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Child Sexual Assault: Children's Memory and the Law

GAIL S. GOODMAN* AND VICKI S. HELGESON**

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This article concerns ways to increase the likelihood of obtaining accurate and complete reports from child victims of sexual assault. Specifically, we examine the available psychological literature on children's memory and eyewitness testimony for guidelines about how to question child sexual assault victims. We focus on

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two points at which children are interviewed by legal authorities: the initial police investigation and the child's courtroom testimony. These points mark the official beginning and end of the child's contact with the legal system. They also represent two of the most important times when the questioning of a child will influence the outcome of a case. If the child is not questioned properly on these two occasions, the case may well be lost or an innocent person may be accused and convicted.

Over the years, we have seen many cases in which adherence to psychological principles during the initial interview and the trial might have resulted in justice being better served. Because these experiences helped motivate us to write this article, we begin with an example.

I. A CASE EXAMPLE

In the summer of 1970, in a small town in Oklahoma, Tina and Mary disappeared from their grandmother's home. The twin 3-year-old sisters were watching television in the living room when someone allegedly abducted them. The next day, several young children were playing in an abandoned house and heard someone crying. They followed the sounds to a refrigerator, opened the door, and to their horror and amazement, saw two small figures. Tina was alive, but Mary was dead. When the children asked Tina who had done this to her, she said that it was a boy with blond hair named Jackie. She also said that she had spent the night with him and some other children. At the police station, an officer questioned Tina:

Q. Who put you in the icebox?

A. Jackie.

Q. Did he put both of you in the icebox together?

A. No.

Q. Did you walk or ride to the icebox?

A. Walk.

Q. Did he ever hit you or Mary?

A. Yes.

Q. Did he take any of you away?

A. No.

Q. Did he give you any food?

A. No.

Q. Did you know the kids you slept with?

A. Yes.

Q. Did you know Jackie?

A. No.

Q. Did he tell you that was his name?

A. No.

Q. Were you there at nighttime?

A. No.

Q. Did Jackie come in grandma's house?

A. No.

Q. Did you walk all the way?

A. Yes.

Q. Did he take Mary off alone?

A. Yes.

Q. Did you stay with other kids when he took Mary?

A. No.

Q. Did he buy you candy?

A. No.

Q. Did he have short or long hair?

A. Short.

Q. What color was his hair?

A. White.

Q. What color shirt?

A. Red or blue.

Q. Did he know your name?

A. (no answer)¹

As can be seen from this complete, unedited interview, the officer's questions did not elicit much information from Tina. Even though a boy with blond hair named Jackie lived in the town and other evidence also implicated him in the crime, no line up was attempted. Tina was sent home.

Over the years, Tina was repeatedly interviewed and her story gradually changed. Eventually, she claimed that the murderer was not a boy named Jackie but rather her former babysitter, a mentally-retarded Indian girl also named Jackie. Seven years after the abduction, the babysitter was charged with the crime, and a trial ensued.

At the trial, Tina described in detail what had happened. She testified that Jackie (the babysitter) had come into her grandmother's house, told the sisters to come with her, taken them directly to the abandoned house, and forced them into the refrigerator. The defense argued that family members and the police had coached Tina, and that the years had dampened and distorted her

1. Oklahoma v. Roubideaux, No. CRF-79492 (Okla. Cir. Ct. 1982).

memory. The prosecution argued that memory of traumatic events may be inhibited at first but can become more accurate with time. It was argued further that Tina's current testimony, rather than her original story, was accurate. In the end, some of the jurors believed Tina's testimony, others did not. The trial resulted in a hung jury. Whoever it was that abducted the two girls and killed one of them is probably still at large today.

We have seen many other cases like this one, cases in which much more detailed testimony might have been elicited from a child victim and consequently better investigations and more successful prosecutions obtained. How can investigative and courtroom practices be improved to better support a child's ability to recount accurately what happened?

To answer this question, we begin with a discussion of memory. The scientific literature on memory and eyewitness testimony provides valuable information about children's competence as witnesses and about the available techniques for obtaining more detailed and accurate reports from children. We then discuss the initial interview of the child witness, which is typically conducted by a police officer. We suggest ways in which current investigative practices might be improved. Next we turn to the effects of courtroom practices on the accuracy of children's testimony and consider specific reforms. Finally, we discuss the consequences of current legal practices upon child victims, their families, and society as a whole.

II. HUMAN MEMORY

Those who wish to obtain crime reports from children should first have a thorough understanding of memory and its development. Unfortunately, many police officers, attorneys, judges, social workers, and even psychologists and psychiatrists, know little about memory and how it changes with age. Memory, regardless of a person's age, is not entirely accurate. Adults as well as children may fail to notice some features of an event, forget part of what occurred, and may misorder parts of what happened.² Moreover, they may show alterations of report based on misinformation from a variety of sources—others' statements, their own dreams and inferences, and suggestive questioning by authorities.³ Because false

2. E. LOPTUS, *EYEWITNESS TESTIMONY* (1979).

3. *Id.* See also MacFarlane, *supra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985) (discussing factors that

memories can be held with great confidence,⁴ it is often difficult to distinguish false reports from those that are true.

While memory is not perfect, much of what a witness recounts is likely to be accurate. Specifically, testimony is more likely to be accurate when: the report concerns "central" information, such as salient actions;⁵ the event was relatively extended over time;⁶ the assailant was familiar to the victim, such as a known neighbor, relative, or acquaintance;⁷ the event was repeated;⁸ and highly suggestive questioning did not occur.⁹ These principles hold across a wide age range and are relevant to many child sexual assault cases.

A. Children's Eyewitness Reports: Accuracies

How does a child's memory compare with an adult's? We tend to think of children's memory as necessarily inferior, but that assumption is incorrect. It can be demonstrated that, under some circumstances, children's memory is actually better than adults'.¹⁰ For example, if the child understands and is more familiar with a particular event than the adult in question, then the child may provide the more accurate report.¹¹ These circumstances probably occur infrequently. Indeed, children often retain and report less

can influence child victims' testimony)).

4. See Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything about Their Relationship?*, 4 *LAW & HUM. BEHAV.* 243 (1980).

5. See generally Marquis, Marshall & Oskamp, *Testimony Validity As a Function of Question Form, Atmosphere, and Item Difficulty*, 2 *J. APP. PSYCHOLOGY* 167, 171 (1972) (discussing the strong, positive association between topic salience and accuracy) [hereinafter cited as *Testimony Validity*]; Pear & Wyatt, *The Testimony of Normal and Mentally Defective Children*, 6 *BRIT. J. PSYCHOLOGY* 388, 404-05 (1914); G. Goodman & R. Reed, *Age Differences In Eyewitness Testimony* (1984) (unpublished manuscript) (noting the changes in accuracy which occur as the information in question becomes more and more peripheral).

6. E.g., Dent & Stephenson, *Identification Evidence: Experimental Investigations of Factors Affecting the Reliability of Juvenile and Adult Witnesses*, in *PSYCHOLOGY, LAW AND LEGAL PROCESSES* 195 (D. Farrington, K. Hawkins & S. Lloyd-Bostock eds. 1979); G. Goodman & R. Reed, *supra* note 5.

