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Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse

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**EVALUATING CHILDREN’S COMPETENCY TO
TESTIFY: DEVELOPING A RATIONAL METHOD TO
ASSESS A YOUNG CHILD’S CAPACITY TO OFFER
RELIABLE TESTIMONY IN CASES ALLEGING
CHILD SEX ABUSE**

LAURIE SHANKS*

I. INTRODUCTION	575
II. THE MEANINGLESS NATURE OF TYPICAL COMPETENCY QUESTIONING: <i>HOW WILL GOD FEEL?</i>	576
III. NATURE OF CHILD SEXUAL ABUSE CASES	578
IV. SCOPE OF COMPETENCY HEARING.....	581
A. <i>Competency Standards and Their Implementation</i>	581
B. <i>The Ability to Distinguish Fantasy from Reality</i>	586
V. A CHILD’S CONCEPT OF TRUTH.....	588
VI. LEARNING A STORY	589
VII. POTENTIAL FOR WRONGFUL CONVICTION	591
VIII. RECOMMENDATIONS.....	597
A. <i>Expansion of the Competency Hearing</i>	597
B. <i>Appointment of a Law Guardian</i>	600
C. <i>Appointment of an Expert Witness</i>	601
IX. CONCLUSION.....	602

I. INTRODUCTION

This Article discusses the testimony of young children, the inadequacy of the traditional hearing used to determine the competency of such children to testify, and the ways in which the hearing might be changed to make it a meaningful process for determining the ability of a child to give reliable testimony.

Criminal trials involving allegations of the sexual abuse of a young child are particularly susceptible to wrongful convictions due to sympathy for the small “victim,” intense revulsion elicited by the nature of the charges, and the ineffectiveness of traditional methods of impeachment when used with a child witness. The conventional competency determination, made on the basis of a pre-trial hearing, makes little or no attempt to accurately ascertain the child’s level of developmental maturity or ability to reliably relate a series of events. There is rarely

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a meaningful attempt to ascertain whether the child witness is able to distinguish reality from fantasy. Rather, the child is often allowed to testify based upon a brief and essentially meaningless inquiry designed to test her knowledge of colors and her ability to parrot the difference between “the truth” and “a lie.”

While many studies have discussed the dangers inherent in the improper questioning of children during the investigation of alleged sexual abuse,¹ there has been little exploration of how to determine whether a child is competent to testify. This is unfortunate as the failure to adequately evaluate a child’s ability to testify in a meaningful way can have catastrophic consequences. The lives of many individuals, including the child, will be changed forever as a result of the determination made at the competency hearing. This article will address the failures of the present system and offer suggestions for effecting reform.

II. THE MEANINGLESS NATURE OF TYPICAL COMPETENCY QUESTIONING: *HOW WILL GOD FEEL?*

“Are we ready to proceed with the competency hearing?” “Yes, Your Honor,” the prosecutor replies and turns to ask the victim-witness advocate to bring in the star, and *only*, witness of the day. She returns in a moment, hand-in-hand with Suzi, an adorable five-year-old in a freshly-pressed dress, matching bows in her hair, ruffled white anklets, and black, patent leather ballet slippers on her little feet. The advocate shepherds Suzi to the witness chair where she sits, tiny and fragile, legs swinging as she clutches the teddy bear given to her by the state police “special victims unit.”

“Can you tell us your name?” the prosecutor begins. “Suzi,” the child responds in a barely audible whisper. “Don’t be afraid. Where do you go to school?” No answer. “Do you know your teacher’s name?” “Miss Cindy,” Suzi mumbles. “Very good,” the attorney smiles and nods. “Is Miss Cindy nice?” Nod of head. “How old are you?” Holds up her hand, palm out, with all five fingers extended. “Five—what a *big* girl you are!” “Can you count to ten?” Suzi does so, and the prosecutor praises her effusively.

With the preliminaries over, the prosecutor now straightens, takes out a black pen and waves it in front of Suzi. “What color is this pen, Suzi?” “Black.” “You’re right! Good girl. Is that the truth?” “Uh-huh.” “You’re right, it is the truth. You are very smart.” The prosecutor pauses for a moment and asks in a serious tone, “Okay, Suzi, now if I tell you that this pen is red,” holding up the same black pen, “would that be the truth or a lie?” “A lie,” replies Suzi. “That’s right! Perfect! You are doing *such* a good job,” the prosecutor beams, as he nods and smiles. He then frowns and deepens his voice. “Now,” he says, “is it a good thing or a bad thing to

¹ See generally Stephen J. Ceci, Maggie Bruck & David B. Battan, *The Suggestibility of Children’s Testimony*, in FALSE-MEMORY CREATION IN CHILDREN AND ADULTS: THEORY, RESEARCH AND IMPLICATIONS 169 (David F. Bjorklund ed., 2000) (highlighting the importance of this issue by the staggering lack of reliability in allegations of abuse, “[o]nly 36% of nearly two million maltreatment investigations involving nearly three million children resulted in substantiated or indicated reports of child abuse, neglect, or both”); Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAGAZINE, Sept. 19, 2004, at 77 (providing a terrifying look at the lasting psychological effects of false allegations on not only the accused, but the onetime child accuser twenty years after the incident). See also THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., 1991).

tell a lie?" "A bad thing," Suzi says sinking a bit lower in the chair. Again, the prosecutor is all smiles. "That is exactly right. You are such a smart girl." He takes a dramatic pause, frowns, and with a gloomy voice adds, "What would happen if you told a lie?" "Mommy would be mad and put me in timeout, and God would be sad," Suzi whispers, again to accolades from the prosecutor.

After a few more questions, which elicit testimony that Mommy would be proud and God would be happy if she correctly identifies the color of the pen as black, which is "the truth," Suzi is asked if she understands who the judge is and what role he has in the courtroom. Suzi responds, "Judges are the boss. They put bad people in jail." When prompted, Suzi confirms that judges are "really nice to little girls who tell the truth." The judge, as well as the prosecutor, is now nodding and assuring Suzi that she is doing a terrific job.

Next, Suzi is asked whether she will promise to tell the truth in court so that the judge, in addition to God and Mommy, will be happy and proud of her. She again answers in the affirmative, and the competency hearing draws to a close. The prosecutor tenders the witness, maintaining that he has demonstrated that she knows the difference between the truth and a lie and understands that there are adverse consequences to telling a lie. The judge rules that the child may testify. The entire proceeding may have taken less than fifteen minutes.²

The above scenario is reflective of the competency hearings that occur in most jurisdictions to determine whether young children should be permitted to testify in serious felony cases, including those alleging child sexual abuse.³ The defense attorney is often relegated to the role of a proverbial "potted plant" during the proceedings. She may be given the opportunity to inquire of the witness directly, or she may be required to submit any requested questions to the court for the judge to ask. Even if the attorney is permitted to address the child directly, the questions may have to be submitted in advance for approval by the court. The judge may strictly

² The scenario described is played out daily in courtrooms across the country. The author was formerly an Assistant County Attorney and Assistant Public Defender in Maricopa County, Arizona, and is admitted to practice law in Arizona, Indiana, and New York. She has prosecuted and defended cases involving allegations of child sexual abuse. In addition, the author has lectured in approximately fifteen states on the topic of cross-examination of child witnesses and has conducted workshops for lawyers from numerous states at the National Criminal Defense College in Macon, Georgia, on child competency hearings and cross-examination of child witnesses. The participating attorneys describe the hearings held in their states with amazing consistency. The dialogue in this Article is drawn from the author's own experiences and those of other practicing attorneys.

³ See, e.g., N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2010); see also STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* (1995). Further exemplifying this concept, a Time Magazine article described a typical courtroom scene:

Lawyers try to frame simple questions that give the youngster a concrete sense of abstract concepts. In the successful California prosecution of kidnaper Kenneth Parnell, for example, Deputy District Attorney George McClure established his witness's competence by picking up a pen and asking the victim, Timmy White, then six, "Timmy, if I told you this thing in my hand is an ice cream cone, would it be the truth or a lie?" To put children at ease, some judges bend courtroom rules. In one Seattle trial, a 5 1/2-year-old witness was allowed to sit on her mother's lap.

Laura Meyers et al., *Out of the Mouths of Babes*, TIME, Jan. 31, 1983, at 54.

limit the scope of the defense attorney's inquiry to issues involving the child's ability to distinguish truth from falsity and to articulate that one must tell "the truth" in court.⁴

Even in jurisdictions in which the defense attorney is permitted to directly question the child, the lawyer may have no effective means to do so. It may be difficult to determine what meaningful questions can be propounded within the strictures of the proceeding. Should the defense attorney maintain that the pen is really green and see if the child will agree? Should she inquire whether prior to the hearing the child practiced the precise questions posed and answers elicited during the proceeding? Perhaps she should ask whether the child actually goes to church or what the basis is for her belief in God's or the judge's emotional reactions? What can be done if the child will not answer or begins to cry? More significantly, what, if anything, can be done to combat a judge's *pro forma* attitude toward competency hearings when it is a foregone conclusion that the child will be adjudged competent to testify and that any deficiencies in the child's testimony will go to the weight of the testimony, but not its admissibility?

Alternatively, should the defense attorney use the hearing to try to establish some rapport with the child? Should (or may) questions be asked about the allegations in the indictment—the acts about which the child is being found competent to testify? Perhaps the attorney should try to explore whether Suzi has an imaginary friend, or whether she is known to make up stories to avoid being put in "timeout." Maybe Suzi should be questioned about what activities she has previously engaged in that made God happy and those that made him (or her mother) sad or mad.

