

ARE CHILDREN COMPETENT WITNESSES?: A PSYCHOLOGICAL PERSPECTIVE

The "new war"¹ against child sexual abuse has spurred intensive scrutiny of the competency of children as witnesses.² Courts struggle with the conflict between the need to admit the critical testimony of a child, who is often the sole witness to the abuse, and the desire for reliable testimony. Courts should resolve this conflict by deferring to sound principles of human behavior as reflected in behavioral data.

Part I of this Note discusses competency rules employed by state and federal courts and the methods used to facilitate the testimony of competent children. Part II outlines the results of empirical studies of child competency. Finally, Part III discusses the applicability of the empirical data to state competency procedures and rules.

I. GENERAL COMPETENCY REQUIREMENTS FOR CHILD WITNESSES

State courts have traditionally excluded child-witnesses on competency grounds, reasoning that children do not have the ability to observe, remember and relate the truth about an event.³ In contrast, Federal Rule of Evidence 601 states that "every person is competent to be a witness except as otherwise provided in the rules."⁴ Federal courts cannot therefore automatically exclude children on competency grounds.⁵

1. Galante, *New War on Child Abuse*, Nat'l L.J., June 25, 1984, at 1, col. 1.

2. N.Y. Times, Jan. 27, 1985, at 6, col. 1; St. Louis Post Dispatch, Jan. 25, 1985, at 12A; N.Y. Times, Sept. 11, 1984, at 11, col. 6 (investigation ending with indictment of 24 adults on charges of sexual abuse of minors began on the word of six children); see also Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 (1985) (noting increased media attention on child sex abuse).

3. McCORMICK, McCORMICK ON EVIDENCE § 62 (1984). Hearsay rules also preclude the admission of a child's out-of-court statements if the court deems the child incompetent. Prosecution attorneys use several hearsay exceptions to circumvent this requirement, including the excited utterance rule, *State v. Gant*, 644 S.W.2d 656 (Mo. 1982); an exception for statements made during medical exams, see Goodman, *Child's Testimony in Historical Perspective*, 40(2) J. OF SOC. ISSUES 9 (1984); and statutory exceptions devised solely for sexual abuse cases, see Note, *supra* note 2, at 811-16.

4. FED. R. EVID. 601.

5. A child need only satisfy Federal Rule of Evidence 603, which requires the witness to declare that he "will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." FED. R. EVID. 603. Some state jurisdictions adopt the federal approach, supplementing it with common-law doctrines. See, e.g., *Kitchen v. State*, 271 Ark. 1, 9-11, 607 S.W.2d 345, 351-52 (1980); *State v. Gibson*, 623 S.W.2d 93, 98 (Mo. Ct. App. 1981).

In state courts, the determination of witness competency usually rests within the discretion of the trial judge.⁶ Some states, however, provide a rebuttable presumption that children younger than a certain age are incompetent.⁷ To determine a child's competency, the judge conducts a *voir dire* examination outside the hearing of the jury.⁸ The court's examination focuses on the child's ability to distinguish between telling the truth and telling a lie and on the child's understanding of the consequences of lying.⁹ A child's definition of a lie as "not telling the truth" and definition of truth as "to tell the truth" is often sufficient.¹⁰ Other jurisdictions require the child to understand the obligation to tell the

6. *State v. Harvell*, 45 N.C. App. 243, 262 S.E.2d 850 (1980). Appellate courts will reverse for abuse of discretion only when no evidence exists from which the trial court could have found the child incompetent. *Kitchen v. State*, 271 Ark. 1, 11-13, 607 S.W.2d 345, 352-53 (1980); *Newton v. State*, 456 N.E.2d 736, 740 (Ind. Ct. App. 1983).

7. See Comment, *The Problem of the Child Witness*, 10 Wyo. L.J. 214, 216 (1955) (discussing statutes that presume the incompetency of children).

8. The trial judge may defer the *voir dire* examination of the child to the attorneys if appropriate questions are asked. *State v. O'Neal*, 651 S.W.2d 634, 636 (Mo. Ct. App. 1983); *State v. Armonit*, 588 S.W.2d 24, 26 (Mo. Ct. App. 1979).

9. For example, under Missouri law a witness under the age of ten may testify with regard to general civil and criminal matters unless the witness "appears incapable of receiving just impressions of the fact respecting which he is examined, or of truly relating them. . . ." MO. REV. STAT. § 491.060(2) (1984). Missouri case law establishes the following criteria for determining the competency of a child witness:

- (1) present understanding of an obligation to speak the truth;
- (2) sufficient mental capacity at the time of the occurrence to observe and to register such occurrence;
- (3) memory sufficient to retain an independent recollection of the observations made; and
- (4) capacity to translate into words the memory of such observations.

State v. Gibson, 623 S.W.2d 93, 98 (Mo. Ct. App. 1981); *State v. Stewart*, 596 S.W.2d 758, 759 (Mo. Ct. App. 1980).

With regard to sexual offenses, however, the Missouri statute provides that a victim under the age of ten shall be considered competent and shall be allowed to testify without qualification. The statute permits the trier of fact to determine the credibility of the testimony. MO. REV. STAT. § 491.606(2) (1984).

10. In *Miller v. State*, 391 So.2d 1102 (Ala. Crim. App. 1980), the court upheld a ruling that a four-year-old girl, a victim of sodomy, was competent to testify. The court made the following inquiries on *voir dire*:

- Q. Do you know what to tell the truth means?
 A. (Witness nods head affirmatively.)
 Q. What does it mean?
 A. It means you tell the truth.
 Q. That's about as good an answer as I could give.

