

**‘CHILDREN OF A VERY TENDER AGE HAVE  
VICIOUS PROPENSITIES’:  
CHILD WITNESS TESTIMONIES IN CASES OF SEXUAL ABUSE**

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**Abstract**

The competency of child witnesses in cases of sexual abuse to give evidence in court and the admissibility and credibility of their testimony is a fundamental component in establishing whether an accused person is guilty or not. This has presented a significant challenge to the criminal justice process as under the common law the reception of children’s evidence falls within the absolute discretion of the judiciary. The paper examines the legal expectations of child witnesses in the eighteenth and nineteenth centuries in the context of the religio-moral perspectives and debates that influenced and shaped judicial attitudes towards the reception of child testimonies and their ability to tell the truth, especially the requirement that a child was suitably ‘pious’. The discussion concludes with an analysis of the most ‘extraordinary’ case of the Reverend Hatch in 1860, convicted of indecent assault partly on the testimony of an 11 year-old child, he then successfully prosecuted the girl for perverting the course of justice and persuaded the jury to convict her.

**Keywords:** child witness, testimony, oath, sworn evidence, child sexual abuse, perverting the course of justice

**Introduction**

This title quotation is from the case of *R v Cockburn* heard at the Durham Summer Assizes in 1849 where the trial judge, Patterson J., directed that the accused be acquitted of the carnal knowledge of a child under the age of 10 because the female prosecutrix, Jane Pattrey,<sup>2</sup> who was under 5 years of age, was too young to be sworn as a witness.<sup>3</sup> The child was prohibited from giving evidence, not directly because of her infant age but since it appeared to the court that she knew nothing of the nature of the oath and therefore could not testify or be cross-examined by the defence. Cockburn was not indicted for the more serious charge of rape as the prosecution would have had to prove that the alleged sexual violation was non-consensual: problematic where such a young child was unlikely to possess any comprehension of what actually happened compounded by the fact that young children

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<sup>2</sup> While it is now generally accepted practice not to name victims of sexual offences primarily because of their lifetime right to anonymity guaranteed by section 1 Sexual Offences (Amendment) Act 1992, this prohibition does not apply retrospectively and so where names are published historically in the public record, i.e. in newspapers, they are reproduced here.

<sup>3</sup> *R v Cockburn* (1849) 3 Cox 543.

typically tend to 'acquiesce' to whatever an adult asks them to do.<sup>4</sup> Medical evidence was presented by the surgeon who testified that Jane's 'private parts' had been 'penetrated and injured', either by a finger or a foreign substance, 'but by what he could not say.' A charge of rape could not be sustained, partly because of the ambiguity of the sexual nature of the violation but primarily as there was no other independent corroborating evidence that she had resisted 'against her will' thereby suggesting that she had implicitly 'consented' to the assault.<sup>5</sup> The prosecution then tried to argue that alternatively Cockburn should be convicted of a common assault on the grounds that 'the consent of the child could not be presumed by reason of its tender age' but this was also dismissed by Patterson who explained:

My experience has shown me that children of a very tender age have vicious propensities. A child under 10 cannot give consent to any criminal intercourse...but she can give consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault.<sup>6</sup>

The case illustrates the evolving and shifting landscape of the prosecution of sexual assaults in the mid-nineteenth century demonstrating how charges could be dismissed and alternatives proposed as the trial progressed. More significantly, as evidenced in this article, this case was neither an unusual nor atypical example in respect of the contemporary judicial commentary and reasoning about the credibility of child witnesses.<sup>7</sup> Since the advent of the modern criminal justice process from the mid-eighteenth century onwards, legal and judicial discourse over the acceptance, admissibility and reception of children's evidence in cases of sexual abuse and exploitation has often distorted or overshadowed attempts to

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<sup>4</sup> See for example, Clair O'Kane, 'The Development of Participatory Techniques: Facilitating children's views about decisions which affect them' in Pia Christensen and Allison James (eds.) *Research with children Perspectives and Practices* (Falmer Press 2000) pp.136-159; Madeleine Leonard, *The Sociology of Children, Childhood and Generation* (Sage 2015) ch.3.

<sup>5</sup> Rape and associated indecent assaults could only be committed against girls as there was no equivalent offence of indecently assaulting a boy although this would have been prosecuted as a criminal assault. In 1880 the Assault of Young Persons Act fixed the age of consent for both males and females at 13. Sexual intercourse with a girl under 12 years of age constituted the felony of rape as that was the age of protection through marriage - see Offences Against the Person Acts 1828 and 1861. An 1875 amendment to the 1861 Act raised the age of protection to 13 years and this was increased again by the Criminal Law Amendment Act 1885 to 16 years.

<sup>6</sup> *R v Cockburn* (1849) 3 Cox 543. Cockburn affirmed a decision he made in *R v Stevens* (1843-46) 1 Cox CC 225 where he confirmed that 'there could not be a verdict for the assault, where the child consented' advising that the better charge would be attempt carnal connection as this is a misdemeanour and or the alternative option of a common assault.

<sup>7</sup> Similar responses can be found well into the late twentieth century see *R v Hayes* [1977] 1 WLR 234 where three boys aged 11, 10 and 8 at the time of the alleged offence of gross indecency and aged 12, 11 and 9 at the time of the trial were interrogated about their understanding of God and Jesus. The Court of Appeal held that it was up to the discretion of the trial judge as to whether a child may be sworn as a witness but unnecessary that they must believe in divine sanctions, not least because many adults are non-believers. The decision was approved in *R v Campbell* [1983] Crim LR 174 but in 1988 at Exeter Crown Court Judge Willcock QC ordered the jury to dismiss two specimen charges of indecent assault against a 46 year-old man as 'it would be a waste of time' to ask the two girls aged 10 and 7 years to hold the New Testament and take the oath: *The Times*, 2 March 1988.

uncover the truth of what in fact actually occurred in a specific case.<sup>8</sup> This is largely as a result of our adversarial legal system operating in conjunction with the common law and the cultural - especially religio-moral - values that have underpinned and framed it. Establishing the truth where an allegation of sexual assault has been made is particularly difficult as rarely are other witnesses present and, irrefutably, children find it especially difficult and distressing to articulate that experience to investigators and legal counsel.<sup>9</sup>

Historically, the problem of providing and delivering courtroom testimony was further complicated by the issue of whether young children could, or should, appear as a witness in court, with or without an age bar, and even if permitted whether their testimony should be sworn on oath or given unsworn. Child witnesses were often subjected to embarrassing and intimidatory practices. Some judges were complicit in allowing defence lawyers to use various tactics to discredit a child's evidence and their integrity or, like Patterson, accepted claims that a child had 'agreed' to or 'permitted' the sexual act. Consequently, the common law has found it a challenge to accommodate children in the witness box manifested in the development of complex legal rules<sup>10</sup>. This was compounded by a legislature reluctant to acknowledge the vulnerability of child victims and the psychological and physical impact that the intimidating court atmosphere, delays, uncompromising legal rules, age-inappropriate cross-examination etc., could cause.<sup>11</sup>

This paper examines the judicial approach in respect of the admissibility of child testimonies in cases of sexual abuse in the eighteenth and nineteenth centuries up until the 1860s, supplementing Simpson's analysis of the Old Bailey records 1730-1830 and Jackson's consecutively intensive work from 1830-1910.<sup>12</sup> It explores the relationship between understandings of the meaning and significance of the oath and children's capacity for truthfulness in the context of the prevailing social values of the time. It illustrates how such

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<sup>8</sup> See J.R Spencer and Rhona Flin, *The Evidence of Children* (Blackstone, 1990, 1<sup>st</sup> edn.), pp.70-82; also Jenny McEwan, *Evidence and the Adversarial Process: The Modern Law* (Blackwell, 1992).

