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ASKING THE RIGHT QUESTIONS: REVIVING THE VOIR DIRE FOR CHILD WITNESSES

Lucy S. McGough[†]

INTRODUCTION

Cain was the first child witness, but the chronicler of Genesis did not preserve Cain's account of his family's struggle to adjust beyond Eden. Had Cain told his story, would he have been credible? We know that in early adolescence he lied to God to cover up the killing of his brother.¹ We don't know whether our skepticism of children's testimony stems from Cain's example, but for centuries we have been unsure of all children's accounts.

Debate rages even today over whether children, particularly child victims of serious assaults, should testify in open court. The highly publicized California "McMartin preschool prosecution" gave rise to a wave of statutory and trial innovations aimed at insulating child witnesses from courtroom trauma.²

Recent literature and jurisprudence that consider both novel and traditional evidentiary procedures, however, express little

[†] Vinson & Elkins Professor of Law, Louisiana State University, College of Law. B.A. 1962, Agnes Scott College; J.D. 1966, Emory University; LL.M. 1971, Harvard University. I owe a very special debt of gratitude to Ben F. Johnson, the first Dean of Georgia State University, College of Law, for making my legal education possible and for later hiring me as a colleague at Emory Law School. Acknowledgement is also due the W.K. Kellogg Foundation for its support of my interest in interdisciplinary work during my fellowship years, to my former research assistants, Kimberly Wooten and Mark Hornsby, and to Professor James W. Bowers of the Louisiana State University faculty.

1. *Genesis* 4:1–11 (King James).

2. *People v. Buckey*, No. A-750900 (Cal. Crim. Dist. Ct., 1984). See, e.g., Hoffenberg & Skuthan, *Protecting Children in the Courts*, 59 FLA. B.J., Oct. 1985, at 14–20. See *infra* notes 93–97 and accompanying text. The United States Supreme Court has rejected one such innovation, the "one-way screen," because the screen denies a defendant's rights under the confrontation clause. *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (two thirteen-year-old girls testified, with one-way screening device in place, against defendant accused of sexually molesting them).

concern for the reliability of children's testimony.³ Furthermore, most reforms have focused exclusively upon innovations affecting only criminal prosecutions. If the reliability of child witnesses is a genuine concern, then rule reform should extend to both criminal and civil trials. This Article will ask the fundamental question: If children are to be both seen and heard in court, what safeguards, if any, are necessary to minimize the likelihood of their giving false testimony?

Part I of this Article examines the traditional rules of evidence to expose our beliefs regarding the special reliability risks of children's testimony. Currently, in the United States, three different approaches concerning child witnesses vie for acceptance. These three approaches are the federal or "no inquiry" approach, the "oath understanding" rule, and the "full inquiry" rule.⁴

The federal approach, embraced in the adoption of the Federal Rules of Evidence in 1979, eliminates preliminary inquiry into a child's truthfulness. Instead, the child, like every other witness, may give his testimony under oath subject to cross-examination and to a limited number of exclusionary objections. Competency issues are thus converted into credibility issues. In state courts, a majority of jurisdictions still preserve the voir dire process for child witnesses; they differ, however, on the appropriate subject

3. All of the *Coy* opinions, including that of the Supreme Court, express the dilemma as a choice between protecting children and a defendant's right to a fair trial, specifically the right to confront his accusers. That reliability of an accuser's testimony is somehow served by eye-to-eye contact with the accused is only obliquely suggested by Justice Scalia in the Court's plurality opinion. He asserts, with no reference to empirical data and without acknowledgement that reliability is even ascertainable: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." *Coy*, 108 S. Ct. at 2802. Precisely what those costs are is not a truism.

4. Some states still use the presumptions developed by English law, that is, that a child over a certain age, usually fourteen, is presumptively competent, but younger children must be specially qualified through a threshold voir dire before being permitted to give testimony. This view does not, however, represent a truly different approach to the voir dire process. States retaining age-bound presumptions have simply redefined the category of "children." Such presumptions only allocate burdens of proof, serving as a crude sorting device to determine when special competency proofs are necessary; they do not offer guidance about what questions are relevant to competency. The use of such presumptions begs the more fundamental question of the proper scope of inquiry when a child is offered as a witness. Regardless of how the term "child" is defined, is any voir dire necessary to screen for reliability risks of a child witness and, if so, what risks are to be taken into account? Cf. D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* 27-39 (National Institute of Justice, Issues and Practices in Criminal Justice, 1985).

matter and scope of such questioning. Some states focus exclusively upon whether the child can demonstrate an understanding of the obligation to tell the truth—the “oath understanding” rule. Others permit a more freewheeling probe into the child’s moral and cognitive development—the “full inquiry” rule. None of these approaches examines the real reliability risks inherent in children’s testimony.