Id. at 1102-04.

The New Jersey Supreme Court, in *In the Interest of R.R.*, 79 N.J. 97, 112, 398 A.2d 76, 83 (1979), found a four-year-old victim of sodomy competent to testify when the child understood that to tell the truth is "right" and that the court will punish him if he lied to the court.

truth and the sanctity of an oath.¹¹ Usually the court will swear in or affirm a child-witness after the judge is satisfied that the child is competent.¹² Courts do not specify the form of the oath, but the oath must "quicken the conscience" of the witness.¹³ Even if a child cannot meet this requirement, some jurisdictions permit unsworn testimony when the child possesses sufficient intelligence and capacity for telling the truth.¹⁴

Refusal to hear testimony about a child's competency is generally not an abuse of discretion. Courts have held that the trial judge can base a determination of the child's competency on personal observations made during *voir dire*.¹⁵ Finally, the judge in some instances may order a psychiatric examination of the child-witness.¹⁶

Most courts tolerate some inconsistencies in a child's statements before finding the child incompetent to testify. Contradictions are relevant to the weight, but not the admissibility, of the testimony. Inconsistencies are usually attributable to the embarrassment and awkwardness experienced by a child who must recount the traumatic details of sexual abuse in a courtroom filled with unfamiliar and sometimes hostile adults.¹⁷

11. See, e.g., *Johnson v. State*, 265 Ind. 689, 692-93, 359 N.E.2d 525, 528 (1977) (requirement is satisfied if the child knows the difference between truth and falsity and recognizes some compulsion to tell the truth); *People v. Nisoff*, 36 N.Y.2d 560, 565-66, 330 N.E.2d 638, 641, 369 N.Y.S.2d 686, 690-91 (1985) (witness stating that God would punish her if she lied found competent, but another witness reciting only a definition of oath found incompetent); *State v. Nelson*, 603 S.W.2d 158, 167-68 (Tenn. Crim. App. 1980) (to understand the obligation of an oath requires more than merely distinguishing between the truth and a falsehood).

12. *In the Interest of R.R.*, 79 N.J. 97, 104, 398 A.2d 76, 79 (1979).

13. See, e.g., *State v. Noble*, 342 So.2d 170, 172 (La. 1977) (five-year-old girl stated that she believed in God and knew she should always tell the truth); *State v. Arnoneit*, 588 S.W.2d 24, 26 (Mo. Ct. App. 1979) (sufficient to "quicken the conscience" that child thought she would incur Jehovah's wrath if she told a lie); *In the Interest of R.R.*, 79 N.J. 97, 104, 398 A.2d 76, 79 (1979) (if the oath ceremony evinces a commitment to tell the truth, the child is properly sworn); *Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973) (sufficient that four-year-old boy feared spanking if he lied). *But see Wheeler v. United States*, 159 U.S. 523 (1895) (five-year-old witness' fear of being sent to jail held insufficient).

14. *People v. Nisoff*, 36 N.Y.2d 560, 563, 330 N.E.2d 638, 640, 369 N.Y.S.2d 686, 688-89 (1975) (eight-year-old girl allowed to give unsworn testimony); *People v. Yonko*, 34 N.Y.2d 825, 826-27, 316 N.E.2d 338, 339, 359 N.Y.S.2d 54, 54 (1974) (court allowed questioning of six- and seven-year-old incest victims even though the court considered them unable to understand the nature of the oath); see also Note, *The Competency of Children as Witnesses*, 39 VA. L. REV. 358, 359 (1953) (English "Child and Young Persons Act" abolishes need for spiritual instruction if court satisfied that child understands duty to tell the truth).

15. *State v. Harvell*, 45 N.C. App. 243, 247, 262 S.E.2d 850, 852-53 (1980).

16. *Kitchen v. State*, 271 Ark. 1, 11, 607 S.W.2d 345, 350 (1980).

17. *Id.* at 352; *Newton v. State*, 456 N.E.2d 736, 744 (Ind. Ct. App. 1983); *State v. Gibson*, 623 S.W.2d 93, 99 (Mo. Ct. App. 1981); *State v. Locke*, 625 S.W.2d 631, 633 (Mo. Ct. App. 1979).

Courts do not consider the ability to tell time or measure its passage as critical to competency, because neither skill is indicative of a child's ability to observe, remember, or relate an event.¹⁸ Moreover, a child-victim usually can establish a framework of time by relating the incident to other events or holidays.¹⁹

Some jurisdictions require corroboration of child victim-witness testimony.²⁰ Children are susceptible to suggestion and are often unable to distinguish between fact and fantasy.²¹ When corroboration is required, however, slight circumstances may furnish the necessary corroboration. In some states, the child's complaint confirms her testimony by showing consistent conduct.²²

Courts expect children to be unfamiliar with anatomical terms. If unfamiliarity with human anatomy was fatal to competency, then most children would be incompetent.²³ Such an outcome would drastically impair the prosecution of child sex abuse offenses to which children are often the only witnesses.

Once a child is deemed competent, attorneys often use anatomically correct dolls to aid a child-witness who is unfamiliar with appropriate physiological terminology.²⁴ Courts may also permit an interpreter to as-

18. *State v. Arnoneit*, 588 S.W.2d 24, 26 (Mo. Ct. App. 1979) ("a child's ability to tell time or measure its passage or know the names or days of the week is not indicative of her ability to observe, remember or relate the episode which has taken place").

