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Recommended Citation

Christopher J. Sinnott, *When Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 Clev. St. L. Rev. 569 (1993)
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WHEN DEFENDANT BECOMES THE VICTIM: A CHILD'S RECANTATION AS NEWLY DISCOVERED EVIDENCE[1]

I. INTRODUCTION

"The defendant as victim" is an interesting but definitely oxymoronic phrase void of real value to our legal system. For the accused could never be a victim: he is the victimizer.

This phrase, however contradictory, may not be as inappropriate as it seems. In fact, it may be wholly relevant in situations in which a child is the prosecution's chief, and often sole, witness. In such instances judges may be confronted with two compelling decisions which will determine whether the defendant will become a victim. The first decision is on a motion to disqualify

[1]The author gratefully acknowledges the assistance of Professor Stephan Landsman, Cleveland-Marshall College of Law, Cleveland State University.

Published by EngagedScholarship@CSU, 1993

the child as a witness,[2] motivated by the fear that the child will not testify accurately.[3] In general, the request for such an order is denied, since courts are sympathetic to the plight of the prosecution.[4] If the court disqualified the child, the case would be unlikely to proceed.[5]

The second decision may involve ruling on a motion for new trial when the defendant presents the child's recantation as newly discovered evidence. The emergence of recantation testimony should raise important questions in the mind of the trial judge. Was the court's original competency determination correct? Was the child coerced into testifying?[6] Did the child testify truthfully at trial?[7] Was the testimony a product of the child's remembered experiences or was it learned as a result of the pre-trial interview process?[8] All are important considerations when weighing the validity of a new trial motion. However, all of these questions might not be asked and, if they are asked, might not be addressed with the necessary objectivity or from the necessary perspectives.

Failure to make the necessary inquiries,[9] coupled with exceedingly high standards for granting new trial motions[10] could result in a grave injustice to an innocent defendant. This note will explore the standards for granting new trials within the child recantation setting. It will argue that insistence on respecting the evidentiary statements of children is contrary to common sense and current research. As a result, the standards for new trial ought to be rethought. Part II will analyze the two prevalent standards used by courts to weigh the merit of a new trial motion and will show why both standards present a nearly insurmountable hurdle for a movant to satisfy. Part III will explore the special issues that confront a court each time a young "victim" testifies. It will demonstrate why reviewing courts need to be less deferential to the trial court's factual determinations when child recantation evidence is presented. Part IV will analyze the judicial inference which courts are "permitted" to make when dealing with recantation evidence. Finally, Part V

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[2]The most common objection to the testimony is that the child lacks the requisite competency to be a witness. *See, e.g.*, State v. Carrillo, 502 P.2d 1343 (Ariz. 1972).

[3]State v. Smith, 401 P.2d 445, 447 (Utah 1965).

[4]*Cf. id.* (recognizing that great difficulty surrounds the prosecution of abuse related offenses).

[5]Very often the prosecution's entire case rests upon the child's ability to testify. John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. OF FAM. L. 149, 185 (1985).

[6]*See, e.g.*, State v. Clark, 682 P.2d 1339 (Mont. 1984).

[7]Brook Hart & Anthony Bartholomew, *Forward* to HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE at xi (1988).

[8]*Id.*

[9]*See infra* part III.A.1.

[10]*See infra* part II.A-C.

will propose an alternative to current practices that seeks to strike a more even balance between the competing interests of the defendant and society.

II. STANDARDS FOR GRANTING NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE[11]

In determining whether a defendant should be granted a new trial on the grounds of newly discovered evidence,[12] courts have applied one of two standards. The first, commonly known as the *Berry* or "probability" standard, has been accepted by state and federal courts for many years.[13] In addition, courts have recently begun to apply a second standard developed specifically to deal with the problem of recanted testimony. This test, commonly referred to as the *Larrison* or "might" standard, has been adopted by a growing number of state and federal courts.[14]

A. The Berry Standard

The probability standard was developed in the 19th century case of *Berry v. State*.[15] The *Berry* court determined that in order to obtain a new trial based upon newly discovered evidence the defendant had to prove:

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[11] For further analysis on this topic see Janice J. Repka, Note, *Rethinking the Standards for New Trial Motions Based Upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. R. 1433 (1986); Sharon Cobb, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969 (1986); Note, *Criminal Procedure: Minnesota Adopts the Larrison Standard for Granting a New Trial Because of Newly Discovered Evidence: State v. Caldwell*, 67 MINN. L.R. 1314 (1983).

[12] Although there are numerous types of newly discovered evidence upon which a defendant could justify a motion for new trial, this note deals with only one, recantation evidence.

The distinction between recantation and other types of newly discovered evidence is important. With the latter, the defendant is attempting to introduce new material to the record. With the former, the defendant is only attempting to receive a fair trial by removing the perjury which taints his conviction. *See* State v. Britt, 360 S.E.2d 660 (N.C. 1987) (recognizing the distinction between the various types of newly discovered evidence).

[13] *See* Tim A. Thomas, Annotation, *Standards for Granting or Denying New Trials in State Criminal Cases on Basis of Recanted Testimony-Modern Cases*, 77 A.L.R. 4TH 1031 (1990).

[14] All circuits except the ninth, second, and third have adopted the *Larrison* standard. *See* United States v. Massac, 867 F.2d 174, 178 (3rd Cir. 1989) (recently applying the standard because both parties agreed that it was appropriate; however, the court noted that the circuit was not adopting the test); United States v. Krasny, 607 F.2d 840 (4th Cir. 1979); United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975). Furthermore, the viability of the standard has recently been questioned by several jurisdictions. *See* United States v. Nixon, 881 F.2d 1305, 1311-12 (5th Cir. 1989); United States v. Tierney, 718 F. Supp. 748, 751-52 (W.D.Mo. 1989). *See* Thomas, *supra* note 13, at 1033-34.

[15] 10 Ga. 511 (1851).

1. That the evidence has come to the attention of the defendant since the trial;[16]

2. That failure to discover the evidence prior to trial was not the result of lack of due diligence;[17]

3. That the evidence was so material that it would probably produce a different verdict if the new trial were granted;[18]

4. That the evidence was not merely cumulative;[19] and

5. That the effect of the evidence was not merely impeaching.[20]

The *Berry* standard is used to deal with many types of newly discovered evidence, not just recantation evidence.[21]

B. The Larrison Standard

Some courts have recognized that there are differences inherent in recantation evidence which justify distinctive treatment.[22] Realizing that the high threshold requirements of *Berry* are inappropriate when conviction is based upon perjured testimony, these courts have applied the purportedly more lenient standard developed in *Larrison v. United States*.[23] The requirements for a defendant to obtain a new trial under the *Larrison* standard are threefold:

1. That the court must be reasonably well satisfied that the testimony given by a material witness was false;[24]

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16 *Id.* at 527.

17 *Id.*

18 *Id.*

19 *Id.*

20 Berry v. State, 10 Ga. 511, 527 (1851).

21 *See* Holmes v. United States, 284 F.2d 716, 720 (4th Cir. 1960) (recognizing that evidence which bears upon the integrity of the jury's verdict will warrant the granting of a new trial regardless of whether it has a direct bearing on the guilt of the defendant); Jackson v. United States, 371 F.2d 960, 963 (D.C. Cir. 1966) (where the court determined that testimony of an eyewitness discovered since the trial was sufficient to warrant the granting of a new trial based upon newly discovered evidence); Casias v. United States, 337 F.2d 354, 356 (10th Cir. 1964) (where the subsequent confession of another was held sufficient to warrant the granting of a new trial based upon newly discovered evidence).

22 *See* State v. Britt, 360 S.E.2d 660, 665 (N.C. 1987) (in the recantation context what is being sought is a new trial absent untruthful testimony rather then one that merely adds different material); State v. Caldwell, 322 N.W.2d 574, 585 (Minn. 1982) (noting that in the ordinary case of newly discovered evidence a higher standard is justifiable, but when a witness recants the situation is different); *but see* United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975) (criticizing the distinct treatment of recantation evidence).

23 Note, *supra* note 11, at 1317-18.

24 *Id.* at 1318.

2. That without the possibly false testimony the jury might have reached a different conclusion;[25] and

3. That the party seeking the new trial must have been taken by surprise when the false testimony was given or been unaware of its falsity until after trial.[26]

C. Comparative Analysis of the Standards

Although it may appear that the two standards lack congruence, in essence they are similar in several respects. It is these similarities which have motivated commentators to argue that the *Larrison* standard is ineffective as an alternative to the lofty *Berry* requirements.[27]

First, both standards require that the newly discovered evidence be material to the final outcome. Under *Berry*, the materiality requirements are threefold. First, the evidence must not be cumulative.[28] Second, the new evidence must do more than merely impeach the credibility or character of the witness.[29] Finally, the evidence must be so material that upon retrial a different result will be *probable*.[30]

Larrison, on the other hand, requires only that a different verdict *might* occur upon retrial.[31] Thus, in theory, the *Larrison* test requires a much lower level of materiality. It has failed to adopt *Berry*'s requirements that the evidence be more than cumulative and do more than merely impeach the witnesses' credibility.[32] Furthermore, when the words are given their ordinary meaning, *might* has a much lower level of certainty than *probable*.