While the answers to these questions may not be apparent, what is clear is that the lives of many individuals, including the child, will be changed forever as a result of the determination made at the conclusion of the hearing.⁵ Given that reality, it is both startling and problematic that the typical competency hearing is comprised of the meaningless ceremony portrayed above. Reform is needed.

III. NATURE OF CHILD SEXUAL ABUSE CASES

Cases involving allegations of child sexual abuse evoke intense, emotional reactions from participants in the criminal justice system and the public. The thought of a helpless child as the victim of a sadistic, perverted, or manipulative adult brings out the protective instincts of every prosecutor and turns the "special victims unit" attorney into an avenging angel in the eyes of her "team."⁶ The public reacts with anger and revulsion.

⁴ For a comprehensive catalogue of each state's statute providing for a child competency hearing, see AM. PROSECUTION RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 359 tbl.V.1 (3d ed. 2004); TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE CHILD WITNESS IN CRIMINAL CASES, app. C at 63 (2002). See also Jane Dever Prince, *Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 113 (2004).

⁵ See Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377 (1985) (highlighting the crucial nature of the competency hearing in sexual abuse cases because these cases often depend solely on the testimony of the child and generally lack witnesses or any corroborating evidence).

⁶ Many jurisdictions have special units composed of police officers, prosecutors, and nurses, among others, who work together utilizing a team-based approach for protecting

Experienced criminal defense attorneys are passionate in their defense of accused murderers, arsonists, and suspected "terrorists." They do not flinch at the thought of cross-examining the most experienced FBI agent, mob informant, or co-defendant. However, these same champions of the criminal justice system are terrified of facing a five-year-old on the witness stand.⁷ This quandary is not unique to defense attorneys. Judges are reluctant to preside over the cases, prosecutors may be hesitant

victims of sexual abuse. *See, e.g.*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP'T OF JUSTICE, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE (Mar. 2000); William P. Heck, *Basic Investigative Protocol for Child Sexual Abuse*, FBI LAW ENFORCEMENT BULLETIN 19 (Oct. 1999); Maxine Jacobson, *Child Sexual Abuse and the Multidisciplinary Team Approach*, 8 CHILDHOOD 231 (2001) (arguing that "understanding child sexual abuse and developing community-based practice approaches must be informed by broader perspective"). Furthermore, for more than ten years, the Department of Justice has been encouraging the use of a multidisciplinary team approach to the investigation and prosecution of cases of alleged child sexual abuse in which "social workers, physicians, therapists, prosecutors, judges and police officers all have important roles to play." OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 3 (2001).

⁷ In a public opinion survey, lawyers were asked whether or not "people *accused* of child sexual abuse should be entitled to the same legal protections as defendants accused of other crimes." Stephen L. Carter, *The Future of Callings—An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium: What is the Source of the Obligation of Public Service for the Professions?*, 25 WM. MITCHELL L. REV. 103, 115 (1999) (emphasis added). Strikingly, the results indicated that twenty-five percent of lawyers admitted that they believed such individuals did not deserve the same rights as all other criminal defendants. *Id.*

It's a scenario which is played out in court rooms across the country every day, the hearing of cases involving child abuse and child sexual abuse. Lawyers hate these cases. They are often in a no-win situation because no matter how sensitively they handle a case, there is always the chance of being accused of being heavy-handed in their approach.

Greg Kelton, *Protecting Innocence*, THE ADVERTISER (Adelaide, S. Austl.), Oct. 10, 1998. *See also* Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 888-89 (2003).

The classic example of such a conflict is the lawyer who is asked to represent a person charged with a sex offense against a child. Many lawyers would refuse this representation because their own beliefs and morals are so offended by the alleged offense that they would be unable to zealously represent such a client.

Id. Attorneys' aversion to defending alleged abusers is not unique to the United States.

One lawyer admitted that it was not always easy to discharge his professional obligation, but that he does his duty nonetheless: "I confess there are particular types of crimes that I prefer not to do—cases involving children, including child killing. I have kids of my own But, you can't reject a case because you don't like the crime or the criminal."

Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495, 511 (2006).

to put child witnesses on the stand, and jurors often opt to recuse themselves from service.⁸

In many respects, the reaction of the participants in the criminal justice system is understandable. The lawyers on each side, the judge, and the jurors are all likely to be parents, aunts, and uncles. Their spouses, parents, neighbors, and the news media have strong, negative opinions and are not hesitant to express them. For the defense attorneys, the question, “How *can* you represent someone *like that*?” is usually followed by, “I can’t believe you would represent him when you have children of your own!”⁹

In addition to the emotional component, there are unique legal concerns that add to the difficulty of prosecuting or defending a case involving an accusation of sexual abuse against a young child.¹⁰ Unlike other crimes, there is typically little or no physical evidence—no weapon, no marked bills, no heroin in small packages, no scales, and certainly no video surveillance.

Although some egregious cases of sexual abuse may involve vaginal or rectal tearing, many allegations of sexual abuse involve improper touching or fondling. Obviously, there will be no physical evidence at all if the child was asked or forced to touch the adult. If the allegation is that the adult touched the child, there may be a medical report indicating that the child has redness or sensitivity in the genital area “consistent with” such touching. Effective cross-examination of the state’s medical witness or use of a defense expert will elicit testimony that such physical findings are also “consistent with” masturbation, tight clothing, improper hygiene, and the use of inexpensive, rough toilet paper.¹¹

⁸ “From the perspective of a judge, the single most difficult criminal case to try is a child sex abuse case.” Phylis Skloot Bamberger & Richard N. Allman, *Some Special Concerns in the Trial of Child Sexual Abuse Case*, 64 N.Y. ST. B.J. 18, 18 (May-June 1992). See, e.g., Ronnie Hall, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 211 (2006).

Often prosecutors offer plea bargains to sex offenders to avoid bringing child witnesses, who may be traumatized by the experience, to testify. Another, less laudable reason, is that the offender will be civilly, and indefinitely, committed under the SVP statute immediately upon release from prison. Why bother sentencing to a long term of years when you can commit for a lifetime?

Id. “In the last twenty years, there have been more appeals of child sexual abuse convictions than in the preceding two hundred years.” Judge Charles B. Schudson, *Child Sexual Abuse: A Judicial Perspective*, http://www.nationalcac.org/professionals/trainings/ocourses/judge_charles_schudson/ (speaking about the challenges of presiding over child abuse cases, and the extreme importance of properly protecting children while preserving the criminal justice process) (last visited Jan. 7, 2011).

⁹ Smith, *supra* note 7, at 511.

¹⁰ See Meyers et al., *supra* note 3. “Cross examining a child has its own set of pitfalls. A defense attorney who badgers a young witness risks alienating the jury, so the lawyer must probe inconsistent statements gingerly.” *Id.*

¹¹ See Joyce A. Adams, *The Role of the Medical Evaluation in Suspected Child Sexual Abuse*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 231 (Tara Ney ed., 1995) (dispelling the myths about what is “normal” to find in an examination of a child suspected to have been abused, specifically whether an examination can truly determine if and how frequently a child has been molested).

Two other factors magnify the legal difficulties in child sexual abuse cases. The accused is often an intimate of the child, typically a family member, friend, or neighbor. Motives to encourage, discourage, or influence the child's testimony may be difficult to ascertain.¹² Further, acts of sexual abuse are hidden and secret, and the presence and testimony of independent, disinterested witnesses is virtually nonexistent.

IV. SCOPE OF COMPETENCY HEARING

A. Competency Standards and Their Implementation

In 1895, in *Wheeler v. United States*,¹³ the United States Supreme Court articulated the common law standard with respect to the testimony of young children.¹⁴ The Court considered the question of whether a five-year-old child was competent to testify in a criminal trial for murder:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the

¹² See Mark J. Blotcky, *The Criminal Defense of Child Molestation Allegations: The Psychiatric Knowledge Base from Which to Evaluate Your Case*, http://www.texas-sexcrimes-defense.com/CM/Articles/child_abuse_talk.pdf (last visited Jan. 7, 2011) (highlighting the complicated social, economic, and familial relationships within which abuse can occur or be alleged). "Sexual abuse, especially within the family is shrouded in secrecy, and confounded by denial, minimization, deflection upon others, exaggeration, and disbelief. And more confounding is that a child's psychiatric illness may cause him to exhibit sexual behavior suggestive of abuse." *Id.* at 8. For an additional example:

Cathy, age 12, accused her father of raping her. One month later she insisted that she had lied about the rape to get back at her father for imposing strict curfews. In reality, Cathy had been raped by her father, but retracted her story under extreme pressure, humiliation, and rejection by her sister and mother. For fear of destroying the family structure, Cathy recanted her allegation.

John C. Yuille, Monica Tymofievich & David Marxsen, *The Nature of Allegations of Child Sexual Abuse*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, *supra* note 11, at 21, 26.

¹³ *Wheeler v. United States*, 159 U.S. 523, 525 (1895) ("To exclude [a child] from the witness stand . . . would sometimes result in staying the hand of justice."). See also Judge Charles B. Schudson, *Child Sexual Abuse: A Judicial Perspective*, NCAC ACADEMY ONLINE, http://nationalcac.org/professionals/trainings/ocourses/judge_charles_schudson/index.html (last visited Sept. 3, 2010) (explaining and criticizing the historical development of child competency standards).