<sup>9</sup> See Children's Commissioner, *Protecting children from harm: A critical assessment of child sexual abuse in the family network in England and priorities for action* November 2015.

<sup>10</sup> McGough asserts that in the USA the common law has oscillated from excluding child witnesses completely to 'freely receiving the testimony and hearsay of toddlers.' Lucy McGough, *Child Witnesses: Fragile Voices in the American Legal System* (Yale University Press, 1994) p.4.

<sup>11</sup> It was not until the late twentieth century that any major legal reforms were secured to improve the position of child witnesses and more effectively facilitate the delivery of their testimony. The Criminal Justice Act 1991 permitted all child witnesses under 14 years to give unsworn evidence and the Youth Justice and Criminal Evidence Act 1999 ameliorated many of the practical and formal difficulties of testifying authorising the introduction of screens and video links, removal of wigs and gowns, and the pre-recording of initial disclosure.

<sup>12</sup> See Anthony Simpson, 'Vulnerability and the age of female consent', in G.S. Rousseau and Roy Porter (eds.), *Sexual Underworlds of the Enlightenment* (Manchester University Press, 1987) pp.181-205; Louise Jackson, *Child Sexual Abuse in Victorian England* (Routledge, 2000) ch.5.

judicial attitudes and trial practices can be framed within the broader development of the conceptualization and social construction of childhood as manifested through societal and judicial expectations of a child's religious, moral and spiritual status.

Methodologically, a qualitative approach is adopted utilising digitised newspaper court reportage because of the paucity of accessible primary source material in the form of non-censored court records of sexual assaults particularly as Clark and Jackson have established post-1830.<sup>13</sup> Official law reports are also referred to where issues concerning the age or ability of a child to testify triggered a legal appeal. Quantitative sampling of newspaper reports was not feasible because of the unsystematic nature of press coverage. Arguably such a selective approach can be problematic but it can and does provide a more nuanced, informative and representative source that reflects the wider socio-cultural contexts in which such assaults were perceived and represented.<sup>14</sup> However, as the Assize reports and many cases in the magistrates' courts were typically written by lawyer-reporters the trial narratives published are largely representative of the actual court proceedings and the comments of judges and lawyers often reproduced verbatim providing a relative degree of authenticity.<sup>15</sup>

Keyword searches included generic terms such as 'child witness', 'child testimony' and 'sworn evidence' cross-referenced with possible charges of sexual offences including 'indecent assault', 'carnal knowledge', 'sexual violation' and 'rape'. The results were then compared to generate more specific phrases that appeared to be commonly used within broad timeframes to describe, for example in the 1850 and 1860s, the expected demeanour of a child witness as an 'intelligent' or 'pretty child', or from the late eighteenth century until abandoned in the 1840s the practice of the 'religious instruction' of child witnesses.

## 1 'The Child Cannot Be Presumed to Distinguish Betwixt Right and Wrong'<sup>16</sup>

More than any other criminal offence complaints of sexual molestation and violation are intrinsically engaged with ascertaining 'the truth', and it is the authenticity of the truth which is operationalized through the criteria of witness competency. Historically, children have

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<sup>13</sup> Anna Clark, *Women's Silence Men's Violence. Sexual Assault in England 1770-1845* (Pandora, 1987); Jackson, *Child Sexual Abuse in Victorian England*. See also See Kim Stevenson, 'Outrageous Violations: Enabling Students to Interpret Nineteenth Century Newspaper Reports of Sexual Assault and Rape', *Law Crime and History*, 4 (2014) 36-61.

<sup>14</sup> Kim Stevenson, 'Unearthing The Realities of Rape: Utilising Victorian Newspaper Reportage to Fill in the Contextual Gaps', *Liverpool Law Review*, 28 (2007) 405-423.

<sup>15</sup> Judith Rowbotham, Kim Stevenson and Samantha Pegg, *Crime News in Modern Britain: Press Reporting and Responsibility 1850-2010* (Palgrave Macmillan, 2013).

<sup>16</sup> *R v Travers* (1726) 2 Str 700 per Raymond at 701.

often been regarded as neither reliable nor competent witnesses, and if the victim of sexual exploitation stereotypically less likely to be believed and trusted. This is hardly surprising as like adult witnesses, the law required child witnesses to give their evidence from absolute memory and, until 1987, in the direct physical presence of the accused.<sup>17</sup> The eligibility of all would-be witnesses depended on their moral integrity and position held in society both of which were inextricably bound up with the rules of competency that applied to prospective members of the jury. Conley and Jackson confirm that the relative class, gender, age and reputation of witnesses and victims and domination of the 'respectability imperative' exerted significant influence upon the decisions of magistrates and juries.<sup>18</sup>

In legal terms 'competency' simply means legal capacity, a witness is therefore competent if they can be lawfully called to give evidence. By the twelfth and thirteenth centuries a number of restrictions had evolved in relation to who could lawfully testify in court generally based on their eligibility to serve as jurors. Predictably, the Church was the first to cast doubt on the competency of child witnesses and others perceived as unreliable. The Canon Law automatically rejected the testimony of all males under 14 years, females under 12, those convicted of crime, excommunicated, the blind, deaf and dumb, poor persons, women in criminal cases, Jews, heretics, and pagans etc..<sup>19</sup> Augustine had warned that:

Children's judgement is not trustworthy, for children will place greater weight on a pet's life than a man's ... we should not assume that children are truly innocent at birth; they are self-centred and grasping, and have merely not had as much opportunity to sin.<sup>20</sup>

Bartholomew spoke of children being capable of deceit and guile<sup>21</sup> epitomised in old English proverbs such as:

'A man should not trust on a broken sword, nor on a fool, nor on a child, nor on a wraith, nor on a drunkard' (1460)

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<sup>17</sup> On 20 October 1987, Judge Thomas Pigot QC allowed a 13 year old girl to give evidence from behind a screen in the Central Criminal Court acknowledging, 'What is proposed is a radical departure from precedents and it is my duty to balance the advantages and disadvantages to ensure a fair trial' *The Times*, 21 Oct 1987. The defendants claimed, unsuccessfully, that they would be 'over-prejudiced in the eyes of the jury', *R v X Y Z* [1990] 91 Cr App Reps 96. They then appealed to the European Court of Human Rights which held there was no violation of Article 6 the right to a fair trial, *Stanford v UK* (1994) Case No 50/1992/395/473. Screens were superseded by video links from 1989 onwards (section 32 Criminal Justice Act 1988 as amended by section 55 Criminal Justice Act 1991).

<sup>18</sup> See Jackson, *Child Sexual Abuse in Victorian England*, pp.90-1; Carolyn Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (Oxford University Press, 1991) Introduction and p.173, also Kim Stevenson, 'The Respectability Imperative: A Golden Rule in Cases of Sexual Assault?' in Ian Inkster (ed), *Golden Age? Britain 1850-1870* (Ashgate Publishing, 2000) 237-248.

<sup>19</sup> Sir John Salmond, *Essays in Jurisprudence* (Steven & Haynes, 1891) p.27.

<sup>20</sup> Cited in Richard Lyman, 'Barbarism and Religion: Late Roman and Early Medieval Childhood' in Lloyd De Mause, (ed.) *The History of Childhood* (Souvenir Press, 1976) pp.88-89.

<sup>21</sup> Mary McLaughlin, 'Survivors and Surrogates: Children and Parents from the 9th to the 13th Centuries', in De Mause, *The History of Childhood*, p.101 et.seq.