7. E.g., Bahrick, Bahrick & Wittlinger, *Fifty Years of Memory For Names and Faces: A Cross-Sectional Approach*, 104 *J. EXPERIMENTAL PSYCHOLOGY* 54 (1975).

8. E.g., Fivush, *Learning About School: The Development of Kindergartners' School Scripts*, 55 *CHILD DEV.* 1697, 1708 (1984); Sanders & Warnick, *Some Conditions Maximizing Eyewitness Accuracy: A Learning/Memory Analogy*, 8 *J. CRIM. JUST.* 136 (1981).

9. See E. Loftus, *supra* note 2, at 94-97.

10. See Paper presented by R. Roberts, Jr. & G. Goodman, *Reverse Developmental Trends: Development as the Acquisition of Constraints*, Society for Research in Child Development, Toronto, Canada (1985) (arguing that adults are at a relative disadvantage on certain tasks because their knowledge and strategies impose greater constraints on information processing and creativity).

11. See Chi, *Knowledge Structures and Memory Development*, in *CHILDREN'S THINKING: WHAT DEVELOPS* 73, 90 (R. Siegler ed. 1978).

than adults do.¹²

Even so, children's reporting errors tend to be acts of omission rather than commission. That is, while children often recall less than adults do, what they recall may be quite accurate.¹³ For example, laboratory studies indicate that, when asked open-ended questions, such as "What happened?," young children tend to say relatively little,¹⁴ and their reports are not always completely coherent,¹⁵ but low error rates indicate that their reports are seldom wrong.¹⁶

It is often necessary to question children in order to obtain a more detailed report. Several studies have shown that children as young as 5 years of age can answer objective questions concerning simple concrete events as well as adults can.¹⁷ Children are more likely to answer correctly questions about central actions than questions about peripheral information or about the culprit's description.¹⁸ A child's ability to answer objective questions may vary, however, depending upon the difficulty of the question in relation to the age of the child. For example, even 8-year-olds may have difficulty answering objective questions that involve units of measurement (e.g., height, weight, and age).¹⁹ Children may also have difficulty with questions that require abstract inferences, such as a person's motivations.²⁰ But, children's ability to answer ques-

12. See *infra* notes 14-16 and accompanying text.

13. Fivush, *supra* note 8; Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40:2 J. Soc. Issues 33 (1984); Slackman & Nelson, *Acquisition of an Unfamiliar Script in Story Form By Young Children*, 55 CHILD DEV. 329 (1984).

14. See G. Goodman & R. Reed, *supra* note 5; Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295, 296 (1979) [hereinafter cited as *Children as Eyewitnesses*]; M. King, *An Investigation of the Eyewitness Abilities of Children* 96 (1984) (doctoral dissertation, U. Brit. Colum.).

15. See N. Sheehy, *The Child as Witness* (1980) (unpublished manuscript presented to the British Psychological Society in London, England).

16. G. Goodman & R. Reed, *supra* note 5; *Children as Eyewitnesses*, *supra* note 14.

17. See, e.g., G. Goodman & R. Reed, *supra* note 5; *Children as Eyewitnesses*, *supra* note 14, at 304. *But see* M. King, *supra* note 14, at 98 (concluding that while younger children are as accurate as adults when permitted to freely recall an event, children are more likely than adults to be inaccurate when asked specific questions).

18. See Pear & Wyatt, *supra* note 5; D. Heppa, *Children's Eyewitness Testimony: Effects of Trauma on Children's Memory* (1985) (unpublished manuscript).

19. H. Goetze, *The Effect of Age and Method of Interview on the Accuracy and Completeness of Eyewitness Accounts* (1980) (unpublished doctoral manuscript, Hofstra U., New York).

20. See Shultz, *Development of the Concept of Intention*, in 13 DEVELOPMENT OF COGNITION, AFFECT, AND SOCIAL RELATIONS: THE MINNESOTA SYMPOSIUM ON CHILD PSYCHOLOGY (W. Collins ed. 1980).

tions about witnessed or experienced events is better than was formerly recognized.

B. *Children's Eyewitness Reports: Inaccuracies*

While children can be reasonably accurate compared to adults in answering open-ended and objective questions, children do have difficulty remembering certain types of information.²¹ Moreover, children's reports, like adults', can be altered by suggestion.²² Defense attorneys often try to discredit a child's testimony based on these deficiencies. Below we discuss some of the areas in which a child's memory is likely to falter. It should be noted, however, that adults, to a greater or lesser degree, exhibit these same memory problems.²³

One noticeable difference between adults and children is that children often say so little in response to questioning, that adults are tempted to ask suggestive questions of them. Asking suggestive and misleading questions of witnesses, particularly of young child witnesses, can lead to inaccurate reporting.²⁴ Questions such as "He hit you, didn't he?," or "Did he have a brown or black mustache?," when the child has not indicated the presence of facial hair, or "All of the other kids in your school say he touched them, didn't he touch you?" are all suggestive. While children are not necessarily more suggestible than adults,²⁵ they can be, for example, when their memory is weaker or the questioner is of a relatively high status.²⁶

21. See *infra* notes 27-29 & 31 and accompanying text.

22. See, e.g., Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 *LAW & HUM. BEHAV.* 201 (1980).

23. See *infra* note 29 and accompanying text.

24. See, e.g., Cohen & Harnick, *supra* note 22; Dale, Loftus & Rathburn, *The Influence of the Form of the Question on the Eyewitness Testimony of Preschool Children*, 7 *J. PSYCHOLINGUISTIC RESEARCH* 269 (1978) [hereinafter cited as *Form of Question*]; Dent, *The Effects of Interviewing Strategies on the Results of Interviews with Child Witnesses*, in *RECONSTRUCTING THE PAST* 279 (A. Trankell ed. 1982); G. Goodman & R. Reed, *supra* note 5. Indeed, a single word within a question can markedly and systematically affect a witness's answer. For example, in experiments conducted by Loftus and Palmer, the question "About how fast were the cars going when they smashed into each other?" elicited higher estimates of speed than "About how fast were the cars going when they hit each other?" *Form of Question*, *supra* note 24, at 271.

25. See Duncan, Whitney & Kunen, *Integration of Visual and Verbal Information in Children's Memories*, 53 *CHILD DEV.* 1215, 1221 (1982); *Children as Eyewitnesses*, *supra* note 14, at 303.

