Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 82 | Issue 4 Article 7

Fall 2007

Toward a History of Children as Witnesses

David S. Tanenhaus
William S. Boyd School of Law, University of Nevada-Las Vegas (UNLV)

William Bush
University of Nevada-Las Vegas (UNLV)

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

 Part of the Courts Commons, Evidence Commons, and the Juvenile Law Commons

Recommended Citation

Tanenhaus, David S. and Bush, William (2007) "Toward a History of Children as Witnesses," *Indiana Law Journal*: Vol. 82: Iss. 4, Article 7.
Available at: https://www.repository.law.indiana.edu/ilj/vol82/iss4/7

This Symposium is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.


JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Toward a History of Children as Witnesses

DAVID S. TANENHAUS AND WILLIAM BUSH*

INTRODUCTION

This brief essay is not a comprehensive history of children as witnesses.[1] Instead, it offers a selective overview of recent trends in the historical scholarship on American childhood from the origins of the American Revolution to the early years of the Cold War. This overview of the literature has two purposes. First, it highlights recent socio-cultural scholarship that presents substantive challenges to the conventional ways of understanding the history of children and the law. Second, in so doing, it points out that legal histories concerned solely with doctrinal matters can, and often do, present a limited and distorted window into the past. Instead, the essay argues that the place of children, historically, has been far more complex and contingent than many, both inside and outside the courtroom, have assumed.

Part I of this essay introduces our basic assumptions about legal history, including the difference between how lawyers and historians approach the past. We then explain how our historical approach can help both to ask hard questions, but cannot provide definitive answers.

The next four Parts of the essay analyze four eras in the history of childhood. In Part II, we examine how path-breaking new work forces us to reconsider the place and role of children from the sixteenth to the nineteenth century. These are significant findings, and should force those, such as Justice Scalia, who champion an originalist reading of the Confrontation Clause of the Sixth Amendment to reexamine their historical assumptions.[2] In Part III, we analyze the emergence of new ideas about children in the

---

* David S. Tanenhaus is the James E. Rogers Professor of History and Law at the William S. Boyd School of Law, University of Nevada–Las Vegas (UNLV). William Bush is a Visiting Professor of History in Residence at UNLV. The authors are indebted to Mary D. Wammack for her research and editorial assistance.

1. Excellent introductions to the history and contemporary legal issues include: Gail S. Goodman, *Children's Testimony in Historical Perspective*, 40 J. SOC. ISSUES 9 (1984) [hereinafter Goodman, *Children's Testimony*]; Gail S. Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. SOC. ISSUES 811 (2006); LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM (1994).

2. As Bruce Smith notes, the U.S. Supreme Court has recently drawn on English legal history in a range of cases. He explains:

> In recently holding that a U.S. federal court had jurisdiction to hear habeas corpus petitions filed by persons held at Guantánamo Bay, the Supreme Court cited several seventeenth- and eighteenth-century English precedents, including cases that extended the writ to the Cinque-Ports town of Dover (Bourn's Case, 79 Eng. Rep. 465 (K.B. 1619)), to the County Palatine of Durham (Jobson's Case, 82 Eng. Rep. 325 (K.B. 1626)), and to a ship docked in English waters and bound for Jamaica (Somerset v. Stewart, 20 How. St. Tr. 1 (K.B. 1772)). See Rasul v. Bush, 542 U.S. 466 (2004). In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court looked to English historical practice circa 1791 in determining that the admission of a statement made to police by the suspect's wife (outside the suspect's presence) violated the Sixth Amendment's Confrontation Clause. In *Atwater v.*

first half of the nineteenth century. We demonstrate how this new conception of the child led to many important innovations in American law, including important institutional developments. Part IV focuses on recent studies of the prosecution of children's cases in New York and Iowa to reveal how cultural assumptions about children—and their sexuality in particular—shaped the workings of the criminal justice system. Part V examines the impact of the social sciences on questions involving children and the law.

The essay concludes with a proposal for further historical work on children as witnesses.

I. DOING LEGAL HISTORY

As Laura Kalman recounts in *The Strange Career of Legal Liberalism*, lawyers and historians conceive of, and use, history in dramatically different ways.[3] Lawyers, including Supreme Court Justices, turn to history to answer present-day legal controversies,[4] such as how the U.S. Supreme Court should classify children's testimony; historians, however, are more interested in developing new interpretations of the past, especially ones that capture its foreignness to modern sensibilities.[5] Moreover, lawyers tend to view the past in monistic terms to find, for instance, *the* original understanding of the Confrontation Clause or some other legal concept. Historians, in contrast, view the past in pluralistic terms, as a place where competing conceptions of law played out in multiple arenas.[6] Thus, while lawyers often seem to look for a single thread that can be pulled to recover a concept's sources, historians are more apt to believe that by pulling one thread they will find the concept embedded in a web of intertwining meanings. Both approaches to history (i.e., "lawyers' legal history" and "historians' legal history") are certainly legitimate, but they are very different professional discourses.[7]

Although we appreciate the importance of the legal discourse about the Founders' original intent, especially in light of Justice Scalia's opinion in *Crawford v.*

Lago Vista, 532 U.S. 318 (2001), the Court cited to a string of eighteenth-century English statutes in determining that a police officer's warrantless arrest of a suspect for a misdemeanor seatbelt violation did not violate the Fourth Amendment. For a critical assessment of the Court's use of history in the *Atwater* case, see Thomas Y. Davies, "The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in *Atwater v. Lago Vista*," WAKE FOREST LAW REVIEW 37 (2002): 239-437.

