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Children's Memory for Conversations About Sexual Abuse: Legal and Psychological Implications

Thomas D. Lyon* & Stacia N. Stolzenberg**

I. INTRODUCTION

The legal and psychological literature on children's testimony in child sexual abuse cases has largely focused on whether children are allowed to testify, how children testify, and what happens after they do. Those concerned about false convictions have emphasized the benefits of mechanisms to exclude children's testimony that is unreliable because of pre-trial influence or developmental immaturity¹ and the utility of expert testimony on children's suggestibility.² Those concerned about false acquittals have argued for eliminating barriers to receiving children's

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1. See, e.g., Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Sexual Abuse*, 58 CLEV. ST. L. REV. 575, 580-81, 593-94 (2010).

2. See, e.g., Livia L. Gilstrap, Kristina Fritz, Amanda Torres, & Annika Melinder, *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59, 71-73 (2005); Julie A. Buck, Kamala London & Daniel B. Wright, *Expert Testimony Regarding Child Witnesses: Does it Sensitize Jurors to Forensic Interview Quality?*, 35 L. & HUM. BEHAV. 152, 153 (2011).

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testimony,³ the benefits of setting up special devices (such as screens or closed-circuit television) for receiving testimony,⁴ and the utility of expert testimony on child sexual abuse accommodation.⁵ Both sides of the debate have emphasized the extent to which children's reports are subject to adult influence.⁶ Those skeptical of children's abuse claims have emphasized the influence of suspicious adults and overzealous investigators, whereas those inclined to believe children's reports have emphasized the influence of perpetrators (and the adults aligned with perpetrators).⁷

There are two other adults whose influence over child witnesses has received less attention: the prosecutor and the defense attorney. Despite the widespread calls for reform to the trial process, the most important evidence in the majority of child sexual abuse cases is still likely to be the child's testimony in open court. Given the expense and time necessary to retain experts, they are unlikely to testify in any more than a small minority of cases.⁸ Although child abuse prosecutions in other countries have been modified to accommodate children's special needs,

3. See, e.g., Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND PRACTICE 69 (Michael E. Lamb et al. eds., 2011).

4. See, e.g., SUSAN R. HALL & BRUCE D. SALES, COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS (2008); Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239, 253-56, 267-77 (2010); Sophia Rowlands, *Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony in the Face of the Confrontation Clause*, 37 MCGEORGE L. REV. 294, 295-96, 298 (2006).

5. See, e.g., John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y, 1, 46-48 (2010).

6. See, e.g., Shanks, *supra* note 1; Gilstrap et al., *supra* note 2; see also Buck et al., *supra* note 2; Lyon, *supra* note 3.

7. See Shanks, *supra* note 1; Gilstrap et al., *supra* note 2; Buck et al., *supra* note 2.

8. For example, we examined final arguments in 189 cases of child sexual abuse and found that expert testimony for the prosecution explaining the dynamics of child sexual abuse was offered in only 9% of the cases. See, e.g., Stacia N. Stolzenberg & Thomas D. Lyon, *Evidence Summarized in Attorney's Closing Arguments Predicts Case Outcome in Criminal Trials of Sexual Abuse* (unpublished manuscript) (on file with authors) [hereinafter Stolzenberg & Lyon, *Evidence Summarized*].

prosecutors in the United States tend to remain reliant on children's testimony, usually eschewing special procedures that would prevent the jury from seeing the child live in court.⁹ This reliance is especially likely to continue given the United States Supreme Court's decision in *Crawford v. Washington*, which found that uncross-examined testimonial hearsay violates the confrontation rights of criminal defendants.¹⁰ Moreover, even in countries that have adopted quite radical reforms (at least by U.S. standards) such as substituting a videotaped forensic interview for children's testimony, it is still thought to be important to allow the defense to cross-examine the child on the stand.¹¹

Hence, the kinds of questions that children are asked in court by prosecutors and defense attorneys remain of central importance in assessing the outcome of criminal prosecutions in abuse cases. A small but growing literature has examined attorney-child interactions in court. Two themes are predominant. The first concerns question types, mainly focusing on defense attorneys, and typically concluding that defense attorneys' questions are more leading and linguistically more confusing than prosecutors'.¹² It has long been known that leading questions can

9. See John E.B. Myers, Allison D. Redlich, Gail S. Goodman, Lori P. Prizmich, Edward Imwinkelried, *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POLY & L. 388, 411 (1999).

10. See *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

11. See Rachel Zajac & Paula Cannan, *Cross-examination of Sexual Assault Complainants: A Developmental Comparison*, 16 PSYCHIATRY PSYCHOL. & LAW S36, S37 (2009); Rachel Zajac & Harlene Hayne, *The Negative Effect of Cross-Examination Style Questioning on Children's Accuracy: Older Children Are Not Immune*, 20 APPLIED COGNITIVE PSYCHOL. 3 (2006) [hereinafter Zajac & Hayne, *The Negative Effect of Cross-Examination*].

12. See JUDY CASHMORE WITH NICOLA DE HAAS, *THE USE OF CLOSED CIRCUIT TELEVISION FOR CHILD WITNESSES IN THE ACT*. SYDNEY: AUSTRALIAN LAW REFORM COMMISSION (1992); Emma Davies & Fred W. Seymour, *Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand*, 5 PSYCHIATRY PSYCHOL. & L. 47, 54-57 (2009); Gail S. Goodman, Elizabeth Pyle Taub, David P. H. Jones, Patricia England, Linda K. Port, Leslie Rudy, Lydia Prado, John E.B. Myers & Gary B. Melton, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y RES. CHILD DEV. 1, 80 (1992); Zajac & Cannan, *supra* note 11, at S47-S48; Rachel Zajac, Julien Gross and Harlene Hayne, *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY PSYCHOL. & L. 199, 206 (2003) [hereinafter Zajac et al., *Asked and Answered*]; but see Angela D. Evans, Kang Lee & Thomas D. Lyon,

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undermine children's reliability. With respect to linguistic difficulty, lab studies have shown that children err frequently and fail to ask for clarification.¹³ The second theme concerns attorneys' case strategies, again focused on defense attorneys, with researchers emphasizing defense attorneys' attempts to imply that children's memories have been tainted or that children are dishonest.¹⁴ In a pioneering series of studies, Zajac and her colleagues have shown that cross-examinations combining complex and leading questions lead a large percentage of children to change their stories, thus reducing the reliability of their testimony.¹⁵

This research makes an important contribution to our understanding of what occurs in the courtroom, but it is limited in several respects. First, permissible and impermissible approaches are not distinguished. Leading questions are routinely allowed on cross-examination in the United States and elsewhere, and defense attorneys in other jurisdictions are required to directly challenge child witnesses with their theories of the case.¹⁶ In contrast, many complex questions are objectionable, either on the generic grounds of being "vague" or "ambiguous" or on the grounds of statutes that specifically prohibit developmentally

Complex Questions Asked by Defense Lawyers But Not Prosecutors Predict Convictions in Child Abuse Trials, 33 L. & HUM. BEHAV., 258, 262 (2009); Kristen Hanna, Emma Davies, Charles Crothers and Emily Henderson, *Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?*, 19 PSYCHIATRY PSYCHOL. & L. 530, 535 (2012).

13. See Nancy W. Perry, Bradley D. McAuliff, Paulette Tam, Linda Claycomb, Colleen Dostal, & Cameron Flanagan, *When Lawyers Question Children. Is Justice Served?*, 19 L. & HUM. BEHAV. 609, 625 (1995); Cathleen A. Carter, Bette L. Bottoms & Murray Levine, *Linguistic and Socioemotional Influences on the Accuracy of Children's Reports*, 20 L. & HUM. BEHAV., 335, 349 (1996).

14. See Mark Brennan, *The Battle For Credibility—Themes in the Cross Examination of Child Victim Witnesses*, 7 INT'L J. SEMIOTICS L. 51, 53–54 (1994); Hanna, *supra* note 12, at 541; Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 NW. U. L. REV. 1415, 1424 (1998).

15. See Rachel Zajac, Sarah O'Neill & Harlene Hayne, *Disorder in the Courtroom? Child Witnesses Under Cross-Examination*, 32 DEVELOPMENTAL REV. 181, 186 (2012) [hereinafter *Disorder in The Courtroom*].

16. Rachel Zajac & Harlene Hayne, *I Don't Think That is Really What Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. EXPERIMENTAL PSYCHOL.: APPLIED 187, 191–93 (2003) [hereinafter Zajac & Harlene, *I Don't Think That is Really What Happened*].

inappropriate questions.¹⁷ Second, problems with prosecutors' questions are largely overlooked. Prosecutors' questions are often as complex as defense attorneys'.¹⁸ Although their questions are not as leading, they tend to be closed-ended,¹⁹ and are therefore less productive and more error-prone than open-ended questions.²⁰ Third, subtle difficulties may be overlooked. For example, the complex questions studied in the lab tend to be obviously difficult, at least to adults.²¹ If the complexities are obvious, then greater vigilance on the part of judges and attorneys could solve the problems. But if the problems are subtle, either special training is necessary or questioning should be taken out of the attorneys' hands altogether.

Furthermore, subtle problems are as likely to occur in the prosecutor's direct examination as in the defense attorney's cross-examination, because prosecutors are less likely to evince deliberate attempts to change the child's report. Similarly, the challenges to children's credibility assessed in this research are typically overt—questioners directly suggested to children that their reports were in error. However, practice guides routinely suggest to defense attorneys that they undermine children's reports through implying external sources of influence, rather than through overt challenges.²²

17. See Thomas D. Lyon, *Child Witnesses and Imagination: Lying, Hypothetical Reasoning, and Referential Ambiguity*, in THE OXFORD HANDBOOK OF THE DEVELOPMENT OF IMAGINATION 126 (Marjorie Taylor ed., 2013) (questions difficult for children could be objected to as "vague" or "ambiguous"), available at <http://works.bepress.com/thomaslyon/77/>; CAL. EVID. CODE § 765(b) (2004) (questions asked of children under ten years of age must be age-appropriate).

18. See Evans et al., *supra* note 12, at 262; Hanna, *supra* note 12, at 541, Table 4 (defense attorneys tended to ask more complex questions than prosecutors, but the differences were statistically significant in only one comparison).

