

The History of Children’s Hearsay: From Old Bailey to Post-Davis

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INTRODUCTION

In *Crawford v. Washington*¹ and *Davis v. Washington*,² the United States Supreme Court profoundly changed how hearsay statements are analyzed under the Confrontation Clause. If a hearsay statement is “testimonial,” then the statement cannot be admitted against a criminal defendant unless the defendant had the opportunity to cross-examine the hearsay declarant. Testimonial statements include many, if not most, statements to law enforcement, particularly if elicited through structured interviews and captured on tape. The full reach of the “testimonial” concept, however, has not been determined.

It is also unclear how the new rules interpreting the application of the Confrontation Clause to hearsay statements will affect cases involving child witnesses. Children sometimes fail to testify, and when they do fail, they cannot be cross-examined. In some of the most progressive localities, their early disclosures will have been elicited through the use of structured protocols by trained interviewers, with the results videotaped and transcribed. When will those pretrial statements be classified as testimonial, making them inadmissible?

The Court has held that guidance in interpreting the definition of testimonial hearsay can be found in pre-Framing English cases, which “were the progenitors of the Confrontation Clause.”³ One such case is cited in *Davis*, discussing the claim that a 911 call reporting an ongoing emergency constituted testimonial hearsay:

* We would like to thank Daniel Klerman, Thomas Gallanis, Stephan Landsman, and Michael Risinger for their comments on a draft of this paper. We have modernized and Americanized the spelling and capitalization of words quoted from English sources.

1. 541 U.S. 36 (2004).
2. 126 S. Ct. 2266 (2006).
3. *Id.* at 2276.

In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), . . . a young rape victim, “immediately on her coming home, told all the circumstances of the injury” to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to Davis if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.⁴

In context, the Court only appeared to reference *Brasier* for the proposition that a hearsay declarant’s statements made some time after a crime has been completed do not constitute an ongoing emergency. Broadly, one might read the reference to suggest that statements of this sort to relatives (and not merely law enforcement) are testimonial hearsay, and at least one court has adopted this reading.⁵ A still broader interpretation is that young children’s reports of abuse, even those that might qualify as excited utterances, are testimonial hearsay, and are inadmissible unless the child is (or was) subjected to cross-examination. Under this interpretation, if a child fails to testify, and is thus unavailable, the statements cannot come in as evidence.

Whatever the Court’s exact purpose in citing *Brasier*, it clearly believes that a pre-Framing British case enables one to read the scope of the Confrontation Clause. Critics have taken the Court to task for this assumption. Thomas Davies argues that cases decided after 1776, including *Brasier*, are unlikely to have had much influence on the Framers.⁶ Robert Mosteller notes that the early reports of *Brasier*, which were published shortly before the Framing, said nothing about hearsay, but merely held that children should not testify unsworn.⁷ Randolph Jonakait argues that even the later reports of the case are not relevant to interpretation of hearsay under the Confrontation Clause.⁸

We would like to take a different approach. Rather than start with *Brasier*, we will end with it. We will show that the hearsay of unavailable child witnesses was routinely admitted in eighteenth century British courts, and that *Brasier* did not change this practice. Until *Brasier* was decided, young children were conclusively presumed to be

4. *Id.* at 2277.

5. See *State v. Mechling*, 633 S.E.2d 311, 323 n.10 (W. Va. 2006) (reading the Supreme Court’s reference to *Brasier* as “suggesting that statements made to non-law-enforcement individuals may be testimonial and also be subject to Confrontation Clause limitations”); cf. *State v. Mizenko*, 127 P.3d 458, 481 (Mont. 2006) (Nelson, J., dissenting) (citing *Brasier*, arguing that “at the time of the framing, the legal community understood that a person who made an accusation against the defendant was the equivalent of a witness against him, though the statement was not made to a government official or pursuant to a prescribed procedure”). The dissent in *Mizenko*, in turn, relied on Mosteller’s argument that the holding in *Brasier* “unmistakably rested on the conclusion that the child was effectively a witness against the defendant despite her oral statement being offered through other witnesses.” Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 750 (1993).

6. See Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

7. Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 917, 926 (2007).

8. Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases* 17 n.30 (N.Y. Law Sch. Pub. Law and Legal Theory Research Paper Series No. 06/07 #13, 2006).

incompetent to take the oath, thus rendering them unavailable as witnesses. Their hearsay statements were routinely admitted, under the theory that it was the best evidence available. However, the sufficiency of hearsay evidence to support a conviction, particularly of a capital crime such as rape, was frequently questioned. As a result, commentators argued that a better solution would be to eliminate the conclusive presumption against incompetency and the bar on unsworn testimony, thus maximizing the opportunity to hear the child firsthand in court.

Brasier eliminated the conclusive presumption of incompetence, but retained the requirement that all testimony be under oath. After *Brasier*, a court first assessed the young child's competence. If she could qualify, she was sworn. Only if she failed to qualify could her hearsay be admitted without her testimony. Because the trial court had presumed the child incompetent in *Brasier*, rather than assess her competency and attempt to swear her in, it was improper to receive her hearsay. *Brasier* clearly does not stand for the proposition that incompetent children's hearsay was inadmissible; indeed, it preserved the opposite proposition, which was that if a child could not testify, his or her hearsay statements could be heard.

Our analysis reveals several ironies regarding contemporary interpretations of the case. First, *Brasier* was cryptic about hearsay because eighteenth century courts simply assumed that young children's hearsay statements would be received. Either the child testified and the hearsay was admitted to corroborate, or the child failed to testify, and the hearsay was admitted as the best evidence of what the child said occurred. Second, *Brasier* did not endorse contemporary claims that the right to cross-examination was at the heart of the objections to hearsay. If cross-examination was key, then *Brasier* would have allowed unsworn testimony. Rather, *Brasier* was consistent with the then-prevailing view that the oath was the most important guarantor of truth at trial.⁹

Our argument will proceed in several steps. In Part I, we examine treatises published before *Brasier*. They reflect the influence of Matthew Hale, who argued that competency requirements for children should be relaxed and children allowed to testify unsworn. He based his argument on the fact that children's hearsay was routinely admitted when children were found incompetent to testify, and that he thought it preferable to hear the child in person. Hale's recommendations were picked up by others, and were the foundation for *Brasier*. In Part II, we examine one hundred years of trial reports from London's Old Bailey (up until the Framing) to obtain insight into how children's hearsay was received in practice. We find that incompetent children's hearsay was frequently admitted. Although the courts doubted hearsay's sufficiency to prove a capital rape charge, they clearly believed that incompetent children's hearsay

9. See, e.g., JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 233–38 (2003) (explaining that the hearsay rule was originally predicated on the fact that the statements were unsworn; an emphasis on the lack of cross-examination only emerged toward the end of the eighteenth century); T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999) (finding that the primary rationale for the rule against hearsay in the British evidence treatises he surveyed moved from lack of oath to lack of cross-examination by the end of the eighteenth century). This is not to say that cross-examination was never mentioned as a rationale for the hearsay rule early in the eighteenth century, but rather that it tended to be a secondary consideration to the oath. See, e.g., 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 431 (Garland Publ'g 1978) (1716). (“[W]hat a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross examination.”).

could suffice to support a lesser sexual offense such as an assault or attempted rape. We also find that the two child rape cases decided after *Brasier* and before the Framing continued the practice of allowing incompetent children's hearsay to be repeated in court. In Part III, we examine the treatises published after *Brasier*, and show that virtually without exception, they interpreted *Brasier* as changing the rules for qualifying child witnesses but not the acceptability of hearsay when a child could not testify. In conclusion, we discuss the implications of our analysis for application of the Supreme Court's Confrontation Clause jurisprudence to cases involving children's hearsay. Examining the doctrine of forfeiture by wrongdoing, we conclude that defendants should not be able to benefit by committing crimes against children too young to testify, a view that is consistent with both history and fairness.

I. BEFORE *BRASIER*: TREATISES AND UNAVAILABLE CHILDREN'S HEARSAY

One approach in understanding *Brasier* is to understand what came before. The report itself is brief, and can easily be reprinted in full:

(An infant witness under seven years of age, if apprized of the nature of an oath, must be sworn; for no testimony is legal except it be given upon oath.)

[S.C. 1 East, P.C. 443; Bull. N. P. 293, Edit. 1790. Referred to, *R. v. Guttridge*, 1840, 9 C. & P. 471; *R. v. Paul*, 1890, 25 Q.B.D. 202; *R. v. Lillyman*, [1896] 2 Q.B. 167.]

This was a case reserved for the opinion of the Twelve Judges,¹⁰ by Mr. Justice Buller, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to commit a rape on the body of Mary Harris, an infant under seven years of age.

The case against the prisoner was proved by the mother of the child, and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but she was not sworn or produced as a witness on the trial.

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer's Reports (Dyer, 303, b, in marg.; 1 Hale, 302, 634; 2 Hale, 279; 11 Mod. 228; 1 Atkins, 29; Foster, 70; 2 Hawk. 612; Gilb. L. E. 144); for these notes having been made by Lord Chief-Justice Treby, are

10. Langbein explains this procedure:

Submitting a case to the Twelve Judges was a practice that functioned as a species of appellate review. When a point of difficulty arose that a trial judge was reluctant to decide on his own, especially when capital sanctions were involved and the convict would otherwise be promptly executed, the judge could defer sentencing and refer the question to a meeting held back in London of all the judges, commonly twelve, of the three common law courts. Their decision would resolve the case, and the precedent would clarify future practice.

LANGBEIN, *supra* note 9, at 212–13 (citation omitted). As we will see, the trial judge could also refer a question to the Twelve Judges following an acquittal as well. See *R. v. Powell*, (1775) 1 Leach 110, 168 Eng. Rep. 157 (K.B.), discussed *infra* text accompanying notes 25–33.

considered of great weight and authority; and it was submitted to the Twelve Judges, Whether this evidence was sufficient in point of law?