Part II explores the function of the voir dire process. Such a process is useful only if it tests for and can eliminate the most likely reliability risks. Current empirical data show that the three risks which pose the greatest potential for distortion in children’s testimony are memory-fade, suggestibility, and imaginative recreation. This Article closes with suggestions to reform the current oath administration and voir dire processes by tailoring them to eliminate these three reliability risks.

I. APPROACHES TO THE QUALIFICATION OF CHILD WITNESSES

Any witness’ basic task is to give an accurate report of an accurate perception of some past event. Perceptual accuracy is meaningless unless the witness speaks truthfully. However, a commitment to tell the truth is meaningless unless the witness can form a perception of the observed event accurately. Historically, the law has used the oath ceremony and the voir dire, or preliminary examination, to test both the cognitive skills and the truthfulness of a proposed child witness.

Classic jurisprudential analysis of witness capacity uses Wigmore’s categories.⁵ The essential components are that the witness demonstrate a capacity for observation, for recollection and for communication. Communication capacity, in turn, is composed of two elements: an ability to understand and respond intelligently to questions, and a sense of “moral responsibility,” defined as a “consciousness of the duty to speak the truth.”⁶ Accurate perception includes Wigmore’s first two components of observation and recollection; accurate reporting includes both parts of Wigmore’s third requirement—the ability to communicate and the felt obligation to communicate truthfully.

The duty of accurate reporting, symbolized by the oath, is a directly enforceable obligation. Any witness knowingly giving

5. 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 506, at 712–13 (J. Chadbourn rev. ed. 1979).

6. *Id.*

false testimony can be convicted of perjury. Accurate perception should be an equally serious concern but it is unenforceable by any direct sanctions against the witness. Instead, the concern for accurate perception is enforced only indirectly through rules aimed at preventing a witness' testimony altogether or discounting its effect. The initial concern of recorded law, a concern which still preoccupies courts today, is accuracy of reporting. Far less attention has been devoted to children's accuracy of perception.

Over time and through different cultures, preliminary assurance of a witness' truthfulness has been sought. Some methods,⁷ like the rack and screw, were very compelling; but all methods, including the modern oath, serve notice that the truth is a societal expectation and command. The modern oath has been pared to a symbolic reminder of this expectation.

A. *The "Oath Understanding" Test*

Both common and civil law regarded child witnesses as suspect, only a short step removed from the perceived unreliability of imbeciles and lunatics. Reasons underlying this skepticism were not clearly differentiated. However, because of the spiritual immaturity of a child, his ability to appreciate an oath taken before God eclipsed all other possible concerns. Most children were precluded from testifying "because of their supposed inability to understand the significance of the oath" in a religious sense.⁸

It is not altogether clear whether the early justification for finding children incompetent was the child's susceptibility to adult influence,⁹ the child's inability to distinguish truth from

7. For an intriguing, though unannotated, array of truth-seeking rituals from differing cultures, see Note, *The Oath as an Aid in Securing Trustworthy Testimony*, 10 TEX. L. REV. 64 (1931-32).

8. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 601[04], at 32 (1988).

9. The taproot of testimonial disqualification is the law's early skepticism about witnesses' potential self-interest. Under Roman law, self-interest was broadly extended to include family members as well. Family interdependence, both affectional and economic, was thought to be a sufficiently strong incentive for perjury that parties' spouses and children were precluded from testifying; this same bond could be used to diminish the credibility of the testimony of domestic servants. LA. CIV. CODE of 1925 art. 2260, *repealed by* Acts of 1916, No. 157. English law, until the mid-nineteenth century, disqualified both plaintiffs and defendants from giving testimony in their own cause of action. 2 J. WIGMORE, *supra* note 5, § 602, at 736. The English law, however, never extended the self-interest disqualification beyond spouses. *Id.* at § 600, 731 n.3. Even though Anglo-American doctrine never used familial self-interest to disqualify children, lawmakers have long entertained grave doubts about children's ability to make autonomous testimonial choices adverse to the family's interest. Children's presupposed "suggestibility," which surfaces

fantasy, or a combination of these two presumptions. For whatever reason, until late in the eighteenth century, English courts did not permit children under the age of fourteen to give testimony.¹⁰ At that time, children aged fourteen and over became presumptively competent to take the oath and testify.¹¹