19. *Minnesota v. Eggert*, 358 N.W.2d 156, 158 (Minn. Ct. App. 1984) (state established dates by allowing child to tie her memory of incidents of sexual abuse to family events).

20. R. CARLSON, E. IMWINKELREID, & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 7 (Supp. 1983); Galante, *New War on Child Abuse*, Nat'l L.J., June 25, 1984, at 1, col. 1. See generally Younger, *Requirement of Corroboration in Prosecution of Sex Offenses in New York*, 40 *FORDHAM L. REV.* 263 (1980); Comment, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 *BROOKLYN L. REV.* 378 (1970). In some jurisdictions the corroboration requirement is statutory. N.Y. FAM. CT. ACT § 1046 (Consol. Supp. 1984). Others have a common-law requirement. *State v. Buitenhoff*, 155 N.W.2d 894 (Minn. 1968).

21. *People v. Serrano*, 40 A.D.2d 789, 790, 337 N.Y.S.2d 746, 747 (1971) (Murphy, J., dissenting) (stating that children may, without malice, be the victims of sexual fantasies).

22. *Isabell v. People*, 405 P.2d 744 (Colo. 1965); *Butt v. Tennessee*, 450 S.W.2d 48 (Tenn. 1969).

23. *State v. Lee*, 404 S.W.2d 740, 743 (Mo. 1966) ("he put his privates in mine"); *State v. Palmer*, 306 S.W.2d 441, 442 (Mo. 1957) (child testified that defendant unzipped his pants, took his "privacy" out and got on top of her); *State v. O'Neal*, 651 S.W.2d 634, 636 (Mo. Ct. App. 1982) (child testified that her stepgrandfather touched her "bottom" with "the thing he went to the bathroom with" and that she "tried not to cry").

24. In *Minnesota v. Eggert*, 358 N.W.2d 156 (Minn. Ct. App. 1984), the court allowed the use of anatomically correct dolls notwithstanding the victim's pretrial practice with the dolls. The court found no evidence that the pretrial use of the dolls improperly reinforced the child's testimony. *Id.* at 161. The court stated that it is accepted procedure for counsel to display to a witness a testimo-

sist the jury in understanding the child. A child's parents, however, may never act as interpreters for the child.²⁵

Most jurisdictions allow attorneys to use leading questions on direct examination of the child.²⁶ A few jurisdictions, however, require "independent recollection" as a prerequisite to allowing a child to testify. These courts rule testimony resulting from leading questions inadmissible, reasoning that the need for leading questions demonstrates the child's lack of independent recollection.²⁷

II. EMPIRICAL STUDIES OF CHILD WITNESSES

For centuries, courts have questioned the competency of children as witnesses.²⁸ The prevailing view among commentators was that children

nial aid that counsel will use to elicit testimony. *Id.*; see also *Newton v. State*, 456 N.E.2d 736 (Ind. Ct. App. 1983) (pretrial practice with dolls does not preclude admission but such practice is relevant to credibility).

Distinguishing the factors that render hypnotically-induced testimony inadmissible, the court in *Newton* stated that while hypnosis increases and taints a witness' recollection, anatomically correct dolls relax the victim in an embarrassing situation and help her verbalize her own recollection of the incident. *Id.* at 741-42.

25. In *In the Interest of R.R.*, 79 N.J. 97, 398 A.2d 76 (1979), the court held that the trial court erred in appointing a child's mother to interpret her child's idiosyncratic gestures and speech patterns. In reaching this holding, however, the court focused on the mother's dual role as interpreter and primary witness. *Id.* at 118, 398 A.2d at 86. Although the court found the trial court's utilization of the mother was an abuse of discretion, it did not find reversible error because the interpretations did not affect the trial result. *Id.* at 119, 398 A.2d at 87.

26. See, e.g., *State v. Leigh*, 580 S.W.2d 536 (Mo. Ct. App. 1979); *In the Interest of R.R.*, 79 N.J. 97, 398 A.2d 76 (1979). See generally *McCORMICK*, *supra* note 3, § 63, at 141.

The Federal Rules of Evidence codify the common-law rule, stating that "leading questions should not be used on the direct examination *except as may be necessary to develop his testimony.*" FED. R. EVID. 611(c) (emphasis added). The Eighth Circuit has held that leading questions are necessary to develop an infant's testimony. In *United States v. Littlewind*, 551 F.2d 244, 245 (8th Cir. 1977), the court noted that the Advisory Committee notes to Rule 611(c) recognize questioning of child-witnesses as a traditional exception to the prohibition against leading questions.

27. At common law, a child, prior to testifying, had to satisfy the judge that he possessed an independent recollection of events. 2 WIGMORE ON EVIDENCE 596 (Chadbourn ed. 1976); *McCORMICK*, *McCORMICK ON EVIDENCE* 140 (2d ed. 1972). Although most jurisdictions have abandoned this requirement, *id.*, Missouri courts emphasize its importance because leading questions might induce a "false memory" by the child-witness. *State v. Armonoit*, 588 S.W.2d 24, 26 (Mo. Ct. App. 1979). In determining whether independent recollection exists, the Missouri courts weigh four factors: (1) length of time between event and trial; (2) whether anyone assisted in the recollection; (3) the nature of the event (whether it would create a strong impression on the child's mind); and (4) the consistency of the child's testimony with other witnesses. *Id.* Applying these factors, the court in *Armonoit* held that the child possessed sufficient recollection. *Id.* See *supra* note 9 (discussing Missouri's new stand regarding competency).