A second point of comparison is the knowledge that the judge must "impute" to the jury as he makes his decision regarding the effect of the newly discovered evidence.[33] In determining, under *Berry*, whether a new verdict is probable, the judge must make his determination in light of a hypothetical jury that would have the benefit of having both the original testimony, as well as the subsequent recantation, before it.[34]

Larrison, on the other hand, requires the judge to determine whether a different verdict might result if the "recanted testimony was eliminated

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[25] *Id.*

[26] *Id.*

[27] Cobb, *supra* note 11, at 976. *But see* Note, *supra* note 11, at 1319.

[28] Berry v. State, 10 Ga. 511, 527 (1851).

[29] *Id.* at 527.

[30] *Id.*

[31] Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928).

[32] Cobb, *supra* note 11, at 977.

[33] *Id.*

[34] *Id.*; Note, *supra* note 11, at 1319.

altogether from the jury's consideration. In other words, the hypothetical jury to which the judge makes reference would have no knowledge whatsoever of the testimony which was later recanted."[35] The difference in treatment would appear to arise from the following language of *Larrison*: "[t]hat *without it* [the original testimony] the jury *might* have reached a different conclusion."[36]

Although the two standards differ in the amount of information they impute to the jury, this difference sheds light upon a notable similarity. Both standards require the trial judge to determine the credibility of the testimony.[37] In *Larrison*, the fact that the recanted testimony is kept from the jury necessarily implies that the entire determination is left to the judge.[38] Although *Berry* leaves this determination to the jury, the judge is still required to make a preliminary credibility determination.[39] It is implicit in the judge's finding that if the evidence will *probably* result in a different verdict, then the judge believes the witness.[40] Therefore, both standards require that the judge be satisfied that the recantation testimony is true.

D. Judicial Skepticism and Recantation Evidence

What makes a moving defendant's cause even more difficult when attempting to satisfy the *Berry* and *Larrison* standards is that the prevailing judicial attitude when confronted with recanted testimony is to treat it with the utmost suspicion and to grant new trials only under extraordinary circumstances.[41] This attitude has become so universal[42] that it appears to have

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[35] Cobb, *supra* note 11, at 977; Note, *supra* note 11, at 1319.

[36] Cobb, *supra* note 11, at 977.

[37] *Id.* at 977-78.

[38] *Id.* at 978.

[39] *Id.*

[40] *Id.*

[41] *See* Bell v. State, 90 So. 2d 704, 705 (Fla. 1956); State v. Norman, 652 P.2d 683, 689 (Kan. 1982) (stating that recantation evidence is to be "looked upon with the utmost suspicion." (quoting State v. Bryant, 607 P.2d 66 (Kan. 1980)); Thacker v. Commonwealth, 453 S.W.2d 566, 568 (Ky. 1970) (recognizing that the general rule of recantation evidence is to view it with suspicion and that the motion will be granted only in extraordinary circumstances); Gehner v. McPherson, 430 S.W.2d 312, 315 (Mo. Ct. App. 1968) (recognizing the need for an end to litigation, and that new trials should be granted as an exception and denied as the rule); State v. Perry, 758 P.2d 268, 273 (Mont. 1988).

[42] *See* Wadsworth v. State, 507 So. 2d 572 (Ala. Ct. App. 1987); Ahvakana v. State, 768 P.2d 631 (Alaska Ct. App. 1989); State v. Kasten, 823 P.2d 91 (Ariz. Ct. App. 1991); People v. Harris, 272 Cal. Rptr. 590 (Cal. Ct. App. 1990); Jones v. State, 479 N.W.2d 265 (Iowa 1991); State v. Abell, 781 P.2d 750 (Kan. Ct. App. 1989); Carwile v. Commonwealth, 694 S.W.2d 469 (Ky. Ct. App. 1985); State v. Clayton, 427 So. 2d 827 (La. 1982); Carr v. State, 387 A.2d 302 (Md. Ct. App. 1978) *rev'd*, 397 A.2d 606 (Md. 1979); Potter v. State, 410 N.W.2d 364 (Minn. Ct. App. 1987); Smith v. State, 492 So. 2d 260 (Miss. 1986); State v. Culkin, 791 S.W.2d 803 (Mo. Ct. App. 1990); State v. Miller, 833 P.2d 1040 (Mont. 1992);

given rise to an inference[43] that recantation evidence is not trustworthy and should be treated as such absent the movant's ability to persuade otherwise.

Perhaps no statement reflects this distrust and suspicion more than the often cited statement of Judge Seabury, in *People v. Shilitano*,

> Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice.[44]

The basic concerns surrounding recantation testimony, which have given rise to this judicial inference, can be found within Judge Seabury's statement. First, courts feel that recantation, by nature, calls into question the credibility of the witness. During an initial trial the witness swore to an oath and testified to one version of the facts. At a subsequent proceeding the witness, again being sworn, told a different version of the same facts. Thus, the court is left with determining when, if ever, the witness was telling the truth. Recantation testimony, by nature, "demonstrates the unreliability of a witness."[45] Thus, the court's skeptical attitude must be employed because any contrary position "would grant a person of questionable credibility and motive carte blanche to overturn the determination of a jury operating within the bounds of our constitutional protections. . . ."[46]

State v. Copeland, 448 N.W.2d 611 (N.D. 1989); Commonwealth v. McCloughan, 421 A.2d 361 (Pa. 1980); Marshall v. State, 305 N.W.2d 838 (S.D. 1981); Chambers v. State, 755 S.W.2d 907 (Tx. Ct. App. 1988) *rev'd*, 805 S.W.2d 459 (Tx. Crim. App. 1991); Brown v. State, 816 P.2d 818 (Wyo. 1991).

[43]An inference is a permissive deduction while a presumption is a deduction mandated by law. Engstrom v. Auburn Auto. Sales Corp., 77 P.2d 1059, 1062 (Cal. 1938). One commentator has argued that the courts effectively apply a presumption that the recantation is untrustworthy. Repka, *supra* note 11, at 1441.

It is important to recognize that courts are not required to make inferences. However, the inference against recantation evidence appears to have grown so strong that some courts do feel constrained by it. In United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954) the trial judge noted that if "I could make the law I would have the case retried, but . . . I am bound by this rule. . . ." Also, some courts have required that the witness be convicted of perjury before the recantation of trial testimony will be considered.

[44]112 N.E. 733 (N.Y. Ct. App. 1916). Courts are concerned with the possibility that a witness's motivation for changing his story is greed. *See* Dunbar v. State, 555 P.2d 548 (Alaska 1976).

[45]State v. Perry, 758 P.2d 268, 275 (Mont. 1988).

[46]*Id.* (citing People v. Shilitano, 112 N.E. 733 (N.Y. 1916)).

Second, in light of the possible penalties for perjury, recantation raises questions about a witness's motive for providing such evidence.[47] There is always judicial suspicion that the witness' recantation is the result of duress, coercion, or fear.[48] Once a witness has left the confines of the court, he could be subjected to "seductions, compulsions, or guile that an unscrupulous litigant might choose to employ to rescue his ill-fated cause."[49]

Underlying these basic concerns are a series of policy considerations related to the conceptual framework of our legal system. These policy considerations arise from the concerns surrounding the "proper administration of [criminal] justice."[50] That first is the presumption of validity which attaches to a jury verdict.[51] Society has an interest in "resolving factual disputes in one proceeding and according finality to those resolutions."[52] Once a party has had the opportunity to have his case presented for judicial decision, the judgment of the court will be considered final.[53] The burden of proving that the judgment was erroneous and thus worthy of a new trial properly rests with the convicted.[54]

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[47] *See id. See also* Cobb, *supra* note 11, at 983-87; Repka, *supra* note 11, at 1442-43.

[48] *E.g.*, State v. Caldwell, 322 N.W.2d 574, 585 n.7 (Minn. 1982) ("Courts tend to view recanted testimony with suspicion because of the possibility that it was obtained through coercion."); *see also* Cobb, *supra* note 11, at 983.

[49] *See* Best v. State, 418 N.E.2d 316, 319 (Ind. Ct. App. 1981). Reoccurring circumstances, such as those present in *Potter v. State*, underlie this concern. In *Potter* the court denied a motion for new trial when evidence was introduced which tended to show that the child victim was subjected to improper influences. First, evidence was introduced which proved that the child's family was angry and blamed her for what occurred.

Furthermore, upon discovering that her father would be incarcerated and after having been counseled as to the economic effects of his removal from the household, the child stated that she had not intended to hurt her father and only wanted to see him receive treatment for his problem. As a result, the court believed that the child's recantation was clouded by underlying factors which made the recantation highly suspect. 410 N.W.2d 364 (1987).

