

## **Children in Court: What Do We Now Know?**

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### **Introduction**

Children's testimony is one of the most controversial areas in psychology and law. The last ten years have seen an explosion of heated discussion over the reliability and validity of children's testimony, along with a strong push from children's advocates to make the experience of testimony less threatening to children.<sup>1</sup> This paper will describe the somewhat different perspectives towards children's testimony of the mental health and legal professions, and review the current state of scientific knowledge about children as witnesses. It will provide snapshots of those interview techniques which are likely to increase our faith in the reliability of the child testimony obtained, and those which should decrease that faith. It will review questions of when a child can be a competent witness, and what special accommodations may be needed. And, finally, the paper will make recommendations about training police and child protection personnel in proven interview techniques, and establishing a precedent for the videotaping of such interviews as a matter of protection for the child and the public.

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<sup>1</sup> Excellent general discussions of issues of trauma, memory, interviewing children, and legal controversies in children's memories of abuse may be found in:

Brown, D., Schefflin, A., & Hammond, D., *Memory, trauma treatment, and the law*, 1998, NY, WW Norton & Co. (Hereinafter Brown, et. al.)

Myers, J., Saywitz, K., & Goodman, G., *Psychological research on children as witnesses: Practical implications for forensic interviews and courtroom testimony*, *Pacific Law Journal*, 1996, Fall, v. 28, n. 1, 3-91. (Hereinafter Myers et. al.)

Poole, D.A., & Lamb, M., *Investigative interviews of children: A guide for helping professionals*, Washington, D.C., American Psychological Association, 1998. (Hereinafter Poole and Lamb)

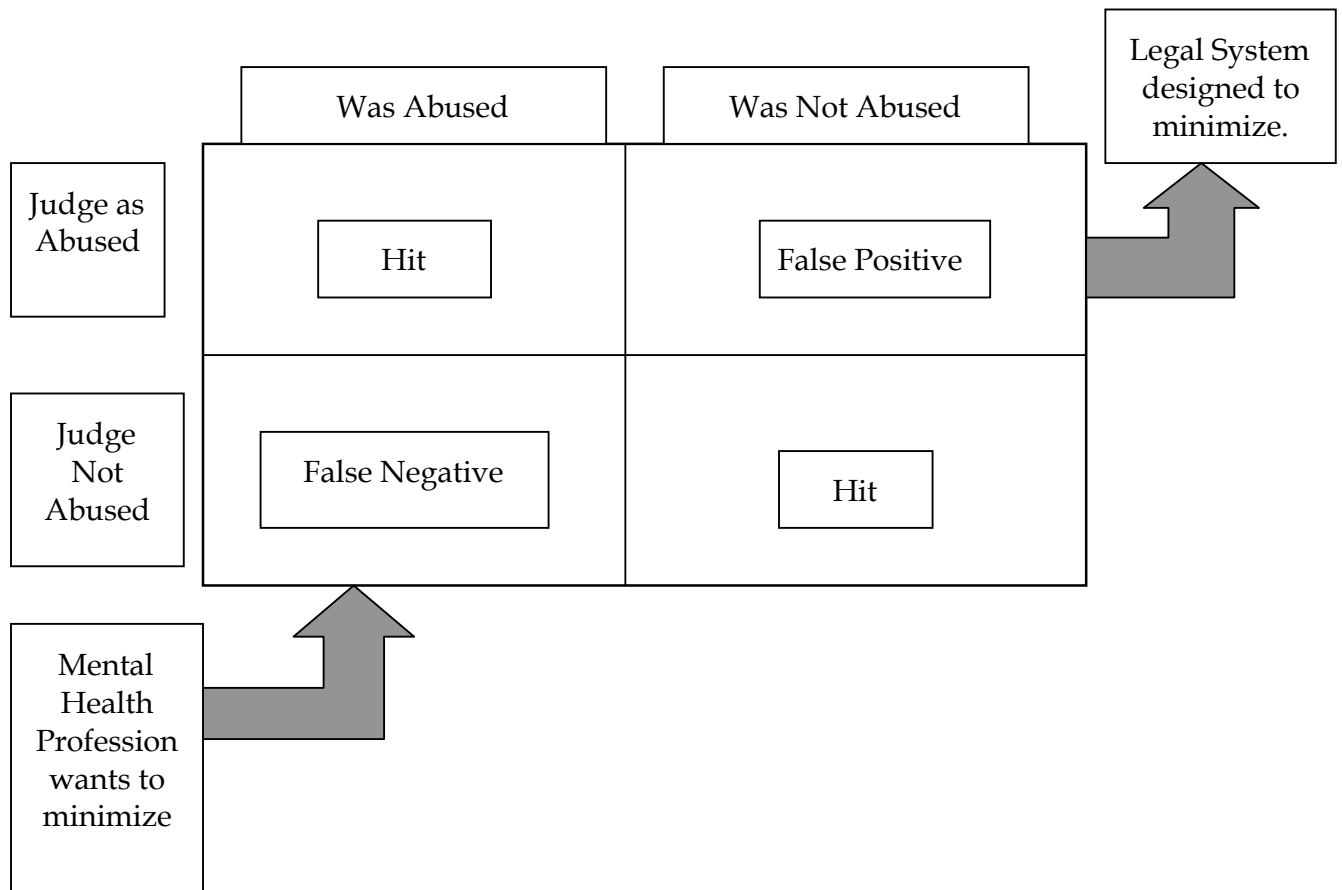
Bruck, M., Ceci, S., & Hembrooke, H., *Reliability and credibility of young children's reports*, *American Psychologist*, 1998, v. 53, 2, 136-51. (Hereinafter Bruck & Ceci)