The Judges assembled at Serjeants'-Inn Hall 29 April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath (see *White's case, post*, 430, Old Bailey October Session, 1786), for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility 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 testimony cannot be received. The Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received. The prisoner received a pardon (see the case of *Rex v. Travers*, 2 Strange, 700).¹¹

A curious reader immediately wonders what the "doubt" was that led the case to be reserved for the Twelve Judges. Review of the references cited in the report reveals that the uniform concern was with the competency of children, either their competency to testify (and the propriety of unsworn testimony), or their competency to be punished for criminal conduct.¹²

11. *R v. Brasier*, (1779) 1 Leach 199, 168 Eng. Rep. 202 (K.B.) (note 10 added).

12. The case referred to in Dyer's reports is that of W.D., a case tried during the reign of Queen Elizabeth (1533–1603), in which the defendant was charged with the rape of a seven-year-old child. The case itself concerned the possibility of raping a child that young, rather than the type of evidence sufficient to prove it, but the marginal notes refer to the propriety of receiving the unsworn testimony of young children. 3 JAMES DYER, REPORTS OF CASES IN THE REIGNS OF HEN. VIII, EDW. VI, Q. MARY, AND Q. ELIZABETH 303–04 (John Vaillant trans., Dublin 1794).

"11 Mod. 228" is a citation to *Young v. Slaughterford*, a case during the reign of Queen Anne (1665–1714) in Leach's reports, in which the court allowed a child under twelve to testify when he demonstrated he understood the nature of the oath. 11 THOMAS LEACH, MODERN REPORTS 228 (5th ed., Dublin 1796). "1 Atkins 29" is a reference to *Omychund v. Barker*, a 1744 case in Atkyn's reports concerning the propriety of accepting the oath of non-Christian witnesses; the page in question concerns argument that children's unsworn testimony might be received. 1 JOHN TRACY ATKYNS, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY IN THE TIME OF LORD CHANCELLOR HARDWICKE 29 (London 1775). The case can be found in the English Reports. *Omychund v. Barker*, (1744) 1 ATK. 22, 26 Eng. Rep. 15. Michael Foster discussed the case of William York, in which the court held that a ten-year-old's confession could properly be received by the jury and the ten-year-old could be executed despite the fact that a ten-year-old would be presumptively too young to understand the difference between good and evil. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS OF THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY 70 (2d ed., London 1776). Although we have not identified the precise reference to Hawkins, he makes a similar claim as Foster, writing that children under the age of discretion could be found guilty of a crime and punished if they understood the difference between good and evil. 1 HAWKINS, *supra* note 9, at 2. Finally, Lord Chief Baron Gilbert noted that although children under fourteen are not usually allowed to testify "[t]here is no time fixed wherein they are to be excluded from evidence, but the reason and sense of their evidence is to appear from the questions propounded

The most complete discussion of the relevant “doubt” can be found in one of the references to Sir Matthew Hale’s treatise, *The History of Pleas of the Crown*.¹³ Although written sometime before Hale’s death in 1676, it was not published until 1736.¹⁴ It was probably the most complete and thoughtful discussion of child rape cases of its time, and remained influential throughout the eighteenth century.

If the rape be committed upon a child under twelve years old, whether or how she may be admitted to give evidence may be considerable.

It seems to me, that *if it appear to the court, that she hath that sense and understanding that she knows and considers the obligation of an oath, though she be under twelve years, she may be sworn*; thus we find it done in case of evidences against witches, an infant of nine years old was sworn.

But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet *I think she ought to be heard without oath* to give the court information, though singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the fact when it is done. 2. Because *if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken*, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.¹⁵

Hale’s passage is remarkable in several respects. First, he argued against a conclusive presumption that young children lacked discretion and hence the competency to testify. He argued that the court should inquire into the child’s understanding and swear her if she has an understanding of the oath. Hale’s influence led courts to allow children as young as nine to be sworn, but throughout the eighteenth century children under nine were presumed incompetent.¹⁶ *Brasier* accepted Hale’s suggestion, and held that even the youngest child might qualify. Hence, the trial court in *Brasier* should have asked for the child to be produced so that her competency could be assessed, and so that she might testify. Second, Hale argued that if the child lacks

to them, and their answers to them.” 1 GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 144 (4th ed., London 1777). *Rex v. Travers*, the case cited at the end of the opinion, also dealt with the testimonial competence of child witnesses. *R v. Travers*, (1726) 2 Strange 700, 93 Eng. Rep. 793, 794 (K.B.) (finding a seven-year-old conclusively presumed to be incompetent to testify and noting that “no person has ever been admitted as a witness under the age of nine years, and very seldom under ten”).

13. MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* (Sollom Emlyn ed., London 1736).

14. See LANGBEIN, *supra* note 9, at 19.

15. 1 HALE, *supra* note 13, at 634–35 (emphasis added). The other references to Hale also discuss children’s testimonial competence and unsworn testimony, albeit in less detail. *Id.* at 302; 2 *id.* at 279.

16. See, e.g., *Travers*, 93 Eng. Rep. at 794.

such understanding, she should be allowed to testify unsworn. He pointed out that this is often the best evidence available for proving rape, since the child is often the only eyewitness to what occurred. Although this recommendation was sometimes followed by the courts, *Brasier* clearly rejected Hale's proposal.

Third, and perhaps most important for our discussion, in arguing for unsworn testimony, Hale *presupposed* that a testimonially incompetent child's hearsay was admitted at trial. A careful reading of *Brasier* reveals that it did not alter this presupposition. *Brasier* did not hold that incompetent children's hearsay is inadmissible, and could not have, because the judges concluded that the child might have qualified to testify. Rather, *Brasier* clarified the means by which the prerequisites to receipt of children's hearsay could be established.

Hale was not alone in his understanding of the rules regarding children's hearsay or in his recommendations for relaxing the qualification of child witnesses. Henry Bathurst, who first published his *Theory of Evidence* in 1761, believed it was settled law that children under ten could not qualify, but suggested that children ought to be allowed to testify unsworn in rape cases because "certainly there is much more reason for the court to hear the relation of the child, than to receive it at second-hand from those that heard it say so."¹⁷ Bathurst added two more arguments for receiving children's unsworn testimony. The first was a moral claim: "In cases of foul facts done in secret, where the child is the party injured, the repelling their evidence entirely is, in some measure, denying them the protection of the law."¹⁸ Second, Bathurst commented on children's ingenuousness: "[T]he levity and want of experience in children, is undoubtedly a circumstance which goes greatly to their credit."¹⁹ These arguments were reiterated by Francis Buller, who later presided over the *Brasier* trial, in his revision of Bathurst's treatise, first published in 1767.²⁰

William Blackstone's *Commentaries on the Laws of England*, first published between 1765 and 1769, also reiterated Hale's arguments.²¹ Blackstone's gloss on Hale, in turn, is borrowed by other sources. For example, the *Encyclopædia Britannica*, published both in Europe and in the United States, quoted Blackstone's discussion at length in its entry for rape.²² Indeed, Blackstone even more clearly stated the principle that children's hearsay was admitted into evidence, and explained the rationale: "the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof."²³ Hale, Bathurst, and

17. HENRY BATHURST, *THE THEORY OF EVIDENCE* 109–10 (Dublin 1761).

18. *Id.* at 110.

19. *Id.*

20. See HENRY BATHURST & FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* 288 (London 1767). Langbein notes that Buller's treatise was a revision of Bathurst. LANGBEIN, *supra* note 9, at 212 n.150.

21. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 214 (Oxford 1769).

22. See 9 *ENCYCLOPÆDIA BRITANNICA Rape* 6632 (2d ed., Edinburgh 1782); 16 *ENCYCLOPÆDIA BRITANNICA Rape* 8 (Philadelphia 1789) (first American edition).

23. 4 BLACKSTONE, *supra* note 21, at 214. The entire passage reads:

And [Hale] is of this opinion, first, because the nature of the offense being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and, secondly, because the law allows what the child told her mother, or other relations,

Blackstone thus took a “best evidence” approach to the receipt of children’s statements. They acknowledged that unsworn testimony is inferior to sworn testimony, but argued that it is better than hearsay. If the child cannot testify, then the best evidence is hearsay from others who have heard the child’s report.

The view that children’s hearsay should be heard and considered when it is the best evidence available is consistent with the approach to evidence that prevailed throughout the eighteenth century. Although Geoffrey Gilbert condemned hearsay as “no evidence” in his treatise *The Law of Evidence*, first published in 1754, he asserted that “[t]he first therefore, and most signal rule, in relation to evidence, is this, that a man must have the utmost evidence, the nature of the fact is capable of.”²⁴ Hearsay was often admitted on the grounds that it was the best evidence a party could offer.²⁵

Another measure of Hale’s influence can be found in a child rape case tried at the York assizes in 1775, *Rex v. Powell*, which discussed Hale’s views at length.²⁶ The mother repeated the six-year-old’s description of the rape:

to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so.

Id.

24. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 3–4 (Thomas Pearce ed., London 1754). Gilbert’s treatise was not published until sometime after his death in 1726, and was probably written before 1710. LANGBEIN, *supra* note 9, at 237 n.262. “For Gilbert, [the best evidence doctrine] was truly the most important; not only did it occupy pride of place at the beginning of his treatise, but it reappeared throughout the text as a rationale for many of the other, lesser rules.” Gallanis, *supra* note 9, at 506. By emphasizing this necessity-based approach, “Gilbert’s treatise accurately reflected the broad discretion over such matters exercised by individual trial judges.” *Id.* at 505. Interestingly, however, Gilbert did not apply the best evidence principle when discussing the receipt of hearsay. His assertion that hearsay was “no evidence” is discussed below. Lofft’s 1791 revision of Gilbert’s treatise says with respect to hearsay “where better can be adduced the rule is, that hearsay is no evidence.” 1 GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 279 (Capel Lofft ed., London 1791).

25. Langbein notes that one of the original rationales for the rule against hearsay was that it was not the best evidence, LANGBEIN, *supra* note 9, at 179, and that it was often accepted only when it was the best a party could offer, *id.* at 238. See also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 574 (1992) (noting that, in the 1700s, the application of the hearsay rule was “at most as a rule of best evidence”); Gallanis, *supra* note 9, at 534, 551 (“[T]he exclusionary rules, even at that late date [mid-1700s], were still embryonic and subject to the wide discretion of the individual trial judge”); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 566, 591, 592 n.484 (1990) (“Quite frequently . . . hearsay was used because there was no other readily available source of information. Necessity provided a motive for the introduction of hearsay in situations other than the death of a critical witness.”); James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 103–05, 113–17 (1994) (providing examples of hearsay accepted when live testimony was inadmissible). Gallanis, examining Old Bailey cases for 1755, noted that hearsay was admitted even without necessity in many cases. See Gallanis, *supra* note 9, at 514 (“Some examples might have been explained by the original speaker’s inability to testify, but for the most part this did not seem to matter.”).