26. See, e.g., Cohen & Harnick, *supra* note 22; S. Ceci, D. Ross & M. Toglia, *Suggestibility of Children's Memory: Psycho-legal Implications* (1985) (unpublished manuscript, Cornell U., New York) [hereinafter cited as *Suggestibility of Children's Memory*]; G. Good-

Even though laboratory research indicates that children can be more suggestible than adults, it is important to note that in most of these studies, the children and adults were asked suggestive questions about relatively peripheral information.²⁷ It is likely to be more difficult to lead a child witness into making a false statement about a central piece of information.²⁸ This finding applies to adults as well.²⁹ There are no modern studies indicating that children can be led to fabricate an entire event. Some older studies, however, indicate that this may be possible.³⁰ Because of this possibility, and because of the widespread belief that children can be easily manipulated into making false reports,³¹ the use of suggestive questioning can be a dangerous practice. At least two risks are involved. First, there is a risk of obtaining false information. Second, there is a risk that, even if the child resists suggestion and provides accurate testimony, the jurors will still discount these statements.³²

Recently, MacFarlane asserted that leading questions may be necessary in child sexual assault cases in order to break a frightened or embarrassed victim's silence.³³ Some child sexual assault victims may be threatened with, for example, death to themselves

man & R. Reed, *supra* note 5; M. King, *supra* note 14, at 101-02. Ceci, Ross and Toglia's experiment revealed that reporting accuracy is to some extent dependent on the age of the experimenter. Child subjects were read a short story, given biased (i.e., suggestive) and nonbiased information, and later asked questions to test their memory. The children exhibited an eighteen percent difference in accuracy between the biased and unbiased conditions when a 7-year-old provided the information as compared with a forty-two percent difference when the experimenter was an adult. "Thus, the demands placed on very young children by an adult authority figure appear to be partially responsible for their poorer performance . . ." This study suffers, however, from a lack of "ecological validity." That is, the stimuli and experiences examined in this study differ markedly from those experienced by child sexual assault victims. *Suggestibility of Children's Memory*, *supra* note 26, at 23-24.

27. See, e.g., Cohen & Harnick, *supra* note 22.

28. G. Goodman & R. Reed, *supra* note 5. In this study, children watched a man perform a series of arm movements as part of a "game." The children were then asked suggestive questions about what they had witnessed. When incorrect information was suggested about the central action, i.e., the arm movements, ninety-four percent of the 6-year-olds resisted the suggestion, as did eighty-eight percent of the 3-year-olds. *Id.* at 12-15.

29. See, e.g., *Testimony Validity*, *supra* note 5.

30. E.g., Varendonck, *Les Témoinages d'Enfants dans un Procès Retentissant*, 11 ARCHIVÉ DE PSYCHOLOGIE 129 (1911).

31. E.g., Goodman, Golding & Haith, *Jurors' Reactions to Child Witnesses*, 40:2 J. SOC. ISSUES 139 (1984) [hereinafter cited as *Jurors' Reactions*]; Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in *EVALUATING WITNESS EVIDENCE* 13 (S. Lloyd & B. Clifford eds. 1983).

32. *Jurors' Reactions*, *supra* note 31.

33. MacFarlane, *supra* p. 135 (*Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985)).

or loved ones if they disclose what happened. Similarly, many others will be too embarrassed to discuss the assault freely. Thus, the interviewer faces a dilemma. In an attempt to open the way for discussion, he or she can either use leading questions and run the risk of eliciting inaccurate statements or avoid leading questions and risk obtaining insufficient information to permit prosecution.

We would like to make two points regarding this dilemma. One concerns the degree of suggestion used. Mild suggestion, such as "Did Uncle Henry touch your penis?," would be less likely to lead to an inaccurate report than a strong suggestion, such as "I bet Uncle Henry touched your penis, isn't that right?," or "Let's pretend that Uncle Henry touched your penis. How would he have done it?" The second point is that if mild suggestion is used, but the child is then able to give a detailed free report of what happened in response to the question, one can have somewhat greater confidence that the report is correct. This is particularly true if the report contains detailed information of sexual activity beyond the child's level of understanding or normal experience.

In addition to being susceptible to suggestion, children, like other witnesses, may have difficulty answering questions about peripheral detail. In cross-examination by defense attorneys, child sexual assault victims are sometimes asked about peripheral information, such as what they ate for lunch the day of the assault, what color the walls of the room were, and what time it was when they awoke the next morning. Neither children³⁴ nor adults³⁵ retain peripheral detail well. In fact, a recent study indicates that adults' memory for peripheral detail is inversely related to memory for more central information, such as the culprit's face.³⁶ Presumably, subjects who paid attention to peripheral detail were not paying as much attention to the culprit's face. The intuition that a person who can remember wall color can certainly remember more important details—intuition taken for granted by many defense attorneys and jurors—is likely to be false.³⁷

A child's ability to report the order of events is probably more

34. *E.g.*, D. Hepps, *supra* note 18, at 17-18.

35. *E.g.*, Hagen, *Strategies for Remembering*, in *INFORMATION PROCESSING IN CHILDREN* 65 (S. Farnham-Diggory ed. 1972).

36. Wells & Leippe, *How do Triers of Fact Infer the Accuracy of Eyewitness Identification?: Using Memory for Peripheral Detail Can Be Misleading*, 66 *J. APPLIED PSYCHOLOGY* 682 (1981).

37. In Wells & Leippe's study, the subject-jurors behaved as though the correlation between memory of the thief's characteristics and memory of peripheral detail was positive despite the fact that the correlation was, in fact, negative. *Id.* at 686.

crucial than his or her ability to report peripheral detail. Children can order simple, familiar events quite well,³⁸ but have difficulty ordering more complex, less familiar events.³⁹ Misorderings do not, however, imply that the rest of the report is inaccurate. A child, for example, may misorder the sequence of events but still correctly report that he or she was sexually assaulted. Moreover, children cannot be expected to remember the exact dates of events. Defense attorneys may try to exploit a child's difficulty in remembering the exact order and date of an event in an attempt to discredit the child as a witness.

In a recent sexual assault case, an 11-year-old victim who had spent many weekends with his teacher was asked by a defense attorney to account for his activities during every weekend from August until March (approximately thirty-four weekends) and to indicate on what weekends he was assaulted by his teacher.⁴⁰ Obviously, most adults would likely fail this task. Such questioning is demoralizing for child witnesses who often do not understand that the attorney's intent is to wear them down and discredit them.

Intimidation is another factor that can be expected to interfere with the accuracy of a child's report. Psychological research has shown that stress and intimidation can decrease a person's ability and willingness to retrieve information from memory.⁴¹ Consider people who suffer from test anxiety; they may know the material well, but suffer such severe anxiety at the time of the test that they freeze and fail to perform. It is possible that a similar anxiety inhibits sexual assault victims from telling their stories under certain conditions, such as when facing the defendant in a courtroom. It is likely that children are generally more easily intimidated than adults, so it is important to try to limit as much as possible the ill effects of intimidation.

In sum, children can provide accurate testimony if questioned properly. A child's report can be quite accurate even though the

38. See Brown, *The Construction of Temporal Succession by the Preoperational Child*, in 10 MINNESOTA SYMPOSIUM ON CHILD DEVELOPMENT 28 (A. Pick ed. 1976); Fivush, *supra* note 8, at 334-36; Slackman & Nelson, *supra* note 13.

39. See J. PIAGET, *THE LANGUAGE AND THOUGHT OF THE CHILD* 107-19 (1926); D. Price, *infra* note 74.

40. *Wisconsin v. Palombi*, No. 84-CR-317 (Wis. Cir. Ct. 1984).

41. Dent & Stephenson, *supra* note 6, at 200-03; Spielberger, Anton & Bedell, *The Nature and Treatment of Test Anxiety*, in *EMOTIONS AND ANXIETY* 317 (M. Zuckerman & C. Spielberger eds. 1976) [hereinafter cited as *Test Anxiety*]; Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 *IND. L.J.* 245 (1981).

child may not remember peripheral detail, the exact order of events, or whether the assault occurred on the twenty-third or twenty-fourth weekend spent with the assailant. In order to optimize the chances of obtaining accurate reports from children, suggestive questioning and stress should be kept to a minimum.