'For children and women naturally are hard to keep counsel of that thing a man would have kept secret' (1525)

'He is a fool that agrees to the counsel of a child' (1533).<sup>22</sup>

In the early modern period with the development of the jury trial and embryonic legal profession, witnesses were increasingly presented to the court and inevitably children were called upon to appear as part of that process.<sup>23</sup> As Simpson confirms, rape and the sexual abuse of young children were not a rarity in the London courts – at the Old Bailey between 1730-1830 approximately 'one-fifth of all cases of capital rape involved children under the age of ten' and he estimates that 'if it had been possible to tabulate the number below the age of twelve, it is certain that the proportion would have been much higher.'<sup>24</sup> The judiciary had absolute discretion to decide whether or not a particular witness, child or adult, was eligible to testify and could be heard. This was purely a question of law to be determined as a preliminary issue at the outset of any hearing.<sup>25</sup> Trial judges were guided by the opinions of the great legal jurists of the day but as Hendrick points out, from the late seventeenth century 'a new attitude towards children began to manifest itself, so much so that the eighteenth century has been claimed as a "new world" for them.'<sup>26</sup> The consequent development of the social construction of childhood 'emerged fragmented and ambiguous, torn as it was between the notion of "innocence" and a pessimism born of evangelical and political anxieties' associated with the longstanding belief that children were inheritors of the Original Sin.<sup>27</sup> It is therefore likely that consciously or subconsciously, this cultural shift influenced the opinions of those legal commentators and may serve to explain the difference of opinion between them. For example, Coke and Blackstone held opposing views about the eligibility and competency of child witnesses with Hale's opinion falling somewhere in between.

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<sup>22</sup> Melvin Tucker, 'The Child as Beginning and End: 15<sup>th</sup> and 16<sup>th</sup> Century English Childhood', in De Mause, *The History of Childhood*, p.229.

<sup>23</sup> See Fitzjames Stephen, *A History of the Criminal law of England* (Macmillan 1883); Henry de Bracton, *The Laws and Customs of England*, Woodbine (ed.) (Oxford University Press, 1922); William S. Holdsworth, *A History of English Law*, 2<sup>nd</sup> ed. (Methuen, 1957).

<sup>24</sup> See Simpson, 'Vulnerability and the age of female consent', p.191. Also see Julie Gammon, "'A Denial of Innocence": female juvenile victims of rape and the English legal system in the eighteenth century,' in A. Fletcher and S. Husseys, (eds.) *Childhood in Question: Children, Parents and the State* (Manchester University Press, 1999), pp.74-95. For post-1830 Jackson provides statistical analysis of cases of sexual assault at the Middlesex Sessions and in the West Riding 1830-1910: *Child Sexual Abuse in Victorian England*.

<sup>25</sup> Holdsworth, *A History of English Law*, Vol.IX, p.188 cites a commentator in the first half of the seventeenth century: 'the books of the common law do yield small direction for examination of witnesses, and the civilians are therein far too copious.'

<sup>26</sup> Harry Hendrick, *Child Welfare England 1872-1989* (Routledge, 1994) p.21.

<sup>27</sup> *Ibid*, pp.21-22.

Coke, writing in the seventeenth century was one of the first to assert that all witnesses were obliged to swear an oath to God. Reflecting Jenks' assertion that childhood always relates to the particular cultural setting of the time<sup>28</sup> - in this context the preoccupation with Original Sin - he believed that infants below the eligible age to become a juror lacked capacity and religious discretion and should therefore be excluded.<sup>29</sup> Whereas Blackstone, writing in the eighteenth century, was more empathetic believing that infants should be heard by the court as

...their inexperience and artlessness' limited any motive for falsehood and prevented their 'testimony being shaken by defence counsel ...if a child does not understand the nature of the questions put to him he can only answer according to fact.'<sup>30</sup>

In his view, adults are more anxious to 'reconcile every conceivable inconsistency' whereas the naivety of children makes their evidence more likely to be credible as they were still morally innocent. Blackstone appears to be alluding to Rousseau's prevailing philosophy of a more naturalistic and Romantic conception of childhood where children are genuinely perceived as children and not simply young adults as represented in his book *Emile* (published 1762).<sup>31</sup>

Hale considered that infants under 14 should not be examined on oath but acknowledged the difficulty of establishing the truth in cases where adults had committed 'serious violations against the persons of children' and the only witness who could give any account of what had happened was a child.<sup>32</sup> He was uncertain whether a girl under 12 years of age who had been raped could give evidence but, citing a case against witches where a 9 year old child had been sworn, opined 'If she has the sense and understanding that she knows and considers the obligations of the oath she may be sworn.' As for those who did not show such understanding he advocates that their evidence should be heard without an oath but

...it ought not to move the jury to convict ... [unless] the evidence is fortified with concurrent evidence of some weight, as in cases of rape, buggery and witchcraft, and such crimes which are practised upon children.<sup>33</sup>

Hale further warned of the dangers of convicting a man on the 'single accusation with or without oath of an infant' creating the rule that the evidence of a child of tender years must

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<sup>28</sup> Chris Jenks, *Childhood*, 2<sup>nd</sup> ed. (Routledge, 2005) p.7.

<sup>29</sup> Sir Edward Coke, *The First Institutes of the Laws of England* (Professional Books reprint for J. Clarke, 1832) p.6b.

<sup>30</sup> Sir William Blackstone, *Commentaries IV*, 16<sup>th</sup> ed. (Butterworths, 1826) p.214.

<sup>31</sup> See Hendrick, *Child Welfare*, pp.22-23.

<sup>32</sup> Sir Matthew Hale, *The History of the Pleas of the Crown* (London: Professional Books, 1736) vol.i. p.302.

<sup>33</sup> *Ibid.*

be corroborated in law by other independent evidence.<sup>34</sup> This view seems to accord with the counter to Rousseauism; the Wesleyan doctrine that a child's 'moral will' must be subjugated to its parents' and through them automatically to God.<sup>35</sup>

Initially it is Coke's approach that was prominent in judicial reasoning. In 1726 Travers was indicted for the rape of a 6 year-old girl at Kingston Summer Assizes but was acquitted (by Lord Chief Baron Gilbert) on the grounds she was too young to testify against him. At the subsequent Lent Assizes before Chief Justice Raymond, he appeared on a second indictment of assault with intent to ravish the girl who was now aged 7. Defence counsel again objected claiming that a witness must be 12 years or older to give evidence and 'that a child of six or seven years of age, in point of reason and understanding, ought to be considered as a lunatick or madman.'<sup>36</sup> The prosecution responded that as the second charge was for a misdemeanour rather than the capital charge of rape the testimony was warranted. Raymond held that 'there was no difference betwixt offences capital and lesser ... the child cannot be presumed to distinguish betwixt right and wrong', and further that he was unaware of any child under 9 being allowed to give evidence.<sup>37</sup> He referred to an earlier case of *Steward* (1704) indicted at the Old Bailey for two charges of rape against a child aged 10 years and 10 months and another aged between 6 and 7 years. The elder was not admitted as a witness despite giving 'a good account of the nature of the oath' with supporting circumstantial evidence. The other child was automatically rejected as too young without the court even inquiring into any circumstances that may have given her testimony credit.<sup>38</sup>

In the 1770s the issue was raised in three cases followed in close succession. In 1771 *Dunnell* was charged with raping an 8 year-old girl at Norwich Assizes, by the time of the trial, she was aged 9 years and 4 months. The judge declared that no child under 9 should be examined as a witness on oath or otherwise in a capital case but the court could exercise its discretion where a child was aged between 9 and 14 years. The child was allowed to give evidence but Dunnell was acquitted on an ancillary point.<sup>39</sup> This decision was upheld in *Powell* where a child aged 6 years was not permitted to give evidence as she was deemed incapable of understanding the oath.<sup>40</sup>

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<sup>34</sup> Ibid, p.627. The requirement was abrogated by s.34(1) Criminal Justice Act 1988.