19. See generally Stacia Stolzenberg & Thomas Lyon, *How Attorneys Question Children about the Dynamics of Sexual Abuse and Disclosure in Criminal Trials*, 20 PSYCHOL. PUB. POL'Y & L. 19 (2014).

20. See MICHAEL E. LAMB, IRIT HERSHKOWITZ, YAEL ORBACH & PHILLIP W. ESPLIN, TELL ME WHAT HAPPENED: STRUCTURED INVESTIGATIVE INTERVIEWS OF CHILD VICTIMS AND WITNESSES 40 (Graham Davies & Ray Bull eds., 2008).

21. See Perry et al., *supra* note 13, at 618–19; Carter et al., *supra* note 13, at 337, 349.

22. See, e.g., John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 944–45 (1994); John E.B. Myers, *Examining the Young Witness: Paint the Child into Your Corner*, 10

In this paper we discuss a research program created to better understand the difficulties that child witnesses encounter when testifying about sexual abuse. We focus on a specific concern: children's memory for conversations about sexual abuse. This problem is often overlooked but likely to be extremely important in child sexual abuse trials, because both prosecutors and defense attorneys see adult influence as a major factor in understanding children's allegations of sexual abuse. From a prosecutor's perspective, it is important to educate the jury about the suspect's ability to influence the child, both to acquiesce to sexual abuse and to remain silent about the abuse. From a defense attorney's perspective, it is important to sensitize the jury to the risks that interested parties have influenced the child's report. Both perspectives will make the child's conversational interactions with adults of central importance.

From a legal perspective, one might assume that children's conversations with others run afoul of the rule against hearsay. However, as we will demonstrate, this is a misconception, both because of the non-hearsay uses of out-of-court statements²³ and the numerous exceptions to the rule against hearsay.²⁴ From a psychological perspective, asking children about conversations raises interesting and underexplored empirical issues. First, there is little research on adults' recall of conversations, let alone research on children. Recall of conversations is likely to raise difficulties in source monitoring (that is, the process by which one recalls the source of information, such as where and when one first learned some fact).²⁵ Therefore, to the extent that children are asked to recall specific conversations, their abilities may be

FAM. ADVOC. 41, 42–43, 48 (1988).

23. See FED. R. EVID. 801(d) (2011).

24. See, e.g., FED. R. EVID. 803, 804, 807 (2011).

25. See generally D. Stephen Lindsay, Marcia K. Johnson & Paul Kwon, *Developmental Changes in Memory Source Monitoring*, 52 J. EXPERIMENTAL CHILD PSYCHOL. 297, 314 (1991); Kim P. Roberts & Martine B. Powell, *Describing Individual Incidents of Sexual Abuse: A Review of Research on the Effects of Multiple Sources of Information on Children's Reports*, 25 CHILD ABUSE & NEGLECT 1643, 1651–52 (2001); Maggie Bruck, Stephen J. Ceci, & Emmet Francoeur, *The Accuracy of Mothers' Memories of Conversations With Their Preschool Children*, 5 J. EXPERIMENTAL PSYCHOL.: APPLIED 89, 103–04 (1999); Amye R. Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall Their Interviews With Children*, 5 PSYCHOL. PUB. POL'Y & L., 355, 365–66 (1999).

taxed. Second, children may not understand the implications of questions about conversations, and thus may be susceptible to questions that imply subtly that the child was coached. Third, the language that is used to ask children about conversations is likely to provide difficulties. For example, whether a disclosure recipient “asked” or “told” the child matters much to the case, but there is evidence that the words are not well distinguished by young children.²⁶

In Section II, we describe how the hearsay rules allow for questions about conversations in child sexual abuse cases. In Section III, we discuss how prosecutors seeking to explain the dynamics of sexual abuse to jurors should be motivated to ask children questions about conversations with suspects, and we describe the results of a study of court transcripts suggesting that prosecutors are not making optimal use of this strategy.²⁷ In Section IV, we discuss how defense attorneys are likely to question children about their conversations with others to whom they disclosed their abuse (disclosure recipients) as a means of suggesting adult influence. Again, we describe the results of a court transcript study, and we find evidence that defense attorneys are indeed pursuing this strategy.²⁸ However, we also show that prosecutors are also asking many questions about conversations with disclosure recipients, and that both prosecutors and defense attorneys often ask specific questions that are likely very difficult for children to answer correctly. Furthermore, we show that overt allegations of coaching or lying by defense attorneys are infrequent, which suggests that their attacks on children’s credibility are subtler. In Section V, we discuss the linguistic difficulties presented by questions about conversations and focus on children’s difficulty in distinguishing between “ask” and “tell,” describing research we have conducted examining court transcripts and assessing children’s understanding in the lab.²⁹ Section VI concludes with

26. See Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2 ABA CENTER ON CHILD. & L. 1, 29 (1999).

27. See Stolzenberg & Lyon, *supra* note 19, at 2, 18.

28. See *id.* at 7, 22.

29. The research we discuss, *infra* Section V(c), was recently presented at the American Psychology and Law Society Annual Conference. See Stacia N. Stolzenberg, Thomas D. Lyon, Christen Phillips, and Jennifer Mascia, *She*

recommendations for legal practitioners and the courts in asking child witnesses questions about conversations.

II. THE LEGAL ADMISSIBILITY OF CHILDREN'S CONVERSATIONS IN SEXUAL ABUSE CASES

At first glance, one might expect there to be little discussion of conversations in child sexual abuse trials because of the rule against hearsay. Informally, a hearsay problem arises whenever a witness refers to what someone (including the witness) has said. Technically, hearsay is an out-of-court statement offered to prove the truth of the matter asserted.³⁰ The law expects that cases be proven through witnesses with first-hand knowledge of the dispute at issue. When this occurs, those witnesses' potential infirmities—insincerity, misperception, memory failure, and ambiguous narration—can be tested by the trial process. Witnesses take the oath (which is intended to make them more honest or sincere), and they are subject to direct- and cross-examination, by which their perception, memory, and narration can be tested. When a witness quotes another person (an out-of-court declarant), the hearsay problem arises: the out-of-court declarant is not under oath and cannot be cross-examined.³¹

Because of the rules against hearsay, one might assume that the child witness will be asked to describe the abuse she suffered and nothing more. However, many out-of-court statements are not considered hearsay, because they are not “offered to prove the truth of the matter asserted.”³² For example, when a plaintiff in a slander case testifies that the defendant said, “You are a scoundrel,” he is not offering the out-of-court statement to prove its truth, and the statement would never be called hearsay.³³ If the statement is relevant simply because it was said (and

Told me, ‘What Happened?’ Young Children’s Misuse of the Verbs “Ask” and “Tell” in the Lab and in Court, American Psychology and Law Society Annual Conference, New Orleans, LA (2014).

30. See FED. R. EVID. 801(c) (2011); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 1:2 (4th ed. 2009) (forty-two states have adopted evidence codes based on the Federal Rules).

31. See MUELLER & KIRKPATRICK, *supra* note 30, § 8:3. Technically, even if the witness quotes herself, this is also hearsay, as long as the statement is offered to prove the truth of the matter asserted.

32. FED. R. EVID. 801(c)(2).

33. *Id.*

regardless of its truth), then it is non-hearsay.³⁴ Furthermore, there are a number of exceptions to the hearsay rule.

In sexual abuse trials, many out-of-court statements will be admissible despite the rule against hearsay. Although they fall within the definition of hearsay, the prosecutor can offer any statements by a criminal defendant as “an opposing party’s statement.”³⁵ Therefore, when the prosecutor calls the child to the stand, any statement the child recalls hearing the suspect say is admissible.³⁶ The rationale is that the defendant is in court and is free to explain any statements he may have made (i.e., he cannot complain that he is unable to cross-examine himself). Furthermore, many of the suspect’s statements, such as threats, would not even be considered hearsay, since they are often offered for the non-hearsay purpose of explaining the effects of the words spoken on the child (e.g. compliance or secrecy).³⁷ Therefore, the prosecutor can ask a child about her interactions with the suspect both before and after the alleged abuse, making it easy to elicit reports of preparation before the abuse and efforts to keep the abuse a secret. The suspect’s statements can also prove sexual intent; for example, if the suspect has told the child to keep the touching a secret, this makes it unlikely that the touching constituted appropriate caretaking.³⁸

A number of hearsay exceptions enable the prosecutor to introduce disclosures of abuse by the child. These statements can be elicited from the child or, more commonly, from anyone who heard the child’s statement. One hearsay exception is for excited utterances, which in the classic case involves a report of abuse shortly after the abuse occurred and while the child is upset by the abuse.³⁹ The exception has been expansively interpreted so that both the temporal requirement and the excitement

34. MUELLER & KIRKPATRICK, *supra* note 30, § 8:18.

35. FED. R. EVID. 801(d)(2)(A).

36. *See id.*

37. *See* JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE, CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 7.08 (2013).

38. *See, e.g.*, CAL. PENAL CODE 11165.1 (West 1987) (stating that the statutory definition of sexual abuse “does not include acts which may reasonably be construed to be normal caretaker responsibilities”).

39. FED. R. EVID. 803(2); MYERS, *supra* note 37, § 7.13.

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requirement are relaxed in child abuse cases.⁴⁰ Another hearsay exception is for statements made for the purpose of medical diagnosis or treatment, which will cover many statements made by the child to medical personnel, and to non-medical persons if the child was motivated by a desire to receive care.⁴¹ This exception has also been broadened, although its use for the child's identification of a perpetrator and for statements made to mental health professionals is controversial.⁴² Finally, most states have adopted special hearsay exceptions for children's complaints of abuse.⁴³ These provisions vary, but common requirements limit the statements to complaints of abuse by younger children (typically pre-teens).⁴⁴

If the child fails to testify altogether, concern for the defendant's constitutional right to confront witnesses will place limits on the kinds of hearsay from the child that can be admitted; if the child's statements constituted "testimonial hearsay," they are inadmissible.⁴⁵ "Testimonial hearsay" is still being defined, but has been applied by many courts to formal questioning of the child by law enforcement, by child protective services in many (if not most) circumstances, and by forensic interviewers at child advocacy centers.⁴⁶ It is important to remember, however, that if the child testifies, the constitutional objection to admissibility of any hearsay from the child disappears.⁴⁷

A number of hearsay exceptions (and non-hearsay use of statements) apply to concerns about the consistency or inconsistency of a child's reports with the child's testimony. A child's prior statements that are consistent with the child's

40. *Id.*

41. FED. R. EVID. 803(4); MYERS, *supra* note 37, § 7.15.

42. Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 L. & CONTEMP. PROBS. 47, 47-49 (2002).