28. *Goodman*, *supra* note 3, at 15-17. Early studies of children's abilities resulted in misleading generalities because researchers designed the tests to demonstrate the inaccuracies, rather than the

were the most "dangerous of all witnesses."²⁹ This distorted view of child competency affected the early research on the reliability of child testimony.³⁰

A. *Are Children Good Observers?*

Several researchers have concluded that children are good observers. One early researcher asked children to describe the physical characteristics of a familiar and an unfamiliar person viewed for four minutes. Although concluding that children are not only good observers, but also perhaps more objective than adults, the researcher found that children have greater difficulty than adults in translating observations into verbal accounts.³¹ Another early study concluded that children are the best witnesses for simple events, stating that children make different, but not necessarily worse, errors than adults.³²

More recent studies conclude that recognition is a basic memory process that matures fairly early.³³ Infants less than one year old demonstrate some degree of recognition memory capacity.³⁴ Children over four years old reveal almost adult-level recognition memory performances.³⁵

accuracies, of a child's memory. Thus, Goodman suggests that older literature on children's abilities be viewed with caution. *Id.* at 15.

29. Varendock, *Les Femiognaages d'enfants dans un proces retentissant*, 11 ARCHIVES DE PSYCHOLOGIE 129-71 (1911), translated in Goodman, *supra* note 3, at 26. Varendock concluded from his experiments:

(1) That we can hardly trust the declarations of children when they claim to have observed certain details that they describe; (2) That their imaginations play nasty tricks on them; (3) That it suffices to have a person who has power over them (*i.e.*, parents, teachers, and in general all persons enjoying a certain prestige) to be convinced of a thing, and this conviction will immediately be shared by children; and (4) That by badly posed questions—whether voluntary or involuntary—we can obtain answers that stupefy. . . .

Id. at 29.

30. Goodman, *supra* note 3, at 21.

31. Whipple, *Psychology and Testimony of Report*, 9 PSYCHOLOGICAL BULL. 264-69 (1912).

32. *Id.*

33. Perlmutter & Meyers, *Recognition Memory in Preschool Children*, 12:3 DEVELOPMENTAL PSYCHOLOGY 271-72 (1976); Perlmutter & Meyers, *Recognition Memory in Two to Four Year Olds*, 10:3 DEVELOPMENTAL PSYCHOLOGY 447-50 (1974).

34. Fagan, *Infants Recognition Memory for Faces*, 14 J. OF EXPERIMENTAL CHILD PSYCHOLOGY 453-72 (1972); Fantz, *Visual Experience in Infants*, 146 SCIENCE 668-70 (1964); Feinman & Entwisle, *Children's Ability to Recognize Other Children's Faces*, 14 J. OF EXPERIMENTAL CHILD PSYCHOLOGY 453-72 (1972) [hereinafter Feinman & Entwisle, J. OF EXPERIMENTAL PSYCHOLOGY]; Feinman & Entwisle, *Children's Ability to Recognize Other Children's Faces*, 47 CHILD DEV. 506-10 (1976) [hereinafter Feinman & Entwisle, CHILD DEV.] ("even first graders can process and store huge amounts of visual information").

35. Brown & Campione, *Recognition Memory for Perceptually Similar Pictures in Preschool*

B. Can Children Remember?

Researchers have discovered many factors that influence a child's memory, including age,³⁶ race,³⁷ environment,³⁸ sex,³⁹ and familiarity.⁴⁰ These findings indicate that children may be reliable witnesses in identifying perpetrators of crimes. Identification of a perpetrator in sexual abuse cases is not a crucial issue because the perpetrator is usually a close

Children, 95 J. OF EXPERIMENTAL PSYCHOLOGY 55-62 (1972); Brown & Scott, *Recognition Memory for Pictures in Preschool Children*, 11 J. OF EXPERIMENTAL PSYCHOLOGY 401-12 (1971); Corsini & Jacobus, *Recognition Memory for Preschool Children for Pictures and Words*, 16 PSYCHONOMIC SCI. 192-93 (1969).

36. Carey, Diamond, & Woods, *Development of Face Recognition—A Maturational Component?*, 16:4 DEV. PSYCHOLOGY 257-69 (1980) (assessing development between ages 6 and 16 of ability to encode unfamiliar faces and noting marked improvement between ages 6 and 10 and again by age 16); Ellis, Shepherd, & Bruce, *The Effects of Age and Sex Upon Adolescents' Recognition of Faces*, 123 J. OF GENETIC PSYCHOLOGY 173-74 (1973) (studying adolescents' recognition memory and finding improvement between ages 12 and 17); Feinman & Entwisle, *CHILD DEV.*, *supra* note 34, at 506-10 (studying facial recognition ability with 288 children from 1st, 2nd, 3rd, and 6th grades, and concluding facial recognition ability increased significantly with each grade, but leveled off between ages 8 and 11 and recognition memory may improve very little from age 11 through adulthood).

37. Chance, Turner, & Goldstein, *Development of Differential Recognition for Own and Other-Race Faces*, 112 J. OF PSYCHOLOGY 29-37 (1982) (testing of 106 subjects ranging in age from 6 to 20 performing face-recognition tasks with Caucasian and Oriental photographs showed that the youngest children recognized both kinds of faces equally well, but the older subjects identified Caucasians more accurately); Feinman & Entwisle, *CHILD DEV.*, *supra* note 34, at 510 (black children's performance on recognition memory tasks was significantly better than white children's, particularly in recognition of white faces).