In 1778, when English law first permitted children to testify, the test for competency was oath understanding. Children could be heard provided that they "possess[ed] a sufficient knowledge of the nature and consequence of an oath [A]dmissibility depends up on the sense and reason they entertain of the danger and impiety of falsehood."¹² Wigmore reported that "[i]t is not always possible to determine whether the language of the [English] Courts is used in view of the oath-test or of an independent testimonial requirement."¹³ However, Wigmore concluded that the English rule was focused primarily on the child's understanding of the oath.¹⁴

often in legal commentary and decisions, seems to be an offshoot of this self-interest taproot. As but one example, the West Virginia Supreme Court confidently asserted in 1893: "[Children] are as clay in the potter's hand, to be moulded, some to honor and some to dishonor. Lacking conscientiousness, they repeat with phonographic precision the things that have been told them to say, be they true or false." *State v. Michael*, 37 W. Va. 565, 569, 16 S.E. 803, 804 (1893).

10. Common law distinctions extended to several other classes of persons. *See, e.g.*, 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2181, at 6 (J. McNaughton rev. ed. 1961) (officers of justice, including judges, jurors, and attorneys are improper witnesses); 2 J. WIGMORE, *supra* note 5, § 518, at 725 (insufficient religious belief necessary to take oath was ground for disqualification at common law); 2 J. WIGMORE, *supra* note 5, §§ 519–20, at 725–30 (any person convicted of treason or certain crimes requiring fraud or deceit were not considered competent witnesses at common law); 2 J. WIGMORE, *supra* note 5, §§ 576–77, at 810–19 (disqualification of any witness having an interest in the pending cause, including parties); 2 J. WIGMORE, *supra* note 5, §§ 600–01, at 856–61 (a spouse of any party could not serve as witness at common law); 2 J. WIGMORE, *supra* note 5, §§ 492–500, at 697–709 (any witness who was insane, an idiot, or intoxicated was not competent to testify at common law).

11. *See* B. JONES, *JONES ON EVIDENCE* § 20:10, at 605 (6th ed. 1972). Presumptive competence for individuals over the age of fourteen is thought to be a vestige of canonical influence in the early development of English law. Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 488 (1939).

12. *The King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779) (announcing that there was no longer a per se rule forbidding the receipt of a child's testimony based exclusively upon the child's age).

13. 2 J. WIGMORE, *supra* note 5, § 505, at 595.

14. *Id.* The "oath understanding" rule developed at common law although England has now abrogated this test for competency. The modern English rule, now in effect for a half-century, permits a "child of tender years" to testify if, "in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." Children and Young Persons Act, 1933, 23 & 24 Geo. 5, ch. 12, § 38. Within the classification scheme of this Article, England would now fall within the "full inquiry" rule category.

Several states still screen child witnesses by focusing exclusively on the child's ability to understand an oath.¹⁵ According to this rule, if a child demonstrates an understanding of the obligation to tell the truth, he is competent to relate his perceptions even if there are reasons to believe his perceptions are faulty. At times, the "oath understanding" voir dire addresses general cognitive capacity. Generally, however, issues of the perceptual accuracy of the child's recollection are reserved for cross-examination.

For example, in an Alabama murder prosecution, the state offered a five-year-old witness. After preliminary inquiry by the court, defense counsel renewed its motion to suppress because "[h]e has shown no knowledge of God, and that God awards for the truth and avenges for falsehood. He has no comprehension of the solemnity of the oath" At this point, the trial court resumed control of the voir dire:

THE COURT: Okay. Dennis, do you know what it means to tell the truth?

(NO ANSWER FROM THE WITNESS)

THE COURT: Do you know what it means to swear to tell the truth and to take an oath?

THE WITNESS: Uh-huh.

THE COURT: What do you do when you swear to tell the truth?

THE WITNESS: When you tell the truth you have got to tell the truth.

THE COURT: Okay. Anything else from the State?

[*STATE'S COUNSEL:* I don't have anything.

THE COURT: All right, come down.