<sup>35</sup> See Hendrick, *Child Welfare*, p.21.

<sup>36</sup> *R v Travers* (1726) 2 Str 700.

<sup>37</sup> Ibid 701.

<sup>38</sup> Ibid.

<sup>39</sup> Reported in the case of *Powell*.

<sup>40</sup> *R v Powell* (1775) 1 Leach 110.



The issue was finally resolved in the lead case of *Brasier* (1779) where the accused had been convicted of an assault with intent to commit rape on Mary Harris aged 'between five and under seven'. Mary had not been produced or sworn as a witness in the trial but evidence had been given by her mother and another woman who lodged with her. The case was reserved for the opinion of the 12 judges at Serjeants Inn Hall. Pardoning *Brasier*, the judges unanimously confirmed 'That no testimony whatever can be legally received except upon oath' but indicated a willingness to accept Hale's more subjective approach in suggesting that an infant under 7 may be sworn provided she is sufficiently mature and could answer questions that would test her understanding of piety:

For there is no precise or fixed law as to the time within which infants are excluded from giving evidence, but the admissibility of their evidence depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court, but if they are found incompetent to take an oath their evidence cannot be received.<sup>41</sup>

After the ruling in *Brasier* examples can be found of young children being permitted to testify though convictions were more likely to be secured where a child's testimony was corroborated by that of adult witnesses especially if supported by medical evidence. Likewise child testimonies did not prejudice capital convictions provided there was other supporting evidence. For example, in 1807 at Yorkshire Assizes, Thomas Jewett a 24 year-old servant, was found guilty of violating the chastity of his master's 10 year-old daughter whose testimony was corroborated by her mother and a surgeon. Despite the jury's plea for clemency given Jewett's previous good reputation, the judge said he had no choice but to impose 'the unmitigated severity of the law'.<sup>42</sup> At Salisbury Assizes one H. Smith was also sentenced to death for raping 6 year-old Ann Fleck whose testimony was corroborated by the fact he had only just been released from serving 18 months imprisonment for a similar offence and that a second bill against a 13 year-old girl had also been presented to the court.<sup>43</sup>

In March 1827 at Worcester Assizes 72 year-old John Mason, 'a debilitated old man' was convicted for 'an assault with an unlawful attempt' on his 7 year-old granddaughter. The grand jury had thrown out the bill for the capital offence suggesting that the violation was one of attempted sexual intercourse. The child is reported to have given her testimony 'with great minuteness' implying that the judge, Baron Garrow, was satisfied she was telling the truth. This was corroborated by a woman who saw Mason take the child into a room and lock the door and then watched what he was doing through the window as she suspected he had

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<sup>41</sup> *R v Brasier* (1779) 1 Leach 199 at 200.

<sup>42</sup> *Hull Packett*, 24 March 1807.

<sup>43</sup> *Sunday Times*, 18 March 1827.

attempted something similar on her own daughter. Garrow sentenced Mason to 18 months solitary confinement 'remarking he was one of that unhappy class whose disposition to wickedness had outlasted his power' and this was not the first time he had subjected a child to his 'unnatural attacks.'<sup>44</sup> A later case demonstrates the importance of medical evidence. James Stevens was charged with raping his daughters Sarah, aged 10, and her elder sister aged under 12. Sarah's testimony was corroborated by the surgeon who examined her but for the older sister there was no medical testimony, only her mother and brother as witnesses, so this charge was dismissed. The Chief Baron sentenced Stevens to transportation for life for the assault on Sarah, 'You have been found guilty on testimony the most conclusive. This is one of the most appalling instances of crime I have ever heard'.<sup>45</sup>

## 2 Does She Understand her Primary Duty?

Fundamental to English law was the belief that adult witnesses would only speak the truth if paralysed by the 'fear' of giving sworn evidence by taking the oath on the Gospel clarified in the case of *White* 1786 as 'a religious asseveration by which a person renounces the mercy and imprecates the vengeance of heaven if he do not speak the truth.'<sup>46</sup> Non-Christians were rejected not because of their incompetency as a witness but because the weight of their evidence was regarded as inferior. So crucial was such religious belief that the judge in *White* was prepared to postpone the trial until the next Assizes so that an adult witness, who had heard of God but had never learned the catechism and so was ignorant of the notion of eternity and a future state, could be instructed in such matters.

However, few had the same confidence in childhood innocence as Blackstone. The differences of opinion displayed by the great legal jurists alluded to above reflect a more universal societal tension between those who believed that children were born naturally innocent and good (as Blackstone and some theologians did), and those (like Coke) who believed Satan was always omnipresent spawning an innate and uncontrollable 'viciousness' in children, especially girls. This trait could only be defied if they had been consciously 'saved' or as today's idiom would describe it 'born again.' Having survived babyhood at a time when infant mortality was notoriously high, the child who had now learned to walk independently and converse with adults was no longer protected solely by her natal baptism.<sup>47</sup> These were potentially vulnerable years when responsible parents eagerly awaited and needed their children to manifest signs of salvation at as young an age as

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<sup>44</sup> *John Bull*, 19 March 1827; *Sunday Times*, 18 March 1827.

<sup>45</sup> *Lloyds Weekly*, 15 March 1846.

<sup>46</sup> *R v White* (1786) 1 Leach 430.

<sup>47</sup> See, for example, Judith Rowbotham, *Good Girls Make Good Wives. Guidance for Girls in Victorian Fiction* (Basil Blackwell, 1989).

possible so that their souls could, and would, go to heaven if they did in fact die. It was presumed that sometime between the ages of 4 and 6 years young girls would be affected by some 'other-worldly' religious 'experience' that was supposed to occur when their pious sensibilities first became aroused investing the child with the desired level of pious virtue. Such idealised infant piety and morality was something that the Victorians in particular enthusiastically embraced believing that such infants would be more receptive to their mother's pious teaching and quickly develop a taste for Bible stories and other 'educative' moral literature.<sup>48</sup>

Consequently, children were only permitted to give evidence on oath provided they could demonstrate sufficient understanding of the actual implications of 'burning in hell' if they lied. The issue was not whether the child was competent to *in fact* give evidence but whether they were competent to *understand* the significance of the religious oath. This underlines Hilton's argument that the Evangelical Movement, which expressly rejected Rousseauism, didactically inculcated a universal fear of God and that Evangelism was highly influential in judicial thinking.<sup>49</sup> Hendrick notes that Evangelical 'believers had little alternative but to view children as being in need of discipline and education in order to provide the necessary salvation, to protect not only their souls but also Christian society itself.'<sup>50</sup>

Such dogma is evident in the courtroom; 10 years after the trial of *White* was postponed for a 'crash course' in religious education the practice was extended to children. In the case of *Murphy* (1795) indicted for the rape of a 7 year-old girl the trial was postponed until she had been instructed by a clergyman on the principles of her 'duty'.<sup>51</sup> Examples soon started to appear of children being 'educated' and given immediate religious instruction in their God-fearing responsibilities before testifying: after all God would be watching them in the witness box and would always know if a child told a lie as in the ubiquitous sermon 'Thou God Sees't me'.<sup>52</sup> A judge who failed to prevent a child unconsciously lying on oath and so perjuring

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<sup>48</sup> Hesba Stretton, *Jessica's First Prayer* (Religious Tract Society, 1867); Mrs Ewing, *Six to Sixteen* (SPCK, 1876) and probably the classic US novel, much loved here, Susan Warner *The Wide, Wide World* (George Routledge and Co, 1853). This was originally published in 1850 by Warner under the pseudonym of Elizabeth Wetherell. Such dogmatism was also famously encapsulated in Edward Gorey's 1966 allegory *The Pious Infant*.