26. See W. WILLIAMSON, *THE TRIALS AT LARGE OF THE FELONS, IN THE CASTLE OF YORK* 17 (York 1775).

After the boy went out, the captain barred the door, and then put his finger up her body, and hurt her very ill.

Did she say that he did any thing else?—That was all the child told me at that time. . . . In the afternoon, we asked her, what Capt. Powell did with her? She said, he unloosed his breeches, put his c—k in her a—e h—e, and used her very ill.

. . . .
What were the words the child said to you?—She said that Capt. Powell unbuttoned his breeches, took out his c—k, and put it into her a—e h—e. I asked if she felt any thing come from him; she said, she thought he made water in her.

Did you hear the child say any thing else?—She said, he did it in his room below stairs; then he took her up stairs, and did the same again. She showed the motion he made in his chair.

What way did she say he did it below stairs?—She said, he sat in his chair, and took her before him.

. . . .
Did the child bring you any thing from the prisoner at that time?—On Friday before New-year's day, she brought me part of a bottle of wine; she said that Capt. Powell gave it [to] her for her mama

. . . .
Did the child tell you when it was that he used her in that manner?—She said, it was the afternoon she brought me the wine.²⁷

The defendant's attorney then objected, arguing that

as the evidence of the child clearly could not be admitted on oath, she being under the age of seven years, and laboring under a natural impotency and debility, as idiot and lunatic, the evidence of declaration made by the child to its mother or friends, could not be received by the court, as such were taken without oath, and liable to be misrepresented.²⁸

The court rejected the attorney's argument, and both allowed the hearsay and had the child testify unsworn. The court believed that although there might be disagreement over the propriety of unsworn testimony,²⁹ "[w]ith regard to the admitting the declaration of the child to the mother, lord Hale speaks of that as *a clear and settled thing*; for he says, if you hear the child at second hand, she should be heard also at first hand."³⁰

27. *Id.* at 17–18.

28. *Id.* at 18.

29. This issue continued to divide the Twelve Judges, who were less than unanimous in holding that children should not testify unsworn. *See R v. Powell*, (1775) 1 Leach 110, 168 Eng. Rep. 157 (K.B.). They did not achieve unanimity on this point until *Brasier*.

30. WILLIAMSON, *supra* note 26, at 19 (emphasis added). The court also discussed the issue of the timing of the child's statements to her mother, anticipating arguments over the proper scope of hearsay exceptions:

It has been objected, that the child did not make its complaint immediately, but several days after the fact. I don't understand that the word *presently* in my lord Hale's opinion, to mean immediately, but in convenient time, when it appears to the parent that the child is wronged; but that will be fit for the jury's consideration.

Id. (emphasis in original).

The jury acquitted, an outcome that we will see was quite common for its time. Although the child's statements to her mother included an explicit allegation of what would clearly constitute a rape (penile penetration plus emission), her initial claims that there was only digital penetration was emphasized by the court when questioning the child.³¹ Furthermore, two surgeons testified, and neither would state that a rape had occurred.³² The first testified that he knew not the source of the child's injury, and that he did not believe her to have a venereal disease.³³ The second testified that had there been a completed rape, he would have expected to see blood, but there was none.³⁴

The acquittal thus reflected more on the lack of physical evidence than on the insufficiency of the child's unsworn statements. Indeed, based on this evidence, the defendant was indicted for an assault on the child, and was returned to jail to await trial at the next assizes. Hence, the court believed that the child's statements were legally sufficient to convict the defendant of sexual assault. Unfortunately, the results of the subsequent trial are not reported.

Although we have not systematically explored admissibility of hearsay in the colonies, Hale's influence is easy to document there as well. In their 1944 study of Colonial New York criminal procedure, Julius Goebel and T. Raymond Naughton reported a 1755 case in which an eight-year-old child in a sexual assault case was allowed to testify "upon the authority of Justice Hale," referring to Hale's beliefs that young children could be sworn.³⁵ Although Goebel and Naughton do not describe children's hearsay specifically, they note that "a good deal of testimony which would today be excluded as hearsay was regarded as admissible."³⁶

In sum, eighteenth-century treatises, largely influenced by Hale's views, assumed that when children were too young to testify, and thus unavailable, their hearsay was admissible in child rape and assault prosecutions. The debates concerned the propriety of allowing children to testify, whether sworn or unsworn. The treatises argued that because children's hearsay was routinely admitted, and because their testimony in court would be preferable, conclusive presumptions against competency should be dropped, and even if a child was clearly incompetent, his or her testimony should be heard unsworn. This is the debate that occupied the Twelve Judges in *Brasier*.

The cases from York in England and New York in Colonial America also exemplify both Hale's influence and the attempt to hear children's statements even if they could not qualify as competent witnesses. However, these isolated cases do not give us a good feel for common trial practice at the time, and whereas treatises offer an idealized and often normative view of what goes on in real cases, there is no substitute for trial reports.

31. *Id.* at 22.

32. *Id.* at 20–21.

33. *Id.* at 20.

34. *Id.* at 21.

35. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776)*, at 645 (1944).

36. *Id.* at 642.

II. THE OLD BAILEY SESSIONS PAPERS AND UNAVAILABLE CHILDREN'S HEARSAY

A better sampling of trial practice in England in the eighteenth century can be found in the Old Bailey Sessions Papers (OBSP).³⁷ The Old Bailey was the trial court for felonies committed in London and most felonies committed in the adjoining county of Middlesex, and sat eight times per year. The judges who presided over trials at Old Bailey also sat on the assize circuits in the other counties, which were held twice per year.³⁸ "Hence, while the special problems of the metropolis shaped the trial procedure that we see in the Old Bailey, there was no means of confining the developments to London. What was created was not London law but English law."³⁹ Reports from the trials were sold to the public in pamphlet form.⁴⁰ As Langbein stated, these reports are "probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century."⁴¹ Although the reports began as curt summaries of the proceedings, by the middle of the century the reports had expanded to chronicle each case heard, often with near verbatim transcripts of testimony.⁴² A comparison of mid-eighteenth-century judicial notes and the respective reports confirms the accuracy of these commercial pamphlets.⁴³

Historians examining the OBSP and other evidence of British trial practice have commented on the liberal receipt of hearsay throughout the eighteenth century. There is general agreement that judges began to limit hearsay in the 1730s, but there exists some uncertainty regarding how quickly and how firmly a rule against hearsay was applied. Examining the OBSP, Stephan Landsman found that "[i]n the 1730s, courts began to develop hearsay rules that excluded untested material or that required the party offering it to demonstrate its particular reliability," but that "[d]evelopments in this area were sporadic. In any given year, cases sensitive to a particular hearsay issue might be found immediately preceding reports failing to identify an almost identical

37. These pamphlets are often referred to as the Old Bailey Sessions Papers (OBSP), but were typically published in the eighteenth century under titles such as Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the City of London, and County of Middlesex. See LANGBEIN, *supra* note 9, at 180 n.7. A searchable database of these trials with copies of the original reports is available at www.oldbaileyonline.org. Each citation to an OBSP case will begin with the case name (the surname of the first listed defendant), followed by a notation that the case is found in the OBSP, the month and year of the case, and a citation to the webpage where the case can be found online.

38. LANGBEIN, *supra* note 9, at 17, 181.

39. *Id.*

40. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 UNIV. CHI. L. REV. 263, 268–269 (1978).

41. *Id.* at 271.

42. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 UNIV. CHI. L. REV. 1, 4, 14 (1983); see also Langbein, *supra* note 40 at 269–72.

43. Langbein, *Shaping the Eighteenth-Century Criminal Trial*, *supra* note 42, at 25–26. However, as we discuss later, interactions between judge and jury were often omitted, *id.* at 21–23, leading Langbein to warn that "[i]f the OBSP report says something happened, it did; if the OBSP report does not say it happened, it still may have. Legal historical researchers can rely upon the OBSP, but not for negative inferences." *Id.* at 25; see also LANGBEIN, *supra* note 9, at 185.

hearsay problem.”⁴⁴ Subsequently, “[a] common refrain of trial judges, from the middle of the century on, was that the witnesses should limit themselves to what they knew personally,”⁴⁵ and “[b]y the closing decades of the century a more sophisticated rule had been developed and was being applied in a constantly broadening range of cases.”⁴⁶

Langbein similarly notes cases at the Old Bailey as early as the 1730s “in which the court resisted such evidence” but finds that “contrary cases occurred for decades.”⁴⁷ Beattie, in his examination of assizes in Surrey County, found that by the second quarter of the 1700s “there had emerged the outlines of a ‘hearsay rule’ that did not necessarily prevent such evidence from being given in court, but that did at least increase the sensitivity of judges and jurors to its dangers.”⁴⁸ He found that “by the middle of the century judges more commonly prevented its being given at all.”⁴⁹ Thomas Gallanis, reviewing several hundred Old Bailey cases from 1755 to 1800 (as well as civil cases) concluded that “very few controversies arose between 1754 and 1779 about the extent or application of the rule against hearsay.”⁵⁰ James Oldham found that “[h]earsay evidence was often admitted . . . in the cases in Lord Mansfield’s trial notes” in the 1780s.⁵¹

Although a systematic survey of child rape cases tried at the Old Bailey has not been conducted, scholars have identified a number of cases in which the hearsay of unavailable child victims was received in such cases. Landsman discussed a 1722 Old Bailey case in which an unavailable five-year-old rape victim’s hearsay was admitted.⁵² Langbein found that the Old Bailey court “tolerated flagrant hearsay” in child rape cases as late as the 1760s.⁵³ However, historians have not always distinguished between cases in which the hearsay was admitted and the child testified, perhaps unsworn,⁵⁴ and cases in which hearsay was admitted despite the child’s incompetence to testify. Furthermore, without reviewing child rape cases post-*Brasier*, Langbein read *Brasier* as rendering incompetent children’s hearsay inadmissible.⁵⁵

44. Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 567 (1990).