Bruce P. Smith, *English Criminal Justice Administration, 1650–1850: A Historiographic Essay*, 25 LAW & HIST. REV. (forthcoming 2007) (manuscript at 49 n.45, on file with the *Indiana Law Journal*).

3. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 167–90 (1996).

4. *See id.* at 169.

5. *See generally* William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994); William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997).

6. *See, e.g.*, Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (1985).

7. KALMAN, *supra* note 3, at 170–71, 328 n.9.

Washington,[8] we have serious professional reservations about using history to solve contemporary legal controversies, especially the U.S. Supreme Court's method of doing so.[9] We agree with Kalman's assertion:

> I doubt any historian considers the past authoritative. At best, it may be edifying, but to the historian, there are no "lessons from the past." . . . For the historian, the past is relevant to the present insofar as it shows how other people lived their lives. It does not explicitly tell historians or their contemporaries how to conduct their own.[10]

Consequently, we will let the other contributors to this symposium address the contested history of cases, such as *King v. Brasier*, that Justice Scalia has used to interpret the Confrontation Clause.[11]

American constitutionalism is perhaps best characterized as a system of governance that allows for plausible interpretations of morally charged issues to coexist.[12] Thus, instead of offering our assessment of the right answer to the questions involving children's testimony, we will turn our attention to how historians are writing about the place of children in history and society, as well as their relationship with the law.

II. RETHINKING THE ENLIGHTENMENT

There is no better place to begin considering how historians are challenging the way we think about children and the law than Holly Brewer's *By Birth or Consent*.[13] Although only one chapter of her book, "'To Stop the Mouths' of Children: Reason and the Common Law,"[14] focuses exclusively on children as witnesses, the significance of her work for the readers of this symposium is how she frames her analysis of children's testimony in the broader context of the Enlightenment. As she explains, in

---

8. 541 U.S. 36, 38–69 (2004).

9. KALMAN, *supra* note 3, at 70. We appreciate the wisdom in Jack Rakove's wry observation: "I happen to like originalist arguments when the weight of the evidence seems to support the constitutional outcomes I favor—and that may be as good a clue to the appeal of originalism as any other." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION xv (1996).

10. KALMAN, *supra* note 3, at 180; *see also* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING xxvi–xxx (Oxford Univ. Press 2004).

11. Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917 (2007).

12. *See, e.g.*, MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006). And, as Larry Kramer reminds us, the role of the U.S. Supreme Court in interpreting the U.S. Constitution has expanded since the 1790s. LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 31 (2004).

13. HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005). Brewer's work received the 2006 William Nelson Cromwell Prize. American Society for Legal History, 2006 Annual Meeting, http://www.h-net.msu.edu/~law/ASLH/conferences/aslh_conference_2006.htm (last visited Jan. 28, 2007). The prize is awarded for excellence in the field of American legal history by a junior scholar. The William Nelson Cromwell Foundation, http://www.h-net.org/announce/show.cgi?ID=138484 (last visited Jan. 28, 2007).

14. BREWER, *supra* note 13, at ch. 5.

the status-based society of the sixteenth and seventeenth centuries, children could not only testify in court, but they could also serve in the military, as electors, as members of Parliament or the Virginia House of Burgesses, and as jurors. In addition, they could sign labor contracts, consent to marry, and be punished for criminal offenses, including the high crime of treason.

Brewer reveals how seventeenth-century-religious disputes over the nature of consent informed Enlightenment political theory, including John Locke's influential writings on child development and social contract theory. Treatise writers, judges, and legislators then incorporated these new ideas into civil and criminal law, redefining the legal identities of children. Central to this revolution in defining children's identities was a restructuring of patriarchy that vested fathers—instead of lords—with control and custody over children until they could reason for themselves. Children were subjects in "the empire of the father," Blackstone rationalized in his *Commentaries on the Laws of England*, until they could enter "the empire of reason."[15] Brewer shows how lawmakers constructed both the empire of the father as well as the empire of reason from the same ideological blueprints. In the process, the traces of children's pre-Enlightenment legal identities faded as the new assumption that parents, especially fathers, had the right to the custody and control of their offspring became boldly inscribed into Anglo-American law, practice, and culture. Thus, in the Age of Reason, it was not only the concept of reason, but also the classification of age that took on new significance in societies built upon a contractual foundation.

These findings offer a significant corrective to present-day assumptions of childhood, which have led scholars to misconstrue the past. For instance, scholars blinded by modern conceptions of childhood have overlooked or dismissed evidence of children playing "adult" roles as errors in the historical record.[16] Instead, they have assumed that the common law must have set age limits and that children must have been excluded from courtrooms. Brewer, for instance, points out that John Wigmore, the leading scholar of evidence in the early twentieth century, wrongly assumed it was only over the course of the eighteenth century that "judges moved from a simple age-based equation to one inquiring more closely into each child's competence."[17] Instead, "[i]t was only during the late seventeenth century that the rule that children should not testify was introduced—for the first time."[18] And, as she emphasizes, "The eighteenth century was one of debate over at what age that line should be drawn."[19] Brewer's approach in explaining this transformation is instructive. Uncovering the history of children as witnesses, she demonstrates, is not something that can be isolated from the society in which the history unfolded.