C. *Eyewitness Identification*

When an unfamiliar person is seen quickly and under highly stressful circumstances, and when a relatively long delay follows before an identification is attempted, face recognition can be quite poor.⁴² Moreover, once an incorrect identification is made, witnesses tend to stick with their initial identification, even if the actual culprit is later included in a new line up.⁴³

In most child sexual assault cases, however, the victim has the opportunity to view the culprit for more than a few seconds. In many cases, the culprit will be familiar to the victim. The abuse may be repeated, so that the child has many opportunities to see the person, increasing the likelihood of a correct identification.⁴⁴ In one study, when 10-year-old children attended to an unfamiliar man for five minutes, eighty-two per cent of them accurately identified him a week later.⁴⁵ In another study, 3-year-olds, 6-year-olds, and adults interacted with an unfamiliar man for five minutes and were tested four to five days later. While ninety-three per cent of the 6-year-olds and seventy-five per cent of the adults accurately identified the man in a photo lineup, only thirty-eight per cent of the 3-year-olds were able to do so.⁴⁶ Thus, when adults and children six years attend to a person's face for five minutes in a non-stressful, real-life situation, developmental differences virtually disappear. (In this study, the 6-year-olds were actually more accurate than adults.)

We can speculate that young children require longer exposures to a stranger's face before they, as a group, will be as accurate as older children and adults in later recognizing that face.⁴⁷ But cer-

42. Shepherd, *Identification After Long Delays*, in *EVALUATING WITNESS EVIDENCE* 173 (S. Lloyd & B. Clifford eds. 1983).

43. Gorenstein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 *J. APPLIED PSYCHOLOGY* 616 (1980). The authors refer to this phenomenon as the "commitment effect . . . (i.e., the person chosen the first time is particularly likely to be chosen again)." *Id.* at 617.

44. Sanders & Warnick, *supra* note 8.

45. Dent & Stephenson, *supra* note 6, at 200-01.

46. See G. Goodman & R. Reed, *supra* note 5.

47. *E.g.*, Werner & Perlmutter, *Development of Visual Memory in Infants*, in 14 *AD-*

tainly there are times when even a young child will be accurate. A 3-year-old who was kidnapped and sexually assaulted last year in Denver was able to identify her abductor accurately after viewing a line up within 24 hours of her rescue.⁴⁸ In this case, the young victim had been with the assailant for at least half an hour and possibly for as long as an entire day, long enough to encode and retain the assailant's appearance.

When a child is victimized, the event is likely to be stressful. Children's memory for faces originally viewed under stressful conditions has just begun to be studied. Therefore, we do not yet know whether stress increases or decreases a child's ability to recognize someone later. It does appear, however, that if an identification is conducted under stressful circumstances, children's accuracy is likely to suffer.⁴⁹

As this brief review indicates, many factors influence a person's memory and eyewitness identification. Age is only one factor and is not necessarily the most important one.

III. LEGAL PRACTICES

Given current knowledge of memory development, how do legal practices during the first interview and the trial optimize or minimize the chances of obtaining complete and accurate reports from children? This is the question we take up next.

A. *The First Interview*

We have reviewed transcripts of numerous child sexual assault investigations, articles on investigations of rape and child sexual assault,⁵⁰ and books dealing with criminal investigations.⁵¹ We have also interviewed a number of police investigators. From these sources, a consistent picture has emerged. The police are likely to be the first professionals to interview child victims despite the fact that they receive little, if any, relevant formal training to do so.

VANCES IN CHILD DEVELOPMENT AND BEHAVIOR (H. Reese & L. Lipsitt eds. 1979).

48. Colorado v. Thiret, No. 83-CR-942 (D. Colo. 1983).

49. See Dent & Stephenson, *supra* note 6, at 200-03.

50. *E.g.*, Amidon & Wagner, *Successful Investigations and Prosecution of the Crime of Rape: A Descriptive Model*, 6 J. POL. SCI. & ADMIN. 141 (1978); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133 (1983).

51. *E.g.*, ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, CHILD MOLESTATION: THE CRIMINAL JUSTICE SYSTEM (1980) [hereinafter cited as ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION]; C. Swanson, Jr., N. Chamelin & L. Territo, CRIMINAL INVESTIGATION (1977) [hereinafter cited as CRIMINAL INVESTIGATION].

Police officers appear to rely mainly on vague guidelines developed for interviewing adult witnesses. "Specialists," such as detectives, are assigned to investigate only *after* field officers have obtained initial reports, if at all. Moreover, the "specialists" are often not sufficiently trained to interview children either. Many mental health professionals may also be unaware of techniques that can be used to support the accuracy of a child's report. In addition, these professionals are often unaware of the legal implications of their interviewing practices.⁵²

While some of the current police practices are necessary given practical constraints and the need to obtain certain types of evidence quickly,⁵³ we believe that there are areas in which police practices could be improved. We focus on the police because they are typically the first to interview child witnesses, but our suggestions also apply to other professionals who might become involved in the case. We begin with a description of typical police practices.

B. Police Practices

Police wisely attempt to obtain reports from witnesses as soon after the incident as possible. Research indicates that memory will be strongest at the time of the first interview.⁵⁴ Unfortunately, because children do not readily report sexual molestation to their parents (and are even less likely to report to other adult authorities),⁵⁵ days, months, or years may pass between the events in question and a child's first interview with the police.

Once the interview actually begins, the officer is responsible for obtaining information relevant to the "elements" of the charge. For example, one element of a rape charge is the use of force, whereas one element of a child sexual assault charge is that sexual contact was made. The officer also tries to obtain a complete description of what happened. In advising officers about the actual questioning, some legal authorities correctly advise that free reports should be obtained before specific (and perhaps unintentionally leading) questioning is attempted,⁵⁶ while others do not.⁵⁷ Vir-

52. For a description of a model system by a District Attorney who revised the system to alleviate these problems, see Cramer, *infra* p. 209 (*The District attorney As a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. MIAMI L. REV. 209 (1985)).

53. H. SODERMAN & J. O'CONNELL, *MODERN CRIMINAL INVESTIGATION* (1962).

54. See, e.g., E. LOFTUS, *supra* note 2, at 68-70; Dent & Stephenson, *supra* note 6; Lipton, *On the Psychology of Eyewitness*, 62 J. APPLIED PSYCHOLOGY 90 (1977).

55. E.g., Russell, *supra* note 50.

56. See, e.g., H. SODERMAN & J. O'CONNELL, *supra* note 53.

tually all legal authorities recognize the need to ask objective, nonsuggestive questions. Through such questioning, the officer is to obtain reports in chronological order.⁵⁸

Police attempt to obtain a complete description of the offender, the time and location of the assault, the offender's car (if appropriate), and the assault itself. The officer also typically tries to determine whether force or threats were used and what the victim did after the assault.⁵⁹ If the assailant is unknown to the victim, the child's assistance in developing a composite description of the assailant may be requested, despite the lack of knowledge about children's ability to construct depictions of previously seen faces. The interview is usually recorded on audio tape or via notes taken either contemporaneously with the interview or written later from the officer's memory.