43. See, e.g., THOMAS GARDNER & TERRY ANDERSON, EVIDENCE: PRINCIPLES AND CASES 174 (7th ed. 2009); Glen Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1 (1984).

44. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 369-70 (3d ed. 2004).

45. See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

46. See Thomas D. Lyon & Julia Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1183 (2012).

47. See *id.*

testimony may be admissible under the prior consistent statements hearsay exception.⁴⁸ The exception typically requires, however, that those statements in some way rebut a claim of fabrication or influence, and they can do so by having occurred prior to the time that something influenced the child to falsify her story.⁴⁹ For example, if the defense argues that the police's suggestive questioning influenced the child's report, then the child's disclosure to a friend before the police were notified could be admissible as a prior consistent statement. It is also possible for prior consistent statements to be admitted as non-hearsay rehabilitation. The rationale is that the consistency between the prior statement and the child's current testimony rebuts the attack on the child's testimony.⁵⁰ For example, if the defense suggests through cross-examination that the child does not recall the original event, then the prosecutor could introduce the child's prior consistent statements (made closer in time to the event) to argue that the consistency rebuts the attack on the child's memory.

Another hearsay exception applies to a child's statements that are inconsistent with that child's testimony. Some states require these prior statements to have been made under oath, which would essentially limit them to preliminary hearing testimony.⁵¹ Furthermore, prior inconsistent statements can also be offered as non-hearsay impeachment. The rationale is that the prior statements are not offered for their truth, but to show that the child makes inconsistent claims and therefore should not be believed generally.⁵² The prosecution and defense will use prior inconsistencies differently. The prosecution might seek to admit prior inconsistent statements if a child recants some or all of her disclosure on the stand. The defense is likely to use prior inconsistencies to argue that the child is lying on the stand, or that her story is the product of suggestion. The rationale is that a

48. FED. R. EVID. 801(d)(1)(B) (2011).

49. *Id.*

50. *See id.*; *see also* FED. R. EVID. 801(d)(1)(B) (advisory committee notes).

51. FED. R. EVID. 801(d)(1)(A). *But see* CAL. EVID. CODE § 1235 (not requiring that prior inconsistent statements have been under oath at a proceeding).

52. *See* MUELLER & KIRKPATRICK, *supra* note 30, § 8:17.

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child whose report is inconsistent over multiple disclosures is unlikely to be true.

Because many statements made out of court can be admitted under a hearsay exception or offered for a non-hearsay purpose, it should not be surprising that children may be asked many questions about conversations when they testify. However, it is important to note that the conversations can be admitted through any person who heard the statements.⁵³ Therefore, although it would probably be necessary to ask the child about many of the suspect's statements (because they would be made in private and because the suspect would not admit having made them), the child's conversations with other adults could be elicited through the adults' testimonies rather than the child's. Prosecutors concerned with children's limited memory and linguistic skills might be inclined to avoid asking child witnesses questions about specific aspects of their abuse disclosures, whereas defense attorneys hoping to undermine children's credibility might direct most of their questions to the child. Therefore, one is likely to see differences in the kinds of questions that prosecutors and defense attorneys ask children about their prior conversations.

We recently completed the first study to examine how child witnesses are questioned about their conversations. We reviewed seventy-two transcripts of six- to sixteen-year-old child witnesses testifying to child sexual abuse in Los Angeles County criminal cases.⁵⁴ We were interested in whether defense attorneys and prosecutors did what a reading of the dynamics of sexual abuse disclosures would suggest that they would do: Do prosecutors ask questions focusing on conversations with suspects, in which suspects cajole children into sexual acts and then threaten them not to disclose? Do defense attorneys ask questions focusing on prior disclosures as a means of identifying external influences on children's reports?

53. FED. R. EVID. 801(c).

54. See Stolzenberg & Lyon, *supra* note 19.

III. PROSECUTORS' QUESTIONS ABOUT CHILDREN'S CONVERSATIONS
WITH SUSPECTS: EXPLAINING THE DYNAMICS OF SEXUAL ABUSE

A. *The Relevance of Children's Conversations from the
Prosecution's Perspective*

From the prosecutorial perspective, the unique dynamics of sexual abuse—including abuse by an adult close to the child, grooming behavior, and inducements to secrecy—lead children to report abuse only reluctantly and often inconsistently.⁵⁵ Prosecutors will often attempt to explain how the suspect accomplished abuse without the use of force, because the jury may envision abuse as akin to violent rape.⁵⁶ It is also important to explain why the victim kept the abuse a secret for a lengthy period of time, because the jury may perceive delayed disclosure as evidence that the allegation was fabricated.⁵⁷ Although jurors recognize that delayed disclosure is commonplace,⁵⁸ they are more likely to believe children when disclosure occurs soon after the alleged abuse and when the child's disclosure does not change over time.⁵⁹

Because of their pre-existing relationship with the child and their grooming methods, perpetrators need not use force in order to accomplish abuse or to guarantee the child's silence. In most sexual abuse cases, the suspect is familiar to the child, often a close relative.⁶⁰ The relationship gives the perpetrator access to the child and allows the perpetrator to capitalize on the child's

55. See Jennifer Long, John Wilkinson & Julie Kays, *10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member*, STRATEGIES: THE PROSECUTORS' NEWSLETTER ON VIOLENCE AGAINST WOMEN, Sept. 2011, at 2.

56. KENNETH V. LANNING, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR PROFESSIONALS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN* 139 (5th ed. 2010).

57. Long et al., *supra* note 55, at 2.

58. See ELLEN GRAY, *UNEQUAL JUSTICE THE PROSECUTION OF CHILD SEXUAL ABUSE* 164 (1993).

59. See John A. Yozwiak, Jonathan M. Golding & D.F. Marsil, *The Impact of Type of Out-of-Court Disclosure in a Child Sexual Assault Trial*, 9 CHILD MALTREATMENT 325, 330 (2004).

60. See Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse*, 27 CHILD ABUSE & NEGLECT 525, 530 (2003); see also BARBARA E. SMITH & SHARON ELSTEIN, *THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE* 30–32 (1993).

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trust. The closeness of the relation increases the likelihood of delay.⁶¹ Research that questions perpetrators about their *modus operandi* reveals how perpetrators actively develop trust, compliance, and silence.⁶² For example, Kaufman and colleagues interviewed 228 perpetrators, who reported that over time they would increasingly talk about sex, encourage children to wear less clothing, and tell children that they would “teach them something” before engaging in sexual acts.⁶³ The progressive nature of the abuse enabled perpetrators to assess the risk of disclosure before the sexual behavior became overt, so that any disclosures could be explained as innocent or misinterpreted.⁶⁴ Once overt sexual acts occurred, children would be deterred from disclosing because the earlier acts made them feel as if they had consented and led them to fear that they would be blamed for failing to complain.⁶⁵

Perpetrators sometimes overtly threaten children not to disclose the abuse. In 27–33% of criminal cases, children recalled overt threats.⁶⁶ According to Smith and Elstein,

[W]arnings ranged from pleas that the abuser would get into trouble if the child told (or that the abuser would be sent away and the child would never see them again—a powerful message to a young child whose abuser is also a ‘beloved’ parent), to threats that the child would be blamed for the abuse (especially troubling were children who were told that the defendant’s intimate—the child’s mother—would blame the child for ‘having sex’ with the defendant and would thus turn against him or her), to ominous warnings that the defendant would hurt or kill

61. LOUISE DEZWICK SAS & ALISON HATCH CUNNINGHAM, *TIPPING THE BALANCE TO TELL THE SECRET: THE PUBLIC DISCOVERY OF CHILD SEXUAL ABUSE* 24 (1995), available at http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Peter_Jaffe/pdf/Tipping.pdf.

62. Benoit Leclerc, Jean Proulx & Eric Beauregard, *Examining the Modus Operandi of Sexual Offenders Against Children and its Practical Implications*, 14 *AGGRESSION & VIOLENT BEHAV.* 5 (2009).

63. Keith L. Kaufman et al., *Factors Influencing Offenders’ Modus Operandi: An Examination of Victim-Offender Relatedness and Age*, 3 *CHILD MALTREATMENT* 349, 353 (1998).

64. See Reuben A. Lang & Roy R. Frenzel, *How Sex Offenders Lure Children*, 1 *ANNALS OF SEX RESEARCH* 303, 308 (1988).

65. See Kaufman et al., *supra* note 63, at 350–55.

66. See GRAY, *supra* note 58, at 90; SMITH & ELSTEIN *supra* note 60, at 93.

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the child (or someone he or she loved) if they revealed the abuse.⁶⁷

Perpetrators themselves have described how they discourage children from disclosing.⁶⁸ They emphasize the way in which disclosure will lead the child to lose positive factors in the child's life, such as love, affection, friendship, and family stability.⁶⁹ For example, in a criminal sample of convicted offenders of child sexual abuse, 33% of offenders specifically told their victims not to tell and an additional 20% of offenders reported having threatened loss of love or said the that child was to blame to maintain abuse and discourage disclosure.⁷⁰ Conte and colleagues similarly found that perpetrators encouraged silence by telling victims that "their friends wouldn't like them anymore," their mom might be mad, or just by generally advising the child to "be careful not to tell anyone."⁷¹

The efficacy of perpetrators' methods is demonstrated by delays in disclosure. Criminal samples reveal that children typically delay disclosure until multiple instances of abuse have occurred, with one-third of children waiting at least a year.⁷² In addition, children are capable of describing their reasons for failing to disclose. Sas and Cunningham interviewed 135 children after prosecution and found that the most common reasons for delaying disclosure were: (a) fear of harm to self or others, (b) fear of being rejected by a non-abusive caregiver, (c) concern for family and thinking that non- or delaying disclosure might protect family, (d) fear that their disclosure would not be believed, (e) concern that bad consequences will harm the perpetrator, (f) inability to trust anyone to disclose to, and (g) wanting to protect

67. SMITH & ELSTEIN, *supra* note 60, at 93.

68. See Michelle Elliot et al., *Child Sexual Abuse Prevention: What Offenders Tell Us*, 19 CHILD ABUSE & NEGLECT 579, 586 (1995); see also Stephen W. Smallbone & Richard K. Wortley, *Child Sexual Abuse: Offender Characteristics and Modus Operandi*, AUSTL. INSTIT. OF CRIMINOLOGY: TRENDS & ISSUES IN CRIME & CRIMINAL JUST., Feb. 2001, at 5.