Most states have followed the federal lead, and presume all witnesses, regardless of age, to be competent. . . . In more and more states children, at least as a matter of written law, are presumed competent and allowed to testify. But what then is the problem? The problem is that sometimes, lawyers and judges don't apply the constitution, but habit and attitude

Id.

¹⁴ *Wheeler*, 159 U.S. at 526.

capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath.¹⁵

In New York, a child's competency is governed by section 60.20(2) of the Criminal Procedure Law (CPL).¹⁶

Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath. If under either of the above provisions, a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.¹⁷

The problem that arises in far too many cases is not so much in the legislative standard, but in its implementation.¹⁸ Perhaps due to the inartful drafting of competency statutes, courts have tended to ignore their obligation to test the intelligence and capacity of young children to accurately relate a series of events. Instead, they have focused on the language relating to whether the child understands the nature of an oath, even in those cases in which no oath will be taken. New York is not alone in this failure to adequately vet young witnesses.¹⁹

¹⁵ *Id.* at 524-25.

¹⁶ N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2010); *People v. Nisoff*, 330 N.E.2d 638, 641 (N.Y. 1975) (“[A] rebuttable presumption exists that an infant less than [nine] years old is not competent to be sworn.”).

¹⁷ N.Y. CRIM. PROC. LAW § 60.20(2).

¹⁸ Responding to the legal dilemmas created by inconsistent methods of conducting competency hearings, many of which were not grounded in any legal requirements, the State of Michigan repealed its requirement that all children under the age of ten be subject to a competency hearing before he or she may testify. Michigan now presumes that all witnesses are competent, regardless of age, and the burden of proving incompetence is on the party challenging the child's competency. Patricia P. Fresard, *Alice in Wonderland: The Child as Complainant in the Criminal Sexual Conduct Case*, 80 MICH. B.J. 60, 63 (2001).

¹⁹ N.Y. CRIM. PROC. LAW § 60.20(2). Other states have adopted varying standards to determine a child's competence. In Wyoming, courts have been directed to utilize a five-part test for determining the competency of child witnesses:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent

Statutes and case law from various states mandate that the following elements must be taken into consideration when deciding whether the child is competent to testify: (1) present understanding or intelligence to understand an obligation to speak the truth; (2) mental capacity, at the time of the occurrence in question, to observe and register the occurrence; (3) memory sufficient to retain an independent recollection of the observations made; (4) ability to translate into words the memory of those observations; and (5) ability to understand and respond to simple questions of the occurrence.²⁰ If these elements are present, it is an indication that the child is competent to testify. In some courts, these elements are reduced to the simple determination by a judge that the child's competency to be a witness depends on the child's intelligence and moral sense.²¹

Unfortunately, there are no clear standards. Each trial court develops its own method of making a decision as to competency. Some of these assessments address only a small portion of the necessary factors. For example, a court may utilize the "red pen, black pen" technique and find the child competent without ever considering the child's mental or developmental capacity at the time the alleged crime occurred.

The conduct of the hearing itself is also left to the discretion of each judge. Some leave questioning to the prosecutor, others allow both attorneys to examine, and some propound questions themselves. There are trial judges who bring the child into chambers for an "introductory meeting," with or without the lawyers present. Some judges question the child about school, family members, or what gifts were received for his or her birthday or Christmas.

In determining the child's competency to testify, courts have tended to place primary emphasis on the child's ability to differentiate truth from falsehood, to comprehend the duty to tell the truth, and to understand the consequences of not fulfilling that duty.²² The child need not understand the legal and religious nature of

recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Morganflash v. Wyoming, 76 P.3d 830 (Wyo. 2003) (citing *Larsen v. Wyoming*, 686 P.2d 583, 585 (Wyo. 1984) (quoting *Washington v. Allen*, 70 P.2d 690 (Wash. 1967))). For a comprehensive discussion of the standard in Maine, see Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment and Controversy*, 42 ME. L. REV. 283 (1990). See also Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377 (1985) (discussing the standard and its challenges as applied in Minnesota).

²⁰ 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

²¹ *Id.*

²² See *In re Noel O.*, 841 N.Y.S.2d 821 (N.Y. Fam. Ct. 2007). This decision provides a narrative of a hearing, both longer and more thorough than most, in which a five-year-old girl was deemed competent to testify under oath. The child, Jessi, testified as to her age and birth date, although she did not know the year in which she was born. In response to questions designed to establish that she could differentiate the truth from a lie, she was asked a series of questions relating to the colors of clothing worn by the Assistant Corporation Counsel. Jessi stated that "it is good to tell the truth" and "not good to tell a lie because her parents would be mad." *Id.* Jessi further indicated that "God was happy when you are nice" and "God is mad if you are bad." *Id.* During cross-examination, the child was not able to describe what an attorney does in the courtroom. She indicated that she learned about God from her mother and "herself." *Id.* She stated that she believed in Santa Claus, but her family also celebrated

an oath; rather, it is sufficient that a child have a general understanding of the moral obligation to tell the truth. The child must also have cognitive skills adequate to comprehend the event he or she witnessed and to communicate the memories of the event in response to questions at trial.²³ If a child is too young to appreciate the concept of an oath, he or she must be able to articulate that there are consequences to knowingly testifying to something that is false.²⁴ For cases involving adults as victims or perpetrators of crimes, the requirement of taking an oath bears with it the same sense of duty to tell the truth.²⁵

The abbreviated “red pen, black pen” competency hearing dispenses with the statutory requirements of various states to evaluate the child’s mental capacity at the time of the occurrence in question.²⁶ The salient questions are whether the child can

Hanukkah. *Id.* She went to temple two times “a long time ago,” but she could not remember what occurred during those visits. *Id.* There is no indication in the opinion that any testing was done to determine the intelligence of the child or her developmental skills. Significantly, there was also no indication that a determination was made as to whether the answers she gave about going to temple were factually correct and, if so, when the visits occurred. There was no inquiry about her ability to tell time or relate a sequence of events. There was also no inquiry as to whether Jessi practiced the questions and answers with the Assistant Corporation Counsel prior to her testimony. *Id.*

²³ Gary B. Melton, *Children’s Competency to Testify*, 5 LAW & HUM. BEHAV. 73, 75 (1981).

²⁴ *People v. Mendoza*, 49 A.D.3d 559, 560 (N.Y. App. Div. 2008); *see also In re Noel O.*, 841 N.Y.S.2d at 821.

A child may give sworn testimony where the trial judge finds that the child understands the difference between truth and falsehood, that he or she understands that there is a duty to tell the truth in court, that there are negative consequences for lying, and that the child can differentiate reality from fantasy. While Jessi is merely five years old, based upon the Court’s opportunity to observe the child in the course of the relatively lengthy hearing at which three different adults, both of the attorneys and the Court, put questions to her, the Court is satisfied that Jessi is competent to give sworn testimony at the fact-finding hearing.

Id.

²⁵ *See, e.g.,* Robert W. Morey, Comment, *The Competency of Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 266-70 (1985) (discussing the different state competency standards and the varying uses and definitions of an oath requirement); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1027 (2000) (providing a comprehensive overview of the challenges presented by child witnesses and oath-taking including cognitive difficulties, difficulties demonstrating an understanding of a truth versus a lie, and the special challenges of the particular form of the oath when a child is deemed competent to testify under oath); SHERRIE BOURG CARTER, *WORKING WITH CHILD WITNESSES: A HANDBOOK FOR LAW ENFORCEMENT OFFICERS AND CHILD PROTECTION WORKERS* 65 (2002).

Most children will not be familiar with the word oath. However, most will understand what it means to make a promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and productive to ask children if they know what it means to make a promise.

Id.

²⁶ *See* 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

observe and register what happened, whether she has memory sufficient to retain an independent recollection of the events, whether she has the ability to translate into words the memory of those observations, and whether she has the ability to understand and respond to simple questions about the occurrence. Unfortunately, these critical skills are rarely explored during the competency hearings.

While there is nothing wrong with using the "red pen, black pen" questions to acclimate the child to the questioner, to the courtroom, or to the concept of differentiating truth from falsehood, they are insufficient. Dr. Sherrie Bourg Carter outlines the shortcomings of such a truncated inquiry: First, although most children can correctly answer these types of questions, they

do not shed very much light on the critical question as to whether the child *understands* the meaning of the truth and lies. While it may be acceptable as a preliminary question, the standard, "*If I said my shirt is white . . .*" type of question mostly establishes whether a child knows his colors . . . and can use that knowledge to determine whether such a statement is correct or incorrect. [Second], these questions do not do a very good job of replicating scenarios similar to . . . the critical question before the court, [which is whether] a child who is placed in a serious situation (the courtroom rather than playing a game) and asked developmentally appropriate questions about a salient event they either witnessed or experienced (ultimately the alleged incident) [can] distinguish what is true from what is not true.²⁷

Clearly, more is needed if the child's testimony is to have value to the trier of fact. The child must be able to cognitively organize any event that actually occurred and also be able to differentiate it from his or her own thoughts and fantasies. Significantly, the child must be able to maintain these skills under psychological stress and under pressure from adult authority figures in the courtroom.²⁸

The ritualistic and abbreviated hearings illustrated above have resulted from the single-minded focus *only* on demonstrating that the child is aware that some statements are true and others are false, and that there may be unpleasant consequences if one knowingly says something false after promising to tell the truth. The real issue, of course, is that a child's ability to correctly identify the color of a pen, or to imagine God's displeasure if she intentionally responds with the incorrect color, is not a reliable gauge of the ability of a young child to testify in a meaningful way.

