirement for young children, enabling Anna's 11-year-old companion to give unsworn, corroborating testimony. Blandoli's prosecution also depended on the state's expanded capacity to police and prosecute offenses committed by and against children, including its power to summon child witnesses, willing or not, to tell their stories in court. In the weeks between Blandoli's arrest and trial, the three girls who testified were removed from their parents and held in the custody of the New York Society for the Prevention of Cruelty to Children (NYSPCC) in order to ensure their participation as witnesses.

This article traces the legal changes that brought Anna and many other young New Yorkers to the witness stand in the late nineteenth and early twentieth centuries, presenting a case study that helps explain a broader transformation in the legal treatment of children as witnesses since the mid-nineteenth century.[6] That transformation has made children's evidence more important to the enforcement of criminal law and the regulation of family life, in the modern era, but has not resolved deep concerns about children's role as witnesses in an adversarial legal system. The story recounted here

[2] N.Y. Penal Code § 2010 (1909).

[3] See Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, Mass.: Harvard University Press, 2013), ch. 7; Stephen Robertson, *Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880–1960* (Chapel Hill: University of North Carolina Press, 2005), ch. 1.

[4] Compare *Revised Statutes of the State of New York* (1829), 2: 663 § 22, with 1887 N.Y. Laws 900.

[5] See notes 19–22 below.

[6] New York provides a valuable case study for several reasons: first, the state reflected broader trends in the reform of evidence law during the Progressive Era, but it also enacted changes (like allowing unsworn testimony) ahead of the curve; and second, NYSPCC records and New York trial transcripts offer a rich archive for studying the causes and consequences of those reforms. In addition to legislation and court decisions regarding children's competency, my analysis relies on 41 trial transcripts featuring substantial testimony by children from the 1890s to the 1920s, culled from John Jay College's collection of New York City criminal trial transcripts and the New York State Library's appellate court records. Though not the focus of this article, my research on jurisdictions beyond New York—including my review of trial transcripts held at the California State Archives—informs the generalizations I draw from New York's records.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

begins to answer questions largely unaddressed by scholarship on both evidence law and children's legal history.

First, this article supplements the literature on the modernization of evidence rules by examining a phenomenon that adult-centered scholarship does not explain: the law's treatment of child witnesses. Holly Brewer has shown how children came to be "legally silenced" by evidence rules in the eighteenth century, but scholars have not examined how and why child witnesses reemerged.[7] The changes that allowed Anna Pollack to testify when she did, in some respects, aligned with a general movement, in the nineteenth-century U.S., to abolish or amend English common law's "highly restrictive" witness disqualification rules—a trend welcomed by the leading authority on evidence in the early twentieth century, John Henry Wigmore.[8] But, in crucial respects, liberalization of the law governing children's testimony did not conform neatly to broader trends in evidence law. Generally, as legal historians have shown, witness disqualification rules were replaced by reliance on juries' credibility judgments, aided by lawyers' cross-examination of witnesses, which Wigmore called "the greatest legal engine ... for the discovery of truth."[9] When it came to children, however, there were, then as now, grave concerns about the effectiveness of cross-examination as a method of ascertaining truth, and its strategic value in discrediting opposing witnesses.[10] Indeed, treatise writers and practitioners in the late nineteenth and early twentieth centuries cautioned that aggressive cross-examination of children could be counterproductive, and some also expressed skepticism about the jury's ability to judge children's credibility.[11] Thus, scholars' persuasive account for the nineteenth-century demise of common-law restrictions on adult

[7] Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill: University of North Carolina Press, 2005), 174. Some historians have turned to records of children's testimony to illuminate children's experiences in the legal system since the late nineteenth century. See David S. Tanenhaus and William Bush, "Toward a History of Children as Witnesses," *Indiana Law Journal* 82 (2007): 1059–75. However, scholars have not identified or explained the particular legal changes that enabled more children to testify and that generated more records of children's voices.

[8] John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (Boston: Little, Brown, 1904), 1: 591.

[9] Wigmore, *A Treatise* (1904), 3: 1698. For leading accounts of the nineteenth-century demise of witness disqualification rules, which attribute that trend to the elevation of cross-examination and juries' credibility determinations as the means of legitimating trial outcomes, see George Fisher, "The Jury's Rise as Lie Detector," *Yale Law Journal* 107 (1997): 575–713; John H. Langbein, "The Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96 (1996): 1194–202; and John Witt, "Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903," *Texas Law Review* 77 (1999): 860–61.

[10] Modern social science research has generally shown that cross-examination is a poor method for obtaining the truth from children. See Richard D. Friedman and Stephen J. Ceci, "The Child Quasi Witness," *University of Chicago Law Review* 82 (2015): 110; Lucy S. McGough, *Child Witnesses: Fragile Voices in the American Legal System* (New Haven: Yale University Press, 1994), 108, 122.

[11] As one nineteenth-century evidence law authority claimed, "[i]t is hardly possible to cross-examine a child, for the test is too rough for an immature mind," and inspires undue sympathy among jurors for the "confused and frightened" child. J. F. Stephen, *A General View of the Criminal Law of England* (London: MacMillan, 1863), 287. For similar concerns, see Amos C. Miller, "Legal Tactics Series: Examination of Witnesses," *Illinois Law Review* 2 (1907–1908): 260, quoted in John

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

testimony does not so readily explain changes in the law governing children's testimony. By tracking New York's evolving legal treatment of child witnesses in the late nineteenth and early twentieth centuries, which paralleled and in some ways surpassed reforms in other states, this article adds a missing chapter to the story of evidence law modernization.

This overlooked chapter points to a different explanation for legal change in the case of child witnesses. The rise of cross-examination did not suffice to sweep aside limits on children's testimony; rather, the imperative for the reform of evidence rules and procedure flowed, perhaps unexpectedly, from a revolution in substantive laws governing childhood. By the end of the nineteenth century, in New York and states across the country, major domains of substantive law had transformed to recognize new legal protections for children, including revisions to custody and tort doctrines, legislation requiring school attendance, restrictions on child labor, and criminalization of many forms of child abuse.[12] Enforcing those laws demanded, and to a considerable degree achieved, greater participation by children—or, from another perspective, more frequent ensnarement of children—in the legal system. The prosecution of sexual crimes against children under reformed statutory rape laws, in particular, heightened demand for young girls' testimony. Progressive-Era courts encountered children as plaintiffs, criminal complainants, defendants, and witnesses—not for the first time, to be sure, but in greater numbers than before, and more often in cases that centered on their legal status as children.

The new substantive law of childhood collided with historically long-standing anxieties about children's role in the legal system, especially as witnesses. Those anxieties were embodied in common-law rules and trial practices, in place since at least the eighteenth century, that constrained children's ability to testify—obstacles that had to fall to enable robust enforcement of child protection laws, even as many of the concerns underlying the old rules lingered.[13] It was not a frictionless process. Easing restrictions on children's testimony, in effect, meant treating children more like adults, or at least as eligible for adult rights. But the idea underlying the late-nineteenth-century child-saving movement was that childhood was special and distinct from adulthood, in ways the law should recognize and reinforce. Given that, and given deeply rooted skepticism about children's reliability and lesser faith in cross-examination when it came to young witnesses, legal change was hardly assured. But efforts to extend substantive legal protections to children

Henry Wigmore, *The Principles of Judicial Proof* (Boston: Little, Brown, 1913); and "Sympathy the Salvation of the Youthful Offender," *New York Times*, February 26, 1905.

[12] For an overview of legal reforms associated with the nineteenth-century "child-saving movement," see Michael Grossberg, "Changing Conceptions of Child Welfare in the United States, 1820–1935," in *A Century of Juvenile Justice*, eds. Margaret K. Rosenheim et al. (Chicago: University of Chicago Press, 2002).

[13] Historians have documented eighteenth- and early-nineteenth-century juries' skepticism of young children's testimony. See Nancy Hathaway Steenburg, *Children and the Criminal Law in Connecticut, 1635–1855: Changing Perceptions of Childhood* (New York: Routledge, 2005). Jurors' negative views of children's credibility remain a rich topic of empirical research. See Stephen J. Ceci, ed., *Perspectives on Children's Testimony* (New York: Springer, 1989).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

eventually produced pressure to alter legal rules that had long precluded children from giving evidence, by creating a demand for testimony that only children could provide, and by empowering groups, like the NYSPCC, committed to enforcing child protection laws using children's evidence. Thus, the child protection movement did not simply transform substantive law, in ways that scholars have recounted; it also set off changes in evidence law and procedure, a feedback effect that scholars have not examined.[14]

Furthermore, the erosion of limits on children's testimony formed an important, often overlooked, mechanism by which the new law of childhood expanded the power and capacity of the state.[15] The welter of child protection laws and doctrines that arose in the nineteenth century not only enlarged the state's authority over children; they also drove state actors to gather more information about children's lives, including information only accessible through children's testimony. Incorporating children and state-building into the story of American evidence law modernization adds a layer of complexity to standard accounts. The history of child witnesses since the nineteenth century could be told, from one perspective, as a story of progress, in which lawmakers and judges, moved by new ideas about children's rights and capabilities, discarded outmoded rules that limited children's ability to speak and seek redress for harms in court. But from another perspective, the story is a murkier one, in which the state haled young witnesses into court to serve the ends of criminal law enforcement, without adequate methods of eliciting reliable testimony, and with little regard for the traumatic effects of subjecting children to intrusive questioning in court.[16] Coercive methods for securing children's testimony fell most heavily on children in New York's working-class, immigrant communities—and girls, most of all.[17] On that account, the child protection mandate,

[14] Though evidence rules are not the focus of his study, Stephen Robertson notes the relationship between certain evidence law changes and efforts to prosecute sexual offenses against children in the Progressive Era. See Robertson, *Crimes against Children*, 49. Estelle Freedman does not explore that relationship, but observes that "long-standing suspicions about girls who falsely claimed rape" began to clash with growing concerns about child welfare and statutory rape in the late nineteenth century. Freedman, *Redefining Rape*, 132.

[15] By examining both the legal reforms and state-building initiatives that adults launched on children's behalf, and the ways that children experienced those legal changes, this article bridges different approaches to writing children's history. A recent scholarly exchange in *The American Historical Review* illuminates the challenges and possibilities of combining the "history *of* children," which focuses on children's own experiences, and "history *through* children," which links changing ideas about childhood to other social and political processes. Bengt Sandin, "History of Children and Childhood—Being and Becoming, Dependent and Independent," *The American Historical Review* 125, no. 4 (2020): 1314.

[16] Child witnesses' greater visibility since the late nineteenth century has generated debate about how the state ought to protect children from courtroom traumatization, a burden that has long fallen disproportionately on poor children, who more frequently appear as witnesses in criminal and family courts. In the late twentieth century, many states enacted reforms meant to reduce the risk of children's "secondary victimization" in the judicial process, including, for example, statutes permitting testimony through closed-circuit television. See McGough, *Child Witnesses*, 3–4; Robert H. Pantell, "The Child Witness in the Courtroom," *Pediatrics* 139, no. 3 (2017): 4.