In Brewer's formulation, the rights and responsibilities of children—including notions of their veracity or reliability—are situated squarely within changing notions of citizenship and government. She demonstrates how progenitors of new ideas about individual consent denied children the right to make legally binding decisions about themselves or how they were governed. Thus, the intellectual ferment that produced the American Revolution also laid the foundations for republican forms of government that

---

15. *Id.* at 338–40.
16. *See, e.g., id.* at 338 & n.1.
17. *Id.* at 161 (citation omitted).
18. *Id.* at 162.
19. *Id.*

privileged one's ability to reason and consent over his or her birth status. Those who were deemed incapable of reason—most notably children—were denied the rights and responsibilities of citizenship. The creators of modern democratic theory thus inscribed inequality, including new forms of patriarchy and parental control, into its practice. Moreover, stripping children of their voice, including in the courtroom, established a dangerous precedent for denying others, including women, slaves, and non-Christians, the opportunity to testify.

Her framing of children as legal actors demonstrates the degree to which the current conversation about whether minors should be allowed to testify began in 1678 with Sir Matthew Hale's *Pleas of the Crown; Or, A Brief, But Full Account of Whatsoever Can Be Found Relating to That Subject.*[20] As she explains, Hale recommended that in capital cases "while the testimony of those between nine and thirteen should be 'allowed in some cases,' normally witnesses should have reached the age of fourteen."[21] In *The History and Analysis of the Common Law of England* (1713), Hale also introduced the idea that jurors should consider "'the very Quality, Carriage, Age, Condition, Education, and Place of Commorance [residence] of Witnesses.'"[22] As Brewer notes, "Hale was central not only to excluding children's evidence but also to excluding hearsay evidence, wives' testimony against their husbands (to a point that alarmed Blackstone in his discussion of Hale on this issue), husbands' testimony against their wives, and one's evidence against oneself. His strictures, though debated during the eighteenth century, formed the foundations of evidence law by the early nineteenth century."[23]

Yet, Brewer argues that scholars must realize that Hale's contribution was not as a recorder of the law, but as a reformer. She argues that he purposefully rewrote the English past, including the history of children as witnesses, to shape the future of the common law. As she explains,

> [H]ale was careful not to label himself a reformer, conscious that to do so after the Restoration would give him a bad name. In an essay not published until after his death, Hale emphasized that judges should make reforms where they could, "without troubling a Parliament": if they did so, "truly this would go a very great way in the reformation of things amiss in the law."[24]

As Brewer argues, "instead of merely reporting the law, [Hale] reformed it." She adds, "In the decades and centuries after Hale, the many legal treatise writers who quoted Hale's judgments assumed he spoke not merely for natural law but for the 'ancient common law.'"[25]

Brewer's reading of Hale as a reformer is a critically significant observation for the history of children as witnesses. When scholars or judges use legal historical sources to make claims about the past, they must remember that these sources were often more normative than descriptive. Brewer contends, "While relying on history for precedent provided some restraints," treatise writers, such as Hale, "revised the law to make it fit

---

20. *Id.* at 26.
21. *Id.* at 163 (citation omitted).
22. *Id.*
23. *Id.* at 172.
24. *Id.* at 170.
25. *Id.*

more closely with their religious and political beliefs about justice. Their reforms tended to limit the ability of children to give voice, to give consent, and to form intent."[26] Consequently, we must pay attention to the idea that

> [t]he assumptions about the link between reason and control over one's own political—and personal—destiny have deep roots in our political and legal culture. Only a keen awareness of this centrality can prevent its misuse. Authority based on personal consent is an empowering concept, but it can be used just as powerfully to subordinate groups who can be defined as incapable of responsibility.[27]

Although the history of children's testimony during the Age of Enlightenment should not determine the hard choices that we must make today, it does at least serve as a cautionary tale about what happens when we classify people, including children, as incapable of reason. This history compels us to question our own assumptions about childhood and democracy, and arguably places the burden on those who call for excluding children's testimony to make a strong case.

We now examine the emergence of the concept of Romantic childhood that contributed to rethinking the relationship between children and the law, including emphasizing the need for child protection.

III. ROMANTIC CHILDHOOD, CA. 1815—1865

Until recent decades, a child witness's reliability took precedence over any concern about shielding children from potential courtroom trauma. This appears to have been the case even in instances of child sexual abuse. According to a recent study of children and the law in Connecticut from the colonial period to the Civil War, judges, juries, and lawmakers in the antebellum period were skeptical enough of child witnesses that they reduced the maximum sentence for adults convicted of sexually assaulting a child.[28] Confronted with such fragmentary evidence, it would be easy to conclude that child protection is a relatively recent concern. This notion is amplified further whenever critics of an originalist interpretation of the Confrontation Clause cite dominant understandings of children's mental health rooted in twentieth century social and behavioral sciences.[29] However, child protection's historical roots run much deeper. Notwithstanding the Connecticut case study, the idea that children needed sheltering from the responsibilities and realities of adult life began to emerge in the Antebellum Period, and found some expression in law and social policy as well as in changing approaches to childrearing, education, and labor.

---

26. *Id.* at 179–80.

27. *Id.* at 367.

28. NANCY HATHAWAY STEENBURG, CHILDREN AND THE CRIMINAL LAW IN CONNECTICUT, 1635–1855: CHANGING PERCEPTIONS OF CHILDHOOD 161–82 (Jerome Nadelhaft ed., 2005). Steenburg describes how juries sometimes imposed less than the maximum sentence of life imprisonment in attempted rape cases in the early nineteenth century, and how a succession of laws granted judges and juries greater flexibility in sentencing due to concerns about the competence of child witnesses.