38. Feinman & Entwisle, *CHILD DEV.*, *supra* note 34, at 510 (children from an integrated school and mixed-race neighborhood recognized black or white faces more accurately than children from segregated schools).

39. Feinman & Entwisle, *CHILD DEV.*, *supra* note 34 (girls were superior at recognition tasks at every grade); Chance, Turner & Goldstein, *supra* note 37 (boys and girls recognized faces equally well until age 13, when girls' recognition became superior to boys').

40. Chance, Goldstein & Schicht, *Effects of Acquaintance and Friendship on Children's Recognition of Classmates' Faces*, 7:6 PSYCHONOMIC SCI. 223-24 (1967) (concluding that friendship with the subject enhances performance and suggesting that positive reinforcements associated with certain faces may facilitate learning and detailed recall); Diamond & Carey, *Development Changes in the Representation of Faces*, 23 J. OF EXPERIMENTAL CHILD PSYCHOLOGY 1-22 (1977) (recognition accuracy of children age 6 to 10 of unfamiliar faces susceptible to error especially when disguises are used; contrary result with familiar faces); Goldstein & Chance, *Recognition of Children's Faces: II*, 20 PERCEPTUAL AND MOTOR SKILLS 547-48 (1965) (finding that third-graders recognize photos of young children more frequently than those of older persons).

Familiarity has special implications in child sexual abuse cases. Although the studies indicate that a child is more likely to remember people or events about which he is knowledgeable, it does not follow that he will remember less of an event about which he is less knowledgeable. In the case of sexual abuse, a detailed statement of sexual abuse may be more believable because children lack the knowledge to construct a believable false statement.

friend or relative of the victim.⁴¹ Even if children process large amounts of information, their testimony is of little use if their memories are susceptible to mistaken impressions.⁴² A child's ability to conceptualize complex events and order them in space and time is critical.⁴³

One commentator states that children before age seven focus on only the most obvious attributes of any given stimulus.⁴⁴ The inability to process multiple stimuli may inhibit a child's ability to recall an event accurately. Children often are unable to recount the chronology of events because they have difficulty comprehending time independent of distance and speed.⁴⁵ Researchers have found that comprehension of time as distinguished from speed and distance may develop near age ten.⁴⁶

Fantasy is another source of mistaken impression.⁴⁷ Although some researchers believe that children confuse fact and fantasy,⁴⁸ a recent study found that children from six to twelve years old are no more likely than adults to confuse fact with fantasy.⁴⁹

41. In a three-year study of New York City sexual abuse cases, concluded in 1971, researchers found that in 75% of the cases reported, the offender was a member of the child's own household, a relative not living in the neighborhood, a neighbor, a friend, or a person in the community with whom the child had frequent contact. Undeutsch, *Courtroom Evaluation of Eyewitness Testimony*, 33 INT'L REV. OF APPLIED PSYCHOLOGY 51 (1984); accord Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 J. OF SOC. ISSUES 125, 126 (1984).

42. Melton, *Children's Competency to Testify*, 5:1 L. & HUM. BEHAV. 73, 77 (1981).

43. *Id.* One commentator suggests that sex acts are simply structured events. Therefore, accurate recounting of the essential details of a sex crime may require limited cognitive ability. Undeutsch, *supra* note 41, at 53.

44. Melton, *supra* note 42, at 77 (1981).

45. *Id.*

46. Berndt & Wood, *The Development of Time Concepts Through Conflict Based on a Primitive Duration Capacity*, 45 CHILD DEV. 825-28 (1974); Levin, *Development of Time Concepts in Young Children, Reasoning About Duration*, 48 CHILD DEV. 435-44 (1977).

47. Johnson & Foley, *Differentiating Fact from Fantasy*, 40:2 J. OF SOC. ISSUES 33, 38 (1984). *But see* *Burham v. Chicago R.R.*, 100 S.W.2d 858 (Mo. 1936) (allowing a child found incompetent in a prior trial to testify after a dream supposedly refreshed her memory).

48. J. PIAGET, *JUDGMENT AND REASONING IN THE CHILD* (1959); Flavell, Flavell & Green, *Development of the Appearance-Reality Distinction*, 15 COGNITIVE PSYCHOLOGY 195-200 (1983); Morison & Gardner, *Dragons and Dinosaurs: The Child's Capacity to Differentiate Fantasy from Reality*, 49 CHILD DEV. 642-48 (1978).

49. Johnson & Foley, *supra* note 47, at 45. Johnson and Foley found that six-year-old children were able to distinguish between memories originating from fantasy and those originating from external experiences. Although children did not confuse what they had imagined with what they had perceived, children did have difficulty distinguishing between what they had done and what they had thought of doing. *Id.* This deficiency is important, but Johnson and Foley note that it does not warrant a generalization that children confuse fact with fantasy. *Id.*

III. LEADING QUESTIONS, SUGGESTIBILITY, AND ALTERATION OF MEMORY IN YOUNG CHILDREN

If children are in fact susceptible to influence, prosecutorial use of leading questions when examining child-witnesses may lead to the introduction of unreliable testimony.⁵⁰ Psychological research indicates that the effect of leading questions on children depends upon many factors.⁵¹ An evaluation of the impact of leading questions is important because a child victim is usually questioned about the event before testifying at trial.⁵² A child typically discloses the sexual encounter to a relative, friend, or teacher, who then probes the child for information. Next, a social worker or a police officer intervenes and questions the child.⁵³ Finally, a prosecutor enters the picture and elicits further details about the event from the child.⁵⁴