[17] On gender dynamics in witness detention, see Part IV below.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

and the changes it produced in evidence law and procedure, did more to empower the state than to liberate children.

Both stories help to explain legal reforms in Progressive-Era New York, but they also help to explain broader patterns in the law's treatment of child witnesses over time. The state's need for children's evidence has spurred waves of legal and procedural reform, without ever resolving deep-seated anxieties about children's role as witnesses. History lays bare the harms of excluding children's voices, but also reveals the costs, and still-unsettled dilemmas, that came with making children into witnesses for the state.

Child Protection and the Mandate for Reform

Today, children regularly speak in court, in delinquency, abuse and neglect, and custody cases, and as witnesses in criminal prosecutions and civil suits.[18] Modern practice reflects a transformation in the law's treatment of children's evidence. Traditionally, English and American courts, especially in criminal cases, commonly excluded children under 10, or under 14.[19] The common-law rule, reiterated in nineteenth-century treatises and legal decisions, fixed "no precise age" under which children were "absolutely excluded" as witnesses, but children under 14 were not presumed competent, so their ability to testify turned on the court's examination of their understanding of "the nature and effect of an oath."[20] Evidence guides endorsed a stringent test of competency: in order to give sworn testimony, children, like adults, must demonstrate comprehension of "the religious sanction implied in an oath."[21] The first

[18] See Pantell, "The Child Witness," 1. No state automatically excludes children from testifying based on age; many states still require some form of preliminary examination to determine if children can testify, but about half follow the Federal Rules of Evidence, dispensing with any preliminary showing of competence before children go before the jury. Many states have enacted permissive rules, usually specific to sexual abuse cases, for the admission of children's hearsay statements and unsworn testimony. See McGough, *Child Witnesses*, 97–98, 145–46.

[19] See Brewer, *By Birth or Consent*, 159. As Holly Brewer has shown, age-based restrictions on testimony originated in seventeenth-century England and migrated to American courts and evidence guides, which document a "trend … toward excluding the evidence of those under ten or even under fourteen" in the eighteenth century. Id., 168. Courts elevated the importance of oath understanding, and moved away from the earlier practice of allowing unsworn testimony by "infant[s] of … tender years" who were victims of rape or other "secret" offenses. Matthew Hale, *The History of the Pleas of the Crown* (Philadelphia: Robert H. Small, [1736] 1847), 1: 634; see also Richard Burn, *The Justice of the Peace, and Parish Officer* (London: H. Woodfall and W. Strahan, 1764), 1: 342.

[20] Simon Greenleaf, *A Treatise on the Law of Evidence* (Boston: Little, Brown, 1842), 1: 410. A 1779 English case was the oft-cited authority for disallowing children too young to be sworn. See *R. v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 203 (K.B. 1779).

[21] Greenleaf, *A Treatise*, 1: 411; see also Thomas Peake, *A Compendium of the Law of Evidence* (Walpole, N.H.: Thomas & Thomas, 1804), 86. The requirement that witnesses evince a religious understanding of the oath was a target of Jeremy Bentham's influential critique of eighteenth-century evidence law. See Jeremy Bentham, *Rationale of Judicial Evidence* (London: Hunt & Clarke, 1827), in *The Works of Jeremy Bentham*, ed. John Browning (Edinburgh: William Tait, 1843), 7: 429. A wave of nineteenth-century legislative and constitutional reforms, in states across the U.S., repealed the common-law disqualification of witnesses lacking religious belief, but did not resolve

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

codification of New York law, in 1829, essentially enacted the common-law rule, providing that when "an infant, or a person apparently of weak intellect," was offered as a witness, the trial court should "examin[e] such person, to ascertain his capacity, and the extent of his religious and other knowledge," to determine whether that person could be sworn.[22]

Thus, in nineteenth-century New York, similar to other states, there were two main limitations on children's testimony: the presumption that "infants" were not competent, meaning that their ability to testify under oath depended on the methods and standards by which courts assessed their "capacity" and "knowledge," and the absence of any provision permitting courts to dispense with the oath for young witnesses.[23] Such restrictions rested on longstanding assumptions that young children typically lacked the requisite understanding to testify, and that cross-examination—seen as an effective replacement for other common-law witness disqualification rules—was not as sure a method of deterring or detecting falsehood in the case of child witnesses. In the late nineteenth century, however, common-law restrictions on children's testimony ran up against a new and powerful countervailing force: the law enforcement imperatives of the child-saving movement.

In the decades following the Civil War, New York and most other states enacted major reforms that enshrined in law a new cultural understanding of childhood as a distinct and protected stage of life, including legislation restricting child labor, mandating school attendance, and raising the age thresholds for consent to sex and criminal culpability. Those reforms enhanced the power of the state—and the power delegated to private organizations like the NYSPCC—to intervene in family life.[24] The movement also drew support from a new developmental model of childhood, popularized by psychologists like G. Stanley Hall, which marked adolescence as a critical stage of moral and intellectual growth.[25] To the extent such theories envisioned a prolonged period of

the problem of children's disqualification. See Wigmore, *A Treatise* (1923), 3: 886–89. As Part III discusses, some judges still required children to convey knowledge of divine punishment for false swearing, even as courts generally moved toward a more flexible, secular test.

[22] *Revised Statutes of the State of New York* (1829), 2: 408 § 89. New York's 1880 Code of Civil Procedure retained the same rule as before, but removed the reference to "religious" knowledge. See N.Y. Code of Civil Procedure § 850 (1881). The same rule applied in both civil and criminal cases. See N.Y. Code of Criminal Procedure § 392 (1881).

[23] Common-law restrictions did not bar children from testifying in all cases, and it is difficult to quantify, with confidence, how often young children actually appeared in court in the eighteenth and early nineteenth centuries. The regular participation of child witnesses did not become possible, though, until the adoption of more flexible tests of children's competency to testify, among other reforms, in the late nineteenth and twentieth centuries.

[24] See Grossberg, "Changing Conceptions of Child Welfare," 24–27. The child-saving movement aimed its interventions primarily at white children in urban, working-class, usually immigrant families, though another movement, led by Black clubwomen, strove to extend child welfare resources to Black youth. See Geoffrey K. Ward, *The Black Child-Savers: Racial Democracy and Juvenile Justice* (Chicago: University of Chicago Press, 2012); Dorothy Roberts, "Black Club Women and Child Welfare: Lessons for Modern Reform," *Florida State University Law Review* 32 (2005): 957–72.

[25] See Granville Stanley Hall, *Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion, and Education*, 2 vols. (New York: D. Appleton and Company, 1904). A century after Hall, developmental psychologists have charted the modern evolution and

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

childhood immaturity, though, they did not necessarily support changes in evidence law and practice that would enable more adolescents to testify in court—at least not in a straightforward way. The issue of children's competency as witnesses laid bare a tension within the new law of childhood. On the one hand, child protection legislation sharpened the legal divide between children and adults; but on the other hand, as reformers soon recognized, enforcing those laws required a system of evidence that treated children more like adults.

As New York's example illustrates, a central factor in easing restrictions on children's testimony was the rise of new substantive laws and law enforcement priorities that brought more children into court. Though the 1848 Field Code and other midcentury legislation had abolished other common-law competency rules in New York, including the disqualification of interested parties and criminal defendants, age-based competency rules did not fall away at the same time.[26] Greater reliance on cross-examination and the jury's fact finding power was a key factor behind the repeal of disqualification rules, at least in the case of adult witnesses, but it was not, by itself, enough to sweep aside all limits on children's testimony. Ultimately, New York did not repeal the requirement that courts examine young witnesses' competency, nor did it abolish the general rule requiring testimony under oath or affirmation. But, as Parts II–IV detail, there were important changes to evidence rules and practices in the Progressive Era. Courts modified their approach to competency examinations, and the legislature carved out a major exception to the oath requirement for young witnesses in criminal cases. In addition to lifting constraints on children's testimony, the state adopted aggressive measures for obtaining their testimony, including pre-trial detention of child witnesses.

In all of those changes, advocates for the enforcement of child protection laws—in particular, NYSPCC officers—played a key role.[27] The NYSPCC was incorporated in 1875 as a private organization with statutory authority to bring "complaint[s] before any court … for the violation of any law relating to or affecting children."[28] It soon became, in NYSPCC president Elbridge Gerry's words, a kind of "subordinate governmental agenc[y]" in the state's nascent child welfare and juvenile justice bureaucracies.[29] New York's delegation of police powers to a quasi-public organization typified state-building strategies in the Gilded Age, particularly in the realm of family regulation, and the NYSPCC became a model for anti-cruelty societies incorporated across

"lengthening of adolescence," a shift with major implications for law and social policy. Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* (Boston: Houghton Mifflin Harcourt, 2014), 9.

[26] See 1857 N.Y. Laws 744; 1869 N.Y. Laws 1597.

[27] In addition to the NYSPCC, women's rights advocates helped publicize the plight of child witnesses, promoting the reform of evidence law and procedure as a child-saving imperative. For example, the American Woman Suffrage Association's weekly journal ran articles protesting young girls' exclusion under competency rules, and the "terrible ordeal" that girls faced when cross-examined in sexual assault trials. "No Protection for Little Girls," *Woman's Journal*, July 26, 1890.

[28] 1875 N.Y. Laws 114.

[29] NYSPCC, Twenty-Fourth Annual Report (1898), 6.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

New York State and in dozens of other states by 1900.[30] Over the second half of the nineteenth century, New York enacted a wide array of laws "affecting children," including laws requiring children to attend school and forbidding factory labor, and legislation expanding the grounds on which adults could be prosecuted for endangering children's welfare.[31] Advocating for such legislation became part of the NYSPCC's work, in addition to its core function of assisting police and district attorneys in investigating and prosecuting violations—funded by fines on those convicted.[32] Created as a lobbying arm of New York State's animal and child protection societies when they held their first annual convention in 1890, and chaired by Gerry, the "committee on legislation for children" pushed successfully for laws that expanded the state's child protection machinery over the next two decades.[33]

An important feature of the new laws "affecting children," as the NYSPCC recognized, was that their enforcement often depended on evidence that only children could provide. The NYSPCC's annual reports frequently complained about the challenge of prosecuting crimes against children whom courts deemed incompetent to give sworn testimony: in a typical case in 1888, a mother accused of beating her son "escaped deserved punishment" because the boy, "who was the only witness in [the] case, proved an incompetent witness."[34] The problems identified by the NYSPCC were not new; eighteenth-century critics of common-law evidence rules recognized that excluding children's testimony in "Cases of foul Facts done in secret" was to "deny[] them the Protection of the Law."[35] But the issue of children's evidence became more salient in the late nineteenth century because of the child protection strategies distinctive to that period: codification of an ever-growing array of offenses against children, and empowerment of new institutions to punish violators in court. In New York, in particular, the political clout and activism of SPCC leaders drew legislators and judges' attention to the issue.

It was not just new child welfare legislation that brought greater numbers of children into court around the turn of the century, but also a surge in the prosecution of sexual violence against children, primarily girls. By Stephen Robertson's estimate, in the period from 1790 to 1876, about one-third to one-half of female rape complainants in New York City were younger than 19, but

[30] On the SPCC model, see Susan J. Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (Chicago: University of Chicago Press, 2011), ch. 4.