During the interview, officers attempt to assess the witness's truthfulness—a highly subjective and difficult task, particularly when child witnesses are involved. In some jurisdictions, a polygraph test may later be used to evaluate a child's credibility⁶⁰—again, despite the lack of scientific knowledge about the validity of polygraph tests on children—or adults for that matter.⁶¹ If the officer believes that the child's report at the initial interview is not truthful, he or she may decide that the charge is "unfounded," and the case may be dropped at that point.⁶²

C. *Improving the First Interview*

Mental health workers also interview child victims of sexual assault, and they have discussed a number of considerations other than the legal ones on which the police focus. We outline these considerations, adding our own comments based on the current literature on memory development.

57. See, e.g., Amidon & Wagner, *supra* note 50.

58. See CRIMINAL INVESTIGATION, *supra* note 51. The author notes that the interviewer should keep in mind that "the objective is to gather information in a manner which will enable him to picture the occurrence with the same degree of clarity and in the same chronology as the witness perceived the event . . . Long complex questions must be avoided as they tend to produce disorganized or confused answers. Instead, concise questions should be asked one at a time." *Id.* at 93.

59. E.g., Amidon & Wagner, *supra* note 50.

60. *Id.*

61. Saxe, Dougherty & Cross, *The Validity of Polygraph Testimony: Scientific Analysis and Public Controversy*, 40 AM. PSYCHOLOGIST 355 (1985).

62. Amidon & Wagner, *supra* note 50. "Unfounded cases are, by FBI standards, those cases that have been investigated and the investigating officer finds no evidence to indicate a crime has been committed." *Id.* at 160 (footnote omitted).

1. THE INTERVIEWER

As mentioned above, memory research indicates that witnesses are most likely to give accurate and detailed reports at the first interview, especially if the interview is conducted shortly after the incident occurs. Because the first interview with a witness is so important, it should be conducted by highly trained professionals, not field officers. While the need for specialists—sexual assault investigators trained in child development and mental health workers trained in forensic issues—is increasingly being recognized, they are typically not involved in the case early enough. Once interviewers elicit inaccuracies from the child, they may be difficult to correct. Even if the interviewer succeeds in obtaining an accurate report from the child in subsequent interviews, the first report may still be used to discredit the child in court.

In addition to being highly trained, the interviewer should ideally be unbiased. Dent found that, regardless of an interviewer's experience with children, the least accurate reports were obtained from child witnesses when the interviewer harbored preconceived notions about what had happened.⁶³ Interviewers with preconceptions tended to direct the questioning so as to confirm their own suspicions rather than to obtain accurate reports.⁶⁴

2. SURROUNDINGS AND THE PRESENCE OF PARENTS

The surroundings in which children are interviewed may also affect their accuracy and willingness to report. Mental health workers generally agree that child witnesses should be interviewed in relaxed surroundings,⁶⁵ but recommendations about the exact site vary depending on the child's relationship with his or her parents. If the parents are supportive and cooperative, the child's home is considered the best milieu,⁶⁶ and it is then recommended that the interviewer permit the parents to remain with the child throughout the interview.⁶⁷ If, on the other hand, the parents'

63. See Dent, *supra* note 24.

64. *Id.*

65. E.g., Bauer, *Preparation of the Sexually Abused Child for Court Testimony*, 11 AM. ACAD. PSYCHIATRY & L. BULL. 287 (1983); Stevens & Berliner, *Special Techniques for Child Witnesses*, in THE SEXUAL VICTIMODOLOGY OF YOUTH 246, 253 (L. Schultz ed. 1980).

66. See Keefe, *Police Investigation in Child Sexual Assault*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 159, 160 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978).

67. See Sgroi, Porter & Blick, *Validation of Child Sexual Abuse*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 39, 49 (S. Sgroi ed. 1982) (suggesting inter-

presence is a source of embarrassment or pressure to the child, the interviewer should question the child in a more "neutral" environment. Of course, if the child is a victim of incest, it is undesirable to conduct a home interview with the parent(s) present.

While the presence of a parent during the interview may be appropriate at times, it is our experience that parents are not warned about the dangers of suggestive questioning and are often not sufficiently restrained during questioning. For example, in a recent Colorado case,⁶⁸ a young boy claimed that a neighbor had sexually assaulted him. The police permitted the boy to sit on his stepfather's lap by their living room window during the questioning. At one point during the interview, the neighbor in question walked out of his house, and the stepfather said to his son: "That's him, isn't it?" The district attorney later dropped the case due to the suggestive nature of the identification.

Parents can be helpful in obtaining information from their children, but investigators must carefully instruct them not to use suggestive questioning. Because parents and children spend a considerable amount of time together, and in situations that may call the event to mind (such as bath or bed time), the child may spontaneously report events to the parent that would be difficult to elicit during a formal interview. In cases where the credibility of the parent is not an issue, parents could be instructed to take verbatim notes of the child's statements and perhaps to ask some objective questions, but to do nothing more. If parents rehearse the incident with the child, they later may be accused of coaching. Moreover, the child's report, even though accurate, may become "scripted" and seem memorized. If the parent obtains and records the child's statements properly, the child's credibility is likely to be less subject to attack and the chances that the child's out-of-court statements may be admitted under laws permitting exceptions to hearsay may be increased.⁶⁹

According to some authorities, police should attend to the parents prior to interviewing the child.⁷⁰ The parents' reaction may be even stronger than the child's; to the extent that the child's reac-

viewing the child either alone or with a "supportive adult ally") [hereinafter cited as *Validation of Abuse*].

68. *Easton v. City of Boulder*, No. 82-M-706 (D. Colo. 1982).

69. See Graham, *supra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U. MIAMI L. REV. 19 (1985)).

70. E.g., Flammang, *Interviewing Child Victims of Sex Offenders*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 175, 180 (L. Schultz ed. 1980).

tion is influenced by parental response to the crime, calming the parents may help calm the child. This initial discussion may also be used to instruct the parents on the proper use of questioning techniques.

3. THE ACTUAL INTERVIEW

It is generally agreed that when the interviewer attempts to question the child, the interviewer's first task is to build rapport with the child. Asking the child about his or her hobbies, pets, or interests should help put the child at ease. Some mental health workers have suggested that providing the child with toys or paper and crayons may help to relax the child and may even be used later to assist the child in narrating or describing the events.⁷¹

Questioning should proceed from open-ended questions to more specific, objective questions. As mentioned earlier, children may not be able to describe an event in correct chronological order, yet police often try to impose such an ordering. The interviewer should be sensitive to the child's organization of the event, and, to an extent, let the child lead the way.

Interviewers must also be sensitive to the child's limited verbal abilities. Questions must be simple and phrased in language that children can understand. The child's own terms to describe body parts or specific acts should be employed and adult labels avoided; otherwise, confusion may result. For example, in a recent case, when a child who was allegedly molested by his teacher was asked by the defense attorney to describe the specific nature of abuse, the child responded, "Oral sex, whatever that is."⁷² The child's statement gave the impression that he was coached into making a false accusation. Later, the child described the assault, including acts which adults would classify as "oral sex," but the child's testimony was damaged because of his earlier, confused use of the adult term.