Researchers have identified two important consequences of using leading questions. First, the wording of a question affects the answer given.⁵⁵

50. Goodman, *supra* note 3, at 9.

51. Loftus & Davies, *Distortions in Memory of Child*, 40:2 J. OF SOC. ISSUES, 51-67 (1984). The factors include whether there is delay between observation and recitation; whether an event is understandable and interesting; whether technical knowledge is required; and whether subtle language is used. *Id.* Loftus suggests that items that are especially interesting or important to children might be less vulnerable to suggestive influence, and that in recalling such items, children would out-perform adults. *Id.* at 51. Young children may confuse suggestion by an adult authority figure with the truth. Melton, *supra* note 43, at 80; see also Allen & Newton, *Development of Conformity and Independence*, 22 J. OF PERSONALITY AND SOC. PSYCHOLOGY 18, 18-30 (1972) (young children have inflated perceptions of power or authority); Fodor, *Resistance to Social Influence Among Adolescents as a Function of Moral Development*, 85 J. OF SOC. PSYCHOLOGY 121, 121-26 (1971) (high vulnerability to adult influence among young children).

52. Empirical evidence indicates that children find repeated statements more credible than new ones. Bacon, *Credibility of Repeated Statements: Memory for Trivia*, 5:2 J. OF EXPERIMENTAL PSYCHOLOGY: HUM. LEARNING AND MEMORY 241-52 (1979); see also DENT, THE EFFECTS OF INTERVIEWING STRATEGIES ON THE RESULTS OF INTERVIEWS WITH CHILD WITNESSES, RECONSTRUCTING THE PAST 279-98 (1982); Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4:3 L. & HUM. BEHAV. 201 (1980) (indicating that precourtroom interrogation not carried out under court supervision is a dangerous source of suggestion).

53. See generally Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 997 (1969) (discussing pretrial interrogations of child victims).

54. One possible solution to the problem caused by excessive pretrial interrogation is to videotape the child's first complaint and substitute the videotape for direct questioning during the pretrial stage. Although some jurisdictions use videotaped depositions as a substitute for the child's testimony at trial, this practice raises serious questions about the constitutional right to confront witnesses. See Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 687-701 (1982).

55. See Cohen & Harnick, *supra* note 52; Messerschmidt, *The Suggestibility of Boys and Girls Between Ages of Six and Sixteen*, 43 J. OF GENETIC PSYCHOLOGY 422, 422-37 (1933).

Second, misleading information introduced during questioning alters a child's memory of the event.⁵⁶ Researchers have reported, however, that both effects also obtain in adult witnesses.⁵⁷ Two studies indicate that five and six year olds are no more likely to distort information than college students.⁵⁸

Because of the adverse impact of leading questions, several psychologists advocate the use of a "free report," allowing the child-witness to give his own narrative version of the event.⁵⁹ Studies indicate that although recall was less complete,⁶⁰ this method produces the most accurate account.⁶¹ Other psychologists argue that courts should not aban-

56. Several studies indicate that information provided in questioning may modify children's memories. In two experiments, researchers showed slides to six-, eight-, and ten-year-old children and college students and then asked various questions. The researchers found that verbal information influenced both recall and recognition of visual material. Verbal information consistent with visual information increased recall, while incorrect verbal information decreased correct recall. Children that had correct visual memory were less likely than adults to use verbal information to modify visual memories. Duncan, Whitney & Kunen, *Integration of Visual and Verbal Information in Children's Memories*, 53 CHILD DEV. 1215-23 (1982); see also Paris & Lindauer, *The Role of Inference in Children's Comprehension and Memory for Sentences*, 8 COGNITIVE PSYCHOLOGY 217-27 (1976) (demonstrating that children include in memory inferences drawn from questions, previously acquired relevant information, and general knowledge).

57. Cohen & Harnick, *supra* note 52, at 209 (finding that leading questions alter a child's recollection of an actual event, but finding the same result in older subjects and no significant difference for subjects in grades 3, 6 and college); see also Bekerian & Bowers, *Eyewitness Testimony: Were We Misled?*, 9:1 J. OF EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 139-45 (1983) (adults given misleading information about an incident are often unable to remember the original incident accurately); Dodd & Bradshaw, *Leading Questions and Memory: Pragmatic Constraints*, 19 J. OF VERBAL LEARNING AND VERBAL BEHAV. 659-704 (1980) (adult subjects remember factual presuppositions in leading questions although effect is cancelled by attributing the verbal material to a biased source); Marshall, Marquis & Oskamp, *Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 HARV. L. REV. 1620, 1628-33 (1971) (guidance in questioning and atmosphere affect accuracy and completeness of interrogation); Weinberg, Wadsworth, & Baron, *Demand and the Impact of Leading Questions on Eyewitness Testimony*, 11:1 MEMORY AND COGNITION 101, 101 (1983) (questions subtly loaded with implications can alter a witness's memory).

58. Duncan, Whitney & Kunen, *supra* note 56, at 1215; Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3:4 L. & HUM. BEHAV. 295-306 (1979).

59. Dent & Stephenson, *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses*, 18 BRIT. J. OF SOC. & CLINICAL PSYCHOLOGY 41, 42 (1979).