[31] See generally Jeremy P. Felt, *Hostages of Fortune: Child Labor Reform in New York State* (Syracuse: Syracuse University Press, 1965); Merril Sobie, *The Creation of Juvenile Justice: A History of New York's Children's Laws* (Albany: New York Bar Foundation, 1987), chs. 2 & 3.

[32] See 1888 N.Y. Laws 203.

[33] See Annual Convention of the New York State Societies for the Prevention of Cruelty (1890), The NYSPCC Archive, New York Society for the Prevention of Cruelty to Children (hereafter NYSPCC Archive); Second Annual Convention (1891), 34, NYSPCC Archive.

[34] NYSPCC, Fourteenth Annual Report (1888), 40.

[35] Henry Bathurst, *The Theory of Evidence* (London: S. Richardson and C. Lintot, 1761), 110; see also Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (London: W. Strahan and M. Woodfall, 1772), 289.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

starting in the 1880s, the share of complainants under age 18 rose sharply to over eight in ten cases, with similar proportions in cases charging sodomy, abduction, seduction, incest, and carnal abuse.[36] As Estelle Freedman has shown, a major consequence of the nationwide movement in the late nineteenth century to raise the age of consent, and thereby expand the offense of statutory rape, was the "construction of rape as a crime committed primarily against youth."[37] Thus, the admissibility of children's evidence, in trials and grand juries, became a key issue in the new era of sexual offenses.

One might expect that concern for young children's testimony would fade after amendments to New York's rape law brought teenaged girls under the age of consent, enabling statutory rape charges in cases where complainants were over the age of presumptive competency to testify. But the results were complex. Like many states in this period, New York raised the age of consent to sexual intercourse from 10 to 16 years in 1887 and to 18 years in 1895, and in 1892 divided the crime of rape into two grades: first-degree rape, punishable by up to 20 years' imprisonment, included sexual intercourse "with a female not [the defendant's] wife ... without her consent," or when, "by reason of ... immaturity," she did "not offer resistance"; second-degree rape, punishable by up to 10 years, was sexual intercourse with a female below the age of consent "under circumstances not amounting to rape in the first degree."[38] New York's SPCCs advocated for shifting the offense of statutory rape to the novel category of second-degree rape, in order to give juries the option of convicting on a lesser offense in cases where older girls appeared to consent to sex.[39] Progressive-Era prosecutors still found it difficult to convict defendants in such cases, though, and girls under 12 remained a sizeable share of rape complainants.[40] Thus, young children's ability to be heard—and older children's tendency to be believed—remained central issues. From the NYSPCC's perspective, securing convictions would require more than just changing the rape statute. It would also require reforming the law governing children's testimony.

The policy imperatives of the child-saving movement pushed the law to accept, even compel, children's evidence—even as public debate and concern about children's reliability persisted. In New York, the state's child protection mandate shaped evidence law and court practice in several ways: first, creating pressure for legislative reform that allowed children to testify unsworn in criminal cases; second, pushing courts toward a more flexible test of child witnesses' competency; and third, authorizing aggressive methods to secure children's testimony in court, including through pre-trial detention of child

[36] Robertson, *Crimes Against Children*, 2.

[37] Freedman, *Redefining Rape*, 127.

[38] See 1887 N.Y. Laws 900; 1892 N.Y. Laws 681. Current New York law contains a more complex age-based scheme, meant to shield teenaged consensual sex partners from criminal charges.

[39] See Second Annual Convention (1891), 11, NYSPCC Archive; Third Annual Convention (1892), 42, NYSPCC Archive; Sixth Annual Convention (1895), 27, NYSPCC Archive.

[40] See Robertson, *Crimes Against Children*, 32. On parallel trends in the U.K., see Laura Lammasniemi, "'Precocious Girls': Age of Consent, Class and Family in Late Nineteenth-Century England," *Law and History Review* 38, no. 1 (2020): 254.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

witnesses in the NYSPCC's custody. Those legal reforms brought more children to the witness stand, but did not ensure that juries would believe them. Not only age, but gender, race, class, and other markers of difference powerfully influenced the presentation and reception of children's evidence, in practice.[41] Long after the repeal of race-based witness disqualification rules in the wake of Emancipation, and even after the demise of evidentiary rules that imposed special burdens on women, an "implicit hierarchy of credibility" has remained embedded in the administration of evidence law.[42] Children's place in that hierarchy has evolved over time. This article explains a crucial stage in that evolution, when lawmakers and judges rolled back certain formal barriers to children's testimony, but did not eradicate the complex set of class, race, and gender biases that have long pervaded determinations of witness competency and credibility.

New York's "Enlightened Modern Statute" and the Return of Children's Unsworn Testimony

In the late nineteenth century, a major obstacle to the reception of children's evidence was New York's preservation of the common-law rule precluding statements by children not under oath. Thus, at the same time that the NYSPCC lobbied to amend New York's rape law, it also pressed for "a very important amendment … to the Criminal Code" that departed from the eighteenth-century rule against unsworn testimony.[43] After a similar bill failed in 1891, in 1892 the legislature added a new rule to the Code of Criminal Procedure, providing that, in "criminal proceedings," children under 12 years old who "d[id] not in the opinion of the court … understand the nature of an oath" could give evidence, "though not … under oath," if the court found they had "sufficient intelligence

[41] Scholarship on late-nineteenth-century statutory rape prosecutions illuminates how class, race, and gender biases affected perceptions of children's innocence: for example, white judges and jurors' tendency to assign maturity and promiscuity to Black girls—and, to some degree, girls of Southern and Eastern European ancestry, who comprised a large share of rape complainants in Progressive-Era New York. See Freedman, *Redefining Rape*, 87; Robertson, *Crimes Against Children*, 122–23. This article reveals the further dilemma that young witnesses faced when their competency to testify depended on a display of maturity, but their substantive legal claim depended on the appearance of immaturity, and it shows how evidence law began to deal with that tension.

[42] Rosemary C. Hunter, "Gender in Evidence: Masculine Norms vs. Feminist Reforms," *Harvard Women's Law Journal* 19 (1996): 165. On the nineteenth-century repeal of rules barring testimony by Black witnesses and other people of color, see Fisher, "The Jury's Rise as Lie Detector," 671–97. On the persistence of racially biased determinations of witness competency and credibility, see, for example, Jasmine B. Gonzales Rose, "Toward a Critical Race Theory of Evidence," *Minnesota Law Review* 101 (2017): 2243–311. On the history of gendered evidentiary rules, and the enduring linkage of sexual virtue and credibility, see Hunter, "Gender in Evidence"; and Julia Simon-Kerr, "Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment," *Yale Law Journal* 117 (2008): 1854–98. For analysis of how witnesses' disability affects perceptions of both their competency to testify and capacity to consent to sex, see, for example, Jasmine E. Harris, "Sexual Consent and Disability," *New York University Law Review* 93 (2018): 480–557.

[43] Third Annual Convention (1892), 56, NYSPCC Archive.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

to justify the reception of the evidence," and so long as there was no conviction "upon such testimony unsupported by other evidence."[44] New York courts generally interpreted the law to create a presumption that a witness under 12 was not competent to give *sworn* testimony in a criminal case, requiring a "proper preliminary examination" to overcome that presumption, but also to give courts substantial discretion to determine a child's capacity to testify, sworn or unsworn.[45] Courts also read the law to extend to grand jury proceedings, which gave prosecutors leverage to extract guilty pleas, if they could secure indictments based on a child's unsworn grand jury testimony.[46] New York modeled the new law on similar legislation recently enacted in the U.K.[47]

Wigmore argued that the "enlightened modern statutes" of England and New York "should be universally followed," and the oath-capacity requirement eliminated for child witnesses in all cases.[48] Several other states in this period, by judicial decision, permitted trial courts to omit the strict requirement that children understand the nature of an oath; however, few other state statutes expressly allowed children's unsworn testimony, at least in criminal cases, until reforms of the later twentieth century.[49] Current New York law retains a similar exception allowing children to give unsworn testimony in criminal cases if the court finds them "ineligible to testify under oath" but "possess[ing] sufficient intelligence and capacity," again with the proviso that unsworn evidence be corroborated.[50]

The arguments for the 1892 legislation, though they did not immediately prevail in other states, illustrated how the child-saving movement gave new force to criticisms of eighteenth-century evidence law. In a state with a powerful child protection lobby, the mounting need for child witnesses in criminal prosecutions—and the growing sense that oath understanding was a flawed test of witness qualifications—brought about a major, lasting change to evidence law and criminal procedure. Leaders of the NYSPCC pitched the reform as critical to the enforcement of child protection laws and the punishment of intrafamilial and sexual violence—"cases of brutal violence [where] the child was the only witness to the transaction," where "[o]ffenders escaped simply because the child was unable to tell its own story."[51] Of course, young children's evidence was not always excluded before the 1892 law; indeed, children appeared sporadically in newspaper coverage of criminal trials in New York, most often as witnesses where men were charged with murdering their

[44] 1892 N.Y. Laws 590; see also Second Annual Convention (1891), 34, 60, NYSPCC Archive.

[45] *People v. Klein*, 194 N.E. 402, 403 (N.Y. 1935); see also *People v. Johnson*, 77 N.E. 1164, 1167 (N.Y. 1906).

[46] See *People v. Sexton*, 80 N.E. 396, 402 (N.Y. 1907).

[47] See Criminal Law (Amendment) Act 1885, 48 & 49 Vict. c. 69, § 4; Prevention of Cruelty to, and Protection of, Children Act 1889, 52 & 53 Vict. c. 44, § 8; Prevention of Cruelty to Children (Amendment) Act 1894, 57 & 58 Vict. c. 41, §§ 14, 15.

[48] Wigmore, *A Treatise* (1923), 1: 874; John Henry Wigmore, *A Supplement to A Treatise on the System of Evidence*, 2nd ed. (Boston: Little, Brown, 1915), xxxi.

[49] For criticism of the rule barring children's unsworn testimony in other states, see cases cited below in notes 92, 96.

[50] N.Y. Crim. Proc. Law § 60.20.

[51] Third Annual Convention (1892), 56–57, NYSPCC Archive.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

wives.[52] In any case, the new rule did not eliminate other constraints on the reception of children's evidence, and the NYSPCC's annual reports continued to complain of cases in which children were found "too young to testify."[53] Still, the law enacted a significant change from the common-law rule, under which "the child was unable to open its lips [if] it did not understand the nature of an oath."[54] It substituted a more permissive standard for children to testify unsworn—namely, whether they had "sufficient intelligence and capacity"—that courts could flexibly interpret.[55] Although judges did not always articulate how they differentiated between the standards for sworn and unsworn testimony, judges' use of the law indicates that they understood it to allow testimony by children who would otherwise be silenced by the oath understanding test. Additionally, as courts construed it, the law lowered the presumptive age of competency, in criminal cases, to 12 years old, rather than 14.