(WITNESS LEAVES THE WITNESS STAND)

THE COURT: Okay, I am going to overrule your Motion. I am going to allow him to testify.¹⁶

15. See, e.g., O.C.G.A. § 24-9-5 (1982): "Persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses."

16. *Harville v. State*, 386 So. 2d 776, 779 (Ala. Crim. App. 1980). In this portion of this voir dire, the court summarized a previous inquiry. The inquiry was a series of leading questions that never elicited any demonstration of an appreciation of consequences attached to falsehood. *But see Cole v. State*, 443 So. 2d 1386 (Ala. Crim. App. 1983). Although the appellate court dutifully cites the Alabama "oath understanding" statute, ALA. CODE § 12-21-165 (1975), it apparently applies a full inquiry rule:

The courts of this state have not set a limit for children of tender age to testify. It is the duty of the trial court to examine a child of tender years, and in its discretion determine if the child has sufficient intelligence to

Any preliminary inquiry by the court requires a specific purpose. A limited purpose of the oath-understanding voir dire is to ensure that the child understands his duty to report accurately or be punished for perjury. In contrast, a broader purpose of the oath-understanding inquiry is to probe the child's propensity for truth-telling. Because some jurisdictions authorize an examination for this broader purpose, it is important to consider the fruitfulness of such a procedure.

Diogenes might never have found an "honest child" had he been equipped only with this type of voir dire procedure. The effectiveness of a search for honesty or truthfulness through propounded questions is easily discredited by our recorded experience. Jurisprudence shows many, often bizarre, accounts of judicial frustration caused by attempts to apply the oath-understanding rule.

For example, in *Commonwealth v. Tatisos*,¹⁷ the child appeared "bright and intelligent, and her answers are direct." In response to questions about the oath, however, she responded only that it was wrong to tell lies and if she did, a whipping would follow. Thereupon, the court adjourned the voir dire until the girl could take religious instruction so she could learn to appreciate the significance of the oath.¹⁸

Unlike *Tatisos*, no state court today would focus its inquiry on the theological basis of an oath,¹⁹ but courts have been given substantial, even unbridled, discretion to question the witness' beliefs and moral principles. Some courts take a philological tack by inquiring literally into the meaning of the word "oath."²⁰ Critics have observed that "[e]ven mature and intelligent laymen

observe, recollect, and narrate what occurs, and has sufficient mental capacity to be a witness.

Id. at 1390.

17. 238 Mass. 322, 130 N.E. 495 (1921).

18. *Commonwealth v. Tatisos*, 238 Mass. at 323-24, 130 N.E. at 496-97.

19. As of 1970, the religious conviction prerequisite has been statutorily abandoned in all states. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1828 (J. Chadbourn rev. ed. 1976). For discussion of the religious conviction requirement, see Note, *Witnesses—Competency—Child Who Denied Belief in God Ruled Competent Witness*, 38 NOTRE DAME L. REV. 95 (1962-1963); Comment, *The Problem of the Child Witness—A Question of Competency*, 32 CONN. L. REV. 103 (1958); and Comment, *Youth as a Bar to Testimonial Competence*, 8 ARK. L. REV. 100 (1953-1954).

20. See *Zillinmon v. State*, 234 Ga. 535, 537, 216 S.E.2d 830, 832 (1975) (affirming the exclusion of a seven-year-old defense witness because he did not demonstrate an understanding of the "meaning of an oath").

might be somewhat put to it to give a definition that would strike the fancy of every court."²¹

Even if there were consensus about the responses sought by a broad oath-understanding voir dire, social science research indicates that some children, particularly younger ones, are disadvantaged in comprehending the usual questions asked. The following series of model questions are suggested to attorneys who are faced with the task of qualifying a child witness under the oath understanding approach:

Q. If you told these people a story, or something that wasn't true, what would happen to you?

A. I'd be punished.

Q. Who would punish you?

A. God.

...

Q. What would happen to you?

A. I wouldn't go to heaven.²²

Researchers have proposed a four-level scale of cognitive complexity in human communication.²³ Level IV, the most sophisticated scale of discourse, requires a child to process his perceptual experiences through what are termed "simple conditionals;" for example, the child might be asked, "What would you do if you found a lost puppy?"²⁴ Consequently, the very phrasing of the inquiry has substantial influence on a child's ability to respond. Hypotheticals, such as the model question

21. Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 YALE L.J. 1017, 1019 (1928). Among other data, this article collects a number of cases involving competency voir dieres of children.

22. Perry & Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369, 1405 n.187 (1984–1985) (quoting 35 AM. JUR. PROOF OF FACTS 2d, *Qualifying Child Witness to Testify* § 12, at 683–84 (1983)).