[50] *See* People v. Shilitano, 112 N.E. 733, 735 (N.Y. Ct. App. 1916) (stating that "the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice."); Cobb, *supra* note 11, at 991-92.

[51] *See* Smith v. State, 492 So. 2d 260 (Miss. 1986); ROBERT M. CIPES, MOORE'S FEDERAL PRACTICE ¶ 33.05 (2d ed. 1991) (recognizing that there is a presumption that the verdict is correct and the burden is on the defendant to show that the motion should be granted).

[52] Dobbert v. Wainwright, 468 U.S. 1231, 1237 (1984) (Brennan, J., dissenting); Note, *supra* note 11, at 1317; Repka, *supra* note 11, at 1443.

[53] State v. Perry, 758 P.2d 268, 273 (Mont. 1988). It is these same basic principles which also underlie the notion of res judicata. *Id.*

[54] CIPES, *supra* note 51, at ¶ 33.05.

Tied into the presumption of validity are notions of judicial economy.[55] Due process guarantees a defendant the right to have the courts adjudicate his dispute. Judicial economy, however, mandates that there be an end to successive litigation of the same issue.[56] As a result, courts have been reluctant to extend new trials to a moving defendant. "Our criminal judicial system, which relies so heavily on witness testimony, could not function if final judgments were constantly vacated on the basis of repudiation of testimony."[57] Courts may also consider the hardship that delay, followed by retrial, would have on the prosecution. The more time that passes between the event and the trial, the greater the opportunity the evidence may become stale, thus rendering the judicial system uneconomical.[58]

E. Conclusion

A comparison of the new trial standards, on their face, reveals that "the greater 'leniency' of the *Larrison* test may be more illusory than real."[59] *Larrison* does require a much lower level of certainty that a different verdict would result. However, this leniency is counterbalanced by the fact that the judge, before a new trial may be granted, must be convinced that the testimony of the

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[55]State v. Perry, 758 P.2d 268, 273 (Mont. 1988); Note, *supra* note 11, at 1317; Repka, *supra* note 11, at 1443.

[56]*See* State v. Perry, 758 P.2d 268, 273 (Mont. 1988) (recognizing that although due process principles guarantee each individual access to the courts, these principles do not give them a right to re-litigate the issue); Coleman v. State, 633 P.2d 624, 630 (Mont. 1981) (stating that "judicial economy dictates restrictions on reruns.").

[57]Cobb, *supra* note 11, at 991.

[58]*See* United States v. Fountain, 840 F.2d 509 (7th Cir. 1988) (recognizing that delay injures the prosecution's case because of the degradation of evidence over time), *cert. denied*, 488 U.S. 982 (1988).

[59]Cobb, *supra* note 11, at 978. It was the consideration of these factors that led one commentator to conclude:

> When the two tests are analyzed . . . , it becomes evident that the greater "leniency" of the *Larrison* test may be more illusory than real. *Larrison* does provide a less demanding standard than does *Berry*—"might" versus "probable"—regarding the degree of certainty that a judge must have in the likelihood of a different result on retrial. But this "easing" of the standard is counterbalanced by *Larrison*'s further requirement that the judge first be convinced of the truthfulness of the recantation. *Berry*, conversely, appears to require more certainty that a different result would ensue, but does not require that the judge be as sure of the truthfulness of the recantation. The tests seem equally exacting; the difference is that *Berry* is more demanding regarding the probative value of the recantation while *Larrison* emphasizes the credibility of the witness. Hence, the two tests in actuality may present nearly equivalent hurdles to a defendant requesting a new trial.

Id.

recanting witness is true.[60] Although *Berry* focuses more on the probability of a different result,[61] the judge, as discussed previously, is implicitly required to make an initial determination of credibility.

Thus, the judicial inference, employed by the courts when applying the new trial standards, has made it nearly impossible for a moving defendant to obtain a new trial. Just as both standards require the court to make an initial credibility determination, they likewise require the trial judge to deny the motion unless he is satisfied that the evidence is, to some degree, trustworthy. By viewing the testimony as inferentially untrustworthy, however, a court will be unable to grant a new trial except in those extreme circumstances when the defendant is able to establish the truth of the recantation.[62] It is this application which results in the most notable similarity between the standards in the denial of a motion for new trial when recanted testimony is presented as newly discovered evidence. Courts have done little to make *Larrison* a meaningful exception to the lofty *Berry* requirements.[63]

III. THE CHILD AS WITNESS

The child sexual abuse litigation process is usually set in motion by an adult who suspects that a child has been abused.[64] This suspicion is frequently triggered by an abrupt change in the child's behavior, a comment made by the child, or some type of physical evidence.[65] After his or her own initial investigation, the adult will usually notify the authorities.[66] What follows is a process of interrogation that has begun with the parents and will continue through social workers, law enforcement personnel, attorneys, and judicial officials.

What transpires in these interrogations is extremely important to understanding the nature and reliability of a child's evidentiary statements. When a child is interrogated, all the characteristics of the interviewer[67]

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[60] *Id.*

[61] *Id.*

[62] Courts, however, have failed to instruct on how a moving defendant may establish the trustworthiness of the evidence. Repka, *supra* note 11, at 1443.

[63] One commentator has noted that "[t]he vast majority of courts that have considered *Larrison* have done little to advance the test as a meaningful exception to the *Berry* standard insofar as they have either denied the motion for retrial or indicated that the result would have been the same under *Berry*." Note, *supra* note 11, at 1318-19 (citations omitted).

[64] *See generally* HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE 23-24 (1988).

[65] *Id.*

[66] *Id.*

[67] Power, authority, and status. *Id.*

influence the child's limited capacity and competency, and this produces the end results.[68] It is upon these results that the prosecution bases its case.[69]

Over the past decade the justice system has waged war against child sex offenders.[70] Many believe, however, that it is not the result of an epidemic of sex abuse, but rather, the epidemic of "sex accuse."[71] Coupled with the epidemic of accusations is the aggressive manner with which alleged abuse cases are pursued.[72] Each year approximately 800,000 cases of child abuse are investigated.[73] However, it has been estimated that 65% of all reports are not grounded in fact.[74] The problem, however, is that not all baseless claims are weeded out before trial.

A. Psychology of the Child Witness

In order to fully understand the dangers surrounding child testimony it is first necessary to understand generally how memory works. Memory is the process of storing and recalling perceived information. The operation of memory can be broken down into three general stages. The first stage, acquisition, relates to the perception of an event that is encoded into memory.[75] This process can be intentional, such as information learned for an examina-

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[68] *Id.*

[69] In sexual abuse litigation, the prosecution's entire case often rests upon the information that can be elicited from the young victim. As a result courts are confronted with two alternative hazards:

> On the one hand, in accepting the testimony of the child there the danger that [the child] may not be telling the truth, in which event an innocent man may be convicted of crime and suffer the consequences thereof. On the other, if the child's testimony is not accepted, a man guilty of crime and possibly with the potential for more such, will go free.

State Store v. Smith, 401 P.2d 445, 447 (Utah 1965) (alteration in original).

[70] The McMartin Preschool trial, the largest and most expensive criminal trial in history, "shocked the nation into a heightened awareness of the specter of child molestation." Michael C. Tipping, *McMartin Jury Deadlocked—Mistrial Declared*, UPI, July 27, 1990, available in LEXIS, Nexis Library, Wires File.

[71] DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR (1988). "Sex accuse" is used as a term to describe what some commentators feel is an epidemic in unfounded allegations of child sexual abuse. *See id.* at 3.

[72] *See CBS News—60 Minutes* (CBS television broadcast, Mar. 15, 1992); Karl Easton, M.D., *Sexual Abuse: A Child's False Evidence*, N.Y. TIMES, Apr. 8, 1984, § 4 at 20.

[73] Teresa Simons, *Children in Molestation Cases Subject to Adult Suggestions*, UPI, July 25, 1991, available in LEXIS, Nexis Library, Wires File.

[74] Paul R. Lees-Haley, *Innocent Lies, Tragic Consequences*, TRIAL vol. 24, No. 4, Apr. 1988, at 37, 38.

[75] Elizabeth F. Loftus & Graham M. Davies, *Distortions in the Memory of Children*, J. SOC. ISSUES, vol. 40, No. 2, 1984, at 51, 54.

tion, or it can be unintentional.[76] Certain experiences are remembered more easily and much more clearly then others.[77] This often results from the complexity of the event being remembered, our psychological arousal or alertness at the moment of perception, whether we are making a conscious effort to remember, etc.[78] A failure in acquisition will cause one to drop the memory trace, resulting in permanent loss.[79]

The second stage involves what is commonly referred to as "short term" and "long term" memory. Short term memory is a stage of conscious thinking, that is, the subject will actually think about the event perceived.[80] At this point, the memory will either be dropped or stored into long term memory.[81] If storage occurs, the memory trace, although it appears to be forgotten, actually lies hidden, "waiting to be retrieved by an appropriate internal or external stimulus. . . ." [82]

The final stage of memory is retrieval. Retrieval is the point at which an individual actually calls back the information that has been previously stored.[83] In some instances, retrieval, or recall will be automatic or effortless.[84] This is especially true when the initial information is well learned.[85] "When we are in a high state of excitement, information that is only moderately well learned may not be retrieved at all . . . Panic and stage fright can prevent retrieval of information if it has not been highly overlearned."[86] This is why actors, musicians, and students, just to name a few, prepare to a state of perfection.[87]

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[76] DOUGLAS L. HEINTZMAN, THE PSYCHOLOGY OF LEARNING AND MEMORY 281 (Atkinson et al. eds. 1978).