Newspaper coverage and court records show that judges quickly made use of their newfound discretion to allow young children's unsworn testimony in criminal trials, as in Anna Pollack's case in 1912.[56] In *People v. Blandoli*, the prosecution benefited from the 1892 law, which allowed another witness to Blandoli's conduct, 11-year-old Julia Rottenberg, to testify unsworn.[57] For many judges, the law was appealing, not just because it gave them greater power, but because it removed the difficult choice of either compelling a young child to swear an oath the child did not understand, or excluding valuable evidence. As one New York trial judge explained, "with young children, unless it be clearly established that they understand the consequences of their acts, I do not like to put children under the obligation of swearing upon the Gospel."[58] The major impetus for the law was the state's need for

[52] See, e.g., "The Mount Hope Tragedy: Trial of Thomas Halloran Continued—Interesting Evidence—A Child's Testimony Against Her Father," *New York Times*, May 19, 1870; "A Child's Sad Testimony: Florence Hackett Tells in Court How Her Father Shot Her Mother," *New York Times*, November 2, 1881.

[53] NYSPCC, Twenty-Third Annual Report (1897), 43; see also NYSPCC, Thirty-Eighth Annual Report (1913), 36, 39; NYSPCC, Forty-Third Annual Report (1918), 26.

[54] Third Annual Convention (1892), 56–57, NYSPCC Archive.

[55] Case law offers examples where judges found children capable of giving unsworn, but not sworn, testimony, as well as instances in which trial judges concluded, after examining a young witness, that the child was too immature to testify either sworn or unsworn under the statute. See, e.g., *People v. Quong Kun*, 34 N.Y.S. 260, 261 (N.Y. Gen. Sess. 1895). Appellate courts then and now have said little about the precise meaning of the statutory language, generally deferring to trial judges' assessments. See, e.g., *People v. Nisoff*, 330 N.E.2d 638, 690–91 (N.Y. 1975).

[56] See, e.g., "His Child Against Him: Herman Reich's Trial for Wife Murder," *New York Times*, June 13, 1896; "Children Describe Murder of Mother: Little Son and Daughter of Abraham Roth Give Testimony Against Him," *New York Times*, December 7, 1910; *People v. Pustolka*, 43 N.E. 548, 548 (N.Y. 1896); *People v. Newman*, TTC case 2100 (1915), 5.

[57] *People v. Blandoli*, TTC case 1494 (1912), 66.

[58] *People v. Badrian*, TTC case 1412 (1911), 55. Another appellate judge described why he considered the oath of little use for children: if a young witness's story was false, "it was more childlike to adhere to her falsehood from fear of parental punishment than to confess it in order to avert Divine wrath." *People v. Donohue*, 100 N.Y.S. 202, 204 (N.Y. App. Div. 1906).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

young children's testimony in order to enforce a host of newly codified offenses against children. But the reform embodied the logic of child protection in another sense as well. Dispensing with an ineffectual oath, as many judges saw it, spared young children from the peril of false swearing.

Also important, in 1906 the law survived a constitutional due process challenge, brought by a man convicted of murdering his wife in a trial where his 9-year-old son testified unsworn.[59] New York's high court affirmed the legislature's power to "change the rules of evidence as they existed at common law," while noting the safeguards that the legislature had preserved around unsworn testimony: the corroboration requirement, the "test of cross-examination," and the new law's limited application only to children for whom "the oath would be useless and yet the evidence might be valuable."[60] In the court's view, the law rightly recognized that "[a] child may not be able to understand the nature of an oath and yet be capable of telling what he saw and heard ... with entire accuracy."[61] Though the 1892 legislation did not eliminate the rule that witnesses must understand the oath in order to give sworn testimony, it was a concession that oath understanding—what Wigmore called "the common-law belief"—was a flawed test of a witness's qualifications and reliability.[62] Ultimately, as Part III discusses, that recognition shaped how trial courts assessed child witnesses in competency examinations.

The growing acceptance of young children's unsworn testimony in criminal court cases may also have helped clear a path for children to speak unsworn in other cases, and other courts, where their evidence was deemed essential. An important limitation on the 1892 law was that it only permitted children's unsworn testimony in criminal cases; thus, in civil trials, children under 14 still had to demonstrate their understanding of an oath in order to testify.[63] However, more informal procedures prevailed in specialized courts for delinquent and neglected children, established in New York and many states in the early twentieth century.[64] In 1924, the New York legislature expressly

[59] *People v. Johnson*, 77 N.E. 1164 (N.Y. 1906).

[60] Id. at 1167, 1168.

[61] Id. at 1168.

[62] Wigmore, *A Treatise* (1923), 887.

[63] The majority view was that the change in criminal procedure did not affect civil cases, where "[u]nsworn testimony of a child [was] inadmissible." *Stoppick v. Goldstein*, 160 N.Y.S. 947, 948 (N.Y. App. Div. 1916); see also *Gehl v. Bachmann-Bechter Brewing Co.*, 141 N.Y.S. 133, 136 (N.Y. App. Div. 1913); *Neustadt v. New York City Ry. Co.*, 104 N.Y.S. 735, 735 (N.Y. App. Term 1907).

[64] See David S. Tanenhaus, *Juvenile Justice in the Making* (Oxford: Oxford University Press, 2004), ch. 2; Sobie, *The Creation of Juvenile Justice*, ch. 6. As historians of juvenile justice have observed, advocates for juvenile courts believed that encouraging accused juvenile delinquents to speak, whether in the courtroom or in judges' chambers, was essential both for gathering information and for the "rehabilitative process." Tanenhaus and Bush, "Toward a History of Children as Witnesses," 1068; see also "Children's Court Opens: Kindly Methods Used in Examining Juvenile Delinquents," *New York Times*, September 3, 1902. Juvenile courts established a new forum for children to speak in delinquency and neglect cases, a crucial development in children's history; however, this article does not focus on the juvenile court system, but rather the evidence-law reforms that enabled more children to testify, formally, in the adult court system—that is, the criminal and civil trial courts that might previously have excluded their evidence.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

permitted judges in "children's courts" (what other states termed juvenile courts) to "dispense with the formality of ... [the] oath" when "taking the testimony of children," which was likely already their usual practice.[65] For courts tasked with extracting information about children and their families in delinquency and neglect cases, the oath requirement was not sacrosanct; it was an obstacle. Thus, the oath requirement fell away in juvenile courts, even as civil trial courts continued to exclude unsworn testimony.

Though it struck a significant blow to the common-law oath requirement, the 1892 reform also illustrated lawmakers' reluctance to remove all restrictions on children's evidence. Embedded in the reform was an important limitation: in cases where the court permitted a child to testify unsworn, there could be no conviction "upon such testimony unsupported by other evidence."[66] That rule was not an innovation, but a requirement that the criminal code attached to various types of evidence deemed inherently unreliable.[67] Notably, New York's rape law, as amended in 1886, contained a similar corroboration requirement, meaning that a rape complainant's testimony must be supported by other evidence on every element of the charge.[68] Despite criticisms in many quarters, including Wigmore's treatises, that rule endured until the late twentieth century, when the legislature limited it to a narrow class of rape cases.[69] The rule requiring corroboration of children's unsworn testimony in criminal cases remains.[70] In the late nineteenth and early twentieth centuries, the corroboration requirement for children's unsworn testimony—together with the corroboration requirement for child rape complainants, sworn or unsworn—produced multiple reversals of convictions for insufficient evidence.[71] New York trial transcripts offer evidence that prosecutors preferred to offer young witnesses' testimony under oath, if the judge agreed, while defense counsel preferred those witnesses to testify unsworn, since it entitled the defendant to an instruction that the jury could not convict without corroboration because the witness was not under oath.[72]

[65] 1924 N.Y. Laws 512; see also "A Morning at the Children's Court," *New York Times*, May 20, 1906. The same rule appears in New York's modern Family Court Act. See N.Y. Family Court Act § 152 (b).

[66] 1892 N.Y. Laws 590.

[67] For example, like many states, New York has long required corroboration of accomplice testimony. Historically, that requirement affected prosecutions under incest and sodomy statutes, which commonly defined the defendant and complaining witness as co-accomplices; however, minors were usually not treated as accomplices. Sometimes, though, in prosecutions of men for sexual assault of boys under sodomy statutes, courts noted the "dilemma" that the young complaining witness was either "so deficient in intelligence as not to understand the nature of the crime or the bearing of his testimony, in which case he was not such a competent witness, ... or else ... he was mentally competent, in which event, ... he was capable of consenting, and thus became an accomplice." *People v. Deschessere*, 74 N.Y.S. 761, 763 (N.Y. App. Div. 1902).

[68] See 1886 N.Y. Laws 953.

[69] See Wigmore, *A Treatise* (1923), 1: 378. For the current rule, see N.Y. Penal Law § 130.16.

[70] See N.Y. Crim. Proc. Law § 60.20 (3).

[71] See, e.g., *People v. Plath*, 3 N.E. 790, 794 (N.Y. 1885); *People v. Page*, 56 N.E. 750, 752 (N.Y. 1900); *People v. Gralleranzo*, 66 N.Y.S. 514, 516 (N.Y. App. Div. 1900); *People v. Shaw*, 142 N.Y.S. 782, 784–85 (N.Y. App. Div. 1913); see also Robertson, *Crimes Against Children*, 126–27.

[72] See, e.g., *People v. Badrian*, TTC case 1412 (1911), 56.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

Another consequence of corroboration rules, particularly in prosecutions of sexual offenses against children, was to elevate the importance of medical evidence.[73] The NYSPCC played a key role in supplying that corroborative evidence. The Society employed physicians to examine children alleged to be the victims of rape or physical abuse, "to corroborate or disprove the truth of the assertion," and to testify in court about their findings.[74] The NYSPCC also successfully lobbied for a 1905 law that created an exception to the physician–patient privilege, whereby doctors and nurses could be "required to testify" about the condition of a patient under 16 years old who appeared to be "the victim or the subject of a crime."[75] In Anna Pollack's case, for example, a "physician for the children's society," testified that he found evidence of "recent penetration by a blunt instrument," the standard language that doctors used to support charges of sexual intercourse with a virginal girl.[76] Prosecutors also called NYSPCC officers to testify about their investigations, including in Anna's case, and the NYSPCC's manuals urged officers to record any inculpatory statements that defendants made upon arrest, because "frequently such testimony by the officer is the sole corroboration of a child's charges against an adult."[77]

With the statute permitting children's unsworn testimony, prosecutors, as in Anna's case, found another source of corroborative evidence for child rape complainants: unsworn testimony by other children who might otherwise be too young to testify under oath. In *People v. Blandoli*, 11-year-old Julia Rottenberg offered eyewitness testimony about the defendant's conduct, not under oath, after Judge Mulqueen examined her and concluded it was "better" not to swear her.[78] The judge's examination of Julia does not read very differently from his questioning of Anna, the 13-year-old complaining witness, suggesting that factors not visible in the trial transcript—possibly, the more childish appearance and demeanor of a girl 2 years Anna's junior—may have influenced the judge's determination that Anna could testify under oath, but Julia should not.[79] As the next Part shows, competency examinations turned on judges' case-by-case discretion, more so than any formal rule of law; thus, even as many judges embraced the trend toward a more

[73] On doctors' role in rape prosecutions in the nineteenth and early twentieth centuries, see Stephen Robertson, "Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823–1930," *Journal of the History of Sexuality* 8, no. 3 (1998): 345–88; and Lammasniemi, "'Precocious Girls,'" 17–18.