Rarely are competency hearings used to assess the types of issues that are critical in criminal cases, such as the child's understanding of the concepts of time and ability to accurately perceive and relate a series of events. Only after such an assessment can a trial court make an informed decision about the capacity of a child to testify.

²⁷ SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 8 (2009).

²⁸ "Alice had never been in a court of justice before . . ." Fresard, *supra* note 18, at 61 (highlighting the vulnerability of child witnesses when faced with the "overwhelming formality and somberness" of the courtroom, coupled with the task at hand of discussing scary occurrences in a room of adults and complete strangers).

Further, in order to make an informed decision about a child's competency, it is imperative to explore the child's ability to comprehend the impact of his or her words, both personally and upon others. Children tend to be self-interested. A young child's understanding of consequences for lying may be limited to the impact it will have upon him or her, perhaps in the form of a "timeout" or other punishment. Even if a child does have some appreciation for how lying may impact others, it is unlikely that the child will understand that if she agrees with the grown-up who is nodding, smiling, and promising her ice-cream, she may condemn an innocent person to life in prison.

Likewise, mastering the skill of counting from one to one hundred does not necessarily demonstrate that a child can pick out twelve objects or prove that something happened twelve times.²⁹ The ability of a child to memorize his or her own birth date does not reflect knowledge of the time differential of days, weeks, months, or years.³⁰ A young child will try to make sense of his world by making his own generalizations, often based on very limited evidence. Child development specialist Dr. Louise Ames gives one such example in her book, *Your Five-Year Old*: "[I]f by chance [the child] has been told that two certain brown dogs were females and two black ones were males, he may conclude that all brown dogs are female and all black ones male."³¹ Asked, "If I tell you that all brown dogs are female, is that the truth or a lie?" he may say it is the truth. For him, it is.

B. The Ability to Distinguish Fantasy from Reality



32

Psychologists and others have spent years researching the developmental capacity of young children, and the breadth of this research is massive. Documented

²⁹ For a comprehensive resource on the emotional and behavioral development of children from ages three to six, see T. BERRY BRAZELTON & JOSHUA D. SPARROW, TOUCHPOINTS: THREE TO SIX (2001). With respect to learning and understanding the nature of time, developmental specialists indicate that at the age of three, time is measured by a subjective internal clock tied to important events in the child's life and can bear little relation to the systematic measurements of time known to adults. *Id.* at 34.

³⁰ *Id.*

³¹ LOUISE BATES AMES & FRANCES L. ILG, YOUR FIVE-YEAR-OLD: SUNNY AND SERENE 53 (1979).

³² *Baby Blues*, TIMES UNION, July 1, 2009, at B13.

developmental milestones of young children can assist in assessing the required cognitive capacity of a young child to testify reliably. For example, researchers Johnson and Foley found that young children (under age eight) had more difficulty than older children and adults in distinguishing between imagined events and those that actually occurred.³³ Dr. Ames describes the typical five-year-old as someone who

learns that actions have both causes and effects—that is, pushing a switch makes a light go on. But he may still explain outside events in terms of his own wishes and needs: “It rained because I wanted it to.” He may even believe that objects and natural events have human thoughts and feelings: “It rained because the cloud was angry.”

....

Fives still have some difficulty in distinguishing between fantasy and reality. “It happened by magic” is still an acceptable answer to a Five’s question (from his point of view).³⁴

Renowned psychologist Dr. Elizabeth F. Loftus, who has done extensive research on the nature of false memories, developed an experiment in which children as old as fourteen years came to believe that they had been lost in a shopping mall as a child when actually they had not.³⁵ Dr. Stephen J. Ceci, an expert in the development of intelligence and memory, has extensively studied the accuracy of children’s courtroom testimony. In one of his experiments, he demonstrated how some children who repeatedly thought about a “non-event” (for example, that the child’s fingers had been caught in a mousetrap) came to believe that the fictitious event actually happened.³⁶ In these experiments, extensive interviews were conducted with the parents of the children to learn the children’s histories. Only children who had not been lost or harmed with a mousetrap were included in the study. It was clear that the event being “remembered” by the child *never occurred*. The “memory” of the event was created by the researchers. They did so by repeating the story to the children and asking them if they “remembered” the event.

Others have explored the issue of false testimony in cases of alleged child sexual abuse. Ofra Bikel, producer of *Innocence Lost: the Plea*, asked the question, “What is a lie for a child?”³⁷ If a child is led to believe, and actually believes something, then he or she is not telling a lie. The child speaks what is a truth for him or her, although it may very well not be the truth. Bikel writes:

³³ Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: The Reliability of Children’s Memory*, 40 J. OF SOC. ISSUES 33, 34 (Summer 1984).

³⁴ AMES & ILG, *supra* note 31, at 53.

³⁵ ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 94 (1994).

³⁶ Stephen J. Ceci, Mary Lyndia Crotteau Huffman, Elliott Smith & Elizabeth Loftus, *Repeatedly Thinking About a Non-event: Source Misattributions Among Preschoolers*, in 3 CONSCIOUSNESS AND COGNITION 388, 397 (1994).

³⁷ Frontline, *Out of Edenton: The Legal and Scientific Issues*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/roundtable/> (last visited Jan. 7, 2011).

I know from personal experience that I have always had a strong visual memory of my falling off the bed as a young child, and my older sister dressed in dark shorts and a white T shirt crawling under the bed and playing with me until my mother came in and screamed at her for not calling her to put me back in bed.

When I told my mother of this memory she laughed, saying that I was less than three months old when that had happened. They had told me the story when I was small (but not that small). I realized then that the clothes my sister was wearing in my memory are the clothes she is wearing in a picture my parents had of us when she was four and I was one year-old. Yet, I bet, that to this day I would pass a polygraph test on this story, so clear is it in my mind. Would I be lying? No. Is it the truth? No.³⁸

Bikel concludes that it is almost impossible for a child to tell the truth, the whole truth, and nothing but the truth. "There is always fantasy, impressions, and the wish to please the one who asks."³⁹

V. A CHILD'S CONCEPT OF TRUTH

In the illustrative hearing described earlier, when Suzi correctly names the color of the pen held by the prosecutor, she knows that she is telling something that is true. She knows her colors, can see the pen, and can accurately relate what she knows about it. While the prosecutor's nodding, gesticulating, and effusive reinforcement of the correct answer may comfort Suzi, it is not the basis of her answers. Similarly, although it is quite probable that she and the prosecutor (and mommy and the victim-witness advocate) practiced the pen questions and talked in advance about how God would feel, her testimony about the color of the pen is grounded in her knowledge of objects and colors.⁴⁰

Likewise, if Suzi intentionally misstates something or is asked to characterize the misstatement of another (e.g., "What if I told you the pen was green?"), she will know that it is not accurate. She may respond, "That's silly," or "no, it's not, it's black," or, if asked, she may characterize the statement as a lie.

Jurors are often asked, during *voir dire*, whether their children ever lie and, if so, to give an example. A juror will almost always describe a time when his or her child lied about starting a fight, whether a cookie was eaten before dinner, or whether the car was taken without permission. Other jurors will nod in agreement, smile, and add their own stories of juvenile misbehavior. The prosecutor follows up with questions about how the jurors knew that the child was not telling the truth. Jurors respond, "He wouldn't look me in the eye," "She was shuffling her feet back and

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See generally LYNN M. COPEN ET AL., GETTING READY FOR COURT CIVIL COURT EDITION: A BOOK FOR CHILDREN 9 (2000) (acting as a child friendly picture and coloring book designed to introduce child witnesses to the characters in the court system, the book even provides a blank space for the children witnesses to draw a picture of themselves in court "telling the truth," showing the extreme focus on the concept of "truth" for child witnesses, rather than the concept of fantasy verses reality).

forth," "He always starts to stutter," or "Her face was bright red (or covered with cookie crumbs)."

The prosecutor is setting the stage for the testimony of the child, secure in the knowledge that the child, testifying about a fact that he or she *believes* to be true, will not exhibit any of these tell-tale signs of willful misrepresentation. The prosecutor is counting on the fact that when the child relates a tale of abuse, the jury will feel a grim determination to convict. It is a brave juror who is able to resist the plea to "believe" a child.⁴¹

Of course, the problem of witnesses testifying to events that they believe to be true, but which are in fact false or inaccurate, is not limited to children. A recent *60 Minutes* episode explored the wrongful conviction of Ronald Cotton, who served ten and a half years in prison for a rape he did not commit.⁴² The victim of the rape testified that she was positive that Ronald Cotton was the man who brutally attacked her. Only when DNA evidence conclusively led to the real perpetrator, Bobby Poole (and after he confessed), was Ronald Cotton released from custody.⁴³

Gary Wells, Ph.D., Distinguished Professor of Psychology at Iowa State University, and an expert on eyewitness identification, explained one of the reasons the jury found the testimony of the woman so convincing. "The legal system is set up to . . . sort between liars and truth tellers. And it's actually pretty good at that. But when someone is genuinely mistaken, the legal system doesn't really know how to deal with that. And we're talking about a genuine error here."⁴⁴ "Cross-examination" is designed to separate those who are telling the truth from those who lie. It is less effective if the witness *believes* the testimony to be the truth.⁴⁵

Sometimes, the tragedy of wrongful conviction may be minimized in cases where there is DNA, other forensic evidence, or witnesses who can counter the testimony of the adult who believes he or she is speaking the truth but is, in fact, mistaken. There is no such safety net in a case where the *only*, or primary, evidence is the testimony of a young child.