[77] *Id.* at 282.

[78] *See id.*

[79] Interview with Patricia Ambrose, Forensic Psychologist, Erie (Pa.) County Court of Common Pleas, in Cleveland, Oh. (Feb. 1993).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Loftus & Davies, *supra* note 75, at 54.

[84] HEINTZMAN, *supra* note 76, at 305.

[85] *Id.*

[86] *Id.*

[87] *Id.*

Retrieval, however, is not always automatic.[88] At times an individual may simply be unable to remember a perceived event. In such situations, retrieval cues are crucial to remembering.[89]

The first two stages of memory are natural, while the third is learned.[90] Most of these learned skills used to recall memories develop between the ages of five and ten.[91] A child who is unable to recall an event does not lack memory; he simply has not learned how to recall memories at will.[92] However, these memories may be triggered back at any time by retrieval cues.[93]

1. Suggestibility of the Child Witness

Suggestibility may be the most widely expressed concern surrounding the child witness. It has become a widely accepted proposition that children are able to freely recall less of a perceived event then adults.[94] Upon free narration a child may not be able to recall enough to provide adequate information of a suspected event. As a result, the natural temptation is to use more specific questions that contain retrieval cues which may contaminate the child's report.[95] Because of a child's impoverished retrieval skills, cues to aid retrieval may be necessary and proper to help an interrogator elicit from the child an accurate report of a real event. However, if the retrieval cue provides misinformation, there is potential for contamination of the memory trace. Great caution needs to be taken when a child has been integrated into the justice system, for suggestion can be a potent disrupter of the truth.

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88 *Id.* at 306.

89 *Id.* at 308. Retrieval cues may take any form. For example, a glimpse of a familiar place, a whiff of an aroma, a statement made in conversation, a leading question, etc. *See* Anastasia Toufexis, *When can Memories be Trusted?*, TIME, Oct. 28, 1991, at 86.

90 John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 708 (1987).

91 *Id.* at 708.

92 *Id.*

93 *Id.*

94 Karen J. Saywitz, *Children's Testimony: Age Related Patterns of Memory Errors, in* CHILDREN'S EYEWITNESS MEMORY 36, 45 (Stephen J. CeCi et al. eds., 1987). This study examined the quality of what the subjects recalled, specifically, whether young children distort what they freely recall and whether they fill in gaps in memory by adding irrelevant information. Seventy-two students ranging in age from eight to sixteen were examined. The memory of the subjects for the description of the crime was tested and compared in an attempt to assess age-related patterns of memory errors. The study revealed that young children were able freely to recall less of a perceived event but were able to use recognition cues to remember propositions not reported in free recall. *See id.*

95 WAKEFIELD & UNDERWAGER, *supra* note 64. One type of retrieval cue particularly pertinent to the legal system is the leading question. A leading question is one which, within the body of the question, suggests the answer desired by the examiner.

Suggestibility has been defined as the extent to which a child can be made to maintain that events occurred which actually did not or, that details of an event which did occur were different than how actually reported.[96] Children are especially susceptible to confusion and distortion as a result of post-event influences and suggestions.[97]

There are several explanations for a child's susceptibility to report misinformation. The first is the examiner's own expectancy. It has come to be accepted that an individual's expectation about the outcome of an event can influence that outcome.[98] If an interviewer is biased as to a particular outcome, the interviewer's own expectations are often unwittingly reflected in his or her subtle mannerisms.[99] Because children are able to pick up on the slightest of cues,[100] the child will perceive the interviewer's expectation and report in accordance with the suggestion in an attempt to be viewed favorably by the interviewer.[101]

The second explanation for a child's susceptibility to report misinformation is conformity. It has been found that a child's behavior may be changed as a result of real or imagined pressures from another.[102] The child's desire to be accepted by, and receive approval from, the interrogator exerts a powerful influence on the behavior of the child.[103]

Finally, the subsequent reinforcement that is likely to follow a positive response will increase the likelihood that the accepted behavior will continue to occur.[104] This process of interrogation may allow the child to "learn" the story of abuse.[105] These three factors, expectancy, conformity, and reinforcement,

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[96] Loftus & Davies, *supra* note 75, at 53.

[97] *See* Saywitz, *supra* note 94.

[98] WAKEFIELD & UNDERWAGER, *supra* note 64, at 111. Not only has the behavior of the target been modified by the interviewer's expectancy, but the target's interpretation of that behavior may lead to a change in the self-concept and future behavior of the target. Thus, the perceived expectancy has exerted an influence that extends far beyond the original interaction and could significantly affect the life of the target person-perhaps for the better, but as many who do this research fear, often for the worse. *Id.* at 112 (quoting J. Darley & R. Fazio, *Expectancy Confirmation Process Arising in the Social Interaction Sequence*, 35 AM. PSYCHOLOGIST 816, 879 (1980)).

[99] WAKEFIELD & UNDERWAGER, *supra* note 64, at 109.

[100] Mary Ann King & John C. Yullie, *Suggestibility and the Child Witness, in* CHILDREN'S EYEWITNESS MEMORY, (Stephen J. CeCi et al. eds., 1987).

[101] Maria S. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults, in* CHILDREN'S EYEWITNESS MEMORY 53 (Stephen J. CeCi et al. eds., 1987).

[102] WAKEFIELD & UNDERWAGER, *supra* note 64, at 114.

[103] *Id.*

[104] *Id.*

[105] Lawrence D. Spiegel, *Child Abuse Hysteria and the Elementary School Counselor*, ELEMENTARY SCH. GUIDANCE & COUNSELING vol. 22, Apr. 1988, at 275, 280.

may result in the altering of a report or the reporting of an event that did not occur.

One study, conducted by Paul R. Lees-Haley, a psychologist and vocational expert, clearly demonstrates this potential.[106] In a staged demonstration, interviews were conducted with three children using commonly accepted interview techniques.[107] The goal of the experiment was to demonstrate the ease with which children could be manipulated, thereby revealing the potential dangers their testimony poses for the justice system.[108] Each child was sworn to an oath, provided with an anatomically *incorrect* doll, and questioned about situations that might be investigated in real sexual abuse interrogations.[109]

The interviewer was able to elicit from two of the children that their fathers had touched all three of their heads, all six of their hands, and all four of their feet.[110] The third child flatly denied that her father touched her anywhere, . . . ever,. . . in her entire life.[111] Furthermore, all three children agreed that Big Bird had behaved in a lewd and lascivious manner by exposing to them his genitalia, both on earth and on other planets in the solar system.[112] Clearly, if this type of ludicrous information can be elicited from children, the more "subtle" forms of information that may prove particularly damaging to an accused may also be elicited. For example, nowhere were the damaging effects of suggestion felt more dramatically then in the McMartin Preschool trial. After a decade of litigation the ultimate jury foreman stated: "If any one thing put a shadow of doubt on the whole thing, it was the interviewing techniques of therapists who questioned the children after the allegations surfaced."[113]

Unfortunately, such activity is not peculiar to the McMartin case. In 1988, a study examined 36 sexual abuse cases nationwide. It concluded that the large majority of the stories were fabricated.[114] In many cases, social workers and

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[106]Lees-Haley, *supra* note 74.

[107]*Id.* at 38. In the interviews, desired answers were rewarded with smiles and encouraging remarks. Undesired answers were met with facial expressions of skepticism and disappointment as well as voice tones to match. Also, the interviewer would make remarks encouraging the child to respond in the desired manner. Comments such as: "It is o.k. to tell me." and, "Are you sure?" *Id.*

[108]*Id.* at 39. In the experiment, no attempt was made to ask reasonable questions. The point of the experiment was to demonstrate that often a child's answers do not reflect experience but rather the child's perception of the interviewer's desires. *Id.*

[109]*Id.* Each child was presented with a doll that had three heads, six arms, and four legs. *Id.*

[110]*Id.*

[111]Lees-Haley, *supra* note 74, at 39.

[112]*Id.*

[113]*See* Tipping, *supra* note 70.