29. For expressions of this sentiment, see MCGOUGH, *supra* note 1, at 4–5, 18–22.

This shift toward sheltered childhood was particularly pronounced among the middle-class families that began to appear in the growing American cities of the era.[30] Lower birthrates, a household economy less dependent on children's labor, and an ideology of child nurture all provided crucial contexts within which new ideas of childhood took root. Equally as important was the influence of Romantic thinkers such as Bronson Alcott and William Wordsworth, who viewed children as inherently pure, innocent, and authentic. Echoing Enlightenment philosophers John Locke and Jean-Jacques Rousseau, the Romantic vision of childhood rejected the traditional idea that the first task of parenting was to purge the child of willfulness and original sin. Instead, Romantics celebrated the playfulness and innocence of children. At the same time, they emphasized the child's "fragility, malleability, and corruptibility"[31]—which resonated with a generation of Americans increasingly anxious about the moral dangers posed by a market-driven and urbanizing society.[32] As these concerns became more widespread throughout the nineteenth century, reformers constructed new rules and institutions to protect and govern children.

Legal scholars seeking to understand these social and cultural shifts in the popular understanding of childhood should consult Steven Mintz's *Huck's Raft: A History of American Childhood*, which synthesizes the last four decades of historical scholarship on the subject. From Mintz and other scholars,[33] it becomes clear that the early nineteenth century was a time of tremendous change in the experiences of children and the popular understanding of childhood. Smaller, close-knit communities were slowly giving way to larger and more anonymous cities, which presented new dangers to younger children while offering adolescents an unprecedented range of choices in employment, education, and even religion. It was a time of great uncertainty for children and families—as traditional pathways to adulthood began to close.

One outgrowth of this transformation was a host of social reform activities. A whole genre of advice literature emerged, instructing middle-class mothers to abandon corporal punishment as a form of discipline in favor of Christian nurture and moral suasion. In the early nineteenth century, families became smaller and children remained at home longer and increasingly pursued their education to a greater extent than had prior generations. In the Jacksonian Period (the 1820s and 1830s), reformers in cities such as New York and Philadelphia succeeded in pushing for the creation of "free" public schools as well as Sunday schools.[34] These institutions were intended not only to prepare children for competition in the adult marketplace but also to build their character.

While middle-class children began to experience the features of prolonged childhood, labor and early adulthood continued to characterize the lives of the children

---

30. The best introduction to the subject is STUART S. BLUMIN, THE EMERGENCE OF THE MIDDLE CLASS: SOCIAL EXPERIENCE IN THE AMERICAN CITY, 1760–1900 (1989). *See also* MARY P. RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790–1865 (1981).

31. STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD 77 (2004).

32. *See id.* at 75–82; PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920 (1978); JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 92–113 (1986).

33. *See* sources cited *supra* note 32.

34. *See* LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876 (1980).

from farm families and the urban working classes. Children from the latter group quickly became an object of concern for middle-class reformers worried about child abuse, abandonment, delinquency, and dependency. Out of such concerns emerged the United States's first attempts at child welfare. In the 1820s and 1830s, New York, Philadelphia, and Boston opened the nation's first houses of refuge for dependent, delinquent, and neglected children. Common schools, orphanages, houses of refuge, and reformatories reflected a growing sense that the State should act "in the best interests of the child" in the absence of parental support.[35]

The "best interests" doctrine emerged most clearly in court cases where judges had to decide upon the placement of a delinquent or dependent child. The doctrine also began to take hold in child custody cases, as Michael Grossberg has shown in his study of an 1840 Philadelphia custody battle over a two-year-old boy. In his recounting of the *d'Hauteville* case, Grossberg demonstrates the influence of social and cultural norms in the judicial decision to award custody to the mother, reflecting the emerging belief that the best interests of a small child were better served by the brand of "mother love"[36] trumpeted in middle-class literature in the antebellum period.[37] Although the infant was too young to testify, his fate reflects the growing importance of child protection in cases involving family disputes.[38]

By the 1820s, most legal practitioners agreed with the growing popular notion that children needed to be treated differently from adults. This view became particularly relevant for adolescent lawbreakers, who were often not held to the adult standard of criminal responsibility. As Steven Schlossman has noted, children's "susceptibility to suggestion and improvement if instructed diligently in moral principles" led many juries to dismiss charges rather than impose adult punishments.[39] It was because of this trend that houses of refuge were built as alternatives to incarceration, aptly named "boarding schools for the children of the poor."[40] That these institutions in turn came under criticism for maltreatment of their child inmates only reflects the thoroughness with which Americans had come to accept the idea of protected childhood by mid-century.[41]

The Civil War interrupted efforts to shield children from the responsibilities and realities of adult life. During the war, children of all ages and backgrounds stepped in to fill voids left by absent fathers. In both the North and the South, "thousands of underage boys"[42] enlisted and fought; after the war, younger children found themselves orphaned or coping with maimed or deceased adult relatives. Children were also at the

---

35. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, *in* A CENTURY OF JUVENILE JUSTICE 3 (Margaret K. Rosenheim, Franklin E. Zimring, & David S. Tanenhaus, eds., 2002).

36. MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA 163–64 (Arthur McEvoy & Christopher Tomlins eds., 1996).

37. *See* MINTZ, *supra* note 31, at 80–82.

38. GROSSBERG, *supra* note 36, at 163–64.

39. STEVEN L. SCHLOSSMAN, TRANSFORMING JUVENILE JUSTICE: REFORM IDEALS AND INSTITUTIONAL REALITIES, 1825–1920, at 26 (2005).