VI. LEARNING A STORY

Although there appears to be no hard data to back it up, child protective services workers and police officers in every jurisdiction continue to insist that children do

⁴¹ See *generally id.* (highlighting the concept of "truth" as presented to child witnesses, by presenting the concept of a courtroom and the many players as a place where one must tell "the truth"). This is a key example of the (prosecutorial) system's focus on "truth" when preparing child witnesses, rather than on the necessity of determining whether the child is developmentally mature enough to accurately relate events that actually occurred.

⁴² See *60 Minutes: Eyewitness: How Accurate Is Visual Memory?* (CBS television broadcast July 11, 2009), <http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml> (last visited Jan. 7, 2011). See also *Know the Cases: Ronald Cotton, INNOCENCE PROJECT*, <http://innocenceproject.org/Content/72.php> (last visited Jan. 7, 2011).

⁴³ See *60 Minutes: Eyewitness: How Accurate Is Visual Memory?*, *supra* note 42.

⁴⁴ *Id.*

⁴⁵ *Id.*

not make up allegations of child sexual abuse.⁴⁶ A corollary is that the child could not have knowledge of explicit details of sexual abuse unless it actually occurred.

In fact, children can learn and are taught rather complicated stories on a regular basis. Some of the stories are true, others fictional, but young children do not have the ability to distinguish between the two, particularly if the story has been told to them by someone they trust, such as a parent or teacher.⁴⁷ Compare, for example, a parent relating stories from the parent's childhood, fairy tales, and bible stories. The child has no basis to evaluate the origin of any of the stories or to determine whether the events actually took place. A very young child has no frame of reference to decide whether the Red Sea parted before or after Grandpa moved to the farm, or Goldilocks ate the Little Bear's porridge.

Significantly, if the child hears the story repeated often enough, she will commit it to memory and will be able to retell it upon request. If she believes the story, she will answer that it is "the truth." She will be able to correct a questioner and add details. For example, if asked, "Is it the truth that Goldilocks slept in Papa Bear's bed?" she may well respond that it is "a lie" because "the truth" is that Goldilocks slept in Baby Bear's bed. While she is testifying, the child will reveal no indicia of telling a falsehood, nor will she fear her mother's or God's disapproval. The child is relating something she has learned, and, for her, it is "the truth."

One of my colleagues has a very precocious five-year-old named Jack. When she picked him up from kindergarten one day shortly after Christmas last year, he asked if Santa was real. His mother was taken by surprise, as she did not expect to confront this particular parenting dilemma for several more years. She loved the Santa fantasy and wanted to continue it, not only with her son, but with his little sister, who was only three. While she attempted to formulate a response, Jack continued, "I know who eats the cookies and it's *not* Santa." His mother wondered if he had seen her and his father taking bites and leaving crumbs while wrapping the presents. Luckily, before she launched into a complicated explanation of the true meaning of Christmas, Jack shouted gleefully, "It's Cookie Monster!"

Five-year-old Jack juxtaposed two "stories" that he had learned and created a new one in which two of his favorite "characters" appeared in the same "episode." Was he lying? No. Jack was trying to make sense of his world. Did a puppet from Sesame Street in fact eat the cookies? Obviously not. We can chuckle when a colleague relates the incident, but the consequences of testimony by a child with the same level of sophistication in a criminal case are anything but humorous.

Children can learn and relate complicated stories with appropriate emotional content. When my son was in first grade, he came home from school one day in January quite agitated. "Do you know who Martin Luther King is, Mom?" he asked. I told him that I did. He went on, obviously very upset, telling me that Rev. King had been beaten up and put in jail "just because he sat at a lunch counter." I assured him that I shared his outrage, and that we all had to work toward a world where

⁴⁶ See Connie Burrows Horton & Kimberly A. Kochurka, *The Assessment of Children with Disabilities Who Report Sexual Abuse: A Special Look at Those Most Vulnerable*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 275, 277 (1995).

⁴⁷ See AMES & ILG, *supra* note 31, at 37-39 (discussing the ability of five-year-olds to tell and remember stories, both based on their own experiences and those centered in make-believe, along with those traditional stories known by almost all five-year-olds).

people are not discriminated against because of the color of their skin. He nodded and then said, "I just want to know one thing: What's a lunch counter?" Although he understood the story, its significance, and was able to repeat it to me with appropriate emotional affect, he did not have a frame of reference that would allow him to have a true understanding of the facts. Tragically, the same lack of an appropriate knowledge base can result in a child testifying about events without an awareness of the meaning of her words in the minds of the jurors. This is particularly dangerous when the words elicit a strong emotional reaction, such as those describing sexual acts.

Children can and do learn stories that involve details of sexual knowledge one would not expect them to have. I was an attorney in a case in which a five-year-old girl was the subject of a rancorous custody battle. Brought by her mother to a counselor, the child reported that during the previous weekend visitation, her father had "played with his pee-pee and white stuff came out" while she was sitting on the couch with him. Horrified, the counselor signed an affidavit recommending that the father have no further contact with his daughter.

The court ordered that an evaluation be conducted by an independent psychologist. The child was videotaped in the playroom attached to the psychologist's office. When the child was asked what "the white stuff" looked like, she was unable to answer. The psychologist told her that she could look around the room to see if there was anything that resembled what she was alleged to have seen at her father's home. After bypassing pitchers of water and milk, she stopped at the sand table and pointed to the white sand. She told the psychologist that the sand looked and felt like the "white stuff." When asked how much "stuff" came out, she poured two large buckets of sand from the table onto the floor. After additional questioning, she shared with the psychologist that her mother had urged her to tell the story of the "white stuff" because "Daddy is being mean to Mommy."

Absent zealous representation, adequate client resources, and a trained mental health professional, a young child would have lost contact with a loving parent and the father would have lost not only his daughter, but his freedom and reputation.

VII. POTENTIAL FOR WRONGFUL CONVICTION

In any case alleging the commission of a serious crime, the potential of an innocent person being convicted and sentenced to death or lengthy imprisonment is present. A recently published comprehensive study of the nation's crime labs exposed systemic flaws in nearly every lab and with virtually every type of "scientific" evidence.⁴⁸

⁴⁸ See generally NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), available at http://www.nap.edu/catalog.php?record_id=12589. The study was conducted by the National Academy of Sciences at the direction of Congress. Over a two year period, a committee comprised of federal officials, academics, law enforcement officials, medical examiners, defense attorneys, and forensic science professionals heard testimony and reviewed numerous reports and studies. The final report contains thirteen recommendations for the future use of forensic science in our legal system. To view the entire report and read the final recommendations, see *id.* See also NEW YORK STATE BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009), available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&Template=/CM/ContentDisplay.cfm&ContentID=27188 (highlighting the challenges/dangers presented by the obvious zeal and political pressure to solve high profile cases). But see John Collins & Jay Jarvis, *The Wrongful*

Initiatives such as the Innocence Project, begun by Professors Barry Scheck and Peter Neufeld in 1992, have led to 238 post-conviction DNA exonerations in the United States.⁴⁹ The Project uses DNA testing to exclude the individuals as participants in the crimes for which they were convicted.⁵⁰ Several law schools have begun Innocence Projects of their own, which have led to additional exonerations.⁵¹

State bar associations have also attempted to address the issue of individuals who have been convicted of crimes that they did not commit. Task forces have been formed to attempt to isolate and examine the causes of such wrongful convictions, focusing on areas such as: eyewitness identification procedures, the use of jailhouse informants, prosecutorial misconduct, coerced or false confessions, inadequate defense counsel, and problems with forensic evidence.⁵² One factor cited by many of the reports is the pressure felt by police and prosecutors to solve high profile, emotionally intense cases, such as the murder of a police officer or the abduction of a child.⁵³ The vast majority of studies have concluded that wrongful convictions are a pervasive problem, and that systemic changes must be implemented to prevent the widespread failures.⁵⁴

Conviction of Forensic Science, CRIME LAB REPORT (July 2008), available at http://www.crimelabreport.com/library/pdf/wrongful_conviction.pdf (analyzing and explaining the limited role of forensic science mistakes in wrongful convictions, specifically emphasizing that, of the two hundred wrongful convictions that were overturned, only 13% were reversed due to forensic science misconduct, data that stands in marked contrast to the previously toted statistic of 57%, which merely reflected the number of overturned cases in which forensic data was used).

⁴⁹ See generally *Innocence Project Case Files*, INNOCENCE PROJECT, <http://innocenceproject.org/know/> (last visited Jan. 7, 2011).

⁵⁰ See generally *id.* For additional information on the project, particularly the contributing causes of wrongful convictions, see *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://innocenceproject.org/understand/> (last visited Jan. 7, 2011).