[114]Ellen Willis, *Child Abuse: The Search for Scapegoats; Usually the Crime Occurs at Home; So Why the Witch-hunt in Day-care Centers?*, NEWSDAY, May 30, 1990, at 61.

therapists, used by the prosecution, subjected children to a range of interview techniques that spanned from leading questions to "coercive tactics that verged on brainwashing."[115] Interrogators often refused to accept a child's denial of molestation and attempted to coerce the child into admission by telling him or her that other children had already admitted being abused and by calling the child stupid or cowardly if he or she would not.[116]

One major concern for the accused is whether the repeated questioning that surrounds allegations of sexual abuse will ingrain in the child's memory the report of an event that did not occur, or whether the child has simply learned the story, thereby creating two separate and coexisting memory traces. If it has ingrained into the child's memory, no subsequent statement of the truth could ever correct the resulting injustice.

Until recently, it was widely accepted that changes in a child's testimony resulted from "memory impairment."[117] This theory argued that once misleading information was suggested to the child, the child's memory of the original event was erased.[118] However, recent studies have tended to dispel this notion of memory alteration. One such study, conducted by Gail Goodman, a member of the Department of Psychology at the University of Denver, found that although children were particularly vulnerable to suggestion, rarely did the suggested information appear in their subsequent free recall.[119] Thus, although they were vulnerable to the original suggestion, the misinformation was not ingrained into memory.

More recent studies have offered other explanations for the likelihood that the child's later reports will contain misinformation. Some argue the child's memory for the truth is rendered inaccessible by suggested information.[120] The

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[115] *Id.*

[116] *Id.* In another case, the defendant, a former day-care teacher, was convicted and sentenced to 47 years in prison for 115 counts of sexual abuse. The defendant was accused of, *inter alia*, repeatedly raping children with kitchen utensils and making them drink urine and eat feces. However, there was no physical evidence that any type of abuse had occurred. Furthermore, as tape recordings of the interview with the children reveal, the investigators pressured the children into making false allegations and refused to take no for an answer. *Id.* at 62.

[117] Memory impairment theory suggests that a child's ability to remember is altered as a result of the suggested information. *See* Zaragoza, *supra* note 101, at 55-56.

[118] *Id.* at 55. For example, if a subject who had witnessed an automobile accident had it suggested to him that there was a yield sign present at the corner (when actually there was a stop sign) and he reports the presence of that yield sign on a later memory test, he does so because the yield sign has erased the stop sign information from his memory. *See* Loftus & Davies, *supra* note 75.

[119] Gail S. Goodman et al., *Child Sexual and Physical Abuse: Children's Testimony, in* CHILDREN'S EYEWITNESS MEMORY 1 (Stephen J. CeCi et al. eds., 1987).

[120] *See* Zaragoza, *supra* note 101, at 55. Children are sometimes unable to recall information that they have perceived. As a result, without the help of a retrieval cue, the stored information remains dormant. Once the proper retrieval cue is presented to the child, the information will become accessible. *Cf.* Saywitz, *supra* note 94 (stating that

original perception is still present in memory but the child is unable to retrieve it. However, proper retrieval cues may bring the truth back to the surface at any time. If the child received the proper stimulus, such as the smell of perfume or the glimpse of a familiar place, the memory could be brought to the surface.[121]

Other explanations focus on the dynamics of the interview process. According to one theory, the child is, at all times, able to freely recall the truth.[122] However, the "social pressures" imposed upon the child cause him to answer in accordance with the suggestion.[123] Furthermore, it has been suggested that the child may simply have no memory of the suggested event and as a result answers in a manner congruent with suggested information. [124] Such results can be seen from the Lees-Haley study.[125]

The above are important considerations for the legal community. Child witnesses can be led away from the truth, either intentionally or inadvertently, through questions posed by careless interviewers.[126] If a child can be influenced into making false allegations or misidentifications, then perhaps the current treatment of recantation evidence needs to be re-evaluated. It may be necessary to temper the standards to make the new trial a more accessible remedy to a wrongly convicted defendant.

B. Conclusion

The potential suggestibility of the child witness reveals a potential for error, an error which has life long consequences for everyone. For the accused, it may mean incarceration and stigma. For the judicial system, it diminishes the reliability of final judgements and society's confidence in those adjudications. Discovering this error and dealing with it are necessary if our criminal justice system is going to operate properly.

While it has been discovered that children are susceptible to suggestive questioning, current research has also established that a child's memory for the

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although children cannot freely recall all information stored in memory, they are able to utilize retrieval cues to access the information).

[121] *See* Toufexis, *supra* note 89, at 87.

[122] Zaragoza, *supra* note 101, at 55.

[123] *See supra* notes 98-105 and accompanying text; *See* Zaragoza, *supra* note 101, at 56. For example, consider a witness who views a theft involving an individual holding a hammer. The witness is later subjected to misinformation implying that the individual was actually holding a screwdriver. The witness who remembers both the hammer and the screwdriver will likely choose the screwdriver on examination. This is because the witness will believe that the experimenter thinks the screwdriver is the critical item, and in an attempt to be viewed favorably by the interviewer will select accordingly. *Id.* at 55-56.

[124] *See* Zaragoza, *supra* note 101, at 56.

[125] *See supra* notes 106-12 and accompanying text.

[126] Toufexis, *supra* note 89, at 89.

original event is not necessarily overwritten by the erroneous information. Rather than impairing memory, "misleading information will be incorporated into testimony where . . . the witness is capitulating to demand or other pressures."[127] This is important because in such situations the child does not believe the misleading information. Rather, the original memory trace is still in existence and therefore should be retrievable.[128] Thus, it may be that "the situations in which the child witnesses are interviewed are particularly suggestive, rather than that child witnesses are particularly suggestible."[129] As a result, there is a likelihood that the original event will be retrieved or, upon reflection, the confusion or distortion which resulted from improper interrogation will be removed. Too often courts fail to recognize this "flip side of the coin" as an explanation for recantation evidence. Such scientific explanations are rarely, if ever, afforded proper consideration when weighing the merits of a defendant's new trial motion.[130]

IV. ANALYSIS OF THE JUDICIAL INFERENCE

In light of current trends in research it is necessary to evaluate the grounds on which the judicial disfavor of recanted testimony is based. If they are no longer reliable, the inference fails in its basic purpose and thus should not be used.[131]

As noted previously, the judicial disfavor of recanted testimony appears to be based upon several broad considerations: first, judicial intuition;[132] second, the fact that recantations are often the result of duress or coercion;[133] and third, broad policies related to the conceptual framework of our legal system.[134]

A. The New Trial Standards and the Child Witness

If one is going to analyze the appropriateness of the current standards for granting new trials when a child's recantation is presented as newly discovered evidence, the historical development of the standards must be explored. Prior to the adoption of the *Berry* rule in the mid-nineteenth century and even up to the time the *Larrison* standard was developed nearly ninety years later, the problem of child recantation had rarely been considered. Cases dealing with

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[127]Brownlyn Naylor, *Dealing With Child Sexual Assault: Recent Developments*, 29 BRITISH J. CRIMINOLOGY, No. 4, Autumn 1989, at 396-97.

[128]*Id.*

[129]J. S. Baxter, *The Suggestibility of Child Witnesses: A Review*, 4 APPLIED COGNITIVE PSYCHOLOGY 393, 404 (1990).

[130]*Id.*

[131]Repka, *supra* note 11, at 1442.

[132]*See infra* part IV.B.

[133]*See infra* part IV.C.

[134]*See infra* part IV.D.

motions for new trials were discovered as far back as the late eighteenth century.[135] However, none were discovered which dealt with motions for new trial when a minor who had testified at trial subsequently recanted.

The *Berry* standard itself was not developed within the recantation context. In *Berry*, the newly discovered evidence was testimony of an individual who claimed to have been hired by the prosecution to befriend the defendant in hopes that he could elicit from defendant evidence of guilt.[136] In *Berry* the recanting witness was willing to testify that he had not obtained any evidence that would have tended to prove the defendant's guilt.[137]

Although *Larrison* was developed to deal with the problem of recantation evidence, it seems clear that the court did not contemplate the problem of child recantation. In *Larrison*, the court, in discussing the character of the witness, noted that "stealing was [the recanting witness'] occupation, and jail his abode."[138] The court went on to state that "witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations."[139]

Based upon the above quoted language, it can be argued that the court envisioned a much different context for the use of the proposed standard, as evidenced by its continual references to the recanting witness' status as a criminal. It would appear to be the character of the witness which rendered the testimony untrustworthy and not a policy reason that would justify such judicial skepticism.

Because the problem of child recantation was scarcely dealt with before the standards for new trial were developed and because one may question the intent of the current standards, one must in turn question their applicability to the child recantation setting. Perhaps the standards for new trial within the child recantation setting need to be rethought. If a conviction is allowed to stand on perjured testimony the integrity of the criminal justice system will be compromised.

B. Judicial Intuition

The notion of judicial intuition ties into the broad discretion that trial judges are granted when reviewing motions for new trials.[140] By nature recanted

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[135] *See* Case of Fries, 9 F. Cas. 826 (C.C.D.Pa. 1799) (No. 5,126) (recognizing that a motion for new trial may be granted).

[136] Berry v. State, 10 Ga. 511 (1851).