45. *Id.* at 569.

46. *Id.* at 572.

47. LANGBEIN, *supra* note 9, at 235, 238. Langbein notes that the refusal to admit hearsay in some cases may have begun even earlier, but went unreported due to the lack of detail in the Sessions Papers before 1730. *Id.* at 235.

48. J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND* 364 (1986).

49. *Id.*

50. Gallanis, *supra* note 9, at 534.

51. James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 104 (1994).

52. See Landsman, *supra* note 43, at 565–66 (citing *Booty*, OBSP (May 1722), available at http://www.oldbaileyonline.org/html_units/1720s/t17220510-34.html).

53. LANGBEIN, *supra* note 9, at 239.

54. See, e.g., LANGBEIN, *supra* note 9, at 240 n.277 (discussing *Norris*, OBSP (Dec. 1741), available at http://www.oldbaileyonline.org/html_units/1740s/t17411204-39.html (a child testified, though perhaps unsworn)). Langbein cites Beattie for “another such case that arose at Surrey assizes in 1739 . . .” *Id.* at 241 n.277 (citing J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND* 364 n.22 (1986)). The child testified in that case. *Id.*

55. *Id.* at 241.

We reviewed all rape cases from 1684 to 1789, and read every case in which a minor victim was involved.⁵⁶ We found twenty-two cases in which children's hearsay statements were admitted at trial with no mention of testimony, either sworn or unsworn. The dates span almost the entire length of our search, from *Row* in 1687 to *Fyson* in 1788. The children ranged from three to approximately ten years of age (with the exception of one seventeen-year-old, who was described as "an idiot").⁵⁷ The cases are listed in table 1, and the hearsay admitted in table 2, so that the reader can see for herself how extensive the reports were. As the case reports grow in length, reflecting more comprehensive coverage by the reporters, so do the hearsay reports.

Table 1. Old Bailey child rape cases admitting hearsay in which the victim did not testify (sworn or unsworn), 1684–1789.

Case Name	ID Number	Date	Child Age	Child Name
Row	t16871207-30	1687	8 or 10	Elizabeth B.
Robbins	t17210113-28	1721	7	Mary T.
Booty	t17220510-34	1722	5	Ann M.
Hullock	t17230828-64	1723	<10	Elizabeth C.
Nichols	t17240226-73	1724	5	Dorcas R.
Street	t17250827-14/t17251013-66	1725	17	Elizabeth H.
Padget	t17270222-72	1727	5	Catherine B.
Gray	t17350911-53	1735	8	Frances C.
Senor	t17410828-63	1741	4	Alice M.
Moulcer	t17441017-25	1744	8	Ann B.
Tankling	t17500711-25	1750	3	Ann C.
Kirk	t17540530-36	1754	<7	Anne B.
Crosby	t17571207-14	1757	9	Mary R.
Davids	t17591205-25	1759	<7	Hannah H.
Davids	t17591205-25	1759	3	Frances M.
Tibbel	t17651016-2	1765	4	Mary D.
Brown	t17670603-52	1767	8	Mary O
Spicer	t17671209-64	1767	6	Elizabeth M.
Allam	t17680907-40	1768	8	?
Craige	t17710703-33	1771	<10	Elizabeth S.
Ketteridge	t17790915-18	1779	4	Sarah R.
Fyson	t17880625-93	1788	6	Kitty S.

56. The entire run of the OBSP is from the 1670s to 1913. *See id.* at 182, 182 n.15. We limited our search to cases available online, which date back to 1684.

57. *See* Street, OBSP (Aug. 1725), available at http://www.oldbaileyonline.org/html_units/1720s/t17250827-14.html; Street, OBSP (Oct. 1725), available at http://www.oldbaileyonline.org/html_units/1720s/t17251013-66.html.

Source: The Proceedings of the Old Bailey, www.oldbaileyonline.org (last visited Mar. 17, 2007).

NOTE: The ID number refers to the webpage where the case can be found online. For example, T16871207 can be found at www.oldbaileyonline.org/html_sessions/T16871207.html. One easy means of locating these cases is to run a web search for the ID number.

Table 2. Hearsay admitted in Old Bailey child rape cases in which the victim did not testify (sworn or unsworn), 1684–1789.

Case	Year	Hearsay admitted
Row	1687	The surgeon gave evidence, that the child was in a bad condition, and that when he looked after the child, the girl said the prisoner did it.
Robbins	1721	[Child] being examined [by the mother], told her, that the prisoner put his finger into the place where she made water, and also put the thing with which be made water, into the Place where she made water.
Booty	1722	The child complaining of her illness, occasioned the fact to be discovered.
Hullock	1723	Mother: That upon examining the child how she came so, the child told her, that Benjamin Hullock took her on the bed, laid himself down, and put her upon him, and hurt her sadly.
Nichols	1724	(1) Mother: enquiring of her how it came, she told her the prisoner had made her kneel upon his knees had taken up her coats, and had hurt her sadly. (2) Surgeon: the child did say it had been done to her by the prisoner.
Street	1725	Defendant's landlady: I went to look for them, and found them by the Wall of S. Giles's Church-yard. The child cried, and told me the man had hurt her . . .
Padget	1727	The fact was proved on him by the evidence of the father, and nurse of the child.
Gray	1735	Mother: That upon her examining the child, she fell on her knees, and said that one Gray did it.
Senor	1741	(1) Mother: as my child Alice Mimms told me, he used her very ill. (2) Arthur Rawlinson: I was before the Justice when the prisoner was there, and the child picked him out of 20 people in the room.
Moulcer	1744	(1) Mother: I asked her what was the matter with her, she said her backside was sore....I asked her who had meddled with her? She said Francis Moulcer had taken her into a shed, and laid her down on the top of some hides, and pulled down his breeches and lay with her. She said she did not know what he did to her, for she turned her head away.... She said it was the week after Edmonton statute (which was the second of September). I asked her why she did not tell me of it before; she said she was afraid; I asked her why? She said that the Prisoner had threatened to cut her throat if she told any body. (2) Spurling (granted a warrant): I examined the child in what manner the prisoner had used her, she said he took her into a shed and laid her down on some hides, and hurt her very much, but she said she did not know what he did to her, and the child told me when he had done what he did to her he threatened her, that if she told any body he would cut her throat.
Tankling	1750	Surgeon: The child said, the prisoner hurt her very much with his cock.

Case	Year	Hearsay admitted
Kirk	1754	(1) Surgeon: The child told me Mr. Kirk used to set her upon his knee, and used to put his finger into her. (2) Mary Oswal: My children informed me, that when he was teaching the little children English, he would put his hand up their petticoats, and that some of them were sore: they also told me that Anne [B.] was one of those he served so . . . The child told me he had done to her as mentioned by the last evidence. (3) Mother: The child told me he used to put his hands up her petticoats.
Crosby	1757	Mother: Then I said I must know who hurt you. She said, mamy, don't beat me, and I will tell the truth. I said, I would not. Then she said, Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed, and called me to him. I went to him. Then he pulled me to him, and put his c - k to me there, and hurt me sadly; she often went there.
Davids	1759 first case	Mother: When I asked the child how she came to be so, she said Aaron hurted her in her private parts.
Davids	1759 second case	Sister: My mother asked her what was the matter. She answered, Aaron pushed her with a broomstick.
Tibbel	1765	(1) Mother: I asked her who had hurt her? She said, Sam had hurt her, that is the prisoner; he is our apprentice. (2) Mary Draper. I heard the child give an account how this came, on the 29th of July. (3) Patrick Dermot. I brought the girl to confront him, and she pointed to the same place he had done, before his face, and he did not deny it.
Brown	1767	Mother: she told me about the prisoner, and what he had done.
Spicer	1767	Mother: [T]he child told her the prisoner, who was a married man, and had carried milk for her some time past, but then had left the service, had hurt her, and done her the injury which the mother had examined her to.
Allam	1768	(1) Mother: [T]he child then said [to Elizabeth Purnel], William Allam had had to do with her in the shed two days before . . . I understood by the child he had had to do with her three times. (2) Elizabeth Purnel confirmed the testimony the mother had given.
Craige	1771	Mary Burt, acquaintance of parents: I said, I am afraid some little boy has been playing tricks with you, or some man; and if you don't confess the truth, your mammy won't get you cured, and you will die. Then she colored, and burst out a crying, and said I will tell you who it was if you won't tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige. I asked her who he was; she said, the man that worked for her father. I asked her how he met with her; she said she was playing with some peas, tossing them up upon the bed, as she sat in the room playing with her doll. As she went to get some of the peas, he threwed her upon the bed, and did something that hurt her, and pressed her so hard upon her belly that she could eat no victuals all next day. I asked why she did not tell her mother; she said she was afraid: for he had told her, that if she told it, her father and mother would beat her. I asked how long she had had this running; she said, on Tuesday, the day before. I asked her if he had had any thing to do with her; she said, yes, some days before, I can't remember what day; and in the whole, three times, on different days.

Case	Year	Hearsay admitted
Ketteridge	1779	Mother: (1) [S]he said she was sore and could not walk . . . I remember the child two or three weeks before, came in to me at dinner time; she had been missing; I could not find her; I asked her where she had been; she said, mammy, I could not come for Mr. Wright's coachman locked me in the stable; I said what did he do there; she said he took up my clothes before and behind . . . when she came home she said that instead of taking her to ride in the coach he locked her in the stable. (2) Mother: Sir John [Fielding] said, my dear, tell me who hurt you; she said Mr. Wright's coachman. Was you present at the time? - I was. And the prisoner was present? - Yes. She said Mr. Wright's coachman; Sir John said where was it in the garret or the kitchen; she said neither, it was in the stable; where did he lay you? On the hay. Sir John said point out the man; she pointed out the prisoner; upon that Sir John committed him.
Fyson	1788	Father: Oh, mammy, says she, I am so wet you cannot think . . . I went last Sunday, and the child shewed me the place where the affair was committed, upwards of two miles off.