60. See Dent & Stephenson, *supra* note 59, at 41.

61. *Id.*; Pear & Wyatt, *The Testimony of Normal and Mentally Defective Children*, 3 BRIT. J. OF PSYCHOLOGY 388, 397 (1914) ("It can be seen that in every group the degree of accuracy attained is remarkably high, and hence the *spontaneous* account of an event is exceedingly reliable . . . [W]hen the testimony of children is unaffected by questions or suggestions, it is worthy of the utmost consideration"). *But see* Marin, Holmes, Guth & Kovac, *supra* note 58, at 295 (young children unlikely to distort memories in response to direct questions).

don direct interrogation of child-witnesses. These commentators suggest, however, that only specially trained psychologists interview child-witnesses.⁶²

Some commentators are skeptical about the applicability of leading question research to the courtroom setting. Without evidence of the accuracy of laboratory simulations of a courtroom, one researcher suggests that any conclusions are highly speculative.⁶³

One study has attempted to use a courtroom-like laboratory. The results indicate that although children do not explain their observations as thoroughly as adults, they are as accurate as adults in answering objective questions.⁶⁴ Age differences among participants reveal no significant differences in susceptibility to leading questions.⁶⁵

The above studies indicate that children possess the ability to remember accurately an incident of sexual abuse.⁶⁶ Children can process substantial amounts of information.⁶⁷ Furthermore, recounting the essential details of a sex crime, a novel and consequential act in a child's mind, requires limited cognitive ability.⁶⁸

62. Goodman, *supra* note 3, at 9; Parker, *supra* note 54, at 643; Reifen, *Court Procedures in Israel to Protect Child Victims of Sexual Assault*, 3 VICTIMOLOGY: A NEW FOCUS 67-72 (1975); Trankell, *Was Lars Sexually Assaulted? A Study in the Reliability of Witnesses and of Experts*, 56 J. OF ABNORMAL & SOC. PSYCHOLOGY 385-95 (1958); see also Stern, *Abstracts of Lectures on the Psychology of Testimony and on the Study of Individuality*, 21 AM. J. OF PSYCHOLOGY 273-82 (1910) (arguing that special investigators should interview children, only once, as soon as possible after the incident, without using leading questions; Germany and Israel have adopted his suggestion, although most countries have not).

63. Read & Bruce, *On the External Validity of Questioning Effects in Eyewitness Testimony*, 33 INT'L REV. OF APPLIED PSYCHOLOGY 33-49 (1984) (manipulating the variables that might normally differentiate real-world witnesses from laboratory subjects, study found that such manipulation altered the impact of leading questions on the subjects' subsequent testimony). *But see* Dent & Stephenson, *supra* note 59, at 42 (laboratory conditions adequately simulate courtroom).

64. Marin, Holmes, Guth, & Kovac, *supra* note 58, at 295-306.

65. *Id.* Scholars have criticized this study because the interviewer used only one leading question and he probably failed to impart the image of an attorney asking threatening questions in an imposing courtroom. Melton, *supra* note 42, at 82.

66. Exaggeration among children who report being assaulted is rare. Children often recant or fail to report their stories because the consequences of reporting often seem worse than the possibility of being victimized again. The general veracity of children's reports is supported by high rates of admissions by the offenders. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 J. OF SOC. ISSUES 125, 127 (1984).

67. See *supra* notes 35-43 and accompanying text.

68. Pynoos & Eth, *The Child as Witness to Homicide*, 40:2 J. OF SOC. ISSUES 87, 95 (1984). However, a very young child, not familiar with sexuality and reproduction, may have an incomplete memory of a sexual encounter. Melton, *supra* note 42, at 73. *But see* Kreitler & Kreitler, *Children's Concepts of Sexuality and Birth*, 37 CHILD DEVELOPMENT 363 (1966) (indicating that by age four

Nevertheless, mistaken impressions about the event may taint an otherwise accurate recollection. In particular, children may have difficulty relating the time sequence of events⁶⁹ or relating the event verbally.⁷⁰ Allowing the child to associate the occurrence of the sexual abuse with notable events that occurred at or near the time of the sexual abuse, and using anatomical dolls or interpreters may remedy this difficulty. The propensity of children to answer questions literally requires attorneys to phrase questions carefully so that the meaning of a child's answer is clear.⁷¹

Leading questions may also color a child's accurate recollections about the sexual abuse. Although studies show that children are no more susceptible to leading questions than adults,⁷² research does not show that they are less susceptible. Therefore, the fact that a witness is a child does

most children are aware of sex differences and are willing to speak freely about them). The Kreitler study, coupled with the hypothesis that the simplicity of the sex act creates powerful memories, *see supra* note 43, indicate that very young children can give accurate descriptions of the event. Although the child may not be acquainted with technical vocabulary, dolls or drawings may alleviate this problem. Moreover, unfamiliarity with reproduction may indicate reliability because a young child would be less likely to fabricate a detailed description of the sex act.

69. *See supra* notes 44-46 and accompanying text.

70. *See supra* note 31 and accompanying text.

71. Berliner & Barbieri, *supra* note 66, at 132. These commentators give the following example of a five-year-old child who on direct examination told the jury about her father putting his penis in her mouth. On cross-examination, however, she gave the following testimony:

Defense Attorney: And then you said you put your mouth on his penis?

Child: No.

Defense Attorney: You didn't say that?

Child: No.

Defense Attorney: Did you ever put your mouth on his penis?

Child: No.

Defense Attorney: Well, why did you tell your mother that your dad put his penis in your mouth?

Child: My brother told me to.

The experienced prosecuting attorney recognized the child's very literal answer and made the child's answer clear on redirect examination:

Prosecuting Attorney: Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?

Child: Yes.

Prosecuting Attorney: Did daddy put his penis in your mouth?

Child: Yes.

Prosecuting Attorney: Did you tell your mom?

Child: Yes.