Sales, B., et. al., *Psychology, Public Policy and Law – Special Theme: Suggestibility of child witnesses – The social science Amicus Brief in *State of New Jersey v. Margaret Kelly Michaels**, June, 1995, v.1, n. 2. (Hereinafter Sales, et. al.)

**Understanding Error: How the Perspectives of the Professions Differ**

In assessing questions about the truthfulness of abuse allegations, both mental health professionals and the legal system must engage in a delicate dance between two possible sources of error—missing child abuse which has occurred (“false negatives”), and making “findings” of abuse which may, in fact, not have happened (“false positives”). See the diagram below.

The consequences of either error may be grave for a child or their family. There is tension between the legal and mental health systems in which error they would like to minimize. Most mental health professionals wish to protect vulnerable children



and make certain that child abuse does not go undetected. There is a pressure towards detection, even if it increases false positives.

The legal system, in its most ideal form, is designed to protect people from losing personal freedom for events where there is a reasonable doubt that a crime was actually committed. It is theoretically, at least, biased in the direction of minimizing these very same false positives, even if child abuse goes undetected. Much of the conflict between the legal and mental health professions centers on this difference in perspective. One of the best ways to move towards resolution of this issue is to stay current on what is known scientifically about abuse, memory, children’s abilities as witnesses, and how to obtain testimony which is more likely to be reliable and credible.

### **Child Memory—What Does Science Know?**

Beliefs about child memory within the scientific community fall on a continuum, between those who emphasize the potential accuracy of child memory under favorable conditions, to those who emphasize the potential for, and potentially disastrous consequences of, inaccurate memories. Various scientists occupy every position on the continuum between these two end points. Each side has data that supports its position and is important to this discussion.

Scientists who emphasize the potential accuracy of child memory<sup>2</sup> focus on data that shows that:

- Children show few inaccuracies for the central facts of personally relevant events.
- Even preschool children have relatively good memory for actions as opposed to details.
- The “gist of an event” is remembered over the long time delays which often occur in the court process.
- Cueing children, to help them remember more information, does not lead to “great” increases in inaccuracy.

Scientists who emphasize the possibility that children are “easily misled” or may be subject to “false memories” emphasize those conditions which can produce unreliable recall.<sup>3</sup> These studies demonstrate that:

- Both children’s and adult’s recall can be considerably influenced by how a question is asked. Including misleading or desired information in a “question stem” can distort recall. These studies are generally cited as demonstrating the “misinformation effect.”<sup>4</sup>
- In studies of repeated questioning of children, so characteristic of forensic investigations of child abuse, Ceci and his colleagues were able to get up to 80% of preschoolers to falsely assent to a non-event after multiple interviews. 44% assented to the false event after a first interview. Ceci believes this demonstrates children’s tendency to say what they believe a high status interviewer wants to hear.<sup>5</sup>
- In “medical procedure” studies, which investigate children’s memory for painful procedures where touch is involved—ecologically close to a typical

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<sup>2</sup> See Myers et. al., *supra*. Also Fivush, R., & Hammond, N., (Eds.), *Knowing and remembering in young children*, NY Cambridge University Press, 1990.