Source: The Proceedings of the Old Bailey, www.oldbaileyonline.org (last visited Mar. 17, 2007).

Several possible interpretations of the courts' approach to children's hearsay are implausible given the hearsay received in these cases. First, the cases take place both before and after *Brasier* was decided, in 1779. This demonstrates that the opinion did not render inadmissible hearsay testimony by children who were unavailable to testify. Indeed, *Ketteridge*, which was decided only months after *Brasier*, was presided over by Baron Hotham, one of the Twelve Judges who decided *Brasier*.⁵⁸

Ketteridge began with Hotham's efforts to question the child, despite the fact that she was only four years old.⁵⁹ This was likely the direct result of *Brasier*'s pronouncement that even the youngest child might testify should she understand the nature of an oath—because a child so young would surely be presumed incompetent before *Brasier*. The mother then testified, and reported at length both what the child told her about the alleged rape and what the child reported to the magistrate who committed the defendant.⁶⁰ Hoping for better evidence, the court asked the mother “Do you of your own knowledge, or does any body else to your knowledge know any thing that affects the prisoner except what they had from the story of the child?”⁶¹ Nothing more was forthcoming, however, and another witness, a Benjamin Bernard, was quoted only as testifying that “I know nothing but what I heard the child say.”⁶² Although the report does not make it clear, the court may well have limited hearsay from Mr. Bernard, but the child's statements heard by her mother were received.⁶³

58. See *Ketteridge*, OBSP (Sept. 1779), available at http://www.oldbaileyonline.org/html_units/1770s/t17790915-18.html. Hotham served on the Court of Exchequer, one of the three common law courts, from 1775 until 1805. JOHN C. SAINTY, *THE JUDGES OF ENGLAND 1272–1990*, at 130 (1993). He was thus one of the Twelve Judges who heard *Brasier*.

59. *Ketteridge*, *supra* note 58.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

Fyson, the last case in our series, was heard in 1788.⁶⁴ The approach was similar to that in *Ketteridge*. The *Fyson* court hoped for sworn testimony from the young child (seven years of age), but allowed hearsay when it was the best evidence available.⁶⁵ The judge began by asking the father whether the child might be competent to take the oath, but the father testified that she was not.⁶⁶ The judge then asked, "Do you know any thing of this business of your own knowledge?"⁶⁷ The father then proceeded to testify to two out-of-court statements by the child: her response to the mother's initial discovery of the abuse, and when the child showed her father "where the affair was committed."⁶⁸ Immediately after the receipt of this last bit of hearsay, the defense counsel began his cross-examination, with no objection noted in the report.⁶⁹

Ketteridge and *Fyson* demonstrate that courts contemporary with *Brasier* did not read the case as rejecting the receipt of unavailable children's testimony. Rather, they understood that the case eliminated the presumption of a child witness's incompetence, requiring the courts to inquire into competency, no matter how young. Failing receipt of the child's sworn testimony, however, they continued to allow hearsay statements made by children to their caretakers, continuing the approach long predating the *Brasier* opinion.

Second, the doctrine emerging from a review of the cases is incompatible with contemporary approaches that might view the children's statements as admitted for a nonhearsay purpose, or as classifiable as nontestimonial because they were uttered during an emergency. It is untenable that courts were allowing the statements merely to prove that a complaint was made, a nonhearsay use sometimes allowed in contemporary rape cases (though, notably, only in cases in which the alleged victim also testifies).⁷⁰ The details provided by many of the hearsay witnesses go far beyond a statement that the child complained of rape. The statements also cannot be classified as made during an emergency. They are clearly accusing the defendant of a past crime, rather than made to prevent an ongoing or future attack. Indeed, many hearsay statements were made before magistrates, who were either deciding whether a warrant should be issued for the defendant's arrest or whether the defendant should be detained and held for trial.

Other possible objections require further inquiry into the facts of the cases. Table 3 highlights these objections.

64. *Fyson*, OBSP (June 1788), available at http://www.oldbaileyonline.org/html_units/1780s/t17880625-93.html.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See, e.g., *People v. Brown*, 833 P.2d 949 (1994).

Table 3. Outcomes and their possible causes in cases in which unavailable children's hearsay was admitted.

Case	Date	Rape verdict	Rape impossible	Lacking testimony	Assault indictment	Assault verdict	Cross-Examination
Row	1687	NG					
Robbins	1721	NG	Y				
Booty	1722	G					
Hullock	1723	NG		Y			
Nichols	1724	NG		Y	Y	G	
Street	1725	NG	Y		Y	G	
Padget	1727	G					
Gray	1735	NG	Y				
Senor	1741	NG					
Moulcer	1744	G					Y
Tankling	1750	NG		Y	Y	G	
Kirk	1754	NG		Y	Y	?	Y
Crosby	1757	NG		Y	Y	?	
Davids	1759	NG					
Davids	1759	NG	Y				Y
Tibbel	1765	NG			Y	?	Y
Brown	1767	NG			Y	?	
Spicer	1767	NG		Y			
Allam	1768	NG			Y	?	
Craige	1771	NG	Y		? ⁷¹		
Ketteridge	1779	NG					
Fyson	1788	NG	Y		Y	?	Y

Source: The Proceedings of the Old Bailey, www.oldbaileyonline.org (last visited Mar. 17, 2007).

NOTE: "NG" denotes a not guilty verdict; "G" denotes a guilty verdict.

A. Objection: Judges Were Telling Jurors to Ignore Hearsay, Leading to High Acquittal Rates

It is possible that although the hearsay was heard, the trial judges told juries to disregard it. Juries often heard evidence that the court felt was inadmissible. There was no procedure for allowing the court to hear potentially objectionable evidence outside the presence of the jury.⁷² Beginning in the 1730s, courts often admonished witnesses that hearsay evidence was "no evidence." Although none of the twenty-two cases contains such language, judges' statements and instructions to the jury often went unreported.⁷³

71. Without explanation, the report notes that the defendant was held for assault on a different child than mentioned in the rape indictment.

72. LANGBEIN, *supra* note 9, at 249.

73. *Id.* at 177–78. Langbein notes, however, that this practice changed in the early 1770s. *Id.* at 178.

One could argue that this explains the high rate of acquittals for rape in this group of cases (nineteen out of twenty-two, or 86 percent). In two of the three convictions (*Booty* and *Moulcer*) the defendant had made incriminating statements before trial, which might have convinced the jury of the defendant's guilt independent of the child's hearsay. In *Booty*, the father testified that "being charged with the Fact [the defendant] confessed it,"⁷⁴ and in *Moulcer*, the defendant admitted to the Justice of the Peace in the preliminary examination that "he had endeavored to enter her body."⁷⁵ Moreover, in *Moulcer* there was medical evidence that both the child and the defendant suffered from the "foul disease" (gonorrhea).⁷⁶ In *Padget*, the report is particularly cryptic, making it difficult to determine if the testimony by the Father and the Nurse was limited to the child's statements.⁷⁷ Moreover, there was medical evidence of injury to the child.⁷⁸

However, both defendants recanted whatever incriminating statements they had made before trial. In *Booty* the defendant, a fifteen-year-old,⁷⁹ claimed at trial that "he knew nothing of the matter; and if ever he confessed any such thing, it was only in a fright."⁸⁰ In *Moulcer* the defendant admitted only an attempted rape before the magistrate, not a completed rape, because he added "that he had not entered her body," and by trial he claimed that "[w]hat I said before the Justice was when I was in liquor, for I did not offer any such thing to the child."⁸¹ Although the medical evidence in *Moulcer* pointed to the defendant, medical experts were uncertain whether a completed rape was necessary for gonorrhea to be transmitted, and in any case, the child and defendant could have been infected by others.⁸² In *Padget*, the medical evidence was still weaker, since the defendant and the child did not share any disease.⁸³

The high rates of acquittal by themselves prove very little. In a review of all rape cases tried at the Old Bailey from 1730 to 1830, Antony Simpson found an 83 percent acquittal rate for all rapes, and an 82 percent acquittal rate for alleged rapes of children under ten years of age.⁸⁴ Rape cases were extremely hard to win for a number of reasons: (1) rape required proof of penetration, and sometimes emission;⁸⁵ (2) alleged

74. *Booty*, OBSP (May 1722), available at http://www.oldbaileyonline.org/html_units/1720s/t17220510-34.html.

75. *Moulcer*, OBSP (Oct. 1744), available at http://www.oldbaileyonline.org/html_units/1740s/t17441017-25.html.

76. *Id.*

77. See *Padget*, OBSP (Feb. 1727), available at http://www.oldbaileyonline.org/html_units/1720s/t17270222-72.html.

78. *Id.*

79. *Booty*, *supra* note 74.

80. *Id.*

81. *Moulcer*, *supra* note 75.

82. *Id.*

83. *Padget*, *supra* note 77.

84. Antony E. Simpson, *Vulnerability and the Age of Female Consent: Legal Innovation and its Effect on Prosecutions for Rape in Eighteenth Century London*, in *SEXUAL UNDERWORLD OF THE ENLIGHTENMENT* 181 tbl.1 (G.S. Rousseau & Roy Porter eds., 1988). Beattie found a similarly high 83.3 percent acquittal rate for rape in Surrey County from 1660–1800. BEATTIE, *supra* note 48, at 411 tbl.8.3. Beattie also found that juries voted to acquit in higher percentages of rape cases than any other crime, *id.*, and that grand juries refused to vote for indictment in almost half (44.4 percent) of the rape cases. *Id.* at 411 tbl.8.3.

85. See 1 EDWARD HYDE EAST, *A TREATISE OF THE PLEAS OF THE CROWN* 436–40 (London

victims were often too modest to make the necessary, explicit claims;⁸⁶ (3) delays in reporting were considered strong evidence that rape did not occur;⁸⁷ (4) jurors, knowing that rape was a capital offense, were reluctant to convict,⁸⁸ particularly based on the words of a child;⁸⁹ and (5) medical experts (usually surgeons or midwives) frequently opined, after examining the child, that rape was *physically impossible*. As table 3 notes, this occurred in six of the nineteen acquittals.