[74] NYSPCC, Twenty-Fourth Annual Report (1898), 9.

[75] 1905 N.Y. Laws 606; see also Sixteenth Annual Convention (1905), 23, NYSPCC Archive. However, according to an examining physician for the NYSPCC, many a doctor was "loath, especially if the injury is slight, to report it to the proper authorities, fearing if he does so, that he may be brought to court as a witness." William Travis Gibb, "Indecent Assaults upon Children," in *A System of Legal Medicine*, 2nd ed., eds. Alan McLane Hamilton and Lawrence Godkin (New York: E. B. Treat & Co., 1900), 1: 656.

[76] *People v. Blandoli*, TTC case 1494 (1912), 32; see also *People v. Badrian*, TTC case 1412 (1911), 30.

[77] Instructions for Officers and Staff of the New York Society for the Prevention of Cruelty to Children (1931), 9, NYSPCC Archive.

[78] *People v. Blandoli*, TTC case 1494 (1912), 66.

[79] See id., 65–66.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

flexible standard for child witnesses' qualifications, in many ways it remained a fickle test.

The Capacity to be Sworn: Judicial Examination of Children's Competency

New York's 1892 law created a route for the admission of young children's unsworn testimony in criminal cases, but it did not change the basic rule governing the admission of children's sworn testimony. The admissibility of a child's sworn testimony depended on the trial court's assessment of whether the child was competent to take the oath—a discretionary determination, subject to deferential appellate review, and governed by few statutory guidelines. New York's nineteenth-century statute directed courts to "examine an infant ... to ascertain his capacity and the extent of his knowledge."[80] In a procedure particular to child witnesses, when a party called to the stand a child under the presumptive age of capacity, unless the opposing party agreed to the witness, the court conducted a preliminary examination, or voir dire, meant to assess whether the child was competent to be sworn. Except in jurisdictions that have eliminated the competency inquiry, that examination remains the law's primary screening device for children's evidence. As court decisions and transcripts of child witnesses' examinations reveal, several features of the modern competency inquiry developed around the turn of the twentieth century, forged by a growing demand for children's testimony and new ideas about children's moral and mental development.

In New York courts in this period, competency examinations varied from case to case, but a few patterns emerged. First, appellate courts, as well as NYSPCC officers, reminded trial courts of their obligation to examine children offered as witnesses to assess their competency, and instruct them if necessary, rather than simply excluding children who were under the presumptive age of competency. In addition, at least some courts moved away from what Wigmore called the "theological test"—a test of whether the witness appreciated the religious significance of swearing—and instead probed children's ability to perceive and describe events, to distinguish truth from falsehood, and their recognition of a moral duty to tell the truth. Finally, courts' willingness to qualify children as witnesses depended in part on the nature of the case, and the state's need for the evidence.

New York appellate courts reaffirmed that when a party offered a child as a witness, however young, trial judges had not only discretion, but an obligation to conduct a "preliminary examination of the witness ... to ascertain her capacity and the extent of her knowledge," making clear that the exclusion of a child's testimony based on age, without any examination of the child, was reversible error.[81] Meanwhile, as frequent participants in cases involving child witnesses, NYSPCC officers reminded trial judges of their obligations,

[80] N.Y. Code of Civil Procedure § 850 (1881); see also N.Y. Code of Criminal Procedure § 392 (1881).

[81] *Ryan v. Hall Co.*, 193 N.Y.S. 952, 952 (N.Y. App. Div. 1922).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

and monitored how they conducted preliminary examinations of children, while NYSPCC manuals trained officers on salient points of law.[82] For example, in 1903, NYSPCC president John Lindsay wrote to a judge of Brooklyn's newly created children's court, to underscore courts' "right and duty ... to see that a child of tender years, ignorant of the nature and obligation of an oath, is properly instructed in that regard before its competency as a witness is determined."[83] Trial judges could not omit the preliminary examination, but they had latitude in how to conduct it, and how to evaluate a child's answers. In a Texas man's appeal from a murder conviction based on a 5-year-old boy's sworn testimony, the U.S. Supreme Court stated the prevailing view in 1895, citing caselaw from state courts around the country: "The decision of [a child's competency] rests primarily with the trial judge, who ... may resort to any examination which will tend to disclose [the child's] capacity and intelligence, as well as his understanding of the obligations of an oath," that is, his appreciation of "the difference between truth and falsehood, and the consequences of telling the latter."[84] New York courts likewise affirmed trial judges' discretion to permit children to testify under oath, based on children's indications that they "understood that to tell a lie under oath was wrong, and that [they] might be punished for it."[85] The test of competency articulated by New York courts in the late nineteenth century echoed the one stated by eighteenth-century English jurists, but it had changed emphasis in a few important respects.

Increasingly, a child's acknowledgment that lying was "wrong" and would be "punished" sufficed to establish the child's competency to take the oath, without proof that the child understood the oath's religious significance. New York trial transcripts from the turn of the twentieth century offer some evidence of that trend: as in Anna Pollack's case, judges could simply ask whether it was "good or bad to lie," without testing the child's belief in divine punishment for false swearing.[86] Though judges often continued to ask about a child's belief in God, or Sunday school experience, they were satisfied that children could take the oath where they had an age-appropriate concept of the worldly consequences of lying, "in and out of court"—for instance, where an 11-year-old boy stated that "for the former his parents would whip him, and for the latter

[82] See Manual of the New York Society for the Prevention of Cruelty to Children (1888), 10, NYSPCC Archive; Manual of the New York Society for the Prevention of Cruelty to Children (1896), 10, NYSPCC Archive.

[83] John D. Lindsay to Hon. Robert J. Wilkin, October 20, 1903, in Children's Court Clipping Book, 1906–39, NYSPCC Archive. The longstanding rule was that courts had discretion to pause proceedings in order for a child to receive instruction on the oath, though it did not ensure the child would pass the test. See Joseph Chitty, *Practical Treatise on the Criminal Law* (London: A. J. Valpy, 1816), 1: 405; Greenleaf, *A Treatise*, 1: 411.

[84] *Wheeler v. United States*, 159 U.S. 523, 524–25 (1895). In *Wheeler*, the Supreme Court concluded that the test was met where the trial judge, through "not very extended examination," heard from the boy that "he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him, and that he was going to tell the truth." Id. at 524.

[85] *People v. Linzey*, 29 N.Y.S. 560, 560–61 (N.Y. Sup. Ct. 1894).

[86] *People v. Blandoli*, TTC case 1494 (1912), 31. But compare *People v. Dobias*, TTC case 1355 (1911), 6.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

he would be sent to prison."[87] A trial judge properly allowed an adolescent boy to testify, New York's high court held, where he told the judge that "he knew what the punishment is for swearing falsely and that he knew what perjury means," suggesting he had "some conception of ... the obligations of an oath," even though he responded "no" when asked if he knew "the nature of an oath."[88] In the early nineteenth century, by comparison, courts regularly "question[ed] infants of tender years ... as to their religious knowledge, and whether they believe in a Supreme Being, and a future state of rewards and punishments," as a prerequisite for taking the oath.[89] One reason for the shift in approach was New York's repeal of the common-law rule disqualifying witnesses for lack of religious belief, in the mid-nineteenth century.[90] However, as Wigmore noted, those reforms did not immediately end courts' exclusion of "children qualified to testify but lacking in theological understanding" of the oath.[91] By the late nineteenth century, the "theological" test of oath understanding had not altogether disappeared, but it faced mounting criticism, when applied to exclude children.[92]

As Wigmore and many judges saw it, assessing children's competency based on their understanding of an oath, particularly when that assessment took the form of a "crude" religious test, failed to measure more relevant indicia of testimonial reliability: witnesses' capacities for "observation," "recollection," and "communication," and their "sense of moral responsibility ... to speak the truth."[93] The oath understanding test, courts increasingly recognized, was a poor gauge of children's actual moral and cognitive maturity.[94] As the New York Court of Appeals explained, a "child may not be able to understand the nature of an oath and yet be capable of telling what he saw and heard on a certain occasion with entire accuracy."[95] In New York, critique of the oath

[87] *Jones v. Brooklyn, B. & W.E.R. Co.*, 3 N.Y.S. 253, 256 (N.Y. City Ct. 1888), *aff'd*, 13 N.E. 1098 (N.Y. 1890).

[88] *People v. Washor*, 89 N.E. 441, 442 (N.Y. 1909). Current New York law states much the same standard. See N.Y. Crim. Proc. Law § 60.20; *People v. Morales*, 606 N.E.2d 953, 955 (N.Y. 1992). Courts in other states in the early twentieth century also took note of children's awareness of the secular, legal consequences of false testimony, including punishment for perjury, though some courts also cautioned that the competency test should not require children to explain legal terminology "which even adults would often find difficult of ready definition." *Houston & T.C. Ry. Co. v. Roberts*, 201 S.W. 674, 676 (Tex. Civ. App. 1918).

[89] *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. 98, 105 (N.Y. Sup. Ct. 1820).

[90] See New York Constitution of 1846, art. 1, § 3.

[91] Wigmore, *A Treatise* (1923), 3: 888–89 (italics omitted).

[92] Criticisms appeared in Wigmore's treatises and in the decisions of multiple state high courts around the turn of the century. See, e.g., Wigmore, *A Treatise* (1904), 3: 2358; *State v. Reddington*, 64 N.W. 170, 172 (S.D. 1895); *Commonwealth v. Furman*, 60 A. 1089, 1090 (Pa. 1905); *Crosby v. State*, 124 S.W. 781, 783 (Ark. 1910) (McCulloch, C.J., dissenting).

[93] Wigmore, *A Treatise* (1904), 3: 2359; id., 1: 638–39. Wigmore's list of relevant cognitive capabilities echoed Bentham's view that witnesses' competency should depend on their "faculties" of "perception, judgment, memory, and expression," rather than the eighteenth-century test of oath understanding. Bentham, *Rationale of Judicial Evidence*, 7: 429.

[94] Legal scholars continue to criticize the competency test, as applied today, as "both overinclusive and underinclusive." McGough, *Child Witnesses*, 102.