⁵¹ See, e.g., THE CENTER ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Jan. 7, 2011); THE COOLEY INNOCENCE PROJECT, THOMAS M. COOLEY SCHOOL OF LAW, <http://www.cooley.edu/clinics/innocence.htm> (last visited Jan. 7, 2011); THE INNOCENCE PROJECT, THE UNIVERSITY OF MISSISSIPPI, <http://mississippiinnocence.org> (last visited Jan. 7, 2011); THE NORTH CAROLINA CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org> (last visited Jan. 7, 2011) (This project is a collaboration between each of the law schools in North Carolina, Campbell, Charlotte, Elon, Duke, NCCU, UNC, and Wake Forest.).

⁵² It is important to note that the potential for eyewitness error is not limited to children, but precisely because they are children there must be enhanced scrutiny in determining child competency to testify in cases of abuse. See, e.g., James M. Doyle, *Two Stories of Eyewitness Error*, THE CHAMPION, Nov. 2003, at 24.

⁵³ NEW YORK STATE BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009). See also WISCONSIN CRIMINAL JUSTICE STUDY COMM'N, <http://www.wcjsc.org/> (last visited Jan. 7, 2011) (This was created as a collaboration between the State Bar of Wisconsin, Marquette Law School, the University of Wisconsin Law School, and the Wisconsin Attorney General; the Wisconsin Criminal Justice Study Commission strives to address the problem of wrongful convictions.).

⁵⁴ See, e.g., NEW YORK STATE BAR ASS'N, *supra* note 53 (emphasizing the pervasive problem of wrongful convictions in New York and providing recommendations for the future). Further illustrating the widespread nature of the failings of the criminal justice system

The cases investigated by the various task forces and the Innocence Projects involved scientific and physical evidence and adult witnesses who were subject to cross-examination.⁵⁵ Even so, the adversary system was insufficient in preventing gross miscarriages of justice. Innocent people's lives were destroyed, individuals were wrongfully convicted and imprisoned, and the real perpetrators went free.

These cases, which document the conviction of the innocent, provide a context for the even more difficult cases, those in which there is little or no physical evidence, and the fate of the accused rests solely on the uncorroborated testimony of a young child. Many of the causes of wrongful convictions are exacerbated in cases alleging child sexual abuse. For example, the inability of an adult to describe height, weight, facial hair, or other physical characteristics may well lead the jury to conclude that the witness did not have an adequate opportunity to observe the perpetrator; a similar failure on the part of a child may be forgiven as a function of the child's limited knowledge or ability to articulate such details. As previously discussed, the lack of physical evidence in child sexual abuse cases will make a later exoneration impossible.

It is the lack of opportunity for meaningful cross-examination, however, that may be the most significant problem. Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth."⁵⁶ Done well, cross-examination can significantly erode or limit the testimony of many witnesses. "Done poorly, it succeeds only in reinforcing the direct examination."⁵⁷ Furthermore, cross-examination triggers heightened interest by the jury, who bring with them certain expectations.⁵⁸ Finally, "[c]ross-examination is about creating impressions and conveying emotions. Jurors may forget the details of the cross-

and the potential for wrongful convictions has led to the commutation of death sentences and even the abolition of the death penalty in some states. In reaction to the flawed system and days before his departure from office Illinois Governor George Ryan commuted the sentence of 163 death row inmates and pardoned four others. David Goodman, *The Conversion of Gov. Ryan*, AMNESTY INT'L MAG., Spring 2003, available at <http://www.amnestyusa.org/magazine/ryan.html>. "'Because the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall 'tinker with the machinery of death,' he said, quoting Supreme Court Justice Harry Blackman's 1994 indictment of the death penalty." *Id.* See Elizabeth Amon, *Death Row Clemency Attacked by Prosecutors*, THE NAT'L L.J., Jan. 20, 2003, at A1. For more information on the mass commutations in the United States see *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 7, 2011). Additionally, New Mexico Governor Bill Richardson explained his reason for signing legislation repealing the death penalty in his state: "Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime." Press Release, Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009).

⁵⁵ See INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Jan. 7, 2011).

⁵⁶ 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (2d ed. 1923).

⁵⁷ THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS AND THE NEW POWER OF PERSUASION 211-12 (2005).

⁵⁸ *Id.* at 216.

examination, but they will remember the impressions formed during the cross: about the testimony, about the witness, and about the lawyer.”⁵⁹ Justice Scalia, writing for the court in the landmark case of *Crawford v. Washington*, stressed the vital importance of having an accusing witness present in court and subject to cross-examination as a prerequisite to ascertaining the truth in a criminal proceeding.⁶⁰

It is hard to overemphasize the importance of confrontation and effective cross-examination to the defense of an individual accused of a crime. Jurors are able to observe and evaluate not only the witness’s words, but his or her demeanor. They draw clues as to the witness’s credibility from tone, body movements, and manner of answering questions. They may detect any hesitancy in answering particular questions or determine whether responses are different if the question is posed by the prosecutor versus the defense attorney.

The vital tool of effective cross-examination as a method of determining the truth is missing or compromised in cases of child sexual abuse. The cross-examination that defense attorneys employ to test the veracity of adult witnesses is useless when utilized with a young child. The most obvious example might be “impeachment by prior inconsistent statement,” one of the most common methods of cross-examination. Attorneys using this technique demonstrate to the jury that the witness made one statement about an important detail, at one time, and later (perhaps during the trial itself) made a substantially different statement about the same information. The inconsistency, or the mere fact that the witness is “changing his story,” demonstrates to the jury that the witness is not worthy of belief.

Imagine questioning little Suzi using this technique:

Q. You told the prosecutor, Mr. Smith, that Pop-pop touched your “private” while you were in the bathroom at your house?

A. Nodding.

Q. Do you remember talking to Officer Jones in September?

A. No.

Q. Did you tell him what happened?

A. No response.

Q. Did you tell him that Pop-pop touched you at Grandma’s house?

A. I don’t know.

Q. So, now you are saying it was at your house?

A. No response.

At the conclusion of this line of questioning, even if the jurors have not leapt over the rail to attack both the defense attorney and his client, what will the attorney argue in his summation? Can the lawyer insist, as he or she would if it were an adult who changed the location of an alleged crime while on the witness stand, that the testimony must be false? If so, is the argument one that will sway the jury, or are they likely to feel that the attorney is simply taking advantage of a child?

⁵⁹ *Id.* at 218.

⁶⁰ *Crawford v. Washington*, 541 U.S. 36 (2004). “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .” U.S. CONST. amend. VI. See also Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691 (1993) (examining the particular challenges presented by hearsay in child sexual abuse cases along with methods of presenting testimony and competency).

Other standard cross-examination techniques are equally ineffective with a child witness. Jurors are instructed that they may consider factors such as motive, interest, and opportunity to perceive when determining whether to believe the testimony of a witness.⁶¹ A co-defendant who has been given a "deal" to testify can easily be cross-examined to show that he or she stands to gain a lesser sentence, or a favorable recommendation, from the prosecutor in exchange for his or her testimony. A disgruntled business partner can be impeached by showing that he or she is motivated by animus toward the accused.

None of these techniques is effective with a young child. Does the child want to please mommy? No doubt. Will the attorney be able to demonstrate that the child's testimony has been shaped by these forces through cross-examination? Unlikely. Can the child describe the dimensions of a room or testify as to the placement of the individuals at a given time? If not, will the jury apply the standard they would apply to an adult witness, or will they simply chalk up any inconsistencies to the child's age?

Another dilemma involves affirmative defenses. In most criminal cases, the accused must be provided with notice of the offense with which he is charged, including a specific date and time.⁶² Such notice permits the defendant to interpose an alibi defense if he or she is able to prove that he or she was at another location at the time charged.⁶³

Conversely, in cases involving allegations of child sexual abuse, the charging document need not contain specific dates, times, or places. For example, if the child told an investigator that the abuse happened "in the pool when it was hot out," it is legally sufficient if the indictment states that the abuse took place "in the summer" of a particular year.⁶⁴ The defense then faces a nearly insurmountable burden of proof in establishing the accused's whereabouts at all times during this ill-defined time period, effectively precluding the affirmative defense of alibi.

A particularly pernicious problem with the child witness is in the area of recantation. An adult who makes a claim and then reverses herself, maintaining that the event never occurred, damages her own credibility. Unless there is a compelling reason for the change, it is unlikely that the jury will believe the first story. The opposite can occur in cases alleging child sexual abuse. The *fact* that the child has told inconsistent stories, or that she now denies any abuse, is *itself* used as proof of

⁶¹ See, e.g., STATE OF CONNECTICUT CRIMINAL JURY INSTRUCTIONS: 1.2-7 CREDIBILITY OF WITNESSES (2007), available at <http://www.jud.ct.gov/ji/criminal/part1/1.2-7.htm> ("In deciding the facts of this case, you are the sole judges of the credibility of the witnesses. You will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it. Every witness starts on an equal basis. You are to listen to all of them with an open mind and judge them all by the same standards.").

⁶² N.Y. CRIM. PROC. LAW § 200.50 (McKinney 2010). "An indictment must contain . . . a statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time." *Id.*

⁶³ See *People v. Morris*, 461 N.E.2d 1256, 1258 (N.Y. 1984); *People v. Iannone*, 384 N.E.2d 656, 660 (N.Y. 1978); *People v. Bogdanoff*, 171 N.E. 890, 892 (N.Y. 1930).

⁶⁴ *People v. Keindl*, 502 N.E.2d 577 (N.Y. 1986).

the abuse.⁶⁵ It becomes a classic Catch-22: If the child says that abuse occurred, it occurred; If the child says that abuse did not occur, it occurred. There appears to be no answer to the question of what the child could say to demonstrate that the accused is innocent.