<sup>49</sup> See Boyd Hilton, *Age of Atonement The Influence of Evangelicalism on Social and Economic Thought 1795-1865* (Clarendon, 1997) for the dominance of the evangelical trope in government and judicial thinking up to 1860 at least.

<sup>50</sup> Hendrick, *Child Welfare*, pp.8-9.

<sup>51</sup> *R v Murphy* (1795) 1 Leach 430.

<sup>52</sup> There is a diverse range of examples and authors exhorting adults and children such as Esther Copley, *Cottage Comforts, with hints for promoting them, gleaned from experience* (Simpkins and Marshall 1834) p.222; Rev C. Smith, 'The Office and Importance of Justifying Faith', *The Church of England Magazine*, 28 August 1841 p.123; Esther Copley *Cottage Comforts, with hints for promoting them, gleaned from experience* (Simpkins and Marshall 1834) p.222; 'Make it a fixed rule, if you would

herself might be responsible for setting that child on a spiralling descent into delinquency and hell.<sup>53</sup> And it was not just in respect of allegations involving sexual assault. In August 1824 at York Assizes, the murder trial of Suzannah Turpin - alleged to have poisoned her mother-in-law - was adjourned from the Summer Assizes to the Spring Assizes in April 1825 so the key witness, her 7 year-old daughter, could be 'instructed in her religious duties, and be made to understand the obligation of the oath.'<sup>54</sup>

The tactic of postponing trials for religious instruction therefore became a fairly common practice in the first half of the nineteenth century but the judiciary were divided over its use. In *Williams* (1836) the judge commented that the 8 year-old child witness should feel the binding obligation of the oath from a general course of religious education and not just from the recent instruction administered 'simply for the purposes of a trial'.<sup>55</sup> However, in *Bayliss* (1849) the prosecution successfully applied for the defendant to be remanded until the next Assizes so that the complainant, under the age of 10 and with no apparent notion of any religious or moral imperative, could be instructed.<sup>56</sup>

By the 1830s if not earlier, the widespread availability of Sunday Schools (established by the Evangelicals to protect society from the 'sinful' children of the poor) providing scripture reading meant that regardless of class, parents could - according to contemporary sensibilities and understandings - be justifiably castigated by the court if their daughters were ignorant of their moral duty and the case collapsed as a result. At the London Guildhall in 1840, 10 year-old Mary Mapleson, 'who could hardly walk', after William Jennings, 40 years, had attempted to violate her, told Alderman Brown that she did not attend church or any other place of worship and did not know what the catechism or hell was. The magistrate admonished her mother, a widow with 7 children, that 'she had brought her child up so ignorantly that he could not take her evidence' and as a result had no choice but to discharge the prisoner. He advised that as 'The child was utterly uninstructed in the principles of religion, and had not the slightest notion of the solemn obligation of an oath' she should be instructed accordingly but that he could not detain Jennings for this purpose even

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live a Christian life, to awake with God, to go to your labour with prayer, to walk in the thought "Thou God seest me": John E.B. Mayor, *Twelve Parochial Sermons* (Cambridge University Press, 1913) p.72.

<sup>53</sup> The fixation with the belief in a future state and eternal damnation is also evident in the admissibility of dying declarations. *R v Pike* (1829) 3 C&P 598 rejected the dying declaration of a 4 year-old girl in the subsequent trial of her murder as a child of such tender years could have no idea of the future state necessary to allow the reception of her evidence. Thus not all judges, especially earlier on, were convinced by the child piety trope.

<sup>54</sup> *The Times*, 9 August 1824; 4 April 1825.

<sup>55</sup> *R v Williams* (1836) 7 C&P 320

<sup>56</sup> *R v Bayliss* (1849) 4 Cox CC 23 following an earlier Anonymous Case where the trial had been similarly postponed.

though he was a 'monster'.<sup>57</sup> The general course of religious education that the judge would probably have been referring to would be staples like Mrs Mortimer's *The Peep of Day* daily series which, starting with Line Upon Line, condensed the Bible into manageable sections for infant minds.<sup>58</sup>

The year of Patterson's title comment, 1849, appears to have been a turning point which is not surprising given Mayhew's revelation of the 'shocking' state of religious ignorance he found in the lower classes of London.<sup>59</sup> At the Central Criminal Court, Baron Alderson examined a 12 year-old girl who had been sexually assaulted by her father, Thomas Hall, as to her knowledge of religious subjects and her understanding of the solemnity of the oath.<sup>60</sup> *The Times'* lawyer-reporter notes that despite attending church intermittently she apparently 'betrayed the utmost ignorance' stating that she 'supposed the people prayed to the Minister, and that he prayed to them, but that she had never heard of God, and knew nothing of the existence of an Almighty Creator.' Alderson said he could not permit a child who 'betrayed such ignorance' to be examined on oath and intimated that as there was no other supporting evidence the accused should be acquitted. The prosecution asked whether Hall might be detained while the girl was instructed. Alderson responded that while he was aware of this practice the judges were all now agreed that it was an 'incorrect proceeding' and objectionable on the ground that it was like 'preparing or getting up a witness for a particular purpose'. He also referenced Mayhew's findings commenting that it was

fearful to see children in this great metropolis so ignorant of their primary duties, and he hoped the people of London would not suffer such a disgrace to continue. It was really dreadful to find a child 12 years old was not even aware of the existence of God.

The jury returned a verdict of not guilty. When Mayhew made the world, including the legal world, aware of the recalcitrant, resilient and incorrigible irreligiousness of so many of the children of the 'dangerous classes' (so called) i.e. the urban poor, effectively the judiciary reverted to Coke's default position of distrusting children. A letter immediately appeared in *The Times* from The Rev C.H pointing out the irony that Hall had walked free because he had 'grossly neglected his parental duties, and left his child in a state of heathenist ignorance'. The Reverend was equally offended that Alderson had only criticised those living in London when there were many others in 'Darkest England' who had closed their hearts to

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<sup>57</sup> *Sunday Times*, 5 July 1840.

<sup>58</sup> Favell Lee Mortimer, *The Peep of Day: A Series of the earliest Religious Instruction the Infant Mind is Capable of Receiving* (Nelson and sons, 1894).

<sup>59</sup> Mayhew's 'shocking' revelations on *London Life and the London Poor* started to appear in the *Morning Chronicle* in 1847 and what caused most comment was the 'shocking' state of ignorance of religion that existed in the lower classes of London and in other major cities.

<sup>60</sup> *The Times*, 1 December 1849.

God declaring that the 'disgrace' belongs not to the people of London but 'to the Judges of England'.<sup>61</sup> The rejection by the judiciary of 'religious instruction' was arguably representative of the move towards a more orthodox approach to Christianity. Spencer asserts that

Perhaps it was as well that not all judges would follow the practice, because it must have been exquisitely cruel. Not only did the child who had been battered and assaulted have a shocking memory to contend with: after a crash course of religious instruction the child had an eternity in hell to think about as well.<sup>62</sup>

Whilst eternal damnation was now less sacrosanct the Victorian pursuit of moral objectives was highly disciplined and their offspring were expected to be strongly motivated in this regard. However, as Black argues many found such moral demands challenging:

Many Victorians had an appalling time with religious belief ... Eternal punishment sat poorly in the minds of humanitarians, and the morality of many Old Testament prophets did not square well with Victorian ethics. This generated intellectual and emotional problems, for the Victorians had turned truth-telling into a supreme virtue.<sup>63</sup>

These problems are illustrated in the case of *Holmes* in 1861 where the value of testing religious belief was questioned. A 6 year-old rape victim was about to be sworn when the defence asked the judge if it was not his duty to test the child's competence. The judge then did so in the following manner:<sup>64</sup>

His Lordship: 'Is it a good thing or a bad thing to tell a lie?'