40. *Id.* at 22–27; *see also* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

41. SCHLOSSMAN, *supra* note 39, at 33–54.

42. JAMES MARTEN, THE CHILDREN'S CIVIL WAR 166 (1998).

center of renewed welfare and protection efforts after the war, as reformers sought to expand social protections for childhood vulnerability and innocence. Such reform efforts amounted to "the moral equivalent of war"[43] in the minds of child welfare advocates, and formed the basis for the full-scale emergence of new forms of child protection in the late nineteenth century.[44]

As a result, during the period when a growing number of Americans began to celebrate children's freedom, reformers began to erect new legal and institutional restrictions—in the name of protecting children. These innovations resulted in what Mintz, echoing other scholars, has called "sheltered" childhood. The rapid development of urbanization, industrialization, and immigration during the Gilded Age lent urgency to the need to shelter children from the new dangers of the adult world. In addition, the sheer scope of problems facing children and families drew the attention of a plethora of new helping professions. Educated in the social sciences departments at a growing number of universities and colleges, the "child savers" of the Gilded Age and Progressive Era hoped to shield American children beneath a "protective umbrella" of adult-supervised activities and arrangements.[45] The era of "sheltered childhood" cemented a national attachment to most of the key features prominent in our twenty-first-century discussions of child witnesses. In our next section, we discuss how notions of Romantic childhood influenced child savers and legal experts alike in their approaches to children in the courtroom.

IV. SHELTERED CHILDHOOD, CA. 1870–1925

The years after the Civil War were not only a formative era for American childhood, but also for constitutional law.[46] As William Novak has shown, American lawmakers invented liberal constitutionalism in the late nineteenth century. As he explains:

> Liberal constitutionalism thrived on (and reinforced) the separation of public from private, state power from individual right. Indeed, its identity and strength hinged on its role as the principal guardian of the sacrosanct boundaries between power and liberty. The invention of this constitutional law entailed fundamentally new rationalities of regulation, social governance, and public order.[47]

Many of the assumptions about children that emerged during the Enlightenment and contributed to the rise of Romantic childhood in the nineteenth century became part of this new liberal constitutionalism. In the 1920s, for instance, the U.S. Supreme Court established the "parental rights" doctrine, which, via the Fourteenth Amendment,

---

43. The phrase comes from the title of a 1910 essay by the pragmatist philosopher William James. *See* William James, *The Moral Equivalent of War, in* ESSAYS ON FAITH AND MORALS 311–28 (Ralph Barton Perry ed. 1962)

44. MINTZ, *supra* note 31, at 118–32; *see also* MARTEN, *supra* note 42, at 211–17.

45. We borrow the phrase "protective umbrella" from JOAN JACOBS BRUMBERG, THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS 16–18 (1997).

46. David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351 (2005).

47. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 245–46 (1996).

granted parents a property right in their offspring.[48] This doctrine sought to make the family into a private realm secure from state action, but as Barbara Bennett Woodhouse argues, this doctrine often left children without individual rights or their own voice in legal proceedings.[49]

Although more work needs to be done on the ideological role that conceptions of childhood played in the development of liberal constitutionalism from the 1870s to the constitutional revolution of 1937, historians are uncovering the experiential history of children in court during the Gilded Age (ca. 1873–1890) and Progressive Era (ca. 1890–1920).[50] Much of this scholarship has focused on the development of a separate justice system for juveniles, beginning in 1899 with the establishment of the Cook County Juvenile Court in Chicago, Illinois.[51] The founders of American juvenile justice sought to create a court system distinct from the adult criminal justice system. They did not want this new system to follow the stringent due process requirements of criminal law. As a result, children's testimony that might have otherwise been precluded in criminal court could be heard in juvenile court.

The founders of the juvenile court were familiar with a legal world in which children testified in dependency hearings and before coroners' juries, and were detained as material witnesses for criminal cases.[52] Not only did the first generation of juvenile court practitioners—including judges—consider children's testimony an essential part of juvenile court hearings, they also believed it to be essential to the rehabilitative process.[53] Children spoke for themselves in juvenile court, whether in the formal courtroom or a judge's chambers.

For the purposes of this essay, however, we will focus on two recent historical monographs that shed light on children's testimony in the criminal justice system during the late nineteenth and early twentieth centuries. The first is Stephen Robertson's extraordinary *Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880–1960*.[54] Much like Brewer, Robertson is a practitioner

---

48. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that a law forcing children to attend public school was unconstitutional in that parents, and not the state, should have the responsibility to determine where to send their children to school); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a law prohibiting the teaching of foreign languages to children was a violation of due process because it interfered with the right of a parent to control his child's education).

49. Barbara Bennett Woodhouse, *Who Owns the Child?* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1058 (1992). For a defense of the parental doctrine, see MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005).

50. For more on children in the Gilded Age, see generally Bill Bush, *The Rediscovery of Juvenile Delinquency*, 5 J. GILDED AGE & PROGRESSIVE ERA 393 (2006). For more on children and the law during the Progressive Era, see TANENHAUS, *supra* note 10, at 215–20.

51. TANENHAUS, *supra* note 10, at ch.2.

52. For a discussion of the experience of children testifying before dependency hearings, see Tanenhaus, *supra* note 46, at 376; as to their testimony on coroners' juries, see David S. Tanenhaus & Steven A. Drizin, *"Owing the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641 (2002). Progressive reformers, such as Julia Lathrop, repeatedly expressed concerns about children being held in jails, including as material witnesses. David S. Tanenhaus, *Justice for the Child: The Beginning of the Juvenile Court in Chicago*, CHI. HIST., Winter 1998–99, at 4, 4–19.