Children can be quite literal in their interpretations of words, and misunderstandings may result.⁷³ For example, if a child were asked, "Did the man take off his clothes?" he or she might respond

71. See Jones & McQuiston, *Interviewing the Sexually Abused Child - (II) Principles and Practice*, in *MULTIDISCIPLINARY ADVOCACY FOR MISTREATED CHILDREN* 159, 172-74 (D.C. Bross ed. 1984); Stevens & Berliner, *supra* note 65; *Validation of Abuse*, *supra* note 67, at 53.

72. *Wisconsin v. Palombi*, No. 84-CR-317 (Wis. Cir. Ct. 1984).

73. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40:2 *J. Soc. Issues* 125, 132 (1984).

"No," but if asked, "Did the man take off his pants?," he or she might respond "Yes." In the questioner's mind, the first question might subsume the second, but for the child, clothes and pants may be two distinct ideas. Thus, the child's testimony may appear to be inconsistent when it really is not. Being able to detect and avoid this kind of confusion requires considerable experience with children. Many field officers will not have this experience. Two techniques can help avoid these communication problems. One technique is to eliminate the heavy reliance on strictly verbal reports by using physical props.⁷⁴ The other technique is to ask questions in multiple forms until a consistent picture emerges.

When the interviewer conveys an attitude of disbelief, communication may become blocked. Police officers sometimes use hostile questioning to test a child's truthfulness. This can be harmful to child victims who may easily feel guilty about their own involvement in the abuse. Mental health workers advise the interviewer to communicate to the child that he or she is not to blame for the acts.⁷⁵ If an attitude of belief is not conveyed, the child's confidence and willingness to cooperate may decline.

At the close of the interview, children should be informed about the possibility of future contact with the officer.⁷⁶ It is also recommended that parents be provided with information about further legal involvement and be kept informed about each stage of the legal process.⁷⁷

4. VIDEOTAPING

One method of ensuring that children are questioned properly is to videotape the initial interview.⁷⁸ There are several advantages to this procedure, but there are disadvantages as well. One advantage is that if interviewers know their interviews are being recorded and will possibly be presented at trial, they will be more likely to avoid improper questioning. A second advantage is that it avoids the distortions and omissions that may result when an interviewer writes a report based on notes or memory. Third, videotape lends itself to fewer ambiguities in interpreting the child's re-

74. D. Price, *Children's Comprehension of Recurring Episodes* (1983) (doctoral dissertation, U. Denver, Colorado).

75. See *Validation of Abuse*, *supra* note 67.

76. See Jones & McQuiston, *supra* note 71, at 174.

77. E.g., ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, *supra* note 51; Stevens & Berliner, *supra* note 65, at 255-56.

78. See MacFarlane, *supra* note 33.

sponses. Because a young child's report may seem incoherent by adult standards, adults have a tendency to impose their own interpretation on the child's statements. In addition, the videotape records emotional reactions, nods of the head, and other movements in response to questions. Finally, Chaney finds that defendants are more likely to confess once they view a videotape of the child describing the abuse.⁷⁹

MacFarlane⁸⁰ has noted a number of problems with videotaping the initial or any interview of a child sexual assault victim. One problem is that the child may at first deny that the assault ever took place and will only gradually admit that the incident did indeed occur.⁸¹ Because the videotape may be subpoenaed, the defense may use the child's initial denial to later discredit the child in court. Chaney⁸² reports, however, that the use of videotaped interviews of child victims in Texas (where special legislation for videotaping has been enacted) has not led to the use of videotapes to discredit the children. Perhaps in most sexual assault cases denial is not a problem; since the child is likely to be the one who initially reports the abuse to parents, the child will already have made the abuse public. In some types of cases—notably incest where family pressure may force the child to recant, or assaults involving threats, so that the child tries to maintain silence—MacFarlane's warning may be a more important consideration.

A second problem MacFarlane has noted concerns the confidentiality of the tapes.⁸³ For example, some judges have permitted children's videotaped statements to be released to the press, in which case the children run the risk of public embarrassment by, for example, seeing themselves on the nightly news. Obviously, the courts should protect the confidentiality of such video tapes. When a child accused of violating the law appears in juvenile court, his or her name is automatically protected. Certainly the courts should treat child victims at least as well. Because such protection is not yet ensured, however, special laws or heightened judicial sensitivity may be required before videotapes will be widely used.

79. Chaney, *Videotaped Interviews with Child Abuse Victims*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (J. Buckley ed. 1985).

80. MacFarlane, *supra* note 33.

81. *Id.*

82. Chaney, *supra* note 79.

83. MacFarlane, *supra* note 33.

Prosecutors are sometimes reluctant to use videotaped testimony because they fear that it will not be as effective as live testimony. Perhaps, jurors will not sympathize with the child; perhaps the testimony will have less impact. One of the major obstacles to the presentation of videotaped testimony at trial is the defendant's sixth amendment right to confront his or her accuser.⁸⁴ Cross-examination during trial is impossible, of course, if the child only testifies on videotape. The Texas legislation governing videotaped testimony still permits the defense attorney to call the child witness to the stand during trial for purposes of cross-examination.⁸⁵ Interestingly, few do.⁸⁶

In sum, videotaping the first interview can eliminate later confusion about the child's responses and demeanor, and about the kinds of questioning used during the interview. Several practical, ethical, and legal problems, however, still preclude the widespread use of videotaped interviews.

5. LATER INTERVIEWS

The same principles discussed above apply also to later interviews. It is not uncommon for child victims to be interviewed numerous times during their involvement in the legal process. It is widely believed that repeated interviewing can result in emotional trauma to children.⁸⁷ While it may be necessary to interview a child more than once as further questions arise in a given case, the interviews should be kept to a minimum. Recent attempts to collapse the number of interviews into one cooperative effort involving police officers, social service workers, and attorneys may be a step in the right direction, particularly if one neutral, highly-trained party assumes the responsibility for interviewing while the others remain out of view.

84. See Comment, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 585 (1976) (arguing that the only constitutionally permissible manner in which videotaped testimony could replace live testimony at trial is if the defendant were to waive sixth and fourteenth amendment guarantees).

85. See Chaney, *supra* note 79.

86. *Id.*

87. E.g., Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 187 (L. Schultz ed. 1980). The author notes that the greatest achievement of the Scandinavian system of investigating sexual abuse reports is the guarantee that child victims need make only one pretrial statement to a person trained in child victims' interrogation. *Id.* at 206.

D. Children and the Adversary Process

Some child sexual assault victims eventually testify in court. They may testify at preliminary hearings, at competency examinations, and at the actual trial. At trial, the legal profession assumes, based in part on the sixth amendment to the United States Constitution, that direct and cross-examination of a witness in the presence of the accused is the best way to arrive at the truth.⁸⁸ We argue below that this assumption is likely to be incorrect when applied to children. Again, we start by describing the typical procedures used at trial. We then comment on these procedures based on psychological research.

1. THE CHILD TAKES THE STAND

Once a child qualifies as a witness,⁸⁹ he or she is treated much like an adult. The child is sworn in, seated alone in the witness stand, and questioned by the attorneys. Many children naturally express fear upon seeing the defendant, meeting the judge, speaking in front of an audience, and being cross-examined.⁹⁰ It is also likely that physical separation from supportive others, such as the child's mother, causes additional stress during the child's court appearance.⁹¹ While there are no laws forbidding it, permitting the child to testify while sitting with his or her parent is likely to raise defense objections that the parent might subtly suggest answers to the child.