69. See Lang & Frenzel, *supra* note 64, at 311–12; Smallbone & Wortley, *supra* note 68, at 5; SMITH & ELSTEIN *supra* note 60, at 93.

70. See Elliott et al., *supra* note 68, at 582–86.

71. Jon R. Conte, Steven Wolf, & Tim Smith, *What Sexual Offenders Tell Us About Prevention Strategies*, 13 CHILD ABUSE & NEGLECT 293, 297–98 (1989).

72. See SAS & CUNNINGHAM, *supra* note 61, at 27.

other children, including siblings, from abuse.⁷³

These findings suggest that, from the prosecutorial perspective, much can be understood about the dynamics of abuse by inquiring into what the suspect has said to the child, both to reveal grooming and to uncover any admonishments against disclosure.⁷⁴ Furthermore, it is likely that the child will have delayed disclosing the abuse, and it is worthwhile to explore the reasons for that delay in order to help the jury understand. Indeed, prosecutors are advised to explore the dynamics of abuse,⁷⁵ and the courts have been receptive to efforts to educate juries about the reasons behind children's delays and inconsistencies.⁷⁶

B. *What Prosecutors Actually Do In Court*

As we noted above, we reviewed the testimony of seventy-two six- to sixteen-year-old child witnesses testifying to child sexual abuse in Los Angeles County criminal cases.⁷⁷ Initially, it is worth noting that attorneys gave children little opportunity to answer in their own words.⁷⁸ Although the defense attorneys were more inclined to ask overtly suggestive questions than prosecutors, a majority of both prosecutors' and defense attorneys' questions could be answered simply "yes" or "no" (combining across yes-no questions, declarative questions, and suggestive questions).⁷⁹ As a result, over 50% of children's responses to attorneys' questions were in fact unelaborated yes and no responses. Furthermore, children virtually never spontaneously mentioned conversations; less than 1% of the question-answer pairs that mentioned a conversation were spontaneous reports by the children.⁸⁰ Hence, children relied on the attorneys to develop details about their conversations.

73. *Id.* at 27–28.

74. *See id.*

75. *See* Long et al., *supra* note 55, at 1–7.

76. *See generally* MYERS, *supra* note 37, § 6.18 (citing cases which hold that expert testimony "is admissible to rehabilitate a child's credibility following impeachment focused on delayed reporting, inconsistency, or recantation").

77. Stolzenberg & Lyon, *supra* note 19.

78. *See id.* at 18.

79. *Id.* at 12.

80. *Id.*

We found that children were asked about conversations with suspects in virtually all (92%) of the trials.⁸¹ We classified perpetrator statements to the child as pertaining to commands during the abuse (i.e., giving the child instructions), seduction (statements encouraging the child to engage in sexual activity), silencing (attempts to keep the abuse a secret), and threats (references to the negative consequences of disclosure). Not surprisingly, prosecutors were more likely to ask about commands and silencing than defense attorneys, and asked a larger number of questions about all four categories of suspect statements.⁸² We also analyzed children's statements to the perpetrator, and considered whether those statements were protesting abuse.⁸³ Here, too, prosecutors were more likely than defense attorneys to ask about children's statements.⁸⁴

However, prosecutors appeared to put more emphasis on the coercive aspects of the abusive acts than on suspects' seductive preparation or efforts to keep the abuse a secret.⁸⁵ Of those prosecution questions that referenced either commands or seduction, 75% referenced commands.⁸⁶ Similarly, of prosecutors' questions that asked about children's statements, over 80% referenced protests.⁸⁷ Furthermore, whereas prosecutors asked about perpetrator commands in a majority of the cases (71%), they asked about seduction (38%), silencing (36%), or threats (15%) in only a minority.⁸⁸

Prosecutors were also disinclined to ask children why they had disclosed or not disclosed abuse, asking each type of question in less than a third (31%) of trials.⁸⁹ This was particularly curious because in 93% of the trials, child witnesses denied disclosing some information (90% of cases by the prosecution, 83% by the defense).⁹⁰ On average, prosecutors elicited four denials per child,

81. *Id.* at 13.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 37.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 15.

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and defense attorneys seven.⁹¹ Hence, children were denying that they had disclosed information, but they were only infrequently asked to explain why.

The greater emphasis on coercion was surprising, given both the emphasis on the seductive aspects of child molestation that is stressed in the literature and on legal commentator's advice to prosecutors to emphasize the ways in which children accommodate abuse.⁹² One possibility we considered was whether the cases prosecuted are different than the cases discussed in the literature. Indeed, there is evidence that prosecutors will weed out cases that are most likely to involve seduction and silencing rather than a single violent act of assault.⁹³ Nevertheless, children knew the suspect in 92% of the cases (and accused a family member in 56%), and children in 70% of the cases alleged multiple instances of abuse.⁹⁴ Force was charged in only 10% of the cases.⁹⁵ These case characteristics strongly suggest that seduction and silencing played a significant role in accomplishing repeated abuse.

This raises additional explanations for prosecutors' emphasis on coercion. Prosecutors may be unaware of the manipulative aspects of abuse. Protocols for interviewing children focus on eliciting details about abuse⁹⁶ and do not provide recommendations regarding questions about the behavior of the suspect with the child before abuse was initiated. Therefore, prosecutors might receive cases without any information that would assist them in understanding the process by which the perpetrator molested the child over time. Prosecutors might deliberately avoid questioning children about the seductive aspects of abuse, because of concerns regarding how juries would interpret such testimony. Jurors may view molestation cases with seductive elements as less serious. One study found that male mock jurors inquired into possible consent in cases involving children as young as twelve years of age.⁹⁷

91. *Id.* at 19.

92. *Id.*

93. *See* GRAY, *supra* note 58, at 114.

94. Stolzenberg & Lyon, *supra* note 19, at 19–20.

95. *Id.* at 10.

96. LAMB ET AL., *supra* note 22.

97. Peter K. Isquith, Murray Levine & Janine Scheiner, *Blaming the Child: Attribution of Responsibility to Victims of Child Sexual Abuse*, in

We think it is likely that prosecutors are missing an opportunity to help jurors understand the dynamics of sexual abuse when they fail to inquire into the child's relationship with the suspect before the abuse began and the ways in which the suspect maintained the child's acquiescence to abuse over time. If the prosecutor doesn't ask, then jurors may be puzzled by the child's reports of repeated abuse without any indication of outcry or resistance. It seems particularly wrongheaded to fail to ask children for their reasons for disclosing and for delaying disclosure, because research has shown that children are capable of explaining their disclosure decisions.⁹⁸ Since, as noted above, courts have been friendly toward expert testimony that explains to jurors why children delay disclosing,⁹⁹ it seems sensible to ask children directly for their reasons.

In our study examining seventy-two cases, we were not able to show that the kinds of questions prosecutors asked mattered to the verdict (though there was a hint: juries were marginally more likely to convict if the prosecution asked questions about motives for non-disclosure).¹⁰⁰ However, in a larger sample, we found evidence that the common dynamics of sexual abuse made it more difficult to obtain a conviction: jurors were much less likely to convict if force was not charged and if there was evidence that the child maintained contact with the suspect after the abuse allegedly occurred.¹⁰¹ This suggests that prosecutors should attempt to teach jurors that child sexual abuse is less like violent rape and more like ongoing and subtle manipulation.

CHILD VICTIMS, CHILD WITNESSES 203, 222–23 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

98. See, e.g., SAS & CUNNINGHAM, *supra* note 61, at 27.

99. See MYERS, *supra* note 37, at § 6.18 (citing cases which hold that expert testimony “is admissible to rehabilitate a child's credibility following impeachment focused on delayed reporting, inconsistency, or recantation”).

100. Stolzenberg & Lyon, *supra* note 19, at 25.

101. See Stolzenberg & Lyon, *Evidence Summarized*, *supra* note 8.

IV. DEFENSE ATTORNEYS' QUESTIONS ABOUT CHILDREN'S
CONVERSATIONS WITH DISCLOSURE RECIPIENTS: EXPLAINING THE
DYNAMICS OF SEXUAL ABUSE DISCLOSURE

A. *The Relevance of Children's Conversations from the Defense
Perspective*

When children first disclose abuse, a chain of events is set into motion, including multiple formal and informal conversations with family members, medical professionals, and legal authorities. For those whose cases make it to criminal trials, children will have reported their abuse numerous times to various recipients over a lengthy period of time. These factors present unique concerns regarding children's ability to recall prior disclosure conversations. One study found that sexually abused children received on average four formal interviews (e.g., with law enforcement, Department of Child and Family Services/social workers, medical or mental health professionals, and school personnel) and two informal interviews (e.g., with caregivers and relatives) in the course of dependency court proceedings.¹⁰² It is likely that children in criminal court proceedings experience still more interviews because of the longer delays before trial in criminal cases. These contacts provide a basis for the defense to claim that the child's report is the product of external influence.

From the defense perspective, children are vulnerable to suggestion, and the fact that they have typically been questioned about abuse several times before trial makes it difficult to elicit the truth, as these pre-trial interviews and conversations may have altered the child's report.¹⁰³ The defense will often argue that the alleged victim is making a false report and will likely explore how others have exerted influence over the child, leading the child either to lie or to believe falsely that abuse occurred. Caregivers (and others close to the child) may be motivated to coach the child, and both caregivers and investigators may have strong suspicions of abuse that they communicate through

102. Lindsay C. Malloy, Thomas D. Lyon & Jodi A. Quas, *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD ADOLEC. PSYCHIATRY 162, 165 (2007).

103. Kathleen B. Stilling, *Developing the Defense in Child Sexual Assault Cases*, 16 THE WISCONSIN DEFENDER 1, 4–5 (2008), available at <http://www.buting.com/KBS-Wis-SPD-Article.pdf>.

suggestive questioning. Commentators have stressed that when the suspect is an ex-spouse or ex-partner of a concerned adult, that adult may be the source of the child's report.¹⁰⁴ Although jurors understand that children, particularly young children, are susceptible to suggestion,¹⁰⁵ they may not be adequately sensitive to the suggestiveness of different types of questioning.