<sup>3</sup> See particularly Bruck et. al, and Sales et. al., *supra*.

<sup>4</sup> See Brown et. al., *supra*, Chapters 1-8 for a careful review of memory and suggestibility issues. See also Loftus, E., (1993) *The reality of repressed memories*, *American Psychologist*, 48, 518-37.

<sup>5</sup> Ceci, S., Crotteau-Huffman, M., Smith, E., & Loftus, E., (1994), *Repeatedly thinking about a non-event: Source misattributions among preschoolers.*, *Consciousness and Cognition*, 3, 388-407.

child abuse scenario—, some children do misidentify who has touched them, where, and how.<sup>6</sup>

- Research in England with preschool children has indicated that up to one-third of three year old children misidentify their own father in a photo-lineup, casting doubt on their ability to correctly identify a potential perpetrator.<sup>7</sup>

Reconciling these two positions requires knowledge of the development of children's memory, and the conditions that produce more as opposed to less reliable child statements.

### **How Does Children's Memory Develop?**

Children appear to develop two systems of memory. The first of these is behavioral memory—memory for common actions and highly scripted or repetitive events—nap time, snack time etc. The existence of this memory is shown during play, where the child acts out these typical, remembered actions—putting their doll down for a nap, or mimicking typical adult actions about feeding them, for example. This type of memory predominates until the child develops verbal narrative skills—typically somewhere between three and three and a half years old.

In forensic contexts, it is extremely difficult to use behavioral memory in a reliable way. The meaning of play behavior is too subjective, too subject to adults reading in their own meanings. Does Johnny's smashing two trucks together indicate simply an active boy, or the 'effects' of physical abuse?<sup>8</sup>

Typically, a child can be a competent witness when they have the verbal skills to describe events, and understand certain basic concepts such as "before and after" and "who, what, where and when." These skills are *developing* in the young child. The Sesame Street program does a great deal of teaching of these kinds of concepts to children. Big Bird walks down the street, the announcer says "Before," then Cookie Monster comes along, and the announcer says "After." Certain children have verbal narrative skills sufficient to testify as early as 3 1/2 years old. This is highly variable and any child's ability in this area must be assessed in determining their ability (competence) to testify.

At approximately six years of age, there is a usual developmental jump in which children show dramatic increases in verbal and memory skills. This is why we typically start children in school around this time. They are, normatively, ready to learn to read, tell stories, etc. And, as we can see in any class of kindergartners, there

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<sup>6</sup> See generally Bruck and Ceci, *supra*. For an important alternate set of results in medical procedure studies also see Goodman, G., Rudy, L., Bottoms, B., & Aman, C., (1990) Children's concerns and memory: Issues of ecological validity in the study of children's eyewitness testimony. In R. Fivush & J. Hudson (Eds.), *Knowing and remembering in young children*, *supra*.

<sup>7</sup> Lewis, C., Wilkins, R., Baker, L., & Woobey., (1995), "Is this man your Daddy?" Suggestibility in Children's Eyewitness identification of a family member., *Child Abuse & Neglect*, 19, 6, 739-744.

<sup>8</sup> See Brown et. al., *supra*, for an extended discussion of the development of child memory.

is enormous individual variation. So, the performance of any child in court is in part a function of their personal intellectual and verbal development.

### **The Language Mismatch**

Children, particularly preschool children, are just acquiring much language and many concepts which attorneys take for granted. For example, many children do not learn to tell time until they are seven or eight years old.<sup>9</sup> For an extensive review of this topic, refer to the Myers. et. al. paper, supra. Drawing on their summary, it is important for attorneys to note that kindergarten children *do* know the following words: lie, police, remember, promise, and judge. However, even typical sixth graders—twelve year olds—*do not* know the words allegation, petition, minor, motion, competent, hearsay, and strike.

Children typically substitute the most common meanings for words that have specific legal meanings—for example, “Court” is “Where you go to play basketball.” It is crucial in interviewing and questioning children to keep language simple and developmentally appropriate. Many attorneys ask questions in paragraphs. Most likely, a child under the age of fourteen will not understand questions with multiple clauses.