[95] *People v. Johnson*, 77 N.E. 1164, 1168 (N.Y. 1906).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

understanding test helped produce important legislative reform allowing young children to testify unsworn in criminal cases. Though most other states lacked similar legislation in the early twentieth century, multiple state high courts declared that trial courts could admit children to testify based on a "promise" to tell the truth, or similar acknowledgment of moral duty, rather than a formal oath or affirmation.[96] Those accommodations reflected a conscious effort to modernize the test of children's competency, to adapt it to the perceived "facts of child-nature."[97]

Though practice was not uniform, courts in this period worked their way toward a more flexible standard of competency, testing children's cognitive capabilities and "sense of moral responsibility," rather than their knowledge of the "impiety of falsehood" under oath.[98] In the 1911 trial of Antonio Blandoli, for example, the judge was satisfied with a fairly perfunctory inquiry into the young witnesses' concept of the duty to tell the truth. Judge Mulqueen asked the complaining witness if it was "good or bad to lie," and accepted her reply that it was "bad" to lie, "[b]ecause you don't tell the truth."[99] The court's investigation of the witnesses' perceptual abilities was more concrete. To assess what the girls meant by "the truth," Judge Mulqueen asked one of them if the court officer before her was "a black man … or a white man," and asked another if it was raining outside—not so different from how courts a century later tested children's ability to describe their reality accurately.[100] The judge also asked the complaining witness if it would be a lie to say that the court officer had "hurt" her, a question meant to test her grasp of the wrongfulness of false accusations.[101] The judge declined to ask her about her belief in God or divine punishment for lying under oath; instead, the core of the inquiry concerned her practical understanding of the difference between truth and lies and her capacity to relate facts accurately. In cases where trial judges admitted children to testify after only a brief voir dire—focusing on the witnesses' knowledge that they faced punishment for lying—judges on appeal deferred to trial judges' discretion; if the child's testimony turned out to be full of contradictions, appellate courts reversed based on the insufficiency of the evidence, not the decision to allow the child as a witness.[102] Those holdings left

[96] See, e.g., *Clark v. Finnegan*, 103 N.W. 970, 970 (Iowa 1905); *Commonwealth v. Furman*, 60 A. 1089, 1089 (Pa. 1905); *De Groot v. Van Akkeren*, 273 N.W. 725, 729 (Wis. 1937). Some states have enacted a similar rule by statute—Michigan, for example, as early as 1887. See 1887 Mich. Pub. Acts 90.

[97] Wigmore, *A Treatise* (1904), 1: 641.

[98] Id., 638–39; *R. v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 203 (K.B. 1779).

[99] *People v. Blandoli*, TTC case 1494 (1912), 31. Similar exchanges appear in trial transcripts many decades later. Compare, for example, *Harville v. State*, 386 So. 2d 776, 779 (Ala. Crim. App. 1980).

[100] *People v. Blandoli*, TTC case 1494 (1912), 30, 65. Compare, for example, the competency inquiries in *Baldit v. State*, 522 S.W.3d 753, 757 (Tex. App. 2017); and *State v. Hicks*, 352 S.E.2d 424, 426 (N.C. 1987).

[101] *People v. Blandoli*, TTC case 1494 (1912), 30.

[102] See, e.g., *People v. Donohue*, 100 N.Y.S. 202 (N.Y. App. Div. 1906); *People v. Ledwon*, 46 N.E. 1046 (N.Y. 1897). In *Donohue*, where a police officer was charged with molesting a 10-year-old girl, the trial judge allowed the complainant to testify under oath after eliciting that she knew she "would be punished" for lying. Trial transcript, at 10, Case on Appeal in *People v. Donohue* (1906), New York Supreme Court Appellate Division Records, New York State Library. On appeal, the

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

room for trial judges to develop a permissive test of children's competency, even as they registered concerns about young children's reliability.

Records of competency examinations also revealed an emerging view that courts bore some responsibility to shield children from the stress of in-court testimony—both to protect children's wellbeing, and to produce more reliable testimony. As the New York Court of Appeals explained, the preliminary examination could be "an informal conversation upon indifferent subjects, designed to put the child at ease so that he will talk naturally."[103] Some judges favored a lengthy inquiry, touching on the witness's family, schooling, and so on, before probing the child's knowledge of the duty to tell the truth and the punishment for lying under oath. Wigmore saw that method—similar to some juvenile court judges' approach to questioning children—as a "sound and sensible way to ascertain a child's capacity."[104] Wigmore offered a Massachusetts judge's anecdote about examining a 7-year-old witness who "looked frightened," but who cheered up when the judge asked him about baseball and school, and turned out to be "one of the best witnesses." The judge reflected that, if he had first asked the young witness "in a stern voice, 'Do you understand the nature of an oath?' ... the boy would have broken down in a crying spell."[105] Judges' experience with child witnesses—in particular, children's distress under cross-examination—likely influenced how they saw their role as gatekeepers of evidence.[106]

Finally, the nature of the case, and the expected content of a child's testimony, likely affected judges' willingness to allow young children to be sworn. In cases where children's evidence was considered indispensable—in particular, prosecutions of crimes against children and violations of child welfare laws—the incentives to permit the child to testify were strongest. As advocates for the free admission of children's testimony had long argued, excluding children in such cases denied them legal protection and hampered the state's capacity to enforce criminal law and regulations.[107] Where the child was not

defendant argued that the trial judge erred in allowing the complainant and her sister to testify without further probing their oath understanding—including whether the young complainant "knew the character of the punishment [for lying], human or divine"—and warned that children "are often the most accomplished of liars, ... with an air of angelic ingenuousness." Defendant's brief, at 5, 31, id. The Appellate Division found "no error" in the trial court's decisions allowing the children's testimony, but it reversed the conviction for insufficient evidence, citing the complainant's multiple contradictory statements and non-answers. *Donohue*, 100 N.Y.S. at 203.

[103] *People v. Johnson*, 77 N.E. 1164, 1167 (N.Y. 1906).

[104] Wigmore, *A Treatise* (1923), 3: 871.

[105] Id., quoting Edgar Jay Sherman, *Some Recollections of a Long Life* (Boston: privately printed, 1908). Of course, long, unfocused competency inquiries carry the risk of exhausting children without necessarily shedding more light on their reliability as witnesses. See McGough, *Child Witnesses*, 104.

[106] In addition to newspaper coverage of trials, New York criminal court transcripts disclose multiple examples where children began to cry and left the stand when asked about the consequences of lying, during cross-examination or a competency examination. See, e.g., *People v. Marco*, TTC case 2157 (1916); *People v. Sherman*, TTC case 2649 (1919).

[107] Ultimately, that argument formed the basis for constitutional challenges to children's exclusion. See *Santillian v. State*, 182 S.W.2d 812, 815 (Tex. Crim. App. 1944); compare *Ambles v. State*, 383 S.E.2d 555, 557–58 (Ga. 1989).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

the state's complaining witness, however, that argument had less power. In divorce suits, for example, some courts showed reluctance to admit the parties' children as witnesses, particularly when children were called to testify against their mother's character.[108] One New York judge in a 1905 divorce case declared that "no child of eight years [would] ever be permitted to testify in his court, especially when the evidence [was] intended to injure a mother," although appeals courts reprimanded trial judges who excluded competent children in divorce cases.[109]

Ultimately, the state's interest in children's evidence, more so than the child's interest in testifying, tended to shape judges' determinations of whether children should be sworn. The need for children's evidence, in order to enforce a slate of new child protection laws, also prompted the revival of an aggressive method of securing children's testimony: court-ordered detention of child witnesses.

Saving the Prosecution, Saving the Child: The Detention of Child Witnesses

In Progressive-Era New York, the law became more permissive and, at the same time, more coercive in its treatment of child witnesses. The greater prevalence of children's testimony in this period was partly the product of evidence-law reforms that removed barriers to children's evidence, and partly a consequence of new efforts to compel children to testify at trials and grand juries. Most notably, lawmakers and judges revived material witness detention as a tool to ensure children's appearance as prosecution witnesses. Thus, for many young victims and witnesses to crime, the law no longer silenced them, but commanded them to speak. The NYSPCC again played an important role, both in advocating the regular use of witness detention, and in housing and transporting child witnesses whom courts committed to its care. Judges and NYSPCC leaders' justifications for the detention of child witnesses, in the controversies that erupted, revealed how child protection laws propelled both the liberalization of evidence law and the expansion of state authority over children's lives. Defenders of pre-trial witness detention presented it both as a

[108] In the late nineteenth and early twentieth centuries, state courts presented different views about whether young children should be permitted to testify in divorce cases, but often the grounds for the divorce were relevant. Similar to the rationale for allowing children's testimony in criminal prosecutions of domestic violence, in wives' divorce suits alleging cruelty, it was deemed a "necessity" for children to testify, since "ill-usage and cruel treatment of the wife do not generally occur in public places, or in the open face of day." *Freeny v. Freeny*, 31 A. 304, 304 (Md. 1895) (internal quotations omitted). In husbands' suits alleging adultery, on the other hand, allowing children to testify about their mother's lack of chastity was seen as "a great wrong to them, not only as it touches them in their natural affections, but also as it tends to destroy their purity of mind and conduct." *Crowner v. Crowner*, 6 N.W. 198, 198 (Mich. 1880).

[109] "Rules Out Child Witness: Judge Condemns Practice of Putting Children on Divorce Stand," *New York Evening Telegram*, March 31, 1905, in Children's Court Clipping Book, 1906–39, NYSPCC Archive; compare "Child Testifies for Mother: Eleven-Year-Old Girl Accepted as a Divorce Case Witness," *New York Times*, March 7, 1913; *Powers v. Powers*, 66 N.Y.S. 9 (N.Y. App. Div. 1900).

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

necessity for the enforcement of child welfare laws and the prosecution of crimes against children, and as a safeguard against the special dangers that many associated with child witnesses, namely, their vulnerability to manipulation and suggestion.

New York law had long permitted criminal courts to detain witnesses, of all ages, before and during trial, but the scope of that power, and its uses, evolved over time.[110] As incarceration of witnesses became more common in the mid-nineteenth century, New York City and other counties created houses of detention to hold witnesses separate from detainees charged with crimes.[111] Throughout the nineteenth century, a portion of those jailed as witnesses were children. In his 1842 visit to New York City's jail, for example, Charles Dickens observed a "lonely child, of ten or twelve years old," held as "a witness against his father."[112] A *New York Times* reporter visiting the city's newly constructed House of Detention in 1859 found that the keeper had formed a "class" of "children detained as witnesses," who were to receive basic schooling while incarcerated.[113] Conditions at the House of Detention deteriorated; in 1874, a grand jury found that the facility was "utterly unfit for the habitation of any human being," and warned of its "demoralizing effect upon the young when so confined."[114] After controversy mounted around police and prosecutors' use of the witness detention law against adults—primarily, as a way of pressuring uncharged suspects, too poor to afford bond, to cooperate—lawmakers restricted the scope of the statute, to cover only accomplices, in 1883.[115] The legislature later revived courts' expansive power to detain or demand security from any person determined to be a "necessary and material witness for the people in a criminal action," so long as the person had an opportunity to challenge the determination at a hearing.[116]

Around the same time that the legislature restricted adult witnesses' detention, the detention of children as witnesses took off on another track, now closely linked to the enforcement of new child protection laws, and aided by institutions recently created for delinquent and neglected children. In 1881, New York passed legislation that specifically authorized the pre-trial detention of child witnesses in criminal cases, and created a role for children's institutions as custodians of child witnesses. The legislature amended the portion of the penal code that set forth various grounds on which courts could commit children to institutions—children lacking "proper guardianship," and the like—by adding another basis for children to be detained.[117] The statute provided

[110] See *Revised Statutes of the State of New York* (1829), 2: 709. On the history of adult material witness detention in New York, and its relation to policing, see Wesley MacNeil Oliver, "The Rise and Fall of Material Witness Detention in Nineteenth Century New York," *NYU Journal of Law and Liberty* 1, no. 2 (2005): 726–81.