The research on children's suggestibility is vast, and comprehensive reviews are available.¹⁰⁶ Research has documented a number of ways in which children, particularly young children, can be led to make false reports: selective reinforcement of the desired response;¹⁰⁷ guided visualization of the fictitious event;¹⁰⁸ negative stereotyping of the suspect,¹⁰⁹ and repeated suggestions from parents.¹¹⁰ There is also a fair amount

104. Nicholas M.C. Bala, Mindy Mitnick, Nico Trocme & Claire Huston, *Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?* 13 J. FAM. STUD. 26, 28–29, available at https://secureweb.mcgill.ca/crcf/sites/mcgill.ca/crcf/files/2007Sexual_Abus_Allegations_Parental_Separation.pdf; see also David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 30 (1987).

105. Jodi A. Quas, William C. Thompson & K. Alison Clarke-Stewart, *Do Jurors "Know" What Isn't So About Child Witnesses?*, 29 L. & HUMAN BEHAV. 425, 440 (2005).

106. Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANNU. REV. PSYCHOL. 419, 434–36 (1999), available at <http://www.arts.uwaterloo.ca/~doneill/cogsci600/Kenyon.pdf>; see also Gail S. Goodman & Annika Melinder, *Child Witness Research and Forensic Interviews of Young Children: A Review*, 12 THE BRIT. PSYCHOL. SOC'Y 1, 9–10 (2007).

107. Sena Garven, Majes M. Wood, Roy S. Malpass & John S. Shaw, *More Than Suggestion, The Effect of Interviewing Techniques from the McMartin Preschool Case*, 83 J. APPLIED PSYCHOL. 347, 354 (1998); see also Sena Garven, James M. Wood & Roy S. Malpass, *Allegations of Wrongdoing, The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. APPLIED PSYCHOL. 38, 45 (2000).

108. Stephen J. Ceci, Elizabeth F. Loftus, Michelle D. Leichtman & Maggie Bruck, *The Possible Role of Source Misattributions in the Creation of False Beliefs Among Preschoolers*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 304, 315 (1994), available at <http://www.shoreline.edu/dchris/psych209/Documents/Ceci%20and%20Loftus.pdf>.

109. Michelle D. Leichtman & Stephen J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers' Reports*, 31 DEVELOPMENTAL PSYCHOL. 568, 572 (1995), available at <http://www.psy.cmu.edu/~rakison/leichtman.pdf>.

110. Debra Ann Poole & D. Stephen Lindsay, *Children's Eyewitness Reports After Exposure to Misinformation from Parents*, 60 J. EXPERIMENTAL CHILD PSYCHOL. 129, 147 (1995); see also Debra Ann Poole & D. Stephen

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of research demonstrating children's susceptibility to explicit coaching to make false claims.¹¹¹

For the defense, it should be of interest to determine what disclosure recipients have said to the child. This may reveal biases of the recipients and sources of influence. Furthermore, the defense is likely to question the child about different disclosures, including: the initial disclosure, typically to a caregiver or a teacher; formal disclosures to law enforcement and social services; and disclosures to the prosecuting attorney, in order to attempt to show that the child's abuse report evolved over time. Indeed, practice guides provide this advice to defense attorneys representing child sexual abuse suspects,¹¹² and the courts have been receptive to defense claims of child suggestibility.¹¹³

B. *What Defense Attorneys Actually Do in Court*

In the study we described above, in which we examined the courtroom testimony of seventy-two six- to sixteen-year-old children in child sexual abuse criminal trials, we found that children were asked questions about their disclosures of abuse in all cases.¹¹⁴ First, we examined when and how often children were asked about specific recipients. Virtually all (88%) of the questions were about specific recipients, and most of these involved disclosures to the child's mother or a police officer.¹¹⁵ On average, children were asked about five different recipients.¹¹⁶ Defense attorneys were more likely than prosecutors to ask about specific recipients, but 85% of prosecutors' questions were nevertheless specific.¹¹⁷ Defense attorneys also asked about more recipients on average than prosecutors, but even prosecutors

Lindsay, *Children's Eyewitness Reports After Exposure to Misinformation From Parents*, 7 J. EXPERIMENTAL PSYCHOL.: APPLIED 27, 49 (2001).

111. Thomas D. Lyon, Lindsay C. Malloy, Jodi A. Quas & Victoria A. Talwar, *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEV. 914, 927-28 (2008); see also Jodi A. Quas, Elizabeth L. Davis, Gail S. Goodman & John E. B. Meyers, *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 CHILD MALTREATMENT 60, 64-65 (2007).

112. Stilling, *supra* note 103, at 4-5.

113. Myers, *supra* note 22, at 944-45.

114. Stolzenberg & Lyon, *supra* note 19, at 2, 10.

115. *Id.* at 6.

116. *Id.* at 7.

117. *Id.*

asked about an average of three different disclosure recipients.¹¹⁸

We then examined specifically how attorneys' questions referenced disclosure content and individual disclosure conversations. We found that most of the questions were general (i.e., they referred to disclosing abuse generally), but nevertheless in 80% of the trials children were asked at least one question about specific content, and prosecutors and defense attorneys were equally likely to do so.¹¹⁹ Similarly, in 80% of the trials children were asked about a specific disclosure conversation, and, again, prosecutors and defense attorneys were equally likely to ask these types of questions.¹²⁰

Defense attorneys differed from prosecutors in a couple of respects. They asked more questions about specific content, and more questions in which they referenced both specific content and a specific conversation.¹²¹ Indeed, they were twice as likely as prosecutors to ask about specific content within a specific conversation (e.g., "Did you tell [your father] when he came into your room at Thanksgiving, that the suspect dragged you out of your room?"), asking this type of question in 60% of the trials.¹²²

The fact that child witnesses were asked a large number of specific questions about their prior disclosures calls into question children's abilities to remember what they previously discussed. Compounding the problem is that there are routinely substantial delays between children's disclosures and their trial testimony;¹²³ the average delay in the present sample was eight months between charges being filed and the start of the trial.

There are several respects in which children's memory for conversations is likely to be limited. First, when children are asked about specific disclosure recipients, details, and disclosure conversations, they may exhibit some confusion regarding what was said to whom and when. Distinguishing among different

118. *Id.*

119. *Id.* at 5–6.

120. *Id.* at 5.

121. *Id.* at 5–6.

122. *Id.* at 6.

123. Gail S. Goodman, Elizabeth Pyle Taub, David P.H. Jones, Patricia England, Linda K. Port, Leslie Rudy & Lydia Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y RES. CHILD DEV. 1, 19 (1992); see also ELLEN GRAY, UNEQUAL JUSTICE 93 (1993).

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conversations requires source monitoring, which exhibits large developmental changes.¹²⁴ Because children have multiple disclosure conversations, questions about individual conversations present difficulties analogous to those encountered by children when attempting to recall a single instance of a repeated event.¹²⁵

Second, children may have difficulty in distinguishing between what they said and what their conversational partner said, another type of source monitoring. Research examining adults' ability to remember their conversations with children has found that adults have difficulty recalling how information was elicited, whether statements were spontaneous or prompted, and who uttered specific utterances.¹²⁶ We are not aware of any research examining children's abilities to identify the speaker in prior conversations. Third, children may confuse what they thought about disclosing with what they actually disclosed, a type of reality monitoring.¹²⁷

The prosecutors' rationale for asking specific questions about prior disclosures is unclear. As we discussed above, the child's disclosures to others may be admissible hearsay corroborating abuse, but if so, it is equally permissible to elicit information about the disclosure from adult recipients as from the child him or herself. By eliciting the information from the child (rather than the adult recipients), the prosecutor increases the risk that the child will be subject to difficult questions about the specifics of each disclosure, inconsistencies across the disclosures, and implications of coaching and influence that the child witness may

124. D. Stephen Lindsay, Marcia K. Johnson & Paul Kwon, *Developmental Changes in Memory Source Monitoring*, 52 *J. EXPERIMENTAL CHILD PSYCHOL.* 297, 314 (1991).

125. Kim P. Roberts, Martine B. Powell, *Describing Individual Incidents of Sexual Abuse: A Review of Research on the Effects of Multiple Sources of Information on Children's Reports*, 25 *CHILD ABUSE & NEGLECT* 1643, 1651–52 (2001).

126. Maggie Bruck, Emmett Francoeur & Stephen J. Ceci, *The Accuracy of Mothers' Memories of Conversations with their Preschool Children*, 5 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 89, 103 (1999); see also Amye R. Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall their Interviews with Children?*, 5 *PSYCHOL. PUB. POL'Y & LAW* 355, 365–66 (1999).

127. Mary Ann Foley, Marcia K. Johnson & Carol L. Raye, *Age-Related Changes in Confusion Between Memories for Thoughts and Memories for Speech*, 54 *CHILD DEV.* 51, 58 (1983).

be ill-equipped to rebut.

C. Overt vs. Subtle Allegations of Influence by the Disclosure Recipient

In some foreign jurisdictions, defense attorneys are expected to directly state their position to the prosecuting witness in cross-examination.¹²⁸ Zajac and her colleagues have shown in a series of studies that children (and adults) will often change their stories if they are directly challenged by cross-examination.¹²⁹ In our study of court transcripts, in contrast, we found that defense attorneys overtly asked the child whether others had influenced the story in only 21% of the cases (prosecutors did so in 26%).¹³⁰ The lack of overt accusations raises a different potential problem; attorneys may be attempting to discredit children in subtle ways. Indeed, practice guides have suggested that attorneys should merely imply that the child witness is lying or that the child's story is the product of influence.¹³¹

Adult witnesses are likely to understand a number of aspects of the trial process. First, they understand that when they testify, the jury or the judge will be assessing their credibility. Second, they recognize that the job of the attorney who called them to the stand is to support their credibility (unless they are called as a hostile witness), and that the job of the cross-examiner is to undermine their credibility. Third, they likely recognize that the cross-examiner will challenge their credibility indirectly. They will listen carefully to each question in order to assess where the questions might lead, and to recognize what the cross-examiner is implying. Nevertheless, adult witnesses are likely to frequently succumb to clever cross-examiners.¹³² In turn, child witnesses are

128. Hanna, *supra* note 12, at 541.

129. Zajac et al., *Asked and Answered*, *supra* note 12, at 206; Zajac & Hayne, *I Don't Think That is Really What Happened*, *supra* note 16, at 191–93; Zajac & Hayne, *The Negative Effect of Cross-Examination*, *supra* note 11, at 9.