53. TANENHAUS, *supra* note 10, at 23–54.

54. STEPHEN ROBERTSON, CRIMES AGAINST CHILDREN: SEXUAL VIOLENCE AND LEGAL

of historians' legal history. His research draws on more than 1,500 case files from the Court of General Sessions in 1886 and 1891, and from the District Attorney's Office from 1886 to 1955. He reconstructs a history of sexual violence that highlights the interactions among working-class communities, middle-class reformers, and the legal system. He reveals why the efforts of child savers, such as the New York Society for the Prevention of Cruelty to Children (NYSPCC), to promulgate and police middle-class notions of childhood met such resistance, and how assistant district attorneys learned which cases of sexual violence they could successfully prosecute.[55]

Significantly, Robertson provides historical evidence on how NYPSCC officers and assistant district attorneys worked to present child witnesses in ways that comported with judges' and jurors' cultural assumptions about childhood, including how children should look, act, and speak. Moreover, they had to reframe children's accounts to mirror jurors' cultural understanding of rape.[56] As Robertson explains:

> The role of NYSPCC officers . . . visible in the trial briefs they prepared for ADAS, centered on the victim's story. . . . [But] . . . the way that a girl told her story was not the way that an NYSPCC officer recorded it. Her statements provided the details, but the emphases, structure, and much of the language came from the NYSPCC officer. In the brief, he summarized the girl's statements in a form that he thought jurors would recognize as an account of a rape.[57]

According to the New York Code of Criminal Procedure, children under twelve years of age could testify if they had sufficient intelligence, but could only be sworn if they understood the nature of an oath.[58] In practice, judges determined that girls as young as five could testify, but required that they be at least seven years of age before they could deliver sworn testimony.[59] Trial judges often allowed prosecutors to ask leading questions of child witnesses, epitomized in the following courtroom exchange from 1891:

Q: What did he do when he came there, when you first saw him?
A: He came in the closet.
Q: He came into the closet?
A: Yes sir.
Q: Did he say anything to you?
A: No sir.
Q: Did you say anything to him?
A: Yes sir.
Q: Tell us what you said to him?
A: I wanted to push him away and said "go away."
Q: Did you try to push him away?
A: Yes sir, and he was too strong for me.
Q: Did he take hold of you?
A: Yes sir.
Q: Did you see him turn the key in the door?

CULTURE IN NEW YORK CITY, 1880–1960 (2005).

55. *Id.* at 44.
56. *Id.* at 46.
57. *Id.* at 44.
58. *Id.* at 49.
59. *Id.* at 49.

A: Yes sir.

By the Court. [Questions from the bench.]

Q: Tell me what he did to you?
A: He took over his privates and put it into mine.
Q: What else did he do?
A: He stayed there about half an hour and then he went out.
Q: Now go on, what else?
A: And then me and my two cousins went out.[60]

As Robertson notes, it was critical for prosecutors, if they were to win sexual assault cases, to demonstrate that girls were passive victims who did not understand the significance of sexual intercourse, and for those girls to speak in "vague, simple, and euphemistic language."[61]

Robertson shows how cultural understanding of childhood and sexual violence limited the range of cases that the NYSPCC and assistant district attorneys could prosecute. They were most successful in prosecuting cases of sexual violence against prepubescent girls, even when there was only scant corroborating evidence. Yet, cultural understanding of childhood made it much more difficult to prosecute rape of pubescent girls and women, or to prosecute sodomy of boys.[62] Thus, Robertson's focus on the law-in-action reveals the degree to which cultural conceptions of childhood structured the everyday workings of the criminal justice system in New York City.

The tension between Romantic understandings of childhood and the courtroom experience of child witnesses also played out in the nation's heartland. In *The Freedom of the Streets: Work, Citizenship, and Sexuality in a Gilded Age City*,[63] Sharon Wood reveals how a socio-cultural history of a secondary city, such as Davenport, Iowa, can uncover forgotten histories of children on the stand, which were once front-page news. In a chapter entitled "Sporting Men and Little Girls," she examines three rape trials from 1891–1892 to show how cultural assumptions about childhood affected the seemingly straightforward prosecution of statutory rape.[64] Unlike Robertson's New York cases, in which prosecutors carefully presented their witnesses as innocent and passive, the Davenport cases demonstrated what could go wrong on cross-examination.

The Davenport community closely followed the trial of Charles Lyon, who was accused of raping three underaged girls, one of whom was twelve-year-old Dolly Hamerly. In 1886, Iowa had raised the "age of consent" to thirteen. Thus, the prosecutor had to prove only three things: that Dolly was younger than thirteen (she was); that Lyon was the assailant; and that there was medical evidence of vaginal penetration. Yet, the most dramatic moment in the trial was the cross-examination of Dolly concerning $1.25 she was alleged to have stolen from Lyon after he raped her and the two other girls in a barn.

Q: What did you mean [Dolly], by saying that Lyon would not pay you?

---

60. *Id.* at 46–47.
61. *Id.* at 47.
62. *See id.* at ch.3.
63. SHARON WOOD, THE FREEDOM OF THE STREETS: WORK, CITIZENSHIP, AND SEXUALITY IN A GILDED AGE CITY (2005).
64. *Id.* at 132.

A: Why, he was sitting us down and taking us on his lap, and then he would not pay us afterwards.
Q: Was he to pay?
A: Yes.
Q: Did he say so?
A: No. He didn't tell us whether he would pay us or not. We never do anything that way for nothing. We wouldn't do it.[65]

Testimony such as Dolly's clashed with the jurors' understandings of childhood innocence. Instead of finding Lyon guilty of rape, the jurors returned a verdict for simple assault.