Prosecuting Attorney: What made you decide to tell?

Child: My brother and I talked about it, and he said I better tell or dad would just keep doing it.

Id.

72. *See supra* note 57 and accompanying text.

not justify the use of leading questions. The only remaining justification is that such questions are required to elicit painful and embarrassing memories about the sexual abuse. An acceptable alternative to the use of leading questions is the use of simple, direct questions in conjunction with anatomical dolls or drawings.⁷³

Although children are potentially reliable witnesses, courts must still devise a method to determine whether a particular child is a reliable and truthful witness. Traditional competency requirements are designed for this purpose.⁷⁴ Typically, a child is asked whether he knows the difference between the truth and a lie and what consequences follow from telling a lie.⁷⁵

One researcher suggests that attorneys should not test a child's ability to distinguish between the truth and a lie by asking for definitions.⁷⁶ Most children, and many adults, cannot define an abstract word such as truth. Instead, examples should be utilized. For example, the judge might ask, "If I said, 'You have red hair,' would that be the truth or a lie?"⁷⁷

In other countries, courts appoint psychologists to assist in the determination of witness credibility.⁷⁸ These experts utilize Undeutsch's "criteria of reality" to determine the veracity of a child's statement in sexual

73. See *supra* notes 24 & 25 and accompanying text. A recent study suggests that props are useful for maximizing narrative detail in children's accounts. In the study, two- to five-year-olds participated in a sequence of events involving 21 details in an unfamiliar setting. Four- and five-year-olds remembered an average of 19-21 details when provided with a small model of the playroom and miniatures of relevant items. The five-year-olds averaged 18 details when no props were available and the four-year-olds' performance averaged 2.5 details. Although the two-year-olds averaged only 1.5 details under both conditions, their performance rose to 63% of that of the four-year-olds when placed in the original room. Despite the use of toy props, no child's account or reenactment contained elements of fantasy. This study indicates that if courts provide relevant props, in addition to anatomical dolls, children might give more detailed reports. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40:2 J. OF SOC. ISSUES 157, 162-63 (1984).

74. See *supra* notes 3-23 and accompanying text.

75. See *supra* notes 9-13 and accompanying text.

76. Melton, *supra* note 42, at 73 (a child's ability to define "truth," "oath," or "God" tells more about the child's intellectual development than about the child's propensity for telling the truth).

77. *Id.* One study indicates that four- and five-year-olds correctly judge an utterance as a lie only 28% of the time while five- to six-year-olds do so 94% of the time. Wimmer and Perner, *Beliefs About Beliefs: Representation and Constraining Function of Wrong Beliefs in Children's Understanding of Deception*, 13 COGNITION 103-28 (1983).

78. Undeutsch, *supra* note 41, at 51-67 (1984) (discussing appointment of psychologists in child abuse cases in East and West Germany and Austria).

abuse prosecutions.⁷⁹ According to the "criteria of reality," the statement's content demonstrates the truthfulness of the statement. Truthful accounts of real, self-experienced occurrences display certain descriptive or emotional characteristics. By checking a child's report against these criteria, courts determine the veracity of the statement.⁸⁰

Wigmore suggests a different approach. He recommends the abolition of the child competency requirement, suggesting that the trier of fact evaluate a child's testimony for credibility just as any other witness.⁸¹ This is the view that the federal system has adopted. Empirical studies finding no correlation between age and honesty support Wigmore's and the federal courts' position.⁸²

79. Undeutsch's "criteria of reality" are as follows:

1. concreteness (definiteness and vividness);
2. wealth of detailed description;
3. originality (free of formalization, clichés and stereotyping);
4. inner coherence and consistency;
5. mentioning of details of criminal-victim relationship (criminologists find this element prevalent in sex offenses, *id.* at 59);
6. embedding of the reported crime in the actual life situation of the defendant and the victim (Undeutsch notes that fulfillment of this criterion excludes the possibility that the child fantasized or invented the event, *id.* at 60);
7. reference to details which exceed the capacity of the witness, *i.e.*, precautionary measures or threats, *id.* at 59;
8. reporting of subjective experiences or emotions;
9. "bilateral emotional criterion": an emotion described in the statement cannot be explained by the content of the observations, unless the witness' personal situation is also considered. A necessary condition is that the emotion be evoked by two independent stimuli, one emanating from the event under investigation;
10. mentioning of unexpected complications (failures, disturbances, interruptions, frustrations);
11. mentioning of socially disapproved behavior demeanor on the part of the witness before, during, or after the incident; and
12. spontaneous corrections, improvements, and additional information.

Id. at 58-60.

80. *Id.* at 64.

81. 2 WIGMORE ON EVIDENCE § 509 (3d ed. 1940). Wigmore states that:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable. . . . Recognizing on the one hand the childish disposition to weave romances, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.

Id. at 601.

82. Melton, *supra* note 42.

IV. CONCLUSION

American jurisdictions generally ensure truthfulness by competency requirements and corroboration rules. Although strict application of these rules prevents the admission of inaccurate testimony, psychological studies indicate a greater probability that they prevent the admission of highly reliable and relevant testimony. State courts that insist on utilizing special competency rules for children should restructure the rules to incorporate the behavioral data on the capabilities of children. For example, a presumption of incompetency for children below the age of six is contradicted by empirical studies.⁸³ Corroboration requirements reflect the erroneous assumption of a correlation between age and honesty.⁸⁴

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83. See *supra* notes 49, 68, 73, 77 and accompanying text.

84. See *supra* note 81 and accompanying text.