130. Stolzenberg & Lyon, *supra* note 19, at Table 3.

131. John E.B. Myers, *Paint the Child into Your Corner*, 10 FAM. AVOC. 41, 43 (1987–1988).

132. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* (1903), available at http://www.gutenberg.org/files/40781/40781-h/40781-h.htm#Page_23 (“If . . . the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can

almost surely more susceptible.

There are a number of ways in which defense attorneys could subtly suggest that children's reports are the product of adult influence. Simply asking a child about the number of people who have spoken to the child about abuse implies influence. Similarly, asking the child about any treats, toys, or games involving disclosure recipients suggests contingent reinforcement. Asking whether various interviewers "helped" the child remember can take advantage of the child's positive view of both adult authority figures (including parents, teachers, and police officers) and the virtues of adult assistance.

For example, in one California case,¹³³ the defense attorney asked the twelve-year-old child witness about the prosecutor's preparatory interview: "Did Mr. Zuniga remind you what you had told the police officer earlier?"¹³⁴ The child answered "yes."¹³⁵ The judge interceded (a rare occurrence), and said: "Wait, just a second. Did Mr. Zuniga go over any report or did he tell you what happened or did you tell him what happened?"¹³⁶ The child responded, "I told him what happened."¹³⁷ The judge recognized the implication of the defense attorney's question, that the prosecutor had coached the child.¹³⁸ The judge's question, in turn, allowed the child to respond in such a way that nothing negative was implied. Indeed, the judge's question could be criticized because it assumed that the choices (the interviewer reminded the child and the child told the interviewer) were mutually exclusive. The extent to which the child understood the purpose of either the defense attorney or the judge's question is unclear.

The extent to which children understand strategic cross-examination is a promising area for future developmental research. In addition to the aspects of the witness role that adults are likely to understand, noted above, other relevant concepts are

almost imperceptibly be induced to enter into a discussion of his testimony in a fair-minded spirit, which, if the cross-examiner is clever, will soon disclose the weak points in the testimony.").

133. Transcript of Preliminary Hearing, *People v. Cedillos*, No. 131880 (Cal. Super. Ct. Dec. 10, 1998) (on file with author).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.*

also likely to undergo substantial change throughout the preschool and elementary school years. First, to what extent do children understand that the biases of a questioner and the types of questions that are asked influence reports and can ultimately taint memory?¹³⁹ Second, when do children understand the process by which one person determines whether another person is telling the truth, as opposed to succumbing to the pressures of a questioner?¹⁴⁰ A child with these types of understanding can appreciate that when a cross-examiner elicits the fact that a disclosure recipient believed that abuse occurred, or asked questions suggesting that abuse occurred, a jury is less likely to believe the child.

A third important question concerns children's ability to understand cross-examiners' questions that are designed to imply one thing to the witness and another thing to the fact-finder. Consider the attorney's question "did the nice policeman help you remember?" Young children are likely to have a positive perception of policemen and of how they can help. They are unlikely to recognize the possibility that the attorney can be implying something quite different, such as insinuating that the policeman was not so nice and not so helpful. Children can respond to implied messages at a very young age, in particular indirect requests (e.g., "can you pass the salt?").¹⁴¹ However,

139. Kamala London, Maggie Bruck, Debra Ann Poole & Laura Melnyk, *The Development of Metasuggestibility in Children*, 25 APPLIED COGNITIVE PSYCHOL. 146, 151 (2011); see also Michael Siegal, Lorraine J. Waters & Leigh Simon Dinwiddy, *Misleading Children: Causal Attributions for Inconsistency Under Repeated Questioning*, 45 J. EXPERIMENTAL CHILD PSYCHOL. 438, 453 (1988).

140. This kind of research is analogous to research examining children's appreciation of the process by which lies are detected, such as a study in which children understood that eye gaze aversion is believed to be inconsistent with sincerity. Alejo Freire, Michelle Eskritt & Kang Lee, *Are Eyes Windows to a Deceiver's Soul? Children's Use of Another's Eye Gaze Cues in a Deceptive Situation*, 40 DEV. PSYCHOL. 1093, 1098 (2004); see also Anjanie McCarthy & Kang Lee, *Children's Knowledge of Deceptive Gaze Cues and its Relation to their Actual Lying Behavior*, 103 J. EXPERIMENTAL CHILD PSYCHOL. 117, 114 (2009).

141. Marilyn Shatz, *On the Development of Communicative Understandings: An Early Strategy for Interpreting and Responding to Messages*, 10 COGNITIVE PSYCHOL. 271, 294 (1978); see also Marilyn Shatz, *Children's Comprehensions of their Mothers' Question-Directives*, 5 J. CHILD LANGUAGE 39, 45 (1977).

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children's conscious recognition of the distinction between literal meaning and implied meaning develops over time.¹⁴² A related line of research concerns children's understanding of referential ambiguity, and shows that if an interpretation of an ambiguous statement is readily available, young children will latch onto that interpretation and fail to recognize the ambiguity of the statement, let alone recognize a secondary interpretation.¹⁴³

V. LINGUISTIC DIFFICULTIES PRESENTED BY QUESTIONS ABOUT CONVERSATIONS: ASK VS. TELL

Even if attorneys could be compelled to ask facially simple questions, children's limited language skills could still lead to misunderstanding. In the context of conversations, one potential for confusion concerns the verbs that we use to describe different kinds of statements. In this section, we will focus on the words "ask" and "tell." When one is seeking information, one "asks," and when one provides information, one "tells." When one is seeking permission, one "asks," and when one commands, one "tells." Children's understanding of these distinctions can affect how they talk about their disclosures of abuse and their interactions with suspects.

A. *Did Your Mother Ask You or Tell You What Happened?*

In *California v. Ortega*, a case tried in Los Angeles County, the defense attorney argued that the five-year-old child's abuse allegations against her uncle were the result of coaching by the child's mother.¹⁴⁴ On cross-examination of the forensic interviewer, he asked: "Now, if . . . the child says to you that someone told me to say that I was touching that person, you know,

142. Carol R. Beal & John H. Flavell, *Development of the Ability to Distinguish Communicative Intention and Literal Message Meaning*, 55 CHILD DEV. 920, 927 (1984); see also Gary Bonitatibus, *Comprehension Monitoring and the Apprehension of Literal Meaning*, 59 CHILD DEV. 60, 68 (1988).

143. Beal & Flavell, *supra* note 142, at 926–27; see also Elizabeth S. Nilsen & Susan A. Graham, *The Development of Preschoolers' Appreciation of Communicative Ambiguity*, 83 CHILD DEV. 1400, 1411 (2012).

144. Reporters' Partial Trial Transcript at 32, *People v. Ortega*, No. PA064937-01 (Cal. Super. Ct. Nov. 16–17, 2010) (on file with author).

that he was touching my private parts, a number of times, wouldn't you follow up on that?"¹⁴⁵ The attorney was referring to several points during the interview when the child appeared to disclose that the mother had told her that she had been abused. For example, the child reported that after the alleged abuse occurred, "And then we get home and my mom says, 'Come here.' And we go to our room and she tells me all what happened when he was touching my private parts." Fortunately for the prosecution, the interviewer had followed up. She asked "what do you mean that your mom told you all what happened" and "what exactly did your mom say to you?" The child explained: "She said, 'What happened?' And I said, 'My uncle was touching my private parts and it hurt.'"¹⁴⁶ The case hints that the child was simply confusing the words "ask" and "tell"—she should have said "she asks me all what happened" instead of "she tells me all what happened"—which highlights the significance of simple linguistic confusion in understanding children's testimony.¹⁴⁷

Unlike many of the developmental questions discussed thus far in this paper, there is a surprisingly large literature on children's ability to distinguish between the words "ask" and "tell," most of it inspired by work on grammatical development conducted by Carol Chomsky in the late 1960s.¹⁴⁸ Furthermore, Anne Graffam Walker, a forensic linguist, brought the potential difficulties to the attention of legal professionals through groundbreaking writings that introduced lawyers to linguistic

145. *Id.* at 37.

146. *See* Transcript of Forensic Interview, *People v. Ortega* (Cal. Super. Ct. July 1, 2009) (No. PA064937-01).

147. *See, e.g.*, Transcript of Trial, *People v. Lomeli* (Cal. Super. Ct. Apr. 9, 1998) (No. 126866) (Jessica, a ten-year-old, stated: "first my mom called the police station, and then they came to our house, and they told me 'what he did'"); *see also* Transcript of Trial, *People v. Vasquez*, No. 148877 (Cal. Super. Ct. Feb. 5, 2001) (Natalie, an eight-year-old was interviewed by the defense attorney: "Q: Okay. And what did he do with the pencil, anything? A: He just like put it like on top and then put it inside and then he just told me if he put it on top or inside."). In *Vasquez*, however, the defense attorney pushed his luck, and followed up with: "So he was telling you what had happened; is that right?" At this point, the child recognized the negative implication, and responded "No. He was asking me if he put it inside or me or on top of me and was using the pencil to pretend that's his private part." *Id.*

148. *See generally* CAROL CHOMSKY, *THE ACQUISITION OF SYNTAX IN CHILDREN FROM 5 TO 10* (1969).

development.¹⁴⁹ Specifically, Walker warned that “the meaning difference” for ask/tell “is often not sorted out by children until they are anywhere from 7 to 10.”¹⁵⁰

However, perusal of the ask/tell research highlights the potential difficulties in applying research in language development to children’s testimony. First, Chomsky’s findings sparked a great deal of research in large part because many researchers challenged her conclusions. Second, Chomsky was primarily interested in how specific grammatical forms could be misconstrued by children, rather than how well children understand the words “ask” and “tell” more generally.¹⁵¹ That is, Chomsky’s findings highlighted the fact that whether children appear to understand “ask” and “tell” can be highly context-dependent.¹⁵² Hence, in applying the research on ask/tell to children’s testimony, it is useful to consider how attorneys use the words, and how children understand those specific uses.