Fyson illustrates the difficulties of proof.⁹⁰ The jury initially returned a guilty verdict, but the court insisted that they reconsider.⁹¹ The court was likely influenced by an examining surgeon's testimony that the child could not have been penetrated by a grown man, and by the fact that the defendant's admissions (which he recanted at trial) did not include a completed rape. The judge emphasized that the evidence had to support the conclusion that "the prisoner has completely entered the body of this child, and has had the same knowledge of her that any of you have had of your wives."⁹² The jury then acquitted.⁹³

1803); 1 HAWKINS, *supra* note 9, at 108.

86. *E.g.*, Roberts, OBSP (Dec. 1683), *available at* http://www.oldbaileyonline.org/html_units/1680s/t16831212-24.html ("The [twelve-year-old] girl herself, also her mother, and a midwife gave some evidence against him; but either their over-much modesty, or for some other reason, it was so favorable, that no positive proof being thereof, he was acquitted."); Cash, OBSP (July 1715), *available at* http://www.oldbaileyonline.org/html_units/1710s/t17150713-54.html (defendant acquitted after twelve-year-old testified that prisoner "put something into her, but was so modest she would not declare what").

87. *See, e.g.*, Man, OBSP (ID Number t16790226-9, Feb. 1679), *available at* http://www.oldbaileyonline.org/html_sessions/T16790226.html ("The girl that pretended the wrong done her, being between 13 and 14 years of age, told her story very confidently; but by her own showing it appeared, that for 12 weeks or upwards she never spoke a word of it"; defendant acquitted); Cave, OBSP (Oct. 1747), *available at* http://www.oldbaileyonline.org/html_units/1740s/t17471014-15.html ("The prisoner, she said, came home with her afterwards, and she never told her mother of it for near a month, for fear she should beat her, and then it was by discovery the mother had made of the [twelve-year-old] child's disorder. . . . These being the circumstances, it was not proved to the satisfaction of the court that it was a rape; he coming home with the child: she making no discovery of it, till she was forced to it; and his continuing to work in the yard."); Costillo, OBSP (Feb. 1784), *available at* http://www.oldbaileyonline.org/html_units/1780s/t17840225-19.html (sixteen-year-old victim; the court concluded: "This is a cooked up story, calculated to extort money from the prisoner, who is represented to be a man in circumstances of ability; for it is impossible that a woman, who as she now represents it herself, had opportunities of informing numbers of people of a transaction of this kind, should make no complaint either to her master or her mistress, or Barnet, or any of the customers, any of whom would have taken the part of an innocent woman; she was entirely a free agent in crossing the streets, and all that evening, and the next morning; and she had only three minutes walk to communicate the whole to her uncle and aunt: therefore in my apprehension there is not the least foundation for the prosecution.").

88. *See* LANGBEIN, *supra* note 9, at 240 n.276.

89. *See* Pewterer, OBSP (Sept. 1716), *available at* http://www.oldbaileyonline.org/html_units/1710s/t17160906-24.html ("[T]he jury not thinking the evidence of so young a child [nine years old] sufficient to convict the prisoner, they acquitted her.").

90. *Fyson*, *supra* note 64.

91. *Id.*

92. *Id.*

93. *Id.*

We identified two child rape cases in which the court did in fact use the language “no evidence” when rejecting hearsay. However, neither case is consistent with a blanket ban on hearsay from unavailable child witnesses, as other hearsay statements were received. In *Pearson*,⁹⁴ the defendant was acquitted of raping Elizabeth L., a nine-year-old. The court did not allow the child to testify, believing she was too young to take the oath.⁹⁵ The mother then testified, and proceeded to describe the alleged rape. The court interrupted, “You was not present?” and when the mother answered “No, this is what the child told me,” the court responded “Then you must not go into particulars, for what another told you is not evidence.”⁹⁶ The court subsequently also prevented another witness—who had questioned the child a week or so before trial—from repeating the child’s words.

However, other hearsay was heard. The court instructed the mother that “If she told you any thing that gave you occasion to suspect that the prisoner had been meddling with her, you may say so in general terms.”⁹⁷ The mother was allowed to testify that she examined the child’s body, and found that she “had been much abused . . . such as if a man had attempted her.”⁹⁸ She continued: “I asked her who did it? and she said, Jo. York (the prisoner).”⁹⁹ Hearsay from another child was also allowed: the defendant’s master testified that “my girl told me, that he had served her the same sauce.”¹⁰⁰

In *Grimes*,¹⁰¹ the defendant was acquitted of raping Elizabeth S., a nine-year-old, but held for an assault. The mother testified:

She came to me about two in the afternoon, and asked leave of me to go out with John Grimes to gather some willow chunks; I gave her leave, and when I came home she was in bed. About a week after, putting her on a clean shift, I observed her linen looked not as it used to do, and examining her about where she had been, she would not confess any thing to me.

Q. How did her shift appear?

[A.] It had like corrupted matter upon it. I tied her to one of the bed-posts to make her tell who she was with.

Court. You must not tell what the girl said, that is not evidence.¹⁰²

The mother was thus allowed to repeat the child’s statement about her intentions (clearly hearsay to prove what the child intended to do), but not allowed to repeat what the child said after being tied to the bed-post. Hence, the court’s primary concern appears to be the manner in which the mother attempted to coerce the child to “confess.” Langbein notes that in the 1740s the courts began to doubt the reliability of

94. *Pearson*, OBSP (Dec. 1732), available at http://www.oldbaileyonline.org/html_units/1730s/t17321206-69.html.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Grimes*, OBSP (May 1754), available at http://www.oldbaileyonline.org/html_units/1750s/t17540530-1.html.

102. *Id.*

defendant's confessions that may have been induced by "the flattery of hope, or by the torture of fear."¹⁰³

*B. Objection: Judges Were Instructing Jurors That Hearsay
Was Not Sufficient Evidence for a Rape Conviction*

Although there is little evidence that judges were preventing juries from hearing unavailable children's statements, there is support for the proposition that unless the child was able to testify, hearsay could not alone support a conviction for rape. In six cases the acquittal was explained in these terms (see table 4).

Table 4. References to insufficiency of evidence to prove rape without child's testimony.

Case	Year	Reference
Hullock	1723	"There being no evidence of his committing the fact, but the child's declaration of it, and she not being capable of taking an oath, he was acquitted."
Nichols	1724	"The child being too young to swear to the fact, the jury acquitted him of the rape."
Tankling	1750	"The infant not being capable of giving evidence, the prisoner was acquitted."
Kirk	1754	"There being no other evidence against the prisoner than hearsay from the child's mouth it was not judged sufficient."
Crosby	1757	"The child being but nine years and three quarters old, and not being examined upon oath, he was acquitted."
Spicer	1767	"The child being too young to be examined, he was acquitted."

Source: The Proceedings of the Old Bailey, www.oldbaileyonline.org (last visited Mar. 17, 2007).

Although on their face these statements might be attributable to the reporter for the OBSP, or the jurors themselves, it is more likely that these statements reflect instructions given to the jury by the court. Langbein notes that unattributed explanations for verdicts appearing at the end of the OBSP case reports were often judge's comments on the evidence or instructions to the jurors.¹⁰⁴

The notion that hearsay might be insufficient to prove a rape is quite a different proposition than that hearsay is inadmissible. The reader will recall that rape was a capital offense, and it is reasonable that the courts and juries might have been loathe to sentence defendants to death based on hearsay, even though they believed hearsay to have probative value, and be worthy of consideration.

103. LANGBEIN, *supra* note 9, at 218 (quoting Warickshall's Case, (1783) 1 Leach 262, 168 Eng. Rep. 234 (O.B.)). In *Rex v. Powell*, the case from the York Assizes discussed *infra* text accompanying note 27, the court asked the mother "did you make use of any threats but those you have mentioned, that if she would not tell you, you would pull the skin off her back?" WILLIAMSON, *supra* note 26, at 18.

104. See LANGBEIN, *supra* note 9, at 226 ("The precise statement of the jury's rationale for acquittal probably reflects the [OBSP] reporter's understanding of the trial judge's recommendation or instruction to the jury.").

The practical significance of this distinction—between hearsay as inadmissible and hearsay as insufficient—is that defendants could be convicted for a rape attempt or an assault with the intent to commit rape on the basis of hearsay evidence. If the jury acquitted the defendant of rape, but the court felt that the evidence was potentially sufficient to support a lesser charge, such as attempt, the court could recommit the defendant to jail, in order to await trial at the next quarter session. For example, in *Fyson*,¹⁰⁵ in which the court felt that the evidence failed to support a completed rape, the judge told the defendant that “the law prescribes a different punishment although under a different prosecution for the offence that has been proved against you,” and ordered the defendant “to be detained till the next sessions, in order to be prosecuted for the attempt.”¹⁰⁶

In nine of the nineteen acquittals (44 percent) the defendant was either held to be tried on the assault charge, or found guilty of an assault.¹⁰⁷ In most of the cases it was not possible to determine if the defendant was ultimately found guilty, because the quarter sessions (at which misdemeanors were heard) are generally not reported in the OBSP. Nevertheless, a decision by the court to recommit a prisoner suggests that the court believed the evidence could support a conviction.

Indeed, in two of the three cases in which it is certain that the defendant was found guilty of the assault, the child's hearsay constituted the only direct evidence of the sexual assault. In *Nichols*,¹⁰⁸ the defendant had been seen alone with the child, and there was medical evidence of abuse. Her two hearsay statements constituted the direct evidence that the defendant committed a sexual assault. The same jury that acquitted the defendant of the rape convicted him of assault.¹⁰⁹ In *Tankling*,¹¹⁰ the defendant had been alone with the child, and she had returned with a bloody nose. Subsequently, both she and the defendant were diagnosed with the “foul disease.”¹¹¹ The child's hearsay statement to the surgeon was the only direct evidence identifying the defendant as her assaulter. The case reporter noted that the defendant was subsequently “cast to be confined in the prison of Newgate three years, twice to stand in the pillory in one

105. *Fyson*, *supra* note 64.