In general, ask simple questions. Do not use double negatives. Children (and witnesses of low intelligence) do not understand them. A child simply does not “get” “Were you not actually, during that occasion, in fact, perhaps only sitting on your Mommy’s lap?” They can understand “Were you really just sitting on Mommy’s lap?”

Under conditions of developmentally appropriate questioning and use of language, even pre-school children can give reliable reports. We’ll review below the conditions which increase or decrease the accuracy of these reports.

### **Conditions Increasing the Accuracy of Children’s Reports**

1. The accuracy of children’s reports increases when interviewers reduce status and authority relationships between them and the child. “You are the expert on what happened to you, I really don’t know. What can you tell me about...?”
2. Children’s first, spontaneous conversation is likely to contain the most accurate data.
3. Ways to aid in production of accurate information:
  - Neutral interviewer tone—don’t “pursue” disclosure as the goal.
  - Encourage children to say as much as possible in their own words.
  - Use general questions to ask for more information (“Can you tell me anything else?”).

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<sup>9</sup> Myers et. al., supra.

- When using specific questions use wh questions rather than yes/no questions. (Where was that?) (Who was in the room then?)
- Use leading questions only as a last resort. (“Does anything scary happen at nap time?”) Only use this type of question **after** obtaining as much as possible from open ended questions and open ended follow up questions.
- Do not offer bribes or rewards (“If you just tell me we can stop the interview. You can have a cookie after you tell me what happened. Frankie told me, you want to help him don’t you?”).

### **Conditions Decreasing the Accuracy of Children’s Reports**

4. Accuracy decreases and suggestibility increases under the following circumstances:
  - ✓ Interviewer bias—The interviewer believes something bad has happened and focuses the interview almost exclusively on obtaining confirmation. For example, if a child denies something happens, their follow-up question might be something like “Why would a child be afraid to tell me.” Soon, most children get the idea of what they should say in these circumstances.
  - ✓ Stereotype induction—“We know something bad happened.”
  - ✓ Leading questions in which the question stem presupposes the desired answer—“After Mommy hit you...”
  - ✓ Yes/No format questions—“Didn’t Johnny touch *your* privates too?”
  - ✓ Repeated questions—children interpret these as their prior answer did not please the interviewer and they need to change it.
  - ✓ Repeated interviews.
  - ✓ Younger age children. Three, four and five-year-olds are particularly suggestible.
  - ✓ More time between the event and the request to recall it.
  - ✓ Multiple interviewers.
  - ✓ Use of anatomically correct dolls (and apparently drawings).
  - ✓ Failure to believe child’s denials.
  - ✓ Use of peer pressure, threats, or bribes—“Now, if you’ll just tell me what happened you can eat the potato chips, go to the bathroom, stop the interview, etc.

### **Child Sexual Abuse—What Behaviors Should We Really Be Concerned About?**

Child physical, emotional, and sexual abuse is real and can have disastrous life-long consequences.<sup>10</sup> The focus of this paper is *not* the desire to discredit child witnesses, but to use the current state of science to aid us in producing information which may be more accurate and on which the legal system can more safely depend. In attempting to sort out actual abuse from inaccurate statements, it is extremely important to know what behaviors are likely to actually raise a “red flag” that a child may have been sexually abused, and what behaviors are developmentally simply normal childhood sexual curiosity.

Dr. William Friedrich and his colleagues have been studying this question for approximately thirty-five years. This research has led to the development of an instrument to aid in determining whether a child is showing normal developmental sexual curiosity (Developmentally Related Sexual Behaviors, DSRB) or is showing behaviors commonly linked to child sexual abuse (Sexual Abuse Specific Items, SASI).<sup>11</sup>

While a complete discussion of this topic is beyond the scope of this paper, a summary suggests that, in preschoolers (ages 2-5) the following behaviors are developmentally normative (these behaviors take place in upwards of 20% of non-abused children):

- For boys: Standing too close to people, touching their private parts in public, touching their mother or other woman’s breasts, touching their sex parts at home, and trying to look at nude people.
- For girls: Standing too close, touching mother or other woman’s breasts, touching sex parts at home, trying to look at nude people.