[111] See 1857 N.Y. Laws 210; 1875 N.Y. Laws 531.

[112] Charles Dickens, *American Notes* (1842), ch. 6.

[113] "The Home for Witnesses," *New York Times*, October 4, 1859.

[114] "Grand Jury Presentments," *New York Times*, January, 1874.

[115] See 1883 N.Y. Laws 589.

[116] 1904 N.Y. Laws 1062.

[117] See 1877 N.Y. Laws 486.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

that "[a]ny magistrate having criminal jurisdiction may commit temporarily to an institution authorized by law to receive children … any child under the age of sixteen years held for trial on a criminal charge … [and] any such child held as a witness to appear on the trial of any criminal case."[118] An 1888 amendment to the Code of Criminal Procedure confirmed courts' power to order the detention of witnesses under 16 years old.[119] In addition, when the legislature amended the Code to allow courts to accept a parent's promise to produce a child arrested for a minor offense, in lieu of money bail or detention, it expressly excluded children held as witnesses from that option.[120] NYSPCC president John Lindsay helped author that legislation.[121]

The NYSPCC promptly seized on the child detention law as a tool for "secur[ing] the attendance of … witnesses" and the "preservation of evidence" in criminal prosecutions, as the president reported in 1898.[122] NYSPCC manuals instructed officers on obtaining court orders for the commitment of children as witnesses until a plea or verdict was reached.[123] In addition, the NYSPCC began housing at its Manhattan headquarters children detained as witnesses, as well as children charged with crimes, and transporting them to and from the courthouse.[124] The rooms where children were held, the *New York Times* reported, were "fitted up so as to dispel the jail idea," though the windows were "heavily barred, lest some ambitious boys and girls … attempt escape."[125] The NYSPCC's annual reports around the turn of the century contained frequent references to children "committed to the Society temporarily as … witness[es]," in prosecutions ranging from men accused of rape and prostitution offenses, to parents who permitted children to hawk newspapers, to shop owners alleged to have sold alcohol or tobacco to minors.[126] As the Westchester SPCC president explained, Society officers preferred to enforce bans on children's consumption of tobacco by compelling children to testify against the sellers, rather than prosecuting young buyers: "Never consider the child a criminal if we can avoid it, but … use them as witnesses."[127] Of course, the threat of potential prosecution—under laws that treated illicit

[118] 1881 N.Y. Laws 670.

[119] See 1888 N.Y. Laws 385–386.

[120] See 1905 N.Y. Laws 1668.

[121] See *The Cyclopaedia of American Biography*, ed. James E. Homans (New York: Press Association Compilers, 1918), 8: 364.

[122] NYSPCC, Twenty-Fourth Annual Report (1898), 10.

[123] See Manual of the New York Society for the Prevention of Cruelty to Children (1888), 133–135, NYSPCC archive.

[124] NYSPCC, Twenty-Fourth Annual Report (1898), 9–10. Records of New York's asylums for delinquent and neglected children show they also held some children committed as material witnesses in the late nineteenth century. See, e.g., New York Juvenile Asylum, Forty-Ninth Annual Report (1900), 93.

[125] "New York's New Children's Court," *New York Times*, August 24, 1902.

[126] NYSPCC, Twentieth Annual Report (1894), 46; see also NYSPCC, Sixth Annual Report (1881), 85; NYSPCC, Eighteenth Annual Report (1892), 31; NYSPCC, Thirty-Ninth Annual Report (1914), 47; and NYSPCC, Forty-First Annual Report (1916), 55.

[127] Ninth Annual Convention (1898), 105, NYSPCC Archive.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

sexual behavior and substance use as forms of juvenile delinquency—provided an additional inducement for children to testify for the state.

The NYSPCC justified the practice of removing children from home and detaining them as witnesses not just as a convenience for law enforcement, but also as a way to make children's testimony more reliable—to keep their evidence "intact."[128] In particular, NYSPCC officials, prosecutors, and judges raised concerns that parents and accused defendants pressured children to change their testimony, making confinement and supervision necessary in order to "prevent the child from being contaminated, or being made to tell a different story on the stand, or putting [the child] out of the way."[129] In their view, it was better to jail children than to "cause the prosecution to fall to the ground."[130] They turned the concerns underlying legal restrictions on children's testimony—notions that children were uniquely vulnerable to pressure and suggestion—into arguments for sequestering children and compelling their testimony, in the name of child protection.

That justification, though, came under attack from those who saw child witnesses' detention as an unconstitutional denial of bail, an invasion of the home, and an affront to the rights of children and their parents. Witness detention received the most scrutiny when it swept up middle-class children, who otherwise generally escaped the reach of criminal courts and the NYSPCC. In 1902, for instance, the *New York Times* covered outcry over the detention of an 11-year-old boy as a witness in the prosecution of the theater proprietor who illegally sold the boy tickets. The paper quoted the diatribe of the boy's father, a Manhattan diamond broker: the boy "committed no crime," yet was "locked up like a common criminal, and even his own father [was] not allowed to see him."[131] The father was determined to "find out if a child can be kidnapped by a man because he happens to be a Gerry society officer," referring to the NYSPCC by its common nickname.[132] Newspapers also covered controversy around the 1903 case of 14-year-old Morris Moses, committed to the NYSPCC's custody as a witness in the prosecution of the saloon keeper who sold Morris a pint of beer intended for his parents.[133] The NYSPCC frequently complained about defense efforts to "induc[e] the child witness to commit perjury" in prosecutions of alcohol sales to minors, and often sought to detain children in such cases.[134] The NYSPCC's own attorney also defended children's

[128] NYSPCC, Eighteenth Annual Report (1892), 31.

[129] Ninth Annual Convention (1898), 128, NYSPCC Archive; see also NYSPCC, Twenty-Fourth Annual Report (1898), 9.

[130] E. Fellows Jenkins to Hon. John B. Mayo, March 25, 1904, in Children's Court Clipping Book, 1906–39, NYSPCC Archive.

[131] "Child Witness Held in Strict Seclusion: Children's Society Prevents Diamond Broker Seeing His Son," *New York Times*, October 2, 1902.

[132] Id.

[133] For coverage of the case, see "On Denying Bail to Children," *The Sun*, August 13, 1903; "Child Witnesses Entitled to Bail," *New York Herald*, August 13, 1903; "Child Witness Detention," *New York Times*, August 14, 1903; "Reply from Children's Society," *New York Daily Tribune*, August 15, 1903, in Children's Court Clipping Book, 1906–39, NYSPCC Archive.

[134] NYSPCC, Twenty-Sixth Annual Report (1900), 153; see also "Child Witnesses Entitled to Bail," *New York Herald*, August 13, 1903.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

detention against court challenges, which might arise, as in Morris's case, when family members were able to get a lawyer. The trial judge in Morris's case defended the policy of detaining child witnesses to prevent "coaching," to allow "justice [to be] served," and to ensure that "the child [was] saved from making false statements," for his own sake.[135] However, a judge of the intermediate appeals court agreed with Morris's attorney and discharged the boy, calling it "an outrage that a tired mechanic's child, going for a pint of beer, may be cast into prison like a common criminal and actually deprived of bail."[136] The case captured competing views on the state's coercive treatment of child witnesses. To some, it was an "outrage" against the rights of children and their parents, but to SPCC officers, it was the more lenient alternative to prosecuting those same children for illicit conduct, and a critical tool for convicting adult violators.[137]

Other legal challenges to the detention of child witnesses generally failed; the claim that witness detention served the ends of child protection and law enforcement prevailed over objections that detention without bail violated children's due process rights. In 1905, New York Supreme Court dismissed a habeas petition for a girl's release from NYSPCC custody, reasoning that "to sustain a writ … would be decidedly against public policy, and would revert to the disadvantage of the people in the prosecution of the criminal offense."[138] The same year, the court confirmed the state's unconstrained authority to hold children as witnesses when it rejected a father's claim that his daughter's commitment violated the criminal procedure code and the Constitution—specifically, that it was "unconstitutional in discriminating against children and depriving them of their liberty without due process of law."[139] The girl, "the victim of a revolting assault," had been committed to the NYSPCC's custody as a witness in the prosecution of her alleged assailant.[140] The girl's treatment was not unusual, as courts commonly ordered the detention of complaining witnesses in statutory rape cases.[141] In dismissing the habeas petition, Supreme Court justified the detention of children based on their distinctive legal status. The court held that the statutory provisions governing the detention of adult witnesses, which offered greater procedural protections, did not apply to child witnesses. Moreover, the girl suffered no

[135] "Child Witness Detention," *New York Times*, August 14, 1903.

[136] *The Sun*, August 13, 1903; see also *New York Herald*, August 13, 1903; Howard Townsend to John D. Lindsay, August 12, 1903, in Children's Court Clipping Book, 1906–39, NYSPCC Archive.

[137] See Ninth Annual Convention (1898), 105, NYSPCC Archive.

[138] *In the matter of the custody of Annie Markewitch* (N.Y. Sup. Ct. 1905), in Children's Court Clipping Book, 1906–39, NYSPCC Archive.

[139] *People ex rel. Bolt v. Society for the Prevention of Cruelty to Children*, 95 N.Y.S. 250, 250 (N.Y. Sup. Ct. 1905).

[140] Id.

[141] On the detention of statutory rape complainants in New York, see note 149 below. In other jurisdictions, too, courts threatened reluctant child witnesses with contempt charges and confinement in jail or a juvenile reformatory. See, e.g., Trial transcript, at 15, Case on Appeal in *People v. Hamilton* (1873), Supreme Court of California Records, California State Archives; Inmate record (1913), in Youth Authority Records, F3738, Folder 106 (Whittier Inmate History Register, 1912–17), California State Archives.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

constitutional deprivation because "unlike an adult witness, [she was] held for her own good, as well as in the interests of society and the enforcement of the criminal laws."[142] The decision both reaffirmed the broad sweep of the state's police power, and reinforced the conviction that child protection depended on children's testimony. But the legal controversy demonstrated that New Yorkers did not accept the state's expanded powers without question.[143]

Despite parents' complaints, the records of the NYSPCC and New York juvenile courts show that the practice of child witness detention continued for decades.[144] Controversy over the practice did generate one legislative reform: an 1896 amendment, modeled on a resolution passed at the NYSPCC's 1894 convention, provided that "cases of offenses by, or against the person of, a child under the age of sixteen years shall have preference over all other cases before all magistrates and in all courts ... both civil and criminal; and where a child is committed or detained as a witness ... such case shall be brought to trial or otherwise disposed of without delay."[145] NYSPCC officers could hardly fail to notice, in Gerry's words, the painful "effects" of young witnesses' "long-continued separation, through no fault of [theirs], from the external world," but rather than ending the practice, they argued for speedier prosecutions.[146]

When the legislature established specialized "children's courts" statewide in 1922, it defined those courts' jurisdiction to include "children who are material witnesses."[147] Children's courts had power to order the detention of children "held for a hearing or as a witness" in facilities maintained by the SPCC or

[142] *Bolt*, 95 N.Y.S. at 251. The court's decision echoed the logic of a series of nineteenth-century cases upholding the confinement of children in juvenile institutions, without trial, under the state's *parens patriae* authority. On those cases, see Douglas R. Rendleman, "Parens Patriae: From Chancery to the Juvenile Court," *South Carolina Law Review* 23 (1971): 218–19, 233–55.