106. *Id.* Both Langbein and Beattie touch on this possibility, albeit uncertainly. Langbein discusses *Kirk* and *Crosby*, and comments “Quare . . . whether the implication is that hearsay deemed insufficient to convict for felony rape might be sufficient upon a trial for misdemeanor.” LANGBEIN, *supra* note 9, at 241 n.277. Beattie discusses *Bromley*, a case tried at the Surrey Assizes, in which the “only evidence against the prisoner” was hearsay because of the child victim's inability to testify to the rape. BEATTIE, *supra* note 48, at 364 n.122. The defendant was acquitted of rape but then convicted of attempt. *Id.* Although this fits the pattern observed here, in which hearsay suffices for attempt but not rape, Beattie speculated that the difference might be due to “the evidence the child was willing to give” regarding the lesser charge. *Id.* In *Powell*, the defendant was similarly acquitted of the rape charges but found guilty of assault. The child in that case testified unsworn. WILLIAMSON, *supra* note 26, at 20–21.

107. *Cf.* Craige, OBSP (July 1771), available at http://www.oldbaileyonline.org/html_units/1770s/t17710703-33.html. The defendant was held for an assault, but against a different child. No explanation is provided in the report, and this case is not included in the nine acquittals.

108. *Nichols*, OBSP (Feb. 1724), available at http://www.oldbaileyonline.org/html_units/1720s/t17240226-73.html.

109. *Id.*

110. *Tankling*, OBSP (July 1750), available at http://www.oldbaileyonline.org/html_units/1750s/t17500711-25.html.

111. *Id.*

month, and once more at the three years end; and find such security for his good behavior as the court approves on for four years more.”¹¹²

The notion that hearsay could support an assault or attempted rape conviction—but not a capital rape conviction—best explains the pattern of results in these cases, in which courts appeared to comment on the insufficiency of the evidence in one breath and send the defendant back to jail in the next so that he could be tried for a lesser crime. Unavailable children’s hearsay was clearly believed to be inferior evidence to sworn testimony, but it was thought insufficient rather than inadmissible.

C. Objection: Defense Counsel Would Have Kept Out the Evidence

If defense counsel were present in more cases, it is possible that more objections would have been made to the hearsay, and that more hearsay would have been excluded. The presence of defense counsel is only mentioned in one of the cases—the last in the series—*Fyson* in 1788.¹¹³ However, although defense counsel were admittedly quite rare, when they did appear, their participation was often not explicitly mentioned by the OBSP.¹¹⁴ Cross-examination was mentioned in four of the cases (not including *Fyson*), which provides some (albeit weak) evidence that there may have been defense counsel in those cases.¹¹⁵

Yet even when it is clear that defense counsel were present, the hearsay objection was either not raised or did not prevail. The reader will recall that no objection to hearsay was noted in *Fyson*, despite the fact that cross-examination began just as the father reported the child’s hearsay.¹¹⁶ In *Powell*, the 1775 case at the York Assizes discussed above, the defense counsel was quoted as objecting at length to hearsay from a testimonially incompetent child, and the court summarily dismissed the objection on the grounds that admitting such hearsay was a “clear and settled thing.”¹¹⁷

In sum, unavailable children’s hearsay was routinely heard in child rape cases during the time period we studied (1684–1789). This included cases both before and after *Brasier* was decided. Although we found evidence that children’s hearsay was believed insufficient by itself to prove that rape occurred, we found equally convincing evidence that hearsay could prove a sexual assault or an attempted rape. Courts doubted hearsay’s sufficiency but not its admissibility. *Brasier* did not affect the admissibility of unavailable children’s hearsay, but changed the manner in which unavailability was determined. Rather than presume young children incompetent, courts were forced to inquire into the child’s understanding of the oath. The notable change after *Brasier* was not the court’s reactions to hearsay, but their attempts to qualify young children previously presumed incompetent.

112. *Id.*

113. *See Fyson, supra* note 64.

114. LANGBEIN, *supra* note 9, at 168.

115. *See cases cited supra* tbl. 3.

116. *See Fyson, supra* note 64.

117. *R v. Powell*, (1775) 1 Leach 110, 168 Eng. Rep. 157 (K.B.); *see supra* notes 27–31 and accompanying text.

III. TREATISES AFTER *BRASIER*

Brasier created an unavailability requirement for the receipt of children's hearsay. After *Brasier*, courts assessed the child for her testimonial competence, and if she could be sworn, she was. If she did not understand the nature of the oath, she could not testify unsworn, but her hearsay was then admissible. The case thus stands for the proposition that hearsay from a child is admissible if it is the best evidence that a party can offer.

The contemporary reports of *Brasier* are consistent with this interpretation, with one notable exception. That exception is Richard Burn's 1783 edition of Blackstone's *Commentaries on the Laws of England*, which briefly cites *Brasier* for the proposition that "no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn."¹¹⁸ Burn's source of information for the case is unknown.¹¹⁹ Leach's 1789 report of the case was quite sketchy, and made no mention of hearsay;¹²⁰ it was not until his 1800 report that he learned that the child had not testified.¹²¹

A much more complete account of the case appears in East's treatise, first published in 1803.¹²² East described how the Twelve Judges initially disagreed over the proper disposition of the case. Nevertheless, all believed the child's statements should be received in some form; some felt she could have qualified to testify, and the two judges who believed she should be conclusively presumed to be incompetent both believed that her hearsay statements should be admitted instead.¹²³ East nowhere concluded that *Brasier* barred the hearsay of children found incompetent. Indeed, a few pages earlier East reiterated Hale's supposition that "if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken."¹²⁴ Other eighteenth century and early nineteenth century treatises discussing *Brasier* also

118. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 214 (9th ed., London 1783).

119. Curiously, Burn's *The Justice of the Peace, and Parish Officer*, published in 1785, cited *Brasier* only for the proposition that "in no case shall the testimony of a child be admitted without oath." 4 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 71 (15th ed., London 1785). Although we have not been able to access every succeeding edition, Burn's hearsay reading of *Brasier* appears by the nineteenth edition: "[I]t is now settled by all the Twelve Judges upon conference, in *Brazier's* case, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn." 4 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 78 (19th ed., London 1800) (citation omitted). This may well have influenced trial practice. Langbein notes that Burn's *Justice of the Peace* manual "became the dominant work of its sort in the second half of the eighteenth century." LANGBEIN, *supra* note 9, at 47.

120. See THOMAS LEACH, CASES IN CROWN LAW DETERMINED BY THE TWELVE JUDGES 346 (London 1789). Davies argued that for the purposes of constitutional analysis, even the initial report of *Brasier* made by Leach was not likely available in the United States until after the Framing. Davies, *supra* note 6, at 156–60 & nn.163, 177.

121. 1 THOMAS LEACH, CASES IN CROWN LAW DETERMINED BY THE TWELVE JUDGES 237 (3d ed., London, Butterworth 1800).

122. Compare LANGBEIN, *supra* note 9, at 306 (discussing East's sources), with 12 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 109 (1926) (criticizing Leach's reporting).

123. 1 EAST, *supra* note 85, at 443–44.

124. *Id.* at 441.

focused on the issues of children's testimonial competency and the impropriety of unsworn testimony.¹²⁵

Subsequent discussions of *Brasier*, citing East's account, assume that unavailable children's hearsay was admissible at the time. Consider Justice Parke's discussion of *Brasier* in an 1840 case, *Guttridges*:

In Brazier's case, the child who was attempted to be ravished was only five years old, and incapable of taking an oath; and it was there held, that the complaints she made to her mother and another woman on her coming home, were receivable in evidence, as she herself was not heard on oath At the time of Brazier's case, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence.¹²⁶

In *Guttridges*, involving an adult's report one day after the alleged crime, Parke found the statement did not fall within the *res gestae*, noting that "[t]he law was not so well settled then as it is now."¹²⁷

John Henry Wigmore's reading of both *Guttridges* and *Brasier* supports this view. Discussing the evolution of the complaint doctrine, which ultimately limited rape reports to a nonhearsay use, Wigmore noted:

[I]n Brazier's case, the use of these complaints, not merely as a formal prerequisite nor yet as corroborative, but assertively as evidence of the details related, was perceived; and it was seen to be necessary to use them, if at all, as a Hearsay exception. If the female was an infant and incompetent to testify there would be some reason for doing this on the principle of necessity. But the judges in this case finally decided that the infant would have been competent, and therefore that the extrajudicial evidence could not be used.¹²⁸

Wigmore may have exaggerated the extent to which the courts imagined that what they were doing when they admitted unavailable children's hearsay was allowing the statements under a "hearsay exception." Whereas Wigmore believed that the rule

125. See, e.g., BULLER, *supra* note 20, at 293; 1 S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 17 (New York 1820) (1814) (reading *Brasier* as holding that children could be examined under oath "if capable of distinguishing between good and evil," but that a court could not examine them unsworn); HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 125 (5th Am. Ed., Philadelphia 1854) (1827) (reading *Brasier* as holding that "a child of any age, if capable of distinguishing between good and evil, might be examined upon oath," but that a court could not examine a child unsworn).

126. *R v. Guttridges*, (1840) 9 Car. & P. 470, 173 Eng. Rep. 916 (K.B.) (citation omitted).

127. *Id.*

128. 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1760, at 2270 (Boston 1904). Wigmore agreed with the reasoning of both *Brasier* and *Guttridges*, arguing that incompetency should not bar a child's statements from being admissible under the complaint doctrine. See JOHN HENRY WIGMORE, A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1761, at 170 (Boston 1908) ("Where the prosecutrix is a child too young to be a witness, the statements should nevertheless be receivable," referencing "Brazier's Case, [1 EAST, PLEAS OF THE CROWN 443 (1779)], so understood by Parke, B., in *R v. Guttridge*, 9 Car. & P. 471 (1840).").

against hearsay was well in place by 1700,¹²⁹ several historians have argued that it took almost another one hundred years to fully take shape.¹³⁰ Yet what Wigmore clearly recognized was that the courts accepted the hearsay of incompetent child witnesses, and that they did so on the basis of necessity—the underpinning of contemporary hearsay exceptions that operate when a declarant's unavailability is demonstrated.

Although the brief mention of *Brasier* in Burn's treatise gives one pause, both treatises and subsequent cases understood that the judges in *Brasier* believed that the child witness should be heard in some form. They hoped that even the youngest children might be competent to testify, thus avoiding the inferior options of unsworn testimony and hearsay. They did not wish, and did not hold, that young children's rape reports be altogether excluded.