[137] *Id.*

[138] Larrison v. United States, 24 F.2d 82, 83 (7th Cir. 1928).

[139] *Id.* at 88.

[140] *E.g.*, Dunbar v. State, 555 P.2d 548 (Alaska 1976) (recognizing that the grant of a new trial rests within the broad discretion of the trial court).

testimony should be treated with caution if the policies of our legal system are to reflect common sense and common experience.

Current research in the area of child development shows that a child is particularly prone to suggestion.[141] However, the memory of a child for the original event is not necessarily overwritten by the misinformation.[142] This principle is demonstrated in *Dobbert v. Wainwright*,[143] where the witness gave as his reason for intentionally perjuring himself at trial, *inter alia*, the influence of and desire to please his social workers.[144] He knew that he was testifying falsely but lied anyway. It was not until years later that he recognized the gravity of his act. He attempted to correct the wrong, but the court denied defendant's motion.[145]

Furthermore, if the memory remains, it may be recalled at any time. Most people, at some point, have confronted a situation which brought back a rush of memories that had not previously been accessed or, that had cleared up a confusing occurrence. For example, in *Parker v. State*,[146] the recanting witness, out one evening, saw an individual that resembled the wrongly convicted defendant and suddenly realized that he was the culpable character.[147] Recently, there has been an influx of individuals coming foreword with newly surfaced recollections of past events.[148] What is happening is that during an evocative or emotional moment, the formerly unaccessible memories are coming to the surface.[149] The proper stimulus is all that is required for the memories to come flooding back to consciousness.

Although it is necessary for a judge to be cautious and to be allowed adequate discretion when ruling on new trial motions, the use of hunches is

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141 *See supra* notes 106-16 and *infra* notes 152-60 and accompanying text.

142 *See supra* part III.

143 468 U.S. 1231 (1984) (Brennan, J., dissenting). In *Dobbert* the defendant's son testified as to the abuse and murder of his nine year old sister. The witness subsequently recanted his testimony eight years later. The lower courts denied the defendant's motion for a new trial. *Id.*

144 Witness Aff., *Id.*

145 *Id.*

146 437 N.W.2d 65 (Minn. 1989).

147 *Id.*

148 *See* Toufexis, *supra* note 89. Some of the more notable cases include a California man who has been convicted of a murder he allegedly committed 23 years ago. The prosecution's primary witness was the defendant's daughter who had allegedly repressed the memory of her friend's murder. Similarly, Roseanne Arnold and former Miss America Marilyn Van Derbur have come foreword with newly surfaced recollections of past sexual abuse. *Id.*

As a response to these types of occurrences, at least twelve states have amended their statute of limitations to allow the state to bring charges upon such delayed discovery of sexual abuse. *Id.*

149 *See* Toufexis, *supra* note 89.

not a sound practice. The need for caution should not require a position of intuitive disfavor. Our legal system relies on demonstrably reliable proof, not hunches. Therefore, the use of discretion should not be arbitrary so as to render convictions unjust.[150] If defendant has not had a fair trial on the merits, the motion for new trial should be granted.[151]

C. Susceptibility to Improper Influences

Courts are cautious when weighing the validity of a defendant's motion for new trial. They tend to suspect that the recantation resulted from duress or coercion,[152] and the judicial suspicion which surrounds recanted testimony is often well grounded.[153] Scientific evidence has shown that children are susceptible to coercion from adults.[154]

But however appropriate this suspicion, it has a tendency to be carried too far. It will often be overextended and result in denial of a motion when a new trial ought to be granted. For example, in *Commonwealth v. Krick*,[155] the defendant, a boarder in the home of the alleged victim, was convicted of statutory rape.[156] Several weeks after trial the child recanted her testimony stating that, at the urging of her father, she alleged the incidents in retaliation for her mother leaving to be with the defendant.[157] Notwithstanding that the recantation was more believable than the original testimony,[158] the court suspected the mother had coerced the daughter into recanting, although there was no evidence of such before the court.[159] A court's belief that recantations

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[150]State v. Knapper, 555 So. 2d 1335 (La. 1990).

[151]People v. Minnick, 263 Cal. Rptr. 316, 317 (Cal. Ct. App. 1989) (quoting People v. Love, 336 P.2d 169, 173 (Cal. 1959).

[152]Coercion has been defined as a compulsion to do that which one's own freewill would deny. BLACK'S LAW DICTIONARY 135 (5th ed. 1983).

[153]Potter v. State, 410 N.W.2d 364, 366 (1987).

[154]*See supra* part III.A.1.

[155]67 A.2d 746 (Pa. 1949).

[156]*Id.*

[157]*Id.* at 748.

[158]At trial the witness testified that the defendant, on two occasions, had come into her bedroom and forced her to have intercourse with him. On neither occasion did the child make an outcry, although admittedly both times her mother would have heard her shout. The defendant's testimony, denying the allegations, was corroborated by the child's mother who testified that the defendant was with her at the time of the alleged offenses. Upon recantation the child stated that she falsified the allegations at the urging of her father and the family with whom the child was now staying in an attempt to get revenge on her mother. *Id.* at 747-48.

[159]The court stated that it was informed by a reputable person that the child's mother had threatened suicide if the child did not recant. However, no depositions were taken, no affidavits received. *Krick*, 67 A.2d at 748.; *See also* Best v. State, 418 N.E.2d 316 (Ind. Ct. App. 1981). Defendant was convicted of child molestation upon the sole testimony

are often obtained through duress or coercion fails to recognize that equally improper motives could be employed to obtain the original testimony.[160]

As noted previously, children are particularly susceptible to suggestion as well as to the dynamics of the interview process.[161] Because of this peculiar susceptibility, it could be argued that leading questions and interview dynamics are a peculiar type of coercion particularly relevant to child testimony.[162] The coercion results from the judicial process itself. Although it is those who are involved in prosecuting the accused who improperly influence the child, too often, courts fail to recognize this phenomenon as an explanation for a child's recantation.[163] If a child, through coercive questioning, can be influenced into reporting an event which did not occur, the truth finding process will be undermined.[164]

D. Public Policy

As noted previously, the judicial disfavor of recantation evidence arises from policy considerations related to the conceptual framework of our legal

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of the child victim. The child subsequently recanted. The court refused to grant a new trial stating "it is unknown what pressures *may have been brought* to bear to influence her to recant her testimony." *Id.* at 320 (emphasis added).

[160] *See* State v. Sanders, 460 A.2d 591 (Me. 1983) (recognizing that it was possible that the child witness's mother had coerced him into making false allegations); State v. Whiteside, 400 N.W.2d 140 (Minn. Ct. App. 1987) (child gave as reason for testifying falsely that she feared the consequences that may have resulted if she changed her story).

This problem is especially prevalent in divorce disputes that give rise to custody battles. It is not uncommon to have one parent raise allegations of sexual abuse against another in an attempt to gain custody of the child. *See* WAKEFIELD & UNDERWAGER, *supra* note 64, at 294.

It is suggested that the child would go along with the allegation in an attempt to ingratiate himself with the parent. The stress of the divorce may make the child more vulnerable to influence from accusing parent. Furthermore, the behavior changes used as evidence of abuse are often very similar to those which accompany the stress of divorce. *See Id.*

[161] *See supra* part III.A.1.

[162] In determing whether a child has been subjected to improper influences the courts should look to the age of the victim, circumstances under which the interrogation was made, type of questions that were asked, form of questions, etc. *See* State v. Bethune, 578 A.2d 364 (N.J. 1990) (where court recognized that a child witness could be subjected to coercive questions that may have an effect on the self-motivation of the report).

[163] *See* State v. Murray, 559 A.2d 361 (Me. 1989). In *Murray*, the child's trial testimony was halting and contradictory. She had a pattern of non-responses, continued to say she was unable to remember, and refused to implicate the defendant as the perpetrator. Although the trial court expressed concern about the witness's behavior, it failed to sustain the defendant's objection to the repetitious questioning. *Id.*

[164] "[S]tatements . . . made directly in response to coercive questioning are inadmissible . . . because coercive interrogation robs the statements of their self-motivation. . . . There is a line . . . between questioning that precedes a complaint . . . and coercive questioning." *Bethune*, 578 A.2d at 366 (alteration in original)

system.[165] Courts are reluctant to overturn the work of a jury when it has operated within its constitutional parameters.[166]

Although this practice is logical, blind adherence to the policy is not. There is no harder crime for an innocent defendant to disprove than sexual abuse.[167] However, courts are not sympathetic to a defendant's plight. The presumption placed upon the verdict is so strong that even when a defendant comes forward with the most shocking evidence of perjury, a sworn affidavit from the chief prosecution witness, the judge will dismiss the motion.[168] In light of such evidence, how can we be certain that there has been a reliable factual determination of guilt sufficient to warrant public confidence in the outcome? Courts need to be more attentive to the special issues surrounding child witnesses. If they are not, innocent defendants may be punished for crimes they did not commit. The need for finality and validity in judgments must be balanced against the need to minimize injustice.[169]

Consideration should be given to those difficulties which confront the prosecution when recantation evidence is presented. Lengthy delays can weaken the state's case. The memory of witnesses may fade, or upon the passage of time the witnesses may no longer be accessible to the court, etc. However, such considerations should be made in light of the realities of child testimony. In sexual abuse litigation the primary evidence is obtained from the victim. As noted from current research in the area of child development, the subsequent recantation may be more accurate than the original testimony. The time that passes between the child's integration into the justice system and his subsequent recantation may provide him with the necessary time to shake the influences of suggestion or sort through the confusion that may have arisen.[170] The subsequent statements may be more reliable than the original trial testimony.