The child first undergoes direct examination. Leading questions are typically forbidden on direct examination of adult witnesses,⁹² but are used more liberally during direct examination of

88. For a discussion of the sixth amendment and other constitutional rights afforded to defendants in sexual offense prosecutions, see Mylniec & Dally, *supra* p. 115 (*See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115 (1985)).

89. For a survey and thorough discussion of the different types of competency requirements, see Comment, *infra* p. 245 (*The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245 (1985)).

90. See Berliner & Barbieri, *supra* note 73, at 134-35; Pynoos & Eth, *The Child as Witness to Homicide*, 40:2 J. SOC. ISSUES 87, 100-01 (1984); D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim is a Child: Issues for Judges and Prosecutors* 14, 15 (1985) (unpublished manuscript in press, National Institute of Justice, Washington, D.C.).

91. BOWLBY, 2 ATTACHMENT AND LOSS: SEPARATION ANXIETY AND ANGER (1973); Shaver & Klinnert, *Schachter's Theories of Affiliation and Emotion: Implications of Developmental Research*, in REVIEW OF PERSONALITY & SOCIAL PSYCHOLOGY 37, 40-43 (L. Wheeler ed. 1982).

92. Graham, *supra* p. 19 (*Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sex Abuse Prosecution*, 40 U. MIAMI L. REV. 19 (1985)).

child witnesses.⁹³ Anatomically-correct dolls may be used at this juncture to support the child's memory, but it is unclear whether such dolls will elicit accurate testimony when the attorney asks the child leading questions.

While the child is typically familiar with the prosecuting attorney, the young witness's conversation with that person will now take place in a context that is probably bewildering and frightening to the child. Some children are terrified, especially those who have been threatened by the accused with death or bodily harm. During direct examination, the defense attorney may object to some of the questions, adding to already strained atmosphere.

Cross-examination follows direct examination. Here the express goal of the defense attorney is to discredit the witness. Even broader leeway in the use of suggestive questioning is permitted. Attorneys may use double negatives, "big" words, and difficult sentence constructions to purposefully confuse the child. Even if the attorney is not deliberately trying to confuse the child, his or her lack of experience with children may nevertheless result in confusion. (This is a problem for prosecution and defense attorneys, as well as judges.) A defense attorney's accusatory manner may intimidate the child. Furthermore, the attorney may ask about peripheral detail or the specific order of events that occurred many months or years earlier. These questions tend to undermine the child's confidence.

Sometimes children undergo cross-examination for days. In the *McMartin* case in Los Angeles,⁹⁴ one 10-year-old was on the stand every day for over a week. Seven defense attorneys questioned him. He was only one of the many child witnesses to be called to testify. Worse yet, this 7-day ordeal occurred during preliminary hearings. The trial itself had not yet begun!

Several investigations have attempted to determine whether court involvement is traumatic for children. The studies, as well as clinical observation, indicate that it is stressful for many children,⁹⁵ though perhaps not for all.⁹⁶

93. See 6 AM. JUR. *Proof of Facts* (1960).

94. *California v. McMartin*, Grand Jury Indictment A750900, Preliminary Hearing A753005 (L.A. Mun. Ct. 1985).

95. Pynoos & Eth, *supra* note 90; V. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults: Final Report* (1969) (unpublished manuscript) (available at The American Humane Association, Childrens Division, Denver, Colorado); T. Gibbens & J. Prince, *Child Victim of Sex Offences* (1963) (unpublished manuscript) (available at The Institute for the Study and Treatment of Delinquency, London, England).

96. Berliner & Barbieri, *supra* note 73, at 130-31 (proposing ways to prepare the child

2. THE ADVERSARY SYSTEM VERSUS THE TRUTH

Researchers have never investigated whether court proceedings interfere with a child's ability to recount a criminal experience, but there are reasons to believe that the typical courtroom procedures often reduce the chances of obtaining the most complete testimony from children.

The fact that children may not testify until months or years after the assault increases the chances that they will have forgotten part of what occurred. We do not know whether children's memories fade more quickly than adults' memories, but, if so, children will be at a relative disadvantage. We do know that, at least in several circumstances, children are less likely than adults to fill memory gaps with inferred information.⁹⁷ Whereas an adult who has forgotten part of what happened will attempt to relate a believable, coherent story, a child may be less able to do so. Thus, the child's testimony may appear less coherent, even if it is, in fact, more accurate than an adult's.

In addition to the effects of long delays on children's memory, the stressful nature of a court appearance is also likely to reduce the chances of obtaining complete reports. As mentioned earlier, high levels of stress can be expected to interfere with a person's ability to retrieve information and to make accurate eyewitness identifications.⁹⁸ The child may have greater difficulty understanding the questions asked. Psychological research indicates that high levels of stress reduce short-term memory capacity,⁹⁹ a capacity needed to comprehend sentences. Testifying in a courtroom is likely to be stressful for any witness, but there are several reasons to predict greater stress for children. The situation will be more novel and less predictable for the child than for adults; the sight of the defendant may be particularly disturbing because the child might believe that the defendant will retaliate against the child in the courtroom; or the child may think that he or she, rather than the defendant, will be sent to jail or taken from home.

When placed in a novel, stressful situation, children may also be more susceptible to suggestion. Because stress interferes with

for a court appearance to minimize stress).

97. *E.g.*, Slackman & Nelson, *supra* note 13; G. Goodman & R. Reed, *supra* note 5.

98. *See* Deffenbacher, *supra* note 4; Dent & Stephenson, *supra* note 6; *Test Anxiety*, *supra* note 41.

99. *See* Hockey, *Arousal and Stress in Human Memory: Some Methodological and Theoretical Considerations*, in *PRACTICAL ASPECTS OF MEMORY* 295 (M. Gruneberg, P. Morris & R. Sykes eds. 1978).

the retrieval processes, and because retrieval failures in turn predict heightened suggestibility,¹⁰⁰ it is possible that courtroom questioning will make children more susceptible to suggestion. The courts' liberal allowance of leading questions can be expected to aggravate this problem. It might, for example, lead to false recantation.

Finally, the fact that children may be more easily confused than adults and may consequently suffer a loss of confidence also places them at a disadvantage within the adversary system. Jurors tend to believe witnesses who are confident and do not appear confused.¹⁰¹ Children's credibility may suffer because attorneys may easily confuse children and undermine their confidence. Jurors also tend to believe witnesses who remember peripheral detail, even though such detail is often irrelevant to the particular case.¹⁰² As already stated, children may have difficulty recalling peripheral detail, so again, their credibility suffers. In sum, many factors point to the conclusion that, if the goal is to determine the truth, the adversary process may not be the best means of obtaining the truth from children.