Journalist Lawrence Wright examined some of the most highly publicized cases of child sexual abuse and described the convoluted interpretation given to contradictory statements that the children made about the alleged abuse.

One of the alarming trends in the day-care prosecutions of the '80's was that when children told fantastic stories of ritual sacrifice or bizarre torture scenes, those stories were interpreted as being either literally true, or else a sort of imaginative reconstruction of less spectacular real abuse; on the other hand, when children caught up in those prosecutions denied that anything had happened to them, their denials were interpreted as being products of the abuse itself. In other words, to deny the abuse was a subtle proof that the abuse did, in fact, take place.⁶⁶

Most disturbing, however, are the dire consequences to both the accused and the child when traditional methods of ascertaining the truth in criminal trials are ineffective tools in cases of alleged child sex abuse. To be wrongly convicted of child sexual abuse has immediate and long-lasting effects on the life of the accused, including lengthy prison terms, registration as a sex offender and the conditions and consequences that follow, which may include the loss of professional licenses, inability to live within certain areas, and a lifelong stigma.

Given the nature of child sexual abuse, such convictions can destroy families. The individual accused is not the only victim of wrongful convictions. A spouse who refuses to believe an accusation may lose custody of the child involved or other children in the family. She herself may be charged criminally for refusing to "protect" the child from abuse.⁶⁷

⁶⁵ For additional research indicating that such circumstances and statements are manipulated for the benefit of pro-conviction, anti-abuse advocates see STEPHEN SMALLBONE, WILLIAM L. MARSHALL & RICHARD WORTLEY, PREVENTING CHILD SEXUAL ABUSE: EVIDENCE, POLICY AND PRACTICE 147-48 (2008). See also MARGARET-ELLEN PIPE ET AL., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL 25 (2007). "[C]hildren may deny because they in fact never were abused; children may take a long time to disclose because it is only with repeated suggestive interviewing that they will make disclosures which are false; and children may recant in order to correct their prior false disclosures." *Id.*

⁶⁶ Frontline, *Out of Edenton: The Legal and Scientific Issues*, *supra* note 37.

⁶⁷ See N.Y. FAM. CT. ACT § 841 (McKinney 2010). For an example of the use of this statute, see *Manhattan Man Held in Sex Abuse of Girl*, N.Y. TIMES, Nov. 29, 1989, <http://www.nytimes.com/1989/11/29/nyregion/manhattan-man-held-in-sex-abuse-of-girl.html?scp=1&sq=Manhattan%20Man%20Held%20in%20Sex%20Abuse%20of%20Girl&st=cse> (last visited Jan. 7, 2011). In that case the mother was charged with endangering the welfare of her daughter after it was discovered her live-in boyfriend sexually abused the child. *Id.* For another account see *Mo. Father Charged with Incest, Killing Infant*, USA TODAY, Jan. 23, 2009, http://www.usatoday.com/news/nation/2009-01-23-missouri-incest_N.htm (last visited Jan. 7, 2011). There, the mother of the abused child was charged with endangering the welfare of her children for failing to report the alleged abuse. *Id.*

In addition, the psychological impact on a young child of falsely testifying to abuse can endure throughout adulthood.⁶⁸ These dangers make the need to properly determine a child's competency to testify vital not only to a fair system of justice, but to the psychological well-being of both children and the accused.⁶⁹

VIII. RECOMMENDATIONS

A. *Expansion of the Competency Hearing*

Clearly, the current system of determining a child's competency to testify in a case of alleged sexual abuse is flawed, and the consequences of such a failure are devastating. It is imperative that changes be made to ensure that there is a meaningful evaluation of any child who is to testify in such a case. The evaluation must be based on a realistic assessment of the child's developmental maturity and her ability to provide reliable information about the events that are alleged in the criminal action.

At a minimum, the competency hearing should be restructured to allow for expanded questioning of the child. While the "red pen, black pen" and "how will Mommy feel if you tell a lie" questioning need not be dispensed with completely, it must represent only the beginning, rather than the totality of the inquiry. Much more must be done to test the child's ability to accurately relate events that actually occurred, to distinguish the truth from a lie, and to differentiate fantasy from reality. This can be accomplished in a variety of ways.

Questioning of the child can be done within the confines of a traditional competency hearing by the court, the prosecutor, and the defense attorney. The defense attorney must be as comfortable examining the child as the prosecutor, and both should know as much about the child as possible.⁷⁰ Information about the child should be obtained before the hearing begins, either by speaking with the parents (if they are not involved in the case), other caregivers, or the child's teacher. In

⁶⁸ See Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAG., Sept. 19, 2004, at 68 (explaining the dire consequences of such behavior induced by investigators, including serious emotional consequences for the children as adults); see also Robert J. Levy, *The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies*, 7 J. L. & FAM. STUD. 57 (2005) (discussing the challenges to prosecutors and defense attorneys presented by such cases).

⁶⁹ This risk is not limited to sexual abuse cases; in fact an untrustworthy system of evaluating a child's competency to testify can have far reaching effects on other cases as well. For example, in a recent case in Texas, the testimony of a four-year-old boy formed the basis for an indictment of a foster parent for the murder of the child's infant brother. *48 Hours Mystery: Witness* (CBS television broadcast Nov. 15, 2002). Although the defendant was eventually acquitted of the murder charges, the case demonstrates the challenges and potential dangers of cases in which a prosecutor's sole evidence is the uncorroborated, unsworn testimony of a preschooler. *Id.*

⁷⁰ See Annabelle Whiting Hall, *Cross-Examination Techniques in Child Sex Cases and Preparation of Child Sexual Assault Cases 4* (Sept. 2-3, 1993) (providing an in depth tutorial for defense attorneys on how to prepare for interviewing child witnesses and how to secure cooperation from prosecutors and parents). See SPECIALIZED TRAINING OF POLICE PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (2008) (highlighting the importance of and specialized challenges presented by eyewitness identifications and expert testimony).

addition, reviewing medical records and talking to neighbors and other family members can all contribute to a “picture” of the child’s development.⁷¹

A particularly effective preparation technique is to visit the child’s nursery, preschool, or grammar school classroom. Cues for potential areas of questioning can be drawn from the bulletin board or the children’s work that is displayed. For example, around Presidents’ Day, there may be pictures of George Washington and the cherry tree, and the child can be asked about the story she has learned. The inquiry will determine the level of the child’s understanding of the story, as well as whether she will add “facts” to please the questioner. It is important to ask the questions in the same tone and respond with the same encouragement that was given to the “red pen, black pen” and “God would be sad” questioning.

Sample questions relating to the Presidents’ Day bulletin board might include the following: “Who cut down the cherry tree?” “Is it the truth or a lie that George Washington cut down a cherry tree?” “What if I said it was an apple tree?” If the child is able to answer these simple questions, the questioner should add facts or see if the child will agree to statements concerning the story that she did not learn at school. “What did George’s father say when he cut down the tree?” “What did his mother say?” (I have never heard George’s mother mentioned in the story, but I am willing to bet that many children would add dialogue by her if given an opportunity to do so). “Did his mother put him in timeout?” “Was she *very* mad?” The child should then be asked if her recitation of what the mother said is “the truth.”⁷²

Another critical area that needs to be explored with the child is her concept of time. Most children are trained, from toddlerhood, to respond correctly to the question, “How old are you?” Being able to raise one, two, or three fingers in response to the question gives very little information about the child’s concept of age or time. The question, “How old is Mommy?” posed to the same child might evoke a blank stare or a shrug. An older child of four or five might guess that her mother is “sixteen” or “thirty-seven,” either because that is the biggest number she knows or because her mother has responded with that answer in the child’s presence.

When Suzi tells the prosecutor that she is five, and he responds with effusive praise that she is “such a big girl,” very little is learned about her ability to accurately relate when the events alleged in the criminal proceeding actually took place. Even being able to respond that she was four last year and will be six next year does not distinguish between how the child has been taught to respond and an ability to understand an abstract concept such as time sequences.

In many cases of alleged child sexual abuse, the dates in the indictment have special significance to the child, such as her birthday, Christmas, or when she went to the town swimming pool for the first time. The dates may have been selected as a

⁷¹ See Mark J. Blotcky, *The Criminal Defense of Child Molestation Allegations: The Psychiatric Knowledge Base from which to Evaluate Your Case*, http://www.texas-sexcrimes-defense.com/CM/Articles/child_abuse_talk.pdf (last visited Jan. 7, 2011).

⁷² *Id.* at 37. This type of questioning can also be used to cross-examine a child who has been found competent to testify in order to demonstrate to jurors that a child can learn a story about an event that did not actually occur and can also add plausible details to enhance what she has learned. In addition to history lessons, children are often taught myths as truth to teach moral concepts, whether the stories are from Aesop’s Fables, Greek Mythology, or religious texts.

result of suggestive questioning, e.g., "Did Pop-pop hurt you on your birthday?"⁷³ It is important to determine whether the child has a grasp of time that would have allowed her to truthfully proffer these dates in the first instance or knowingly agree to them when suggested by the questioner. The child should be asked how many days there are in a week and how many weeks in a month.

Every classroom for young children has a calendar chart, and most teachers use it every day, discussing the days, weeks, months, weather, and holidays. The charts are very inexpensive and can be purchased by the court, the prosecutor, or the defense attorney. They allow the child to be questioned in a way that is familiar and non-threatening. They can be used with children who do not yet read, as they come with stickers for birthdays, holidays, and weather events.