Judicial economy is another issue courts consider when ruling on motions for new trial.[171] Court dockets are already overcrowded, and continual retrial of the same issue would make the system exceedingly ineffective. However,

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[165] *See supra* notes 64-76 and accompanying text.

[166] State v. Perry, 758 P.2d 268, 275 (Mont. 1988).

[167] This assumption is based on the fact that there are usually only two witnesses to the alleged event. Furthermore, the heinousness of the act makes it extremely prejudicial to a defendant. Allegations of sexual abuse tend to strike at the emotions of members of mainstream society. *Cf.* HECHLER, *supra* note 71 (recognizing that the number of accusations and prosecutions have vastly increased over the past decade).

[168] Dobbert v. Wainwright, 468 U.S. 1231, 1235 (1984) (recognizing that the strongest evidence of perjury which a defendant can submit is a recantation affidavit).

[169] *See* Cole v. State, 589 S.W.2d 941, 942-43 (Tenn. Crim. App. 1979) (recognizing that the need for finality in judgments be balanced against a concern for minimizing injustice).

[170] Cobb, *supra* note 11, at 991.

[171] *See supra* notes 55-57 and accompanying text.

this reason for denying a retrial may also be unsound in the child recantation situation. First, the number of instances in which a child recants are low. Furthermore, reforms necessary to protect a potentially innocent defendant need not include a blanket provision requiring the granting of a new trial whenever a witness recants. The proper remedy would provide the judge with sufficient discretion to deny the motion for new trial if he were convinced that it was not meritorious. New trials would only be warranted in certain narrowly defined circumstances.[172] Therefore, the impact upon the system would be slight at best.

It is necessary to recognize that there are serious considerations which would preclude the granting of a new trial in every case in which a witness recants. However, when these reasons are analyzed in light of the particularities of child testimony, one should begin to question the soundness of the current new trial standards as applied in the child recantation setting.

The motion for new trial should serve as one more procedural safeguard to correct errors that were not detected prior to conviction.[173] The current judicial treatment of recantation evidence does not allow the new trial motion to serve this purpose. Courts are denying motions in situations in which they are left with no real indication of which version of the facts is correct. Allowing courts to dismiss in all instances except those in which the defect is crystal clear severely hampers the effectiveness of the remedy.

V. RETHINKING THE STANDARD FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE: AN ALTERNATIVE SOLUTION

Over the past decade much concern has been expressed over the reliability of the child witness. Studies have been conducted which reveal deficiencies in a child's memory and recall,[174] as well as a child's susceptibility to influences which arise from the dynamics of the interview process.[175] As a result, some commentators have called for a re-examination of the competency require-

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[172] *See infra* part V.

[173] An accused is presumed innocent until proven guilty in a fair and reliable manner. This is evidenced by other procedural safeguards which have been incorporated into our legal system to protect an accused. For example, guilt must be proven beyond a reasonable doubt. *E.g.*, United States *ex rel.* Porter v. Kroger Grocery & Baking Co., 163 F.2d 168, 172 (7th Cir. 1947) (stating that a defendant in a criminal action is entitled to the protection of having the government establish his guilt beyond a reasonable doubt. Other safeguards include the constitutional prohibition against double jeopardy, *see* U.S. CONST. amend. V; and rules of evidence such as hearsay, *see* FED. R. EVID. 401-03, and relevance, *see* FED. R. EVID. 801-05, which serve to guarantee that guilt will be established by the most reliable forms of evidence.

[174] *See supra* notes 88-93 and accompanying text.

[175] *See generally supra* part III.A.1.

ments as a means of procedurally protecting a potentially innocent defendant.[176]

Procedural safeguards are necessary to protect a wrongfully accused defendant. However, use of these safeguards is neither a necessary nor proper solution to the problems that surround the child witness. Often, the prosecution's entire case will rest upon the ability of the child to testify.[177] If the child is held to lack the requisite competency requirements the case will not proceed through the justice system.[178]

An effective remedy would strike a more even balance between the competing interests of the parties. Society's interest in seeing those guilty of crimes receiving punishment, in judicial economy,[179] and in finality[180] would not be disregarded by the use of a new standard. However, a convicted defendant would also have a fairer opportunity to obtain a new trial in those instances where perjury has cast doubt upon the validity of his conviction.

This objective could be attained by abandoning the judicial inference currently employed by the courts. What should replace the current practice is a rebuttable presumption of reliability.[181] Once a defendant came forth with a sworn affidavit[182] as evidence of perjury,[183] the burden should be upon the prosecution to show that the recantation is unreliable.

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[176] *See* Christiansen, *supra* note 90.

[177] *See* Myers, *supra* note 5, at 189.

[178] The crime would become virtually nonredressable. Thus, the injustice would be taken from one extreme to another. Under the current system the injustice rests primarily with the accused. First, the competency requirements are very low. *See generally* FED. R. EVID. 601-03. Second, the burden of proof placed upon a moving defendant by the new trial standards makes them virtually impossible to meet. *See supra* part III.A-B. Raising the competency requirements unjustifiably shifts the burden of proof to the prosecution. The end result is to effectively insulate the defendant from prosecution.

[179] *See supra* notes 55-57 and accompanying text.

[180] *See supra* notes 52-54 and accompanying text.

[181] This rebuttable presumption would operate in conjunction with either the *Berry* or *Larrison* standard. There is no reason to abandon the framework already established. The court should make an original credibility determination based upon the proposed standard. *See infra* notes 209-16 and accompanying text. Once this is accomplished, the court should apply the new trial standard that the jurisdiction has adopted.

[182] According to the proposed solution a defendant must present an affidavit to the court before the motion will be considered. Under the current standard there is no formal requirement that the recantation be presented in the form of an affidavit, although nearly all courts require it. *See* State v. Credeur, 328 So. 2d 59 (La. 1976) (adopting the *Berry* standard but not requiring that the defendant produce an affidavit).

[183] A sworn affidavit of the witness is the most direct evidence of perjury that a moving defendant could produce. *See* Dobbert v. Wainwright, 468 U.S. 1231, 1235 (1984).

This burden would be met when the prosecution introduced evidence *sufficient to support a finding*[184] that the recantation was obtained through duress or coercion. Such a requirement would prevent courts from denying motions where the evidence was insufficient to establish that coercive techniques were employed.[185] A formal hearing should be used for purposes of presenting this evidence as well as for testing the validity of the presumption. At this stage, the court would hear the prosecution's evidence and then would interview the child,[186] thereby giving the judge an opportunity to observe the child's demeanor as well as question the child in an attempt to obtain further evidence of motive.[187]

When conducted properly, this hearing could be a significant evidentiary tool which would aid the prosecution in overcoming its presumption. In *Potter v. State*,[188] the court made excellent use of this proceeding to find evidence sufficient to cast doubt upon the genuineness and reliability of the recantation. First, the court allowed the child to testify to her new version of the facts.[189] Then, the court proceeded to question her as to her motive for recanting.[190] The child stated that she made up the story because she was mad at her father and wanted him removed from the household.[191] The court concluded that her reasons for recanting were not supported by the other evidence.[192] Further-

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[184]This is the same burden as is required by Federal Rule of Evidence 104(b). *See* FED. R. EVID. 104(b) and official comment.

[185]*See* Commonwealth v. Krick, 67 A.2d 746 (Pa. 1949) (where the court denied the motion although no evidence of coercion was before the court); Best v. State, 418 N.E.2d 316 (Ind. Ct. App. 1981) (where the court denied the motion stating that "it is unknown what pressures *may have been brought* to bear to influence her." (emphasis added)).

[186]Under the proposed standard the court would have to hold a recantation hearing to allow the judge to observe the demeanor of the child witness in order to determine credibility and to allow the judge to question the child. These questions would help elicit information that may have a bearing on whether the child were subjected to improper influences.

Under the current standards a motion for a new trial may be decided upon the submitted affidavits alone, without holding a formal hearing. *See* CIPES, *supra* note 51, at ¶ 33,02(2); United States v. Kienzle, 896 F.2d 326, 330 (8th Cir. 1990); United States v. DiPaulo, 835 F.2d 46, 51 (2d Cir. 1987). However, some jurisdictions do require that a formal hearing be conducted. United States v. Page, 828 F.2d 1476, 1478 (10th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987); Dunbar v. State, 522 P.2d 158, 160 (Alaska 1974).