The scholarship of Robertson and Wood not only helps to uncover the experiences of children as witnesses, including revealing how powerfully cultural assumptions shaped the presentation and reception of their testimony, but their work suggests that we need to consider our own assumptions when we are asking questions about children's capacity to serve as witnesses. The Gilded Age and Progressive Era also witnessed the emergence of the "child study movement" and the emergence of behavioral and human sciences. In the next Part of this essay, we explore how new understandings of child and adolescent development increasingly informed the relationship between children and the law—understandings that raised new questions about children as witnesses.

V. DEVELOPMENTAL CHILDHOOD, CA.1930–1954

Although it began in earnest in the late nineteenth century, the scientific study of childhood exerted its greatest influence on normative definitions of childhood and adolescence in the twentieth century[66]—one that reformer Ellen Key famously predicted would be "the century of the child."[67] The ramifications for this symposium, which defines childhood largely in developmental terms, were encapsulated well in a 1953 law review article on the competency of child witnesses.[68] The article shows that by the post-World War II period, most state laws defined competency according to the developmental category of "maturity" rather than the fear of perpetrating "the impiety of falsehood."[69] This developmental standard suggested a more relaxed attitude toward determinations of competency, as well as the influence of John Wigmore's argument that a jury should be permitted to sort out the accuracy of a child's testimony in most cases.[70] Before the early twentieth century, determining competency had been a matter of protecting the accused from children—"the most dangerous of all witnesses."[71]

---

65. *Id.* at 145.

66. MINTZ, *supra* note 31, at 186–92; *see also* MARGO HORN, BEFORE IT'S TOO LATE: THE CHILD GUIDANCE MOVEMENT IN THE UNITED STATES, 1922–1945 (1989); KATHLEEN W. JONES, TAMING THE TROUBLESOME CHILD: AMERICAN FAMILIES, CHILD GUIDANCE, AND THE LIMITS OF PSYCHIATRIC AUTHORITY (1999); THERESA R. RICHARDSON, THE CENTURY OF THE CHILD: THE MENTAL HYGIENE MOVEMENT AND SOCIAL POLICY IN THE UNITED STATES AND CANADA (1989).

67. MINTZ, *supra* note 31, at 372.

68. Note, *The Competency of Children as Witnesses*, 39 VA. L. REV. 358 (1953).

69. Goodman, *Children's Testimony*, *supra* note 1, at 12.

70. Note, *supra* note 68, at 358.

71. Goodman, *Children's Testimony*, *supra* note 1, at 22.

However, by the 1950s, the emphasis had shifted away from accused adults and toward protecting child witnesses from adult sanctions such as perjury.

Increasingly, a developmental model of childhood came to influence legal and practical constructions of child witnesses. Psychiatrists such as G. Stanley Hall, Erik Erikson, and Jean Piaget divided the life course into stages of development characterized by differing levels of emotional and intellectual capacities. Although the chronological borders of the developmental childhood model exceed the timeframe covered here, this Part traces its emergence from the New Deal era, when an expanded impetus for child protection moved the ideas of child psychologists and psychiatrists into the mainstream, to the *Brown v. Board of Education*[72] decision, which cemented the legitimacy of the social and behavioral sciences' definitions of normative childhood.[73]

The Great Depression accelerated federal involvement in child welfare and made high school, rather than wage labor, the typical experience for adolescents. In the two major federal agencies devoted to the "youth crisis," the Civilian Conservation Corps and the National Youth Administration, government professionals confronted youths suffering from psychological as well as economic hardships.[74] These agencies responded to the problems of the estimated 250,000 juveniles who left home to "ride the rails" in the early years of the Depression.[75] This number underscored the astronomical number of children who were out of school, unemployed, or in trouble with the law and prompted Eleanor Roosevelt to confess her "real terror that we may be losing this generation."[76]

Meanwhile, child guidance clinics inaugurated in the 1920s to work with adjudged juvenile delinquents found themselves fielding a growing number of requests from middle and upper-class families concerned about their "defiant but not delinquent" children.[77] As Kathleen Jones has demonstrated, the shift in child psychiatry and psychology toward the problems of "everyday children" both reflected and helped shape popular understandings of childhood.[78]

Child experts became key figures in the "brain trust" of child-serving New Deal agencies, which aimed to help rootless youth find useful work, attend school, and remain at home with their families. Together, these activities mounted by experts became components of a new catchphrase, "personality adjustment," that itself expressed a relatively new and powerful concept: mental health. Popularized by the National Committee on Mental Hygiene (founded in 1909), mental health shifted the attention of psychiatry and psychology away from the incurably insane and toward "normal" people, especially children.[79] A growing legion of intellectuals, professionals,

---

72. 347 U.S. 483 (1954).

73. For an overview of this trend, see GERALD N. GROB, FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA (1991).

74. *See* RICHARD A. REIMAN, THE NEW DEAL AND AMERICAN YOUTH: IDEAS AND IDEALS IN A DEPRESSION DECADE (1992).

75. *See* ERROL LINCOLN UYS, RIDING THE RAILS: TEENAGERS ON THE MOVE DURING THE GREAT DEPRESSION (2003).

76. *See* Eleanor Roosevelt, *Facing the Problems of Youth*, J. OF SOC. HYGIENE, 393–94 (1935).

77. JONES, *supra* note 66, at 138.

78. *Id.* at 120–47.