[143] Ultimately, in a series of twentieth-century cases articulating the rights of parents and children under the Due Process Clause, the U.S. Supreme Court recognized constitutional limits on the state's power to interfere with parents' custody of children, and its authority to deprive children of liberty. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923); *In re Gault*, 387 U.S. 1 (1967). Legal challenges to children's detention as material witnesses, like *Bolt*, anticipated those landmark cases.

[144] See, e.g., NYSPCC Forty-Third Annual Report (1918), 21; Instructions for Officers and Staff of the New York Society for the Prevention of Cruelty to Children (1931), 10, NYSPCC Archive. Some prosecutors today continue to use material witness warrants and detention to secure the cooperation and testimony of victims of gender-based violence and trafficking, including minors. For documentation and critique of that practice, see Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (Oakland: University of California Press, 2023), 27, 62–71.

[145] 1896 N.Y. Laws 384–85; see also Fifth Annual Convention (1894), 153, NYSPCC Archive. Reports differed as to whether the calendar preference actually ensured short detentions for child witnesses. See "Child Witness Detention," *New York Times*, August 14, 1903; NYSPCC, Forty-Second Annual Report (1917), 32.

[146] Elbridge Gerry to William L. Strong, May 24, 1896, Early Mayors Records, Box 312, New York City Municipal Archives. Gerry urged Mayor Strong to support adding judges to "relieve the calendar" in New York's felony court, pointing out the many children who were detained for months "in the custody of the Society" because their "testimony [was] required" in rape and murder trials. Id.

[147] 1922 N.Y. Laws 1262–1263. The legislature provided the same jurisdiction to New York City's previously established children's courts. See 1924 N.Y. Laws 498.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

other institution authorized to receive children, or "in the custody of some fit person, subject to the supervision of the court."[148] The annual reports of New York City's children's courts in the 1910s and 1920s show that the courts consistently dealt with approximately 400–500 material witnesses each year, a disproportionate majority of them girls.[149] Two factors drove that gender disparity in witness detention: first, the state's heightened demand for girls' testimony to support sexual assault prosecutions, and second, the popular assumption that female children were especially liable to manipulation and invention.[150]

Another challenge to the detention of child witnesses came during criminal trials, when defense attorneys flipped the NYSPCC's argument that detention prevented the "contamination" of children's evidence. Keeping child witnesses in the NYSPCC's custody, some defendants argued, simply allowed the NYSPCC to apply its own improper influence. In the 1911 trial of a man charged with assaulting his niece, for example, defense counsel asked the 14-year-old complaining witness whether she had been "persuaded" to accuse her uncle because she was "very anxious to leave the Society where [she was] kept"—as he put it, "practically in prison"—and whether NYSPCC officers had coached her testimony.[151] Some jurors appeared skeptical that detention made children's testimony more trustworthy. In Anna Pollack's case, for instance, a juror asked the NYSPCC officer if the girls, while held as witnesses, were "permitted to mingle with one another" and talk with their parents.[152] In addition, jurors might be made aware that statutory rape complainants faced the threat of longer incarceration for sexual delinquency if they did not cooperate and testify.[153] Making sexual abuse allegations left girls in a bind: they incurred

[148] 1922 N.Y. Laws 1267; 1924 N.Y. Laws 502. For current law governing material witness detention, see N.Y. Fam. Ct. Act § 158; and N.Y. Crim. Proc. Law Art. 620.

[149] Though girls were a minority of the total cases handled by the children's courts—about 10,000 to 15,000 cases of delinquency and neglect each year—they consistently formed the majority of material witness cases, within that total. Court reports clarified that the material witness category "include[d], primarily, the victims in statutory rape cases," who were held by the SPCC and supervised by the children's court to secure their testimony in criminal trials. *Annual Report of the Children's Court of the City of New York* (1925), 49.

[150] On skepticism of girls, see notes 13–14 above. In the growing body of psychological literature on child witnesses in the Progressive Era, which I explore in other work, some authorities presented children, and girls in particular, as "the most dangerous of all witnesses." Guy Montrose Whipple, "The Psychology of Testimony," *Psychological Bulletin* 8, no. 9 (1911): 308.

[151] *People v. Dobias*, TTC case 1355 (1911), 36, 32. For other examples where attorneys referred to the child witness's detention in NYSPCC custody, see *People v. Kaplan*, TTC case 2646 (1919); and *People v. Sherman*, TTC case 2649 (1919).

[152] *People v. Blandoli*, TTC case 1494 (1912), 122.

[153] For example, in a much-publicized sexual assault trial in 1908, one complaining witness "recanted the story she had told the Grand Jury," testifying at trial that she lied because a "Children's Society" agent "had threatened to 'put her away' and keep her from her mother if she did not testify" against the defendant. Prosecutors then charged the teenaged witness with perjury. "Hitchcock Set Free: Girl Recants Story," *New York Times*, March 17, 1908. The Brooklyn SPCC shared an anecdote that revealed the flipside of that dilemma: a young girl refused to testify against the man "charged ... with impairing her morals," and later admitted that "the defendant met her coming from school, and frightened her by telling her that if she testified, the law provided that she

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

the risk of being confined as material witnesses or delinquents, and that very treatment invited suspicions that they fabricated or exaggerated their story in order to satisfy their jailors. Ultimately, although framed as a way to overcome the reliability risks associated with children's testimony, the detention of child witnesses did not remove judges and juries' concerns.

Conclusion

Unreliable yet indispensable, dangerous yet in need of protection, child witnesses posed a problem for the legitimacy of modern evidence law. By the early twentieth century, courts and lawmakers had turned decisively against the eighteenth-century common law's "system of exclusion."[154] If child protection required children's testimony, then the law had to find ways other than categorical exclusion to contain the threat of unreliable evidence. Generally, that meant empowering courts to allow more evidence before the jury, not less. New York exemplified the trend: criminal courts gained discretion to allow children's unsworn testimony, and asserted their authority to compel children to testify for the state. Legal changes helped make children more frequent participants in court, but did not resolve the quandaries surrounding children's testimony.

As New York's story shows, the turn of the twentieth century was a formative period for the modern law governing child witnesses, but it only marked the beginning of a longer, multi-stage transformation in the legal treatment of children's evidence. Recovering this Progressive-Era history has value, though, because it adds a missing chapter, and a layer of complexity, to leading accounts of evidence law modernization. The primary impetus for legal reform, when it came to children's testimony, was not newfound confidence in cross-examination, or in young witnesses' reliability. Rather, shifts in evidence law and court practice fostered the expansion of state authority to serve the goals of the child protection movement. As new substantive laws created a rising demand for child witnesses, evidence law and criminal procedure adapted to meet the demand. Changes in the law governing children's testimony did not, however, resolve questions about what weight that testimony should carry, or what its costs might be, both for the reliability of trial outcomes, and for the wellbeing of child witnesses. The late twentieth century also saw a "revolution" in the law governing children's testimony, where highly publicized cases of child sexual abuse spurred reforms that made children's evidence, including out-of-court statements, more readily admissible, as well as litigation that tested the constitutionality of such reforms, and a burst of social science research on children as witnesses.[155] However, contemporary

must be committed to an institution"—likely referring to laws authorizing girls' commitment as wayward minors. The SPCC presented the story as proving the need to confine children "as material witnesses for the State." Brooklyn Society for the Prevention of Cruelty to Children, Forty-Fourth Annual Statement (1924), 9.

[154] Commissioners on Practice and Pleadings, *New York Field Codes 1850–1865* (Union, N.J.: Lawbook Exchange, 1998), 1: 715.

[155] McGough, *Child Witnesses*, 8.

https://doi.org/10.1017/S0738248024000099 Published online by Cambridge University Press

evidence law has still only partially, or selectively, incorporated empirical findings about the reliability risks of children's testimony and how the law can manage those risks.[156] Looking back to the first wave of reform in the legal treatment of child witnesses, in the late nineteenth century, we observe the beginnings of an enduring dynamic. The policy imperatives of the modern state, more so than a commitment to rational truth-seeking, have powerfully shaped the law governing child witnesses.

The history of children as witnesses also sheds light on the deep and persistent challenge, observed by scholars of children's law to this day, of achieving coherence in the law's construction and treatment of childhood, across different domains.[157] In the Progressive Era, the issue of children's competency to testify exposed a tension between, on the one hand, new substantive laws that aimed to sharpen the category of legal childhood and bring adolescents within its reach, and, on the other hand, evidentiary rules that figured children more like legal adults. Child protection laws demarcated a special status for children, yet the enforcement of those laws required a system of evidence where children were eligible for adult treatment. Young people called to testify as plaintiffs and prosecution witnesses faced something of a dilemma: the need to display both the maturity sufficient to testify and the markers of immaturity needed to win damages or a conviction, where the charges centered on their youthful status. In addition, the child-savers' ambition to enforce child protection laws against adults ran into conflict with the goal of shielding children from harm, as it licensed coercive measures like witness detention, and exposed children to traumatic experiences in court. Those dilemmas have not fully disappeared. As the legal history of children's testimony illustrates, multiple areas of law adapted to enable the state to enforce a modern conception of childhood, but at the same time embedded tensions in that category that the law has long struggled to resolve.

Acknowledgements. For helpful conversations and feedback, I wish to express my deep appreciation to Anne Dailey, Chris Gottlieb, Dan Hulsebosch, Elizabeth Katz, John Langbein, Claire Priest, Noah Rosenblum, David Tanenhaus, and John Witt. I am also grateful to participants in the American Society for Legal History Student Research Colloquium and the Family Law Scholars and Teachers Conference. My research was made possible by the help of librarians at the New York State Library and Archives, the NYSPCC Archive, and John Jay College, among others. I would also like to thank the anonymous readers at *Law and History Review*, Gautham Rao, and the journal's editorial board.

Laura Savarese is a Samuel I. Golieb Fellow at New York University School of Law, a PhD candidate in the Department of History at Yale, and a graduate of Yale Law School <laura.savarese@nyu.edu>.

[156] See id., chs. 6 & 9; Friedman and Ceci, "The Child Quasi Witness."

[157] See, e.g., Susan Frelich Appleton, "Restating Childhood," *Brooklyn Law Review* 79 (2014): 525–49; Anne C. Dailey and Laura A. Rosenbury, "The New Law of the Child," *Yale Law Journal* 127 (2018): 1449–537; Clare Huntington and Elizabeth S. Scott, "Conceptualizing Legal Childhood in the Twenty-First Century," *Michigan Law Review* 118 (2020): 1371–458.

Cite this article: Laura Savarese, "Witnesses for the State: Children and the Making of Modern Evidence Law," *Law and History Review* (2024): 1–30. https://doi.org/10.1017/S0738248024000099