Chomsky tested how children responded when told to “ask” or “tell” another child.¹⁵³ She found confusion in response to a specific type of sentence among children up to ten years of age, and confusion across sentences among children up to six years of age.¹⁵⁴ Chomsky found that children had the greatest difficulty in distinguishing between “ask” and “tell” in sentences such as “ask/tell Laura what to feed the doll.”¹⁵⁵ These sentences combined wh- clauses (e.g. “what. . .”), complement verbs (e.g. “to feed”), and missing subjects (i.e., the sentence does not specify who should feed the doll). Note that if one “tells” Laura what to feed the doll, then Laura should do the feeding, but if one “asks” Laura what to feed the doll, then one should do the feeding. However, in both ask and tell versions of the sentence, children assumed that Laura was the person who should feed the doll.¹⁵⁶ This difficulty persisted among even the oldest children Chomsky tested (ten-year-olds) and she noted anecdotally that these sentences were

149. Ann Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2 ABA CENTER ON CHILDREN AND THE LAW 29 (1999).

150. *Id.*

151. *See generally* CHOMSKY, *supra* note 148.

152. *See generally id.*

153. *Id.*

154. *Id.*

155. *See generally id.* at 101.

156. *Id.*

even difficult for adults.¹⁵⁷ Other sentences, however, were problematic only for the five- and six-year-olds, such as “ask/tell Laura what this is” (wh- clause, subject supplied) or “ask/tell Laura your last name” (noun phrase).¹⁵⁸ The younger children always responded by telling rather than asking.¹⁵⁹

Subsequent work criticized Chomsky's findings. Both Warden and Tanz argued that children ignore the exact wording used by experimenters and instead attempt to infer what the experimenter wants; in other words, they interpret the statements pragmatically.¹⁶⁰ Warden found that four- to five-year-olds responded to both “ask” and “tell” sentences as if they should ask.¹⁶¹ Hence, when told to “tell [the other child] your last name,” children asked the other child “what is my last name?”¹⁶² Warden argued that children assumed that the purpose of the game was to engage the other child in a conversation, and questions operated to spark the other child's interest.¹⁶³ Hence, whether they were told to ask or tell, they asked. Warden argued that the pragmatics of Chomsky's task led children to assume that the adult wanted them to tell the other child what that child should do with the doll.¹⁶⁴ Similarly, Tanz showed that five- to nine-year-old children interpreted “ask” sentences about the rules of a game (e.g. “ask Rachel where to put the red cards”) in light of their knowledge or ignorance; if they were ignorant of the rules of the game, they asked, but when they knew the rules of the game, they told.¹⁶⁵

Importantly, these studies did not deny that children had difficulty in responding correctly to statements using “ask” and “tell,” but rather they disagreed with Chomsky regarding the reasons for children's difficulty.¹⁶⁶ Chomsky argued the difficulty

157. *Id.*

158. *Id.* at 45.

159. *See id.*

160. *See* Christine Tanz, *Asking Children to Ask; An Experimental Investigation of the Pragmatics of Relayed Questions*, 10 J. CHILD LANGUAGE 187, 193–94 (1983); David Warden, *Children's Understanding of Ask and Tell*, 8 J. CHILD LANGUAGE 139,145 (1981).

161. Warden, *supra* note 160, at 143–44.

162. *See id.* at 145.

163. *See id.*

164. *See id.*

165. Tanz, *supra* note 160, at 192.

166. *Id.* at 190; Warden, *supra* note 160, at 144.

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was attributable to grammar, whereas Warden and Tanz argued the difficulty was due to pragmatics.¹⁶⁷ For our purposes, however, the studies failed to resolve an important question: is it possible to focus children's attention on the words themselves (rather than their pragmatic assumptions about our questions), and, if one does so, do they understand the distinction between telling and asking?

Both Chomsky and Warden devised picture tasks in order to avoid children's pragmatic assumptions about how to respond to instructions, but their interpretation of the results only led to more questions.¹⁶⁸ Chomsky found that children's difficulties were reduced, but not eliminated (and a replication by Kessel found the same thing).¹⁶⁹ Warden argued that his tasks showed good understanding among four- and five-year-olds, but Chomsky pointed out two problems with Warden's tasks that likely exaggerated children's apparent comprehension.¹⁷⁰

167. See CHOMSKY, *supra* note 148, at 101–02; Tanz, *supra* note 160, at 192–93; Warden, *supra* note 160, at 148–49.

168. See CHOMSKY, *supra* note 148, at 100; Warden, *supra* note 160, at 146.

169. CHOMSKY, *supra* note 148, at 99–101; Frank S. Kessel, *The Role of Syntax in Children's Comprehension from Ages Six to Twelve*, 35 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. 1, 34–35 (1970).

170. Warden, *supra* note 160, at 147; Carol Chomsky, 'Ask' and Tell' Revisited: A Reply to Warden, 9 J. CHILD LANGUAGE 667, 667 (1981) [hereinafter Chomsky, *A Reply to Warden*]. Both researchers showed children pictures, read them sentences, and asked them questions about the pictures. Chomsky found that the difficulties of children in grades one to three were reduced, but not eliminated, when they were presented with pairs of pictures and asked to identify which picture matched an ask sentence (e.g. "the boy asks the girl what to wear," comparing pictures in which the boy or the girl is trying on shoes). CHOMSKY, *supra* note 148, at 99, 101. Chomsky found that five- to seven-year-olds had difficulty when they were presented with single pictures, told "[name 1] asked [name 2] wh- with non-specific subject," (e.g., "Susan asks Mary which tree to climb") and then asked "which one is [name 1]" and "what is he saying?". See Chomsky, *A Reply to Warden*, *supra*, at 675–76. Warden found that four- to five-year-olds were 90% accurate when presented with single pictures, told "[name 1] asked/told [name 2] wh-." (e.g., "Bill is asking/telling Gordon where the cat has gone"), and asked "which is [name 1]/[name2]?" Warden, *supra* note 160, at 147. Chomsky, however, criticized Warden's stories; they did not always involve the more complicated wh- with non-specific subject construction, and children were not asked what the chosen character actually said. Chomsky, *A Reply to Warden*, *supra*, at 670. In her stories, children often chose the correct character as the asker, but then quoted the character as telling. See *id.* at 670–71. Warden's subsequent response criticized Chomsky's picture method,

In sum, although Walker warned legal professionals that children do not understand the distinction between ask and tell until seven to ten years of age, the literature does not provide clear support for the contention that this misunderstanding will manifest itself in testimony.¹⁷¹ Chomsky argued that seven-year-olds could handle most uses of “ask,” but had difficulty if presented with sentences such as “ask Laura what to feed the doll,” when the subject of “to feed” was unspecified.¹⁷² In contrast, the distinction between “tell you what happened” and “ask you what happened” need not present difficulties, because the sentence does not contain a complement verb with an ambiguous subject.¹⁷³

Another difficulty with the literature is the potential mismatch between the way in which children’s comprehension is tested in the laboratory and the way in which children’s use might be misunderstood in the legal setting. Clearly, children are not provided with instructions to ask or tell in either forensic interviews or in court; rather, they are asked to relate conversations, during which they may spontaneously utter the words “ask” and “tell,” and they will be asked questions that contain the words ask and tell.

In the legal context, and as demonstrated by the opening example, a child’s confusion between “asking” and “telling” could affect his or her characterization of interactions with disclosure recipients. In particular, the child’s characterization of the disclosure recipient’s statements as “telling” rather than “asking” would suggest that the recipient’s statements influenced the child’s disclosure instead of inquiring about it—insinuating coaching or suggestive influence instead of support and interest in the child’s allegation. This suggestion could interfere with the jurors’ understanding of the disclosure process, thus rendering it more difficult to understand why the child disclosed abuse and whether their allegation is credible. Therefore, a more definitive means of assessing children’s understanding is needed to match

but acknowledged the potential difficulty of the wh- with non-specific subject construction. David Warden, *How to Tell if Children Can Ask*, 13 J. CHILD LANGUAGE 421, 423–26 (1986).

171. Walker, *supra* note 149, at 29.

172. See Chomsky, *A Reply to Warden supra* note 170, at 670.

173. See *id.*

the questioning context that is used in the field.

A further complication concerns children's use of the terms "ask" and "tell" when Spanish is their first language. In addition to the obvious difficulties of comprehending anything said in a second language, there is potential for additional confusion among Spanish-speaking children because "decir" can function as both "said," and "told."¹⁷⁴ Hence a Spanish fluent child learning to speak English might use the word "tell" in place of "said." Specifically, the child who says, "My mother told me what happened" may mean, "My mother said to me 'what happened?'"

B. *Did the Defendant Ask You or Tell You to Go with Him?*

The debate between Chomsky and her critics raised an important distinction between different uses of "ask" and "tell" that were touched upon in the beginning of this section. Chomsky noted that some children may have interpreted the instruction to "ask" as "request politely."¹⁷⁵ In other words, children who were told to "ask Laura what to feed the doll" heard "*tell* Laura what to feed the doll *in a nice way*."¹⁷⁶ The distinction is that between epistemic and deontic uses of words. "Ask" and "tell" can be used both epistemically and deontically. We have been discussing the terms in their epistemic sense: "ask" refers to questions seeking information, and "tell" refers to providing information. "Ask" and "tell" can also be used deontically: "ask" means to make a polite request and "tell" means to command.

The epistemic/deontic distinction has been extensively discussed with respect to other terms, such as "must." One can

174. Carole Edelsky & Virginia Muiña, *Native Spanish Language Acquisition: The Effect of Age, Schooling and Context on Responses to 'Dile' and 'Preguntale'*, 4 J. CHILD LANGUAGE 453, 464 (1976) ("if the verb tell is used . . . the embedded clause is ambiguous out of further context in ELA [East Los Angeles Mexican Immigrant] English between a WH question and a WH statement"); Benji Wald, *Spanish-English Grammatical Contact in Los Angeles: The Grammar of Reported Speech in the East Los Angeles English Contact Vernacular*, 25 LINGUISTICS 53, 65-66 (1987).