As noted, most young children have learned how old they are and can name a date for their birthday. While the child is on the witness stand, she can be asked to take the birthday cake sticker and put it on the right day and month of her birthday. Whether she places it on the correct date or not, she should be asked if it is "true." If she believes that it is, she will answer in the affirmative. The sticker can then be moved (to the correct date if the child has misplaced it) and the child asked whether it is now a "lie."

The important fact, of course, is that the child will show no indicia of telling a lie, whether the sticker is placed correctly or not. Even if she is inaccurate, *she is telling something that she believes to be the truth.*⁷⁴ As long as she believes it to be true, she will repeat it, acknowledge its truthfulness, and declare anything contrary to be a lie.

The next step is to determine whether the time sequences contained in the indictment and police reports could have been supplied by the child, were the result of conjecture by the investigators, or were supplied by a person with a vendetta against the accused.

As with the calendar, use of props is helpful, as the child will feel at ease if she is asked to engage in what she will perceive as play. Again, for a nominal sum, the court or the attorneys can obtain cutouts on a felt board, or tag board strips with dates that relate both to the dates in the indictment and to important events in the child's life, such as her birthday, Halloween, Christmas, birth of her baby brother,

⁷³ For a more detailed discussion of the accuracy and reliability of children's testimony with respect to suggestibility, see Maria S. Zaragoza, *Preschool Children's Susceptibility to Memory Impairment*, in *THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS*, *supra* note 1, at 27; see also Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in *THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS*, *supra* note 1, at 60.

⁷⁴ The importance of this fundamental disconnect is illustrated by a recent case from Massachusetts in which the 1985 conviction of a child care worker for molesting five children was overturned because, although by the time of the trial the children had come to believe that they were molested, their belief was not based on fact but created by improper investigation and questioning. *Commonwealth v. Baran*, 905 N.E.2d 1122 (Mass. App. Ct. 2009). The defense attorney discussed the significance of proper questioning: "The Amirault case taught us how important it is that children in these kinds of situations are questioned properly, and how improper questioning techniques, even if done with the best of intentions, can lead to unreliable and false accusations." Jack Dew, *Parallels Drawn Between Amiraults*, *Baran*, *BERKSHIRE EAGLE* (Pittsfield, Mass.), June 11, 2009, <http://berkshireeagle.com/archivesearch>; see *Commonwealth v. Amirault*, 506 N.E.2d 129 (Mass. 1987); *but see Commonwealth v. Baran*, 905 N.E.2d 1122 (Mass. App. Ct. 2009).

etc. The child can be asked to put them in order: “Let’s start with your birthday. What happened next? How about after that?” What is critical to determine is whether concepts such as “prior” and “subsequent”—“What happened first? What happened after that?”—or even “before and after” have meaning to the child.

Next, the child should be asked to give a narrative account of some event that was important to the child, such as a vacation, a birthday party, or a visit with a grandparent. A conversation with a parent, teacher, or caregiver will reveal the details of such an event. Optimally, the event will have taken place during the same time frame as the events alleged in the criminal action. It is critical that the person providing the information about the event not be given an opportunity to “practice” with the child. The child should then be asked to describe the event so that her version can be compared with that given by the adult. Again, details, both accurate and inaccurate, may be presented to see if the child can distinguish between them.

Of course, the purpose of all of this questioning is to provide the court with the needed information to make a determination about the child’s competency based on the five-part test previously outlined. The judge must determine the child’s

- (1) present understanding or intelligence to understand . . . an obligation to speak the truth; (2) mental capacity at the time of the occurrence in question to observe and register the occurrence; (3) memory sufficient to retain an independent recollection of the observations made; (4) ability to translate into words the memory of those observations; and (5) ability to understand and respond to simple questions about the occurrence.⁷⁵

B. Appointment of a Law Guardian

Judges, prosecutors, and defense attorneys may feel that they are not equipped to conduct the expansive questioning outlined above. An alternative is to appoint a law guardian or guardian *ad litem* to conduct the examination. Presently, many states utilize law guardians to represent the interests of children in custody and other familial disputes.⁷⁶ The role of the law guardian in these proceedings is to protect and advocate for the interests of the children.⁷⁷ Although law guardians are not presently utilized in criminal cases, such appointments could significantly facilitate the effectiveness of the competency hearing.⁷⁸

The responsibility of a law guardian in a criminal case alleging child sexual abuse would be multi-faceted and should be carefully crafted. It is critical that the law guardian be truly independent and not part of either the prosecution or defense “team.” A child who has been abused must be supported if she is competent to testify. A child who has not been abused must be protected from the trauma of testifying falsely. Further, it would be the responsibility of the law guardian to ensure that proper questioning techniques are utilized with children in both categories.

⁷⁵ 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

⁷⁶ See, e.g., NEW YORK APPELLATE DIV. THIRD DEP’T, LAW GUARDIAN PROGRAM SUMMARY, available at <http://www.courts.state.ny.us/ad3/lg/index.html>.

⁷⁷ *Id.*

⁷⁸ It must be noted that legislation may be required to expand the role of a law guardian to representation in criminal cases.

The law guardian could be charged with the task of reviewing the child's medical and school records and speaking with adults who are knowledgeable about her developmental capabilities. The law guardian would visit the child's school to prepare the questions for the competency hearing. The law guardian would also speak with those close to the child to learn about important events in the child's life that could be used to test the child's memory and ability to relate those occurrences.⁷⁹

A preliminary examination could be conducted by the law guardian using a developmentally appropriate book, such as Dr. Sherrie Bourg Carter's *The "Do You Know" Book*.⁸⁰ The book clearly and easily tests the child's ability to distinguish between fantasy and reality, truth and lie, and the consequences of saying something that is false. For the examination and the book to be of use, it must be something that the child has not seen. If a member of either attorney's "team" practices with the child, the resulting examination will be of little value.

The law guardian's interview with the child could be videotaped so that it can be viewed by the court, prosecutor, and defense attorney. It would also be preserved so that it could be reviewed by an appellate court if necessary. Videotaping would ensure that the answers given are those of the child and that there was no prompting by the law guardian. An analysis could also be made of the child's attention span and verbal or non-verbal cues.

As a corollary, prosecutors, police, and victim-witness advocates should be mandated to videotape any sessions or meetings in which the child is prepped for the competency hearing. The judge would then be in a position to assess the extent of any "coaching" or improper suggestions to the child with respect to the questions to be asked at the hearing.

C. Appointment of an Expert Witness

An expert witness could be appointed if the results of the expanded competency hearing and/or the evaluation by an independent law guardian are ambiguous, or the court feels that additional information about the child's developmental maturity is still in question. A child psychologist could evaluate the child using developmentally appropriate testing, such as tests used to determine whether a child is ready to attend kindergarten.⁸¹ The testing should be videotaped, both for the trial court and for any appellate review.

⁷⁹ While many states do require the law guardian to be a licensed attorney, there are some without this requirement. See, e.g., HAW. REV. STAT. § 551-2 (2000); see also ALASKA STAT. § 13.26.025 (2009). In those states where the guardian *ad litem* or court-appointed special advocate is a non-lawyer who represents the child, a separate and independent lawyer could conduct the examination.

⁸⁰ See SHERRIE BOURG CARTER, *THE "DO YOU KNOW" BOOK* (on file with author).

⁸¹ See, e.g., JUDITH K. VORESS & TADDY MADDOX, *DEVELOPMENTAL ASSESSMENT OF YOUNG CHILDREN* (Western Psychological Servs.) (measuring children from birth to five years, eleven months, which measures cognition, communication, social-emotional development, adaptive behavior, physical development); DEVEREUX EARLY CHILDHOOD ASSESSMENT KIT (Kaplan Early Learning Co.) (measuring children ages two to five, which provides a balanced picture of children's social emotional strengths and concerns); JANE SQUIRES & DIANE BRICKER, *AGES AND STAGES QUESTIONNAIRES* (3d ed. 2009) (measuring ages zero to five years).

The expert must be appointed by the court and independent of either the prosecutor or defense attorney. The expert must be confident that the court is interested only in an accurate appraisal of the child's ability to testify under the standard set forth above—not in “preparing” an incompetent child to take the stand or preventing a competent one from doing so.

The appointment of an expert might be particularly appropriate in a case with no physical evidence or any corroboration of the allegation, i.e. where the testimony of a young child is the only evidence of a serious criminal accusation.

IX. CONCLUSION

Allegations of the sexual abuse of a young child evoke strong emotions in society at large, as well as among the participants in the criminal justice system. The charged emotional atmosphere engendered by the nature of the cases, the frequent lack of corroboration, and the ineffectiveness of traditional adversarial techniques enhance the potential for wrongful convictions. The conventional competency hearing is seriously flawed and does not provide a forum for a meaningful analysis of the child's capacity to offer reliable testimony.

The competency hearing must be restructured to appropriately ascertain the child's level of developmental maturity, her ability to accurately relate a series of events, and her capacity to distinguish reality from fantasy. This can be done by training of judges, prosecutors, and defense attorneys and by the appointment of a law guardian or expert witness in appropriate cases. It is imperative that improvements be made to ensure that individuals are not convicted of crimes they did not commit and that children are not the unwitting accomplices in such miscarriages of justice.