3. AN ALTERNATIVE TO THE ADVERSARY PROCESS

While more research is needed, current psychological literature suggests to us that the interviewing of children should be conducted as quickly as possible by one highly trained, neutral interviewer. The interview(s) would be videotaped and presented at trial. The attorneys could submit questions to the interviewer, but they would not engage in direct examination or cross-examination of the child. The attorneys can argue about the content of the videotape, but the trier of fact (judge or jury) would have access to what the child said and how the child was questioned. The child would not necessarily have to testify. The right to confrontation is based on the assumption that cross-examination in the presence of the accused will increase the probability of arriving at the truth,¹⁰³ but as previously indicated, this assumption is likely to be incorrect when applied to child witnesses. Our proposal, similar to one

100. E. LORRUS, *supra* note 2, at 32-36; COHEN & HARNICK, *supra* note 22.

101. See generally *Jurors' Reactions*, *supra* note 31. During deliberations, mock jurors comment on whether the child witness's testimony is unwavering (i.e., the defense attorney does not "shake them"), impartial (the witness has no reason to lie), and appears to reflect an accurate perception and/or memory of the event. *Id.* at 152.

102. See WELLS & LEIPPE, *supra* note 36.

103. See GRAHAM, *supra* note 92.

recommended by Libai¹⁰⁴ and Parker,¹⁰⁵ and quite like what is practiced in Israel,¹⁰⁶ would result in a procedure that lessens the chances of revictimization. The proposed procedures would also increase the likelihood of having the truth revealed—a goal that we believe must be shared by the defense, the prosecution, and the child if justice is to prevail.

Our proposal to shield the child from the adversary system is as much a call for research as it is a call for legal reform. Research could, for example, explicitly determine whether use of a highly-trained, neutral interviewer versus a cross-examiner results in the most accurate child testimony. Additionally, researchers could investigate whether jurors are in fact more impressed with live testimony by children than they are with videotaped testimony. Because research in this area is so new and still so scarce, a wealth of important studies remains to be undertaken.

E. *Consequences of Legal Practices*

Legal practices involving child witnesses have both immediate and far-reaching consequences. First, legal practices have a direct impact on the outcome of the case. Second, the legal system determines in part the child's and the family's emotional recovery. Third, the way in which these cases are handled affects society as a whole. Each of these consequences is discussed below.

1. THE OUTCOME OF THE CASE

The most immediate consequence of poor interviewing practices and of inappropriate treatment of child witnesses in courts of law is the dismissal or loss of the case, on the one hand, or the conviction of an innocent person, on the other. If a trained investigator does not conduct the initial interview, an inaccurate and incomplete account may result. The inaccuracies may remain undetected or may be perpetuated throughout the investigation and trial. At trial, many children, particularly young children, may become confused or frightened, and thus lose credibility as witnesses. From the prosecuting attorney's standpoint, the lack of a complete, coherent, properly-obtained account may so undermine the

104. See Libai, *supra* note 87.

105. Parker, *The Rights of Child Witnesses: Is the Court a Protector or a Perpetrator?*, 17 *NEW ENG. L. REV.* 643 (1982).

106. Reifen, *Court Procedures in Israel To Protect Child Victims of Assault*, in 3 *VICTIMOLOGY: A NEW FOCUS* 67 (I. Drapkin & E. Viano eds. 1973).

child's credibility that the case may never even be pursued. Further, if an incomplete or inaccurate initial report is obtained, the defense attorney may more easily attack the child's credibility at trial. So, too, the judge may be less likely to find the child competent and may be more willing to dismiss the case. Finally, a strong case that might have resulted in a confession or plea bargain may thereby become a weak case, increasing the likelihood of acquittal.

From the defense attorney's point of view, an innocent client may be implicated in a crime that he or she did not commit. Because reporting errors may leave the witness's memory contaminated throughout the legal proceedings, it is to the defense's advantage to ensure that the initial and all subsequent interviews are properly conducted and videotaped.

2. EFFECTS ON THE CHILD AND HIS OR HER FAMILY

Even if the legal system does not terminate the case, the child's parents or the child may nevertheless choose not to continue. If the investigation or the trial causes undue stress to the child, the parents may not allow any further interrogation. In some cases, the child may, in effect, call a halt to the proceedings by recanting or refusing to speak. Several years ago in Colorado, a 5-year-old girl told her mother that she was molested at her day care center. The mother reported the incident to the police, but the district attorney's office decided not to prosecute because it was a case of the child's word against that of the suspect's. Two years later, the suspect confessed to the crime—once during a polygraph test and again to the police. Prosecution commenced.¹⁰⁷ As the trial approached, however, the defense attorney made various attempts to suppress the confessions, resulting in several continuances. By the time of the trial, the child was so distressed that she refused to talk about the incident and would not testify. Ultimately, the parties agreed to a plea bargain in which the defendant received only a few months of imprisonment.

The child's experience with the criminal justice system will color his or her future interactions with it. A negative experience may result in an unwillingness to report crimes later on. Some adult women, molested as children, hesitate to report the sexual assault of their own children because of the way they were treated by the legal system.¹⁰⁸

107. *Colorado v. Johnson*, No. 84-CR-1207 (D. Colo. 1984).

108. ILLINOIS LEGISLATIVE INVESTIGATING COMMISSION, *supra* note 51.

3. EFFECTS ON SOCIETY

The manner in which these cases are handled has far-reaching implications in terms of societal attitudes toward sexual assault, the credibility of child witnesses, and the fairness of the legal system. For centuries, the veracity of children has been doubted and, as a result, children became easy targets for victimization. Society is finally more willing to listen to children, but continues to be unsure about their credibility. Cases like the recent one in Jordan, Minnesota¹⁰⁹—in which charges of child sexual assault were made against parents, their children taken from their home, the children improperly questioned, and the charges finally dropped—do considerable damage to the emerging belief that children may be accurate witnesses. Rather than blaming a system that perpetuates incompetent interviewing and places children in the midst of an adversary system designed for adults, society chooses to discredit the child witness. Thus, as the number of cases that are dropped due to the mistakes of investigators increases, as fear intensifies that false accusations may result in “witch hunts,” and as the number of acquittals rises, society as a whole may doubt the credibility of children as witnesses and may doubt the prevalence of child sexual assault.

IV. CONCLUSION

Memory research offers important insights into legal practices. It indicates that the initial interview of child witnesses and the immersion of children into the adversary process are of crucial concern. There are several ways in which current legal practices could be improved so that more accurate and detailed reports are obtained. First, trained professionals should be the first to interview children and these interviews should be conducted quickly and recorded in full on videotape. Second, children should be taken out of the adversary process. The current adversary process is likely to be stressful and is unlikely to facilitate complete and accurate testimony.

Many of our suggestions may appear slanted in favor of the continued prosecution of alleged sexual offenders, assuming as we do the general validity of children's testimony. This view is based on our experience, which suggests that, despite recent publicity of

109. *Minnesota v. Bentz*, No. 84-OO-587 (D. Minn. 1984).

fabricated reports in a few dramatic cases,¹¹⁰ children rarely fantasize or lie about the central incidents of a sexual assault. The few cases in which fabrication has been documented involved a host of undesirable interviewing practices of the kind we argue should be eliminated (e.g., parental influence, suggestive questioning, highly excessive and repetitive interviews, lengthy courtroom testimony, and questioning about peripheral detail). We urge the adoption of procedures that increase the probability that the child will report completely, with maximum accuracy and minimum stress, and that the truth is heard, regardless of whether it favors or threatens the defendant.

110. *California v. McMartin*, Grand Jury Indictment A750900, Preliminary Hearing A753005 (L.A. Mun. Ct. 1985); *Minnesota v. Bentz*, No. 84-00-587 (D. Minn. 1984).