175. See Chomsky, *A Reply to Warden supra* note 170, at 677.

176. See *id.*; see also Kessel, *supra* note 169, at 8, 35-36 (some children interpreted "ask" as a request); Walker, *supra* note 149, at 29 (arguing that children's difficulty in understanding ask and tell might lie in the fact that ask can signify both a request and a polite command); Warden, *supra* note 160, at 423-24 (discussing the difference between the directive and informative uses of "ask" and "tell").

use “must” to refer to necessity in light of knowledge (a parent would say that the child “must” be in bed when she has searched everywhere else for him); this is an epistemic use of the word. One can also use “must” to refer to necessity in light of a command (a parent would say that the child “must” be in bed when she has ordered her to go); this is a deontic use. Generally speaking, children tend to acquire the deontic meaning of words before they acquire their epistemic meaning, perhaps because they understand concepts of desire and interpersonal influence before they understand belief and knowledge acquisition.¹⁷⁷

Surprisingly, researchers have not compared children’s deontic and epistemic understandings of “ask” and “tell.” However, there is some evidence for early deontic understanding: Bock and Hornsby instructed three- to six-year-olds either to “ask” or to “tell” their partner (either an adult or child) to give them pieces of a puzzle they needed to complete, and found that even the youngest children more often used the word “please” and an interrogative (e.g. “can I have the plate?”) if they were in the “ask” condition.¹⁷⁸

In the deontic context, a child’s confusion between “asking” and “telling” could affect his or her characterization of interactions with suspects and others. In particular, the child’s characterization of the suspect’s statements as “telling” rather than “asking” would suggest that the suspect’s statements were designed to ensure that the child’s compliance were commands rather than requests. This could interfere with the jurors’ understanding of the dynamics of abuse, thus rendering it more difficult to understand why the child might continue to exhibit affection toward the suspect after abuse had occurred. However, unlike the research examining the epistemic uses of “ask” and “tell,” there is little support in the literature for children’s deontic confusion.

177. See JAN NYUTS, EPISTEMIC MODALITY, LANGUAGE, AND CONCEPTUALIZATION: A COGNITIVE-PRAGMATIC PERSPECTIVE 232 (2001).

178. J. Kathryn Bock & Mary E. Hornsby, *The Development of Directives: How Children Ask and Tell*, 8 J. CHILD LANGUAGE 151, 153, 159 (1981).

C. *Research on “Ask” and “Tell” in a Legal Context*¹⁷⁹

In order to assess how confusion between “ask” and “tell” might affect child witnesses, we first examined how attorneys and child witnesses use the terms “ask” and “tell” in sexual abuse trials. We analyzed one hundred cases of alleged sexual abuse involving child witnesses ages twelve and under. We found over 2,500 question-answer pairs in which either the attorney or the child (or both) used either “ask” or “tell.” We found that in 83% of the cases, the use was ambiguous, in that one could grammatically substitute “tell” for “ask” or “ask” for “tell,” so that if a child did not distinguish between the terms, the statement could be misinterpreted.¹⁸⁰ Over 70% of attorneys’ questions were yes/no questions, and children responded without elaboration over 75% of the time. Children clarified whether they meant “ask” or “tell” in 3% of their answers. Further, attorneys clarified whether they meant “ask” or “tell” in 4% of their follow-up questions. As a result, ambiguous uses of the words would usually be followed by a simple “yes” or “no” from the child without clarification of whether the attorneys’ use of “ask” and “tell” matched that of the child. Hence, if children did confuse the terms, it would be impossible to discern the confusion most of the time that the terms were used.

In our second study, we examined ninety-seven maltreated eight- to eleven-year-olds’ abilities to correctly use the words “ask” and “tell.”¹⁸¹ Children were read a series of interactions between parents and children and then were asked about what was said. In the scenarios, children and parents requested or gave information, as well as requested or commanded actions. This corresponds directly with both epistemic and deontic uses for “ask” (epistemic: *The Mommy said “When I was at work, did you play with the puppy?” The boy said, “Yes;”* deontic: *The Mommy said, “Now that I’m home, can we please play with the puppy?” The boy said “Okay”*) and “tell” (epistemic: *The Mommy said “When I was at work, did you play with the puppy?” The boy said, “Yes;”* deontic: *The Mommy said, “Now that I’m home, you must play*

179. See *supra* note 29 and accompanying text.

180. There were 2,573 question-answer pairs where either the attorney or child used “ask” or “tell,” and 2,160 had grammatically ambiguous uses.

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with the puppy." *The boy said "Okay"*). After each scenario, participants were asked yes/no questions about whether a speaker "asked" or "told."

We found that children showed a tendency to claim that the conversational partner who did the majority of the speaking (the first conversational partner) was both "asking" and "telling." Hence, the children correctly affirmed that a person who asked for information or permission was asking, but they also thought that the person was telling. It was only by eleven years of age that children started to show some understanding that a person who asked for information was asking and not telling, and that a person who commanded action was telling and not asking. A surprising finding was that even the oldest children tended to deny that a person who answered an information question was "telling"; this was likely due to the fact that question respondents in our scenarios uttered a single word. Children appeared to define "telling" by the amount of speech. Further, children who also spoke Spanish performed less well than English-only speaking children in several respects.

These findings suggest that children develop the ability to discriminate "ask" from "tell" in middle childhood, with English-speaking children developing the ability to discriminate accurately by eleven-years-old for uses relating to requesting information and demanding action. However, younger children and children in Spanish-speaking homes tend to affirm that speakers are both "asking" and "telling." The results have disturbing implications for how child witnesses will answer yes/no questions about asking and telling when questioned about their interactions with disclosure recipients and with suspects. Children may endorse questions about disclosure recipients "telling" them information, when they were in fact asked. At the same time, they may affirm that adults who coached them to provide information were "asking." With respect to suspects, children may endorse questions about suspects "telling" them to do things, when the suspects may have in fact made polite requests. This problem may mask the extent to which suspects cajole children into acquiescing in the abuse, which helps to explain children's subsequent self-blame and secrecy. Conversely, children may affirm that suspects "asked" them to do things when they were in fact ordered to do so.

VI. CONCLUSION: ADVICE FOR PRACTITIONERS AND RESEARCHERS

A better understanding of how children recall and talk about prior conversations could assist legal professionals in investigating and litigating child abuse claims. Children's conversations with others are forensically relevant. Children's conversations with suspects can elucidate the dynamics of sexual abuse, because perpetrators talk to children in order to seduce them into acquiescing in sexual acts and in order to prevent them from disclosing the abuse. Children's conversations with others to whom they have disclosed abuse can elucidate the dynamics of sexual abuse disclosure, because others can influence children's reports. Adults may suspect abuse when none has occurred, and they may wish to conceal abuse that the child has honestly reported.

Our analysis of court transcripts suggested that there are a number of problems with how attorneys question children about their prior conversations in court.¹⁸² Prosecutors may be missing opportunities to help jurors understand the dynamics of sexual abuse by emphasizing coercive statements made by suspects during the abuse, rather than seductive statements made before abuse is initiated or inducements to secrecy made after abuse has begun. Prosecutors and defense attorneys are asking a large number of questions about children's discussion of the abuse with others, but their questions are often exceedingly specific, asking about specific details of specific conversations with specific adults. Prosecutors typically fail to ask children either why they failed to disclose abuse initially or why they disclosed when they did. Both prosecutors and defense attorneys ask predominantly yes/no questions, which suppress narrative responses from children and make it difficult to determine if children comprehend the questions (because children tend to answer yes/no questions with a simple "yes" or "no").

It is likely that children can be asked about conversations without taxing their developmental limitations if they are asked about what they have said to others (and what others have said to them) about various topics without expecting them to distinguish among repeated conversations with similar content. We

182. Stolzenberg & Lyon, *supra* note 19.

recommend that legal professionals and others questioning children ask them what the suspect "said to you" about abuse (using the child's words to describe abuse) and about talking to other people about the abuse. In order to ask about possible seduction by the suspect, children can be asked "tell me about things you did with [the suspect] before he started touching you."

With respect to the disclosure of abuse, one can ask the child "how did people find out about" the abuse and "who did you first tell about" the abuse. Children are likely to recall their first disclosure, and they are likely to have difficulty recalling specific subsequent disclosures because of the memorability of the first occurrence.¹⁸³ The interviewer can follow up by asking the child to "tell me everything you said to [the disclosure recipient] about" the abuse, and "what did [the disclosure recipient] say" and "what did [the disclosure recipient] do" after the child disclosed. In order to understand the child's reasons for disclosure and non-disclosure, the interviewer can ask "what kept you from telling right away" and "what made you want to tell [the disclosure recipient]," and "how did you feel when you told [the disclosure recipient]" and "what did you think when you told [the disclosure recipient]." In order to inquire into external pressures and influences, the interviewer can ask the child what various potentially influential adults have said about the suspect, about the abuse, and about talking to others about the abuse (including the interviewer). Understanding children's ability to recall conversations, both in general and with respect to abuse allegations, is a promising area for further research. Researchers have called the study of memory for conversations the "orphan child of witness memory research."¹⁸⁴ We have found very little experimental work examining children's memories for conversations. Only a few studies have examined how children talk about their disclosures of abuse.¹⁸⁵

183. See Martine B. Powell, Donald M. Thomson, & Stephen J. Ceci, *Children's Memory of Recurring Events: Is the First Event Always the Best Remembered?* 17 *APPLIED COGNITIVE PSYCHOL.* 127-46 (2003).

184. Deborah Davis & Richard D. Friedman, *Memory for Conversation: The Orphan Child of Witness Memory Researchers*, 1 *HANDBOOK OF EYEWITNESS MEMORY* 1, 3 (2007).

185. Irit Hershowitz, Omer Lanes, & Michael E. Lamb, *Exploring the Disclosure of Child Sexual Abuse with Alleged Victims and Their Parents*, 31 *CHILD ABUSE & NEGLECT* 111, 115 (2006); Lindsay C. Malloy, Sonja P.

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The areas deserving future work include children's memories for specific conversational interactions, children's understanding of the ways in which others can influence one's memory reports, and children's understanding of the linguistic devices used to describe conversations (such as the distinctions between "ask" and "tell"). This work will enable us to make clearer recommendations for child interviewers so that children's reports can be assessed accurately.

Brubacher, & Michael E. Lamb, "*Because She's One Who Listens*": *Children Discuss Disclosure Recipients in Forensic Interviews*, 18 *CHILD MALTREATMENT* 245, 246–47 (2013); SAS & CUNNINGHAM, *supra* note 61, at 81.