Child: 'a bad thing'.

His Lordship: 'I think the evidence is admissible.'

The defence were not to be shaken off so easily querying: 'It is laid down in books of authority that the witness must understand the nature and obligation of the oath.'

His Lordship continued: 'This is a complicated question which 9 out of 10 children could not answer. Do you say your prayers?'

Child: 'Yes.'

His Lordship: 'What becomes of a person who tell lies?'

Child: 'If he tells lies he will go to the wicked fire.'

His Lordship: 'I think the evidence admissible. I do not know that it really advances the credibility of the testimony to such questions. The testimony is to be given open to the observations to be made upon it as to its value.'

Thus in practice, the testing of religious instruction and knowledge became a less influential determinant and as implied here opinion on whether or not a child was suitably pious increasingly tended to be based on a subjective determination of whether she looked, sounded and presented herself as convincingly 'good'.

<sup>61</sup> *The Times*, 3 December 1849.

<sup>62</sup> Spencer and Flin, *The Evidence of Children*, p.47.

<sup>63</sup> Eugene. C. Black, (ed.) *Victorian Culture and Society* (Macmillan 1973) p.310.

<sup>64</sup> *R v Holmes* (1861) 2 F&F 788.

### 3 Can Her Testimony be 'Shaken'?

Post 1849, therefore, a more subjective shift is apparent. The requirement of religious understanding remained, as obligated by Victorian evangelicalism as well as the law, but the judicial discourse more positively acknowledged the concept of childhood as distinct from the requisite expectations of adulthood. Hendrick comments that during the nineteenth century childhood became constructed as 'a very specific kind of age-graded and age-related condition that went through several stages' which he identifies in 'approximate chronological order' as the natural child, the Romantic child, the evangelical child and the schooled child.<sup>65</sup> We have already seen reflections of such stages in the judicial responses examined so far and now it is the concept of the 'schooled child' that comes to the fore and that facilitates a more subjective approach.

Two tropes start to stand out in the case reports expressly referencing Blackstone's earlier theory: the relative 'intelligence' of the child and the extent to which her testimony 'could be shaken'. These were alluded to by William Best, author of *The Principles of the Law of Evidence*, arguably it is no coincidence that this work was also published in 1849. Best advocated a two-stage approach. A judge should first ascertain the sufficiency of intellect rendering a child capable of giving an intelligent account of what she had experienced; this could then be countered by any ignorance of the nature and obligation of the oath which defeated its admissibility. Best was also highly dismissive of the setting of an age bar regarding it is as a less suitable objective approach and preferring a more subjective and individualistic examination:

the testimony of children has always been a source of embarrassment to tribunals, and the laws of many nations have cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age.<sup>66</sup>

But he also insisted that if the testimony of an infant is to be received at all it should be heard directly from the child and must be sworn.

Prosecutors started to emphasise the 'intelligence' of child complainants implying that an intelligent child was less likely to change her story or utter a falsehood as she would have

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<sup>65</sup> Hendrick, *Child Welfare*, p.37. He also includes the factory and delinquent child but these are not relevant to the discussion here and the final stage of the psycho-medical child which appears much later in the century. See also Jackson, *Child Sexual Abuse in Victorian England*, p.95

<sup>66</sup> William M. Best, *The Principles of the Law of Evidence*, 12<sup>th</sup> ed. (Sidney, Phipson, Sweet & Maxwell, 1922) pp.138-141. Confirming a child's age could also be problematic as illustrated in *R v Jeremiah Hayes* (1846-48) 2 Cox CC 226 where no documentary evidence could be produced to prove that the child was under the age of 10, only the oral testimony of her mother that she was born 3 February 1837. The defence required more 'certain evidence' of the child's age and Justice Coltman rejected the mother's testimony as hearsay. The verdict was not guilty of the felony of carnal knowledge with a child under 10 but guilty of an assault and sentenced to 18 months imprisonment.

most certainly been schooled to understand the significance of so doing and the likely consequences. For example, in 1856 John Clevenly, 40 years, was charged and remanded in custody with indecently assaulting Jane Richardson described as 'a very intelligent' 7 year-old.<sup>67</sup> Newspaper reports also expressly comment on the fact of whether a child's testimony could be 'shaken' picking up on the lawyers' contentions in this regard as in the case of Emily Eminson, aged 10 years, who was subjected to a felonious assault by Thomas Cressy aged 20 years. She satisfactorily replied to the Bow Street magistrates' questions 'respecting the nature of her punishment in a future world if she lied.' Emily made 'a clear statement of the offence' and, as both the *Daily News* and the *Sunday Times* reports note, was cross-examined 'without shaking her testimony' which was further corroborated by her grandmother thereby confirming not only her integrity and resoluteness but also demonstrating that she was 'convincingly good'.<sup>68</sup>

In 1860 Joseph Lock, a 39 year-old 'well-dressed' shopkeeper, appeared at Mansion House police court charged with indecently assaulting Elizabeth Webb, the 13 year-old daughter of one of his workers. Elizabeth had told her mother 'by degrees' that Lock had taken indecent liberties and given her sixpence not to tell anyone. She is described as an 'intelligent girl' who told her story with 'much natural modesty and propriety of manner.' Her mother was asked to leave the court while she testified and was subsequently cross-examined by the accused without him 'eluctating any circumstance in his favour or shaking her testimony'.<sup>69</sup> Lock then requested legal representation and the case resumed two days later before Sir Robert Carden, the Presiding Magistrate. Mr Lewis, the defence counsel, subjected Elizabeth to a 'long and rigid cross-examination' but could not 'shake her evidence'. Lewis stressed his client's moral respectability but Carden was also strongly impressed with the respectability of Elizabeth's parents.<sup>70</sup> He referred the case to the Central Criminal Court where Elizabeth was required to testify for a third time. Lock called a number of highly respectable witnesses, male and female, who described him as being 'a very moral, well-conducted young man.' The jury, after deliberating for over an hour, found him not guilty.<sup>71</sup> Thus despite her intelligence and the fact her testimony could not be shaken, ultimately his respectability outweighed that of her family's.

Despite a child presenting herself in court as 'intelligent', 'pretty' and 'good', the dangers and consequences of parents not imposing, or being able to show that they had so imposed,

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<sup>67</sup> *The Morning Chronicle*, 29 December 1856.

<sup>68</sup> *The Daily News*, 3 June 1862; *Sunday Times*, 8 June 1862.

<sup>69</sup> *The Times*, 22 October 1860.

<sup>70</sup> *The Times*, 24 October 1860.

<sup>71</sup> *The Times*, 27 November 1860.



strict religious instruction and ensuring regular attendance at church to reinforce their daughter's demeanour in the eyes of the court could have devastating results. Such indifference is vividly illustrated in a remarkable case where a young female complainant was subsequently prosecuted by the accused for perverting the course of justice as her competency as a witness was undermined by her parents' testimony. This 'extraordinary' case concerned the Reverend John Henry Hatch, chaplain of the Wandsworth House of Correction, who appeared at Wandsworth Magistrates Court on 14 November 1859, charged with five offences of indecent assault committed against two young sisters. A 42 year-old married man, educated at Eton and Cambridge, Hatch advertised his services to educate young female scholars at his residence in Wandsworth. He was employed by the highly respectable and wealthy Plummer family of Wiltshire in August that year to school their daughters Mary Eugenie aged 11, and her 8 year-old sister Stephanie Augusta.<sup>72</sup> Concerned about information his daughters had passed on to their mother about their stay with Hatch the girls' father reported his suspicions to the police. He also sought legal advice, arranged for the girls to be examined by the family doctor who 'observed slight marks of violence'<sup>73</sup> and later reported the matter to the Bishop who in turn summoned Hatch to a meeting, but when he failed to attend Plummer instigated criminal proceedings.