[187]In order to effectively rebut the presumption the prosecution must present evidence sufficient to support a finding that improper influences existed.

[188]410 N.W.2d 364 (Minn. Ct. App. 1987).

[189]*Id.* at 367.

[190]*Id.*

[191]*Id.*

[192]*Id.* at 368-69.

more, the recantation, as presented, appeared to be memorized and rehearsed.[193]

Next, the prosecution introduced evidence to further convince the court that the recantation was not truthful. First, the prosection introduced evidence of a conversation that the child had with her social worker in which the child stated that she did not wish to see her father punished.[194] She only wanted to see him receive help for his problem.[195] The prosecution then went on to introduce evidence of a psychological report, the results of which tended to show the child had been abused.[196] Finally, the prosecution submitted evidence concerning statements made by the witness' older sister. After the verdict was handed down, the sister rushed down the corridor of the court house exclaiming that she was going to kill the witness when she found her.[197] Viewing the totality of the evidence, the *Potter* court concluded that the circumstances which surrounded the recantation cast serious doubt upon the veracity of the statements.[198] As a result, the court denied the motion.[199]

Similarly, in *State v. Harold*,[200] the court concluded, after holding its evidentiary hearing, that the recantation lacked credibility. In *Harold*, the child witness had testified against her uncle, who was accused of raping another child. At the hearing, the prosecution presented evidence which tended to prove that subsequent to the child's testimony her family members treated her with animosity.[201] Furthermore, evidence of a conversation was presented during which the child witness said that the victim was not raped, but rather, "gave it up."[202] The child said that she knew this because her aunt had told her so.[203] Upon completion of the prosecution's evidence the court evaluated the child. During this evaluation the court elicited from the child that she was punished for testifying and that once she told her mother she had lied about the incident she was excused.[204] The court then went on to question the child as to her motive for testifying untruthfully. The child stated that she lied at trial

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193*Potter*, 410 N.W.2d at 368-69.

194*Id.*

195*Id.*

196*Id.* at 366-68.

197*Id.* at 366.

198*Potter*, 410 N.W.2d at 368.

199*Id.* at 369.

200444 A.2d 605, 606-07 (N.J. Super. 1982).

201*Id.*

202*Id.* at 607.

203*Id.*

204*Id.* at 606-07.

because the victim promised to give her a dollar if she did so.[205] However, when asked when she was to receive this money she seemed confused and offered conflicting stories.[206] As a result, the court felt that the recantation lacked truthfulness and denied the motion.[207] In both instances the court made superb use of its voir dire. In fact, in *Potter*, the appellate court commended the trial court for its thorough findings of fact.[208]

If the prosecution has effectively carried its burden under the proposed standard, the court would not automatically deny the motion. The defendant would then, and only then, be forced to come foreword with further evidence of truth or face having his motion denied.[209]

Appealability of the order would further serve to protect the defendant's interest. Upon review, great deference would be given to the determination of the trial judge.[210] The lower court's decision would only be reversed if there is a clear showing of abuse.[211] Appellate courts would recognize that the trial judge had the opportunity to witness the child both at trial and at the hearing (if one was held) and therefore was in the best position to determine whether a new trial was warranted.[212]

Furthermore, since the granting of the motion appears to be the exception and not the rule, the use of judicial discretion leans toward denying the motion. Thus, very few cases are overturned on appeal. However, with employment of the rebuttable presumption, the balance would be struck with more weight on the side of granting the motion. Thus, the use of discretion should shift as well, toward the granting of the motion. Therefore, it would be likely that a court would abuse its discretion in not granting defendant's motion. Accordingly, more orders denying new trial motions should be reversed and the defendant will have another level of protection.

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[205] *Harold*, 444 A.2d at 606-07.

[206] *Id.*

[207] *Id.* at 607.

[208] Potter v. State, 410 N.W.2d 364 (Minn. Ct. App. 1987).

[209] Under the current standard, courts often feel that more evidence is required before a motion will be granted. *See* Dobbert v. Wainwright, 468 U.S. 1231, 1235 (1984) (where the Court determined that not withstanding the recantation "'there [was no] evidence or proof to support [the] allegation of perjury.'") (alteration in original)

It is inherently unfair to make a moving defendant present further evidence at the outset of the motion. Generally, there is no other evidence to present. However, once the prosecution has presented evidence sufficient to overcome the presumption, then such a requirement is warranted. The recantation would be so questionable that defendant should be required to further convince the court of its veracity.

[210] Brown v. State, 816 P.2d 818, 821 (Wyo. 1991).

[211] *Id.*

[212] *See, e.g., id.* (recognizing that the trial judge is in the best position to make the determination).

There are several factors which make this proposal a feasible alternative to existing standards. First, in those cases in which the court was left with no real clue as to which version of the child's testimony is true, a new trial would be granted.[213] The prosecution would not have met its burden and thus would have failed to overcome the presumption. Accordingly, the defendant's right to receive a fair proceeding would be protected.

Second, the interests of justice would be well served by the proposed standard. Society's interest in seeing the guilty being punished would not be undermined.[214] The defendant would not be absolved of his past sin. Rather, he would simply receive a new trial free from any impropriety. Whether the defendant should be released would be for a new jury to decide.

Furthermore, the impact on judicial resources would be minimal. The proposed standard would not require the granting of a new trial in every case. In many instances it would be clear that the recantation was obtained through the use of coercion. The combination of the prosecution's evidence along with the judge's questioning of the child would produce sufficient grounds for the court to be satisfied that the recantation had been obtained improperly. As a result, the number of instances in which a new trial would actually be granted should not be sufficient to undermine this societal concern for judicial resources.

Society's interest in finality of judgements,[215] however, would be the concern most impacted. This logically follows from the use of the rebuttable presumption. If this standard were utilized properly, a new trial would be granted in two instances: first, when it was clear that the trial testimony was false; and second, when the judge was uncertain which version of the facts was true. Consequently, more motions would be granted.

Our criminal justice system is replete with procedural safeguards designed to protect an accused.[216] Clearly if we are to err, our system, as designed, dictates that we err on the side of the defendant. Accordingly, a consideration such as finality must be secondary to a just result.

This proposed standard would adequately serve the interests of both the defendant and society without radically changing recantation law.[217] The new

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[213] *But see* United States v. Troche, 213 F.2d 401 (2d Cir. 1954) (where the court denied motion in a similar instance).

[214] *See supra* note 69 and accompanying text.

[215] *See supra* notes 52-54 and accompanying text.

[216] *See supra* note 173.

[217] Under the current standard the judge is to weigh the credibility of the evidence. This is a determination traditionally left to the jury. *See* Solis v. State, 262 So. 2d 9, 10-11 (Fla. Ct. App. 1972) (recognizing that it is not the job of the trial judge to determine whether the witness was telling the truth because in so doing the judge would be preempting the function of the jury), *cert. denied*, 265 So. 2d 372 (Fla. 1972). Thus, the current treatment of recantation usurps the power of the jury.

Furthermore, such an approach should be satisfactory to those commentators who are calling for a rethinking of the competency standards. *See* Christiansen, *supra* note

trial remedy would serve as a procedural safeguard to help reduce the number of innocent defendants who wrongly serve time in prison. Also, one must keep in mind that what the defendant would be granted is a new trial, not an automatic release. If the accused were innocent, the court, by using its power to grant new trials, would be able to correct an egregious error. If the accused were guilty, "truth [would] ultimately prevail, and [an] individual guilty of a crime [would] . . . answer for the same."[218]

VI. CONCLUSION

After analyzing the current standards for, and reasons supporting the motion for new trial, one should begin to feel uncomfortable with our current treatment of child recantation evidence. Relying on a child's evidentiary statements as being absolutely reliable is contrary to both common experience and current research. When courts do so, the adequacy of the factual determination of guilt may be questioned.

"The examination of child witnesses in cases of sexual molestation involves complexities at psychological and legal levels and requires rigorous analysis and assessment to safeguard the rights and interests of the alleged victim and of the [defendant]."[219] In failing to recognize this, courts are ignoring the potential for serious injustice. It is this injustice which destroys the foundation upon which our justice system is built. Courts need to reevaluate the new trial standards in light of the special issues which confront them when a child is presented as a witness. The remedy of "new trial" must serve as an adequate procedural safeguard for a wrongly convicted defendant.

CHRISTOPHER J. SINNOTT

89. Because the courts will be directed to grant a new trial in those situations where a suspected perjury casts a shadow upon the validity of the defendant's conviction, the need to raise competency requirements is tempered. Theoretically, the grant of a new trial should cover those instances where the competency of the child could have come to question.

218People v. Shilitano, 112 N.E. 733, 744 (N.Y. 1916) (Hogan, J., dissenting).

219Herbert N. Weissman, *Forensic Psychological Examination of the Child Witness in Cases of Alleged Sexual Abuse*, AM. J. ORTHOPSYCHIATRY vol. 61, No. 1, Jan. 1991, at 48.