The following behaviors are quite developmentally unusual and they, in combination with an overall increase in child sexualization as measured by the CSBI, can be considered to “raise red flags” about the possibility of child sexual abuse:

- Boys—Putting their mouth on sex parts (all age groups), asking others to do sex acts, talking about sexual acts, putting tongue in mouth while kissing, knowing much more than a typical child of that age about sex.
- Girls—Touching other child’s sex parts if over five years old, trying to have intercourse, putting their mouth on someone’s sexual parts, asking other people to do sex acts, putting objects in their rectum or vagina, being

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<sup>10</sup> The literature on this point is overwhelming, and even a brief review would be longer than this entire paper. For a good general review see: van der Kolk, B., McFarlane, A., & Weisaeth, L., *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society*, 1996, The Guilford Press, N.Y.

<sup>11</sup> Friedrich, W., (1997), *Child Sexual Behavior Inventory*, Psychological Assessment Resources Inc., Odessa FL 33556, 1-800-TEST.

overly friendly with men, and knowing more about sex than a child of their own age typically would.<sup>12</sup>

The existence of a substantial number of these behaviors (along with a CSBI score greater than 1½ standard deviations over the mean {T Score>65}) should trigger an investigation, and should serve to bolster the likelihood of something inappropriate having happened to a child. There is no litmus test for child sexual abuse, and CSBI results should be seen as only one part of building an assessment of what did or did not occur.

### **How Do We Improve Children's Testimony?**

In general, children's ability to deal with an investigative interview is improved by training them that:

1. They are the experts in what happened to them, the interviewer does not know, and cannot tell the child how to answer.
2. If they do not understand, they do not have to answer a question. Children must be trained and given permission to say, "I don't know." It is often advisable to help children practice this on non-relevant material, such as aiding them to say "I don't know" when asked the name of the interviewer's dog.
3. If the interviewer misstates what the child says, it is OK for the child to correct them. Again, practice in doing this is important as children are typically too anxious to correct adults.<sup>13</sup>

Children can be aided in learning how to give more information than they often do in free recall, through procedures which help them to understand *how* to tell about events, without implying that there are any specific events which they must talk about. In one such technique, narrative elaboration, children are trained that a story contains information about *who, what, where, when, and consequences*, and are shown a 3x5 card with a simple drawing at each stage of the story to remind them what they should include.<sup>14</sup> Such techniques tend to increase the amount of information a child gives without increasing inaccuracy, and therefore increase the likelihood that a child will be a more credible witness.

We can also improve children's testimony through procedures that train children what to expect in court. Programs such as "Kid's Court," which introduce children to the actors in the courtroom and their roles, do substantially reduce children's anxiety. It is particularly important to take note of what children fear in the court

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<sup>12</sup> Friedrich, W., *supra*, CSBI manual pp. 14-15.

<sup>13</sup> See Poole and Lamb, *supra* for a general discussion.

<sup>14</sup> Saywitz, K., Narrative elaboration: Test of a new procedure for interviewing children., *J. Consulting and Clinical Psych.*, 64, 6., 1347-1357.

setting. This is most typically that either the defendant will yell at them or hurt them, or that they themselves may go to jail if they say or do something wrong. It is therefore very important to describe the role of the bailiff and/or sheriff in protecting the courtroom and controlling witnesses, and to make sure the child knows that they are not on trial.

Finally, the effects of testifying on children can be minimized through adoption of certain special procedures. Though there is little empirical evidence, the evidence that does exist confirms that children are quite anxious about facing alleged perpetrators in court.<sup>15</sup> Closed circuit television procedures do reduce child anxiety, and the existence of two way verbal links may, depending on jurisdiction, allow the constitutionally mandated ability to confront witnesses.<sup>16</sup>

### **Final Recommendations**

Decisions about the presence or absence of child abuse are so critical in the lives of children and families that we should do our utmost to improve the ways we gather data about allegations. We have seen that data gathered in a skillful way, by a neutral interviewer, meets current scientific standards for production of information that is reliable and credible. Data gathered by an interviewer who is biased either for or against the presence of abuse can be dramatically distorted, having unintended consequences for both the child and the accused.

It is clearly time to adopt a set of recommended interviewing protocols, such as those discussed by Poole and Lamb, and to require that children be interviewed on videotape by highly trained, neutral investigators. Such a procedure would be fairer to both the child and the accused.

It is time for legislation to address this issue, for the protection of the public and of the children.

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<sup>15</sup> See Myers et. al., *supra*, for a full discussion.

<sup>16</sup> See particularly McGough, L., For the record: Videotaping investigative interviews, in Sales et. al, *supra*, 370-386.