Hatch was committed to trial at the Central Criminal Court after the Presiding Magistrate, Mr Ingman, had examined the prosecution's case and declared that the 'evidence is not fit for publication'.<sup>74</sup> Unable to pay the bail amount of 500 guineas and find two other friends who would stand surety for 250 guineas each, Hatch was remanded in custody until 1 December when he appeared before Baron Bramwell. The first count of indecent assault was alleged to have taken place on 11 August, the day Eugenie had started at the school, the second on the following day and the others two weeks later when Stephanie joined her sister at the Wandsworth house. Both girls testified on oath supported by other family witnesses but again the evidence was declared unfit for publication. Eugenie claimed that on her arrival at Hatch's residence he had 'commenced a course of the most disgusting conduct' which took place in his bedroom and Stephanie then confirmed that he had also 'acted in the same way towards her'. According to the lawyer-reporter the most 'extraordinary' aspect of their testimony was their claim that Mrs Hatch had apparently been present when the alleged offences had occurred.<sup>75</sup>

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<sup>72</sup> Various referred to as Selina, Stephina and Stephanie in different reports of the case.

<sup>73</sup> *The Times*, 14 May 1860.

<sup>74</sup> *The Times*, 15 and 16 November 1859.

<sup>75</sup> *The Times*, 2 December 1859.

The girls are reported as giving their evidence 'in a simple and artless manner' and when subjected to a 'severe' cross-examination by Serjeant Ballantine their testimony could not be shaken.<sup>76</sup> Ballantine regularly appeared as a defence lawyer in the 1850s and 1860s and was known for his achievements in securing acquittals for men charged with sexual offences by devising 'able and ingenious defences'.<sup>77</sup> He also appeared to have little respect for female complainants and would target their feminine weaknesses suggesting they could persuade a jury with a fainting fit or weeping tears at an opportune moment.<sup>78</sup> In typical fashion, Ballantine made a 'powerful address' to the jury advocating that this was a 'trumped up' charge made by two girls desperate to go back home and produced a dozen character witnesses in support of Hatch. Bramwell reminded the jury that the defendant was of the most reputable standing but that it was up to them to evaluate the evidence, 50 minutes later they returned a guilty verdict. Bramwell imposed a two year custodial sentence for abusing his position of trust to which Hatch responded that the 'children had been telling abominable lies' and he would never have the chance of redeeming his character.<sup>79</sup>

Imprisoned in Newgate gaol Hatch's reputation was destroyed and with no right to appeal he sought a pardon from the Secretary of State. This was refused so in May 1860 he initiated a criminal prosecution against Eugenie for wilful and corrupt perjury on the basis that he had been convicted partly on the testimony she gave on oath. On 9 May, accompanied by her father, 11 year-old Eugenie was 'called upon to surrender and take her trial' before Baron Channell and Justice Keating at Old Court. The trial, which lasted four days, is extensively reported in *The Times*, the lawyer-reporter (unsurprisingly) notes that 'the case appeared to create a great deal of interest, and the court was crowded for the day'.<sup>80</sup> Unusually, as the accused, Eugenie was allowed to sit at the table with her defence counsel Serjeant Shee.

Mr Edwin James QC led the prosecution reiterating that it 'was one of the most extraordinary cases that had ever been investigated' and informing the jury that the original complaint was 'the most odious accusation' leaving his client unable to disprove the allegation.<sup>81</sup> Witnesses who had been called and cross-examined at the original trial were recalled and questioned again. Cross-examined by Shee, Hatch acknowledged that he had briefly entered the girls'

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<sup>76</sup> Ibid.

<sup>77</sup> *The Times*, 24 October 1850, 14 May 1851, 29 November 1851, 29 April 1852, 13 January 1853. He was later described as 'the most brilliant cross-examiner' in 'Illustrated Interviews' Sir Francis and Lady Jeune *Strand Magazine* 7 (1894) p.584.

<sup>78</sup> See *Serjeant Ballantine's Experiences* (Bentley, 1883) p.70.

<sup>79</sup> Ibid.

<sup>80</sup> *The Times*, 10 May 1860 and 11, 12, 14, 15, 16 May. Also see *The Morning Chronicle*, 12 May 1860; *Sunday Times*, 13 May 1860.

<sup>81</sup> *The Times*, 10 May 1860.

bedroom as they had asked him to kiss them goodnight but that he had never allowed Eugenie to get into his bed except for under the counterpane when his wife Essie was also present. When probed further he explained that he had allowed Eugenie to come into his bed while his wife was washing another child in the closet, Eugenie was wearing her nightgown and he was 'undressed, but of course covered with the bedclothes.... I thought the child was accustomed to it, and she did not think any harm of it...I did not think there was any absolute harm in it.' He admitted that he had 'most likely kissed the child' but only 'affectionately'.<sup>82</sup> Finally, he confirmed that Eugenie had behaved exactly as he would have expected a young girl of Christian parents to conduct herself in effect confirming Eugenie's moral integrity.

The couple's 8 year-old adopted daughter, Lady Harriet Hatch, also stereotypically described as a 'remarkably interesting and pretty child', testified with considerable articulation. Her narrative strongly suggests that she had been drilled by a lawyer beforehand and she stated that Hatch had never acted improperly towards her nor could he have assaulted either sister.<sup>83</sup> The prosecution then applied for a number of other witnesses who had visited the house but who had not been called in the original trial to be heard. Realising that none could usefully add any further information Channell refused to accept any more applications to avoid 'confusion and inconvenience'. On the third day Shee challenged much of the prosecution's case and cross-examined Stephanie, described simply as an 'interesting' child who stated that Hatch had come into her bedroom one night in his nightshirt and she had then heard him go into her sister's room. In the morning, Eugenie had said to 'her that "Mr Hatch had done something to her" and I said he had done the same to me.'<sup>84</sup> Shee also called a number of character witnesses such as the Reverend Mr Brighton the proprietor of a school Eugenie had previously attended to confirm that she was 'a very-well conducted good child' whom he considered 'truthful and simple-minded'.<sup>85</sup>

Addressing the jury, Edwin James QC reminded them that Hatch had protested his innocence but had been unjustly convicted on 'false evidence' and that his conviction should be reversed. He intimated that Ballantine should have called more witnesses at the original trial to testify that the Reverend and Mrs Hatch were respectable individuals who would not have perjured themselves and that Hatch was disadvantaged as legally his wife could not be called upon to testify for the defence. The case then suddenly turned when James pointed

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<sup>82</sup> *Ibid.*

<sup>83</sup> *The Times*, 11 May 1860.

<sup>84</sup> *The Times*, 12 May 1860.

<sup>85</sup> *The Times*, 14 May 1860. Eugenie's mother also stated that Eugenie had attended some eight or more schools but no reasons are given in the report to explain this.

out inconsistencies in Caroline Plummer's evidence regarding how frequently her daughters went to church immediately casting doubt on their moral integrity. The prosecutor cleverly invoked the pious sensitivities of the jurors asserting that 'the statement of the children in this case was a "lie – guilt's offspring and its guard."' He asked the jurors:

Was this the first time that they had heard of wicked, designing children making false charges, and did they not know that there were instances in which men's lives had actually been nearly sacrificed on the evidence of children which had afterwards been proved to be false?<sup>86</sup>

James then delivered the killer blow claiming that the girls were not as pious or as Christian as had been suggested. They had not been brought up religiously in the fear of God, one had not been baptised until she was 8 years-old - well beyond that opportune moment when she should have experienced the requisite enlightenment. The girls had sworn that their mother had taken them to church every Sunday whereas the mother had admitted that she 'was not in the habit of taking her children regularly to church.' When testifying Caroline Plummer admitted that she had drunk 'a sherry-wine today ... and brandy the day before yesterday', but then fatally she joked that 'I should like to have some brandy and water or a sherry now'. Irrespective of whether this was due to nerves or because she was a regular drinker it allowed the prosecutor to completely discredit her testimony - and indirectly that of the girls' - and accuse her of being inconsistent as 'if she had been drinking or was *delirium tremens*', the jury had seen her and could 'judge what sort of woman she was.'<sup>87</sup> His address was received by the court with a rapturous round of applause.