79. On the federal reprioritization of resources from mental hospitals to community

and experts insisted that nothing was more important to the healthy development of children and adolescents than their mental health. A raft of published scientific studies in the 1930s and early-40s were based on participant-observation of government sponsored work camps, work-study groups, and recreational activities. They focused on the role of family, peers, and environment on the development of what Erikson would later call a "positive identity"—or self-esteem—of individual children and adolescents.[80] Child development thus was prolonged, divided into separate stages, and defined by psychological and cognitive rather than moral milestones as in earlier eras.

The new emphasis on personality development had two major consequences for the history of childhood. By the postwar period, it led to the idea that "adjustment" to one's culture and society represented normalcy, a concept that helped foster the conformity of the 1950s. The other, arguably more far-reaching result was that it encouraged social scientists, policymakers, and civil rights advocates to apply developmental thinking to the conditions experienced by African American children.

The initial impetus for this shift came from the American Youth Commission ("Commission"), an arm of the Rockefeller Foundation with close ties to the New Deal administration.[81] Between 1937 and 1942, the Commission published several major scientific studies of African American children in different parts of the country. These "caste and class" studies, as they became known, argued that racial discrimination and inequality wreaked havoc on the self-esteem of children. In dozens of interviews with social scientists, children described dilapidated homes and schools, and outlined their low expectations for adult life. This material became part of Gunnar Myrdal's influential 1944 *An American Dilemma*, which explained in unsparing detail the gulf between the "American creed" of equality and opportunity, and the reality confronting African Americans generally.[82]

As is well known, this growing body of work culminated in *Brown v. Board of Education*, which outlawed school segregation based on "psychological knowledge" about its effects on "the motivation of a child to learn" and the development of a healthy personality.[83] As Richard Kluger describes in his authoritative account of the *Brown* case, *Simple Justice*, white and black schoolchildren of various ages participated in clinical and scientific studies commissioned by the plaintiffs' attorneys.[84] Children's voices were heard in this case less often from the witness stand than from the mouths of adult advocates—parents, social scientists, attorneys—but the studies were nonetheless effective, and opened up a new vista of possibilities for child witnesses.

In the latter part of the twentieth century, the developmental model of childhood became the lens through which the issue of child testimony was viewed. Significantly, trained psychologists, such as Gail Goodman, and not professional historians, became the leading experts on the legal history of this subject. In many ways, this symposium

---

psychiatratric clinics, see GROB, *supra* note 73, at 3–4; on the growing emphasis on children, see JONES, *supra* note 66, at 53–54.

80. ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (2d ed. 1963).

81. William S. Bush, Representing the Juvenile Delinquent: Reform, Social Science, and Teenage Troubles in Postwar Texas (May 2004) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with The University of Texas Libraries).

82. GUNNAR MYDRAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

83. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

84. RICHARD KLUGER, SIMPLE JUSTICE 315–45, 396–424, 440–45 (1975).

reflects the recent trend of developmental specialists and legal scholars working together to develop rational policy toward children and youth.[85] Yet, as this essay contends, there is a need for more socio-cultural historical scholarship on this topic. Our conclusion offers a modest proposal for a history in search of its historians.

CONCLUSION

The history of children as witnesses should move beyond debates over whether or not eighteenth-century English cases can unlock the original meaning of the Confrontation Clause of the Sixth Amendment. Instead, this history should embody the virtues of the new historical scholarship, which this essay has briefly presented.

First, like Brewer's work, this history of child witnesses should include rigorous analysis of the ideological assumptions of those most responsible for crafting modern evidentiary rules, such as John Wigmore.[86] As part of this focus on ideas, this history should analyze the changing and contested cultural meanings of both "childhood" and "witnessing."

Second, this history should focus not only on children testifying in criminal cases, but should instead also examine multiple sites and stages of the legal process, such as Robertson's use of records from the New York District Attorney's Office. It would be helpful, for instance, to learn more about the decision to hold children in jails as material witnesses. In addition, many of the most important studies of juvenile justice, such as Mary Odem's *Delinquent Daughters*, effectively use juvenile court transcripts to recreate the juvenile court experiences of children and their families.[87] Although juvenile justice is distinct from the adult criminal justice system, analysis of juvenile court transcripts is a promising avenue for further study of children as witnesses.

Finally, a history of children as witnesses should highlight how legal concepts transcend courtrooms and shape popular understanding of what the law is.[88] For instance, in New Hampshire in 1790, Abigail Bailey wrote a diary entry that reflected how assumptions about child testimony were changing. Bailey was frustrated because she did not believe that she could prosecute her husband for violently raping their sixteen-year-old daughter. The husband had raped the daughter in front of the family's younger children. The daughter was too scared to testify and, as Bailey recorded, each of the other children was "too young to be a legal witness," although they were "old enough to tell the truth."[89] As Holly Brewer observes, "The fact that Abigail Bailey was conscious of the rules about legal witnesses shows how new attitudes toward children's testimony could permeate popular understandings of legal relationships, defining what came before the court even before judges decided whether an individual

---

85. *See, e.g.*, THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (2000).

86. There is a growing body of literature on John Wigmore. For example, see Robert P. Burns, *A Wistful Retrospective on Wigmore and His Prescriptions for Illinois Evidence Law*, 100 NW. U. L. REV. 131 (2006).

87. MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920 (1995).

88. For a fascinating analysis of how popular understandings of law are often wrong, see Grossberg, *supra* note 35.

89. BREWER, *supra* note 13, at 159.

child could testify."[90] A comprehensive history of child witnesses should include people like Abigail Bailey—not just those who wrote treatises and legal opinions.

90. *Id.*