CONCLUSION

It is clear that unavailable children's hearsay was frequently received in British criminal trials close to the time of the Framing. If the Supreme Court wishes to use history to help frame the scope of the Confrontation Clause's application to hearsay, then this should give them pause. How might they approach a case in which a child witness made a clear report, but was unable to testify at trial, either because of testimonial competency requirements, or simply a general fear of testifying?

Imagine that in such a case the child had been interviewed at a child advocacy center early in the investigation by a well-trained forensic interviewer using a structured interview, and that the interview was captured on videotape. These are the steps taken by many localities in response to the concerns over coercive interviewing practices that arose in the high-profile sexual abuse cases of the 1980s and 1990s.¹³¹ These factors would argue in favor of the statement's reliability, because they would make it possible to consider the spontaneity of the child's reports and the suggestiveness of the interviewer's questions.

Such statements would be superior in many ways to in-court testimony because they would be taken closer in time to the alleged event, thus reducing memory problems and issues of intervening taint through multiple interviews or other influences; also, they would be elicited in a non-threatening environment, thus increasing the child's ability to answer questions and resist suggestibility.¹³² On the other hand, the fact that the

129. See 5 WIGMORE, *supra* note 128, § 1364, at 24 ("From this time on [the end of the seventeenth century], the applicability of the Hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned.").

130. See *supra* text accompanying notes 44–51.

131. See Gail S. Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. SOC. ISSUES 811, 820–21 (2006) (discussing emergence of child advocacy centers and videotaped interviewing); Michael E. Lamb & Deirdre A. Brown, *Conversational Apprentices: Helping Children Become Competent Informants About Their Own Experiences*, 24 BRIT. J. DEVELOPMENTAL PSYCHOL. 215, 224–25 (2006) (discussing research demonstrating superiority of structured interviewing with children).

132. See Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 815 (1987) (finding that seven- to nine-year-olds responded "I don't know" more often in an open courtroom environment than in a small room); Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perceptions of Stress in and out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613, 619–20 (1993) (arguing that children are

child failed to testify at trial would say little about the reliability of the child's statements captured on videotape. There is little evidence that a failure to qualify as testimonially competent in court is a good predictor of honesty or reliability, given the clumsy way in which many courts assess children's competency.¹³³ The benefits of the oath can be captured by eliciting a promise to tell the truth during the interview.¹³⁴ Videotaped statements would also answer Hale's primary concern with the admissibility of children's hearsay, since one would not have to rely on witness' second-hand accounts of what the child actually reported.¹³⁵

However, under *Crawford* and *Davis*, the same statements would almost certainly be considered testimonial hearsay, making them conclusively inadmissible unless the child had been, or was available to be cross-examined. Indeed, two of the same factors that reduce fears that the child's statements would be distorted by the interviewer—the structured interview and the documentation by videotape—count towards qualifying the statements as testimonial under *Crawford*.¹³⁶ Moreover, one would expect the Court to be quick to dismiss arguments for the statements' reliability as an attempt to resurrect the trustworthiness concerns of the now-defunct *Roberts* approach to the constitutionality of hearsay. Cross-examination is key, they would say, and not because of reliability, but because of fairness.¹³⁷

However, a refusal to admit the tape seems unfair. The state should be commended for its attempts to preserve the child's early reports without taint. Conversely, the state cannot be blamed for failing to make the child available for cross-examination. Arguably, when the witness' difficulties are *neither* the state nor the defendant's fault, fairness argues in favor of admissibility.

Crawford and *Davis* both recognized that in some cases fairness allowed for admitting testimonial hearsay even when cross-examination is impossible. However,

less accurate when questioned in courtroom environment).

133. See Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1029–47 (2000) (documenting different ways in which competency questions underestimate children's understanding).

134. See Thomas D. Lyon & Joyce S. Dorado, *The Effects of the Oath and Reassurance on Maltreated Children's True and False Reports of a Minor Transgression* (unpublished manuscript on file with the *Indiana Law Journal*) (finding that a promise to tell the truth increased five- to seven-year-olds' accuracy); Thomas D. Lyon, Lindsay C. Malloy, Jodi A. Quas & Victoria Talwar, *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials* (unpublished manuscript on file with the *Indiana Law Journal*) (finding that a promise increased accuracy even among children who failed test of oath-taking competency).

135. See 2 HALE, *supra* note 13, at 635 (noting that when a child's statements are repeated by another witness, "such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered").

136. See *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004) (holding that the declarant's "recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition" of testimonial).

137. See *id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

they point us to forfeiture doctrine, which requires that the defendant be responsible for some wrongdoing rendering the witness unavailable.¹³⁸

Forfeiture doctrine is already being tested in murder cases, in which it seems fair to many to admit the decedent's statements—even if they can be characterized as testimonial. The courts have encountered some difficulty, however. First, the prerequisite for applying forfeiture is the same as the crime with which the defendant is charged. Why should the court decide an issue that is ultimately for the jury to decide?¹³⁹ Second, in many, if not most, murder cases it is unlikely that the defendant's motive was to render the victim unavailable. Forfeiture under the Federal Rules of Evidence requires that the wrongdoing was "intended to, and did, procure the unavailability of the declarant as a witness."¹⁴⁰

Most appellate courts' sense of fairness has allowed them to overcome these difficulties. Regarding the first problem, courts have noticed that prerequisites to the admissibility of evidence often subsume the ultimate issue to be decided by the jury.¹⁴¹ For example, in many conspiracy cases, courts are deciding whether a conspiracy existed in order to decide whether to admit hearsay offered under the co-conspirator hearsay exception.¹⁴² The court can reserve final judgment regarding whether the prerequisites for forfeiture were met.¹⁴³ If the court concludes at the end of the prosecution's case that no reasonable juror could conclude that the crime occurred, the court can direct a verdict for the defense at the same time that it strikes the hearsay.

Regarding the second problem, courts should note that forfeiture under the Confrontation Clause is different than the statutory forfeiture exception to the hearsay rule. Under the Confrontation Clause, the defendant's rights can trump application of any hearsay exception—no matter how reliable the hearsay. The principle behind the forfeiture doctrine is that the defendant should not benefit from his own wrongdoing. Hence, the wrongdoing need not be motivated by a desire to make the declarant unavailable.¹⁴⁴

Assuming that the courts continue to dispense with objections to the reflexive use of the forfeiture doctrine as well as arguments that the wrongdoing must have been designed to render the victim unavailable, it is possible to construct an argument for forfeiture that captures both intuitions about fairness and Framing-era approaches to children's hearsay.

138. *Crawford*, 541 U.S. at 62; *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

139. Richard Friedman refers to this as the "reflexive" use of forfeiture. Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 508 (1997).

140. FED. R. EVID. 804(b)(6).

141. *See, e.g.*, *United States v. Emery*, 186 F.3d 921, 926–27 (8th Cir. 1999); *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *People v. Giles*, 152 P.3d 433, 440 (Cal. 2007).

142. *E.g.*, *Bourjaily v. United States*, 483 U.S. 171 (1987) (holding that when a defendant is charged with conspiracy, the court must consider whether there is sufficient evidence of conspiracy when deciding whether to admit statements under the co-conspirator exception to the hearsay rule).

143. *Giles*, 152 P.3d at 440.

144. *See United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) ("The Supreme Court's recent affirmation of the 'essentially equitable grounds' for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive.").

Defendants who victimize immature witnesses should not benefit from their wrongdoing. If a defendant abuses a child who is too young to testify, then the defendant cannot complain that he is unable to cross-examine the witness at trial. Although the defendant's crime did not *cause* the victim's unavailability, as in a murder case, the fact that the defendant chose to victimize a child *took advantage* of the victim's unavailability. Confronted with this argument, defendants will argue that it presumes their guilt, and is therefore unfair. But if beliefs about a defendant's guilt can invoke forfeiture in murder cases, then they ought to invoke forfeiture in child victim cases.

The court can reserve judgment regarding the application of forfeiture in a child victim case until the end of the prosecutor's case. The court might require that in order for forfeiture to apply, there must be independent corroborative evidence of the crime. This is a requirement for reflexive forfeiture adopted by the California Supreme Court,¹⁴⁵ and is consistent with the concerns regarding the corroboration of hearsay documented in our historical survey.

Defendants will also complain that the abuse was not motivated by the victim's unavailability. But by the same token, murderers forfeit their right to cross-examination regardless of the motive for their murder. Moreover, perpetrators often take advantage of the immaturity of victims and witnesses; child molesters target children they think unlikely to resist or complain,¹⁴⁶ and spouse abusers keep their outbursts within the home.¹⁴⁷ It may be wrong to assert—and virtually impossible to prove—that defendants who victimize unavailable witnesses do so *because* of the witnesses' unavailability. But when defendants choose to victimize the immature, surely they should not benefit from the effects of that immaturity on the victim's ability to testify.

Brasier established a rule that the courts attempt to find a child witness available before allowing hearsay. In modern terms, when the state hopes to admit a child's testimonial complaints of abuse, it ought to make every effort to allow the defendant an opportunity to cross-examine the child. Prerequisites to availability should be relaxed and accommodations should be made. When the child clearly cannot testify, however, neither historical precedent nor contemporary intuitions about fairness allow the defendant to benefit by choosing a vulnerable and immature victim. A criminal justice system that ignores the words of children too young to testify is not fair.

145. *Giles*, 152 P.3d at 440 (“[A] trial court cannot make a forfeiture finding based solely on the unavailable witness's uncontroverted testimony; there must be independent corroborative evidence that supports the forfeiture finding.”).

146. Michele Elliot, Kevin Browne, & Jennifer Kilcoyne, *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, 584 (1995) (interviews with ninety-one child sex offenders: “the child who was most vulnerable had family problems, was alone, was nonconfident, curious, pretty, ‘provocatively’ dressed, trusting, and young or small”).

147. DONALD G. DUTTON, *THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS* 15 (1998) (dismissing theories of domestic violence as uncontrollable outbursts since “the violence only occurs in the context of intimacy and typically in private”).