The next day Channell took eight hours to deliver his summing up which was barely audible to anyone except the jury. He stressed the fact that 'it was impossible to conceive of a more important or extraordinary inquiry ... and felt utterly incapable of presenting to them any theory as to the probability of truth' but he did proffer a fair and considered summary of the evidence. Two hours later the jury returned a verdict of guilt but the foreman handed the judge a written note recommending 'the utmost extent of mercy' and suggesting that if his Lordship had the power that any period of imprisonment be accompanied with the type of training and education which Eugenie had apparently 'hitherto been deprived of, and probably would still be deprived of at home.'<sup>88</sup> Sentence was passed the following day. Channell made a lengthy statement and stressed the fact that his decision was as lenient as it could be within confines of the law: Eugenie was to be imprisoned for three weeks in Holloway gaol followed by two years in a reformatory school. He stated 'there was good

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<sup>86</sup> *The Times*, 14 May 1860.

<sup>87</sup> *The Times*, 12 May 1860; *delirium tremens*: a state of confusion of rapid onset that is usually caused by withdrawal from alcohol.

<sup>88</sup> *The Times*, 14 May 1860.

reason to believe that she was labouring under a want of education, both religious and moral, and had imbibed habits of untruthfulness, which if not checked might lead to great mischief.<sup>89</sup> Eugenie's supporters had suggested a position guaranteeing she would receive a proper education but Channell said he had no power to authorise any such alternative but intimated the Secretary of State might be persuaded to consider it. The case attracted some comment in the press because of the irony that when Hatch was initially tried his wife could not be called as a witness for the defence but when Eugenie subsequently appeared as the accused she was not permitted to testify on her own behalf.<sup>90</sup> The true facts can never be fully ascertained but this appears to be an extreme and unique example of punishing a young child primarily it would seem more for the 'sins' of her mother than any deliberate attempt by the child to lie and undermine or pervert the course of justice.<sup>91</sup>

## Conclusion

Legal arguments as to whether, at what age, and how, young children should appear as witnesses in court continued well into the late twentieth century often reflecting society's wider disavowal of the existence of child sexual abuse. The evangelical movement had, for a while, exerted a very real impact on legal attitudes towards child witnesses manifested in a temporary confidence that the impact of religion had on a young mind so that once made aware of their religious duty, the child witness could generally be trusted. The fixation on God-fearing conformity in respect of adult witnesses was relaxed a few years after the Hatch case. In 1869 Parliament enacted section 4 Evidence Further Amendment Act which permitted non-believers who indicated that an oath had no effect on their conscience to affirm their testimony instead of swearing on the Bible. But this only served to highlight the incongruity that children were still expected to demonstrate their absolute religious understanding leading the great nineteenth century jurist Stephen to acidly conclude that:

The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or the administration of the law ... If a person who deliberately and advisedly rejects all belief in God and a future state is

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<sup>89</sup> *The Times*, 15 May 1860.

<sup>90</sup> See Letters to the Editor of *The Times*: 'The Case of the Rev Henry John Hatch', from William Hitchcock 17 April 1860 and 'The Case of the Rev Mr Hatch', from J. Pitt Taylor 18 May 1860.

<sup>91</sup> The author has not found any other cases of children being similarly prosecuted for making actual or perceived 'false allegations' of sexual assault. There is evidence of a current trend of prosecuting adult females who deliberately make false allegations of rape for perverting the course of justice but this has attracted criticism and proposals that a more appropriate charge would be that of wasting police time see '109 women prosecuted for false rape claims in five years', *The Guardian*, 1 December 2014; Crown Prosecution Service, *Consultation on CPS Interim Guidance on Perverting the Course of Justice - Charging in cases involving rape and/ or domestic violence allegations* (2011).

a competent witness, a fortiarari, a child who has received no instruction on the subject must be competent also.<sup>92</sup>

In 1885, Lord Shaftesbury, on behalf of the Society for the Protection of Children, challenged the government to relax the rule that child witnesses must always give their evidence on oath. He advocated that the oath should be abolished for children under 12 years who had been carnally known as it made it harder to prosecute such cases and

tends greatly to the aggravation of the evil wrought upon little children ...[and further] ... That the necessary delays, commitments and adjournments are unfavourable to the ascertaining of the truth of a charge, and that little children are not able to remember five or eight weeks what actually took place, and especially to undergo cross-questioning upon the testimony.<sup>93</sup>

Shaftesbury secured an amendment to the Criminal Law Amendment Act 1885 which permitted girls under 13 to give unsworn evidence in cases of defilement, but the proviso was added that an accused could not be convicted as a matter of law on her unsworn evidence unless it was corroborated by some other material evidence implicating him.<sup>94</sup>

The age bar was recently settled in the Court of Appeal when Steven Barker (convicted of the murder of baby P) appealed against his conviction for the anal rape of C, a 2 year-old girl, who had disclosed the violation to a child psychiatrist when she was aged 3. At the trial, Barker was convicted on the testimony of C was now aged 4 ½ years. The Court of Appeal, echoing Blackstone's thoughts on the matter, agreed with the trial judge that despite her intelligibility and age the testimony C gave could be understood and so she was presumed to be a competent witness. Age is no longer therefore determinative of the ability to give truthful and accurate evidence.<sup>95</sup> Of course this begs the question of whether such infants should even be required or allowed to testify in court in the first place. The former Lord Chief Justice, Lord Judge, thinks not and the Government has finally agreed to his demand to pilot the admission of pre-recorded video cross-examinations of children to avoid them having to physically attend court. This initiative was first mooted by the Pigot Report some 25 years ago and enacted in section 28 Youth Justice and Criminal Evidence Act 1999 but it has only

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<sup>92</sup> Fitzjames Stephen, *A Digest of the Law of Evidence* (William Clowes, 1886) p.273 and later repealed by the Oaths Act 1888 s.6.

<sup>93</sup> First Annual Report of the Society for the Prevention of Cruelty to Children as cited in George K. Behlmer, *Child Abuse and Moral Reform in England 1870-1908* (Stanford University Press, 1982) p.74

<sup>94</sup> This was later consolidated in section 38 Children and Young Persons Act 1933 to allow children under 14 to give unsworn evidence where they possessed sufficient intelligence to justify its reception and understood the duty to tell the truth, but the proviso was retained leading to a plethora of cases and directions on what evidence could constitute such corroboration. The proviso was eventually removed by section 34 CJA 1988, all children under 14 are now allowed to give unsworn evidence by virtue of the CJA 1991.

<sup>95</sup> *R v Barker (Steven)* (2010) *Times LR* 5 February CA

recently been implemented.<sup>96</sup> What this paper has demonstrated is that the criminal justice process and the law does not always 'think' about children and their needs and vulnerabilities in the way that it should, or indeed in the same way that other social institutions do.<sup>97</sup>

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<sup>96</sup> 'Child victims to be given court video protection', *BBC News*, 11 June 2013, <http://www.bbc.co.uk/news/uk-22849632> [Accessed 13 May 2016]

<sup>97</sup> See Michael King and Christine Piper, *How the Law Thinks About Children* (Gower, 1990) p.1.