23. M. BLANK, S. ROSE, & L. BERLIN, *THE LANGUAGE OF LEARNING: THE PRESCHOOL YEARS* (1978); Blank & Franklin, *Dialogue with Preschoolers: A Cognitively-Based System of Assessment*, 1 APPLIED PSYCHOLINGUISTICS 127 (1980). The four levels are: matching, selective analysis, reordering, and reasoning about experience. *Id.* at 130. The levels represent a scale of cognitive complexity ranging from the simplest, calling an object by its name (matching experience); through the slightly more complex behaviors of describing objects' characteristics (selective analysis) and forming patterns and sequences (reordering experience); to the most complex cognitive communication which is identifying causes and giving explanations (reasoning about experience). *Id.* at 135. Children develop along this scale as they mature. *Id.* at 128.

24. Gordon, *Adequacy of Responses Given by Low-Income and Middle-Income Kindergarten Children in Structured Adult-Child Conversations*, 20 DEVELOPMENTAL PSYCHOLOGY 881, 885 (1984).

above, require this Level IV capability. Such questions can befuddle a child who is truthful and predisposed to relate accurately. The purpose of the inquiry is thus defeated.²⁵

Even when the question can be understood, global abstractions are not likely to adduce meaningful responses. For example, consider another staple of oath-understanding voir dire:

Q. Do you know the differences between right and wrong?

A. Yes.

Q. What is the difference?

A. When I do things right, I'm a good boy, and when I do things wrong, I'm a bad boy.²⁶

Social science research has documented little correlation between age and honesty.²⁷ However, a substantial body of moral development theory explains why children at different developmental stages may be motivated to tell the truth. As a child grows older his reasons for telling the truth may change to include a perceived duty to society and to the criminal justice system.²⁸ However, cognitive sophistication, not motivation, is required to discuss truth. "[A]sking a child to tell the meaning of 'truth,' 'oath,' or 'God' [or distinguish between right and wrong] probably tells more about his or her intellectual development than about the child's propensity to tell the truth."²⁹

The Advisory Committee's Note to Federal Rule of Evidence 601 argues that:

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application . . . Standards of moral qualification in practice consist essentially of evaluating a person's

25. See Perry & Teply, *supra* note 22, at 1371–74. They conclude: "Because of these advances in logical reasoning and memory encoding strategies, six to twelve-year-old children should be considered better witnesses than younger children. On the other hand, they are not yet equipped to handle either abstract, hypothetical dilemmas or situations that require an assessment of relative ethics." *Id.* at 1373.

26. Perry & Teply, *supra* note 22, at 683–84.

27. See Goodman, Aman & Hirschman, *Child Sexual Abuse and Physical Abuse: Children's Testimony*, in CHILDREN'S EYEWITNESS MEMORY 16 (S. Ceci, M. Toglia & D. Ross ed. 1987). See also Melton, *Children's Competency to Testify*, 5 LAW & HUMAN BEHAVIOR 73, 79 (1981). Melton wryly notes that there appears to be only a "rather modest" correlation between strongly asserted moral judgments and actual moral behavior. *Id.* at n.19.

28. T. LICKONA, RAISING GOOD CHILDREN: HELPING YOUR CHILD THROUGH THE STAGES OF MORAL DEVELOPMENT (1983).

29. Melton, *supra* note 27, at 79.

truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.³⁰

Thus, the Committee justified discarding the oath-understanding voir dire in the federal system.

Those states which have adopted the oath-understanding rule are motivated by a proper concern, but the voir dire is the wrong procedure to address this issue.³¹ Qualifying a child as a witness based solely upon his abstract appreciation of an oath's obligations is a test that is both overinclusive and underinclusive. It can exclude some linguistically unsophisticated but truly reliable younger witnesses, while failing to exclude the unreliable. In sum, the use of the oath-understanding voir dire to test a child's truthful predisposition appears to be an even less satisfactory measure with children than with adults. Such a process should be abandoned as confusing to many children and nearly always futile.

B. The "Full Inquiry" Test

Under this approach, a broad inquiry into both the appreciation of the obligation to tell the truth and perceptual accuracy is authorized. Washington is one example of a jurisdiction that adhered to this rule.³² The Washington Supreme Court has found the following factors relevant to the assessment of children's competency:

- (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to

30. FED. R. EVID. 601 advisory committee's note.

31. See *infra* § III.

32. The Washington Code provided: "The following persons shall not be competent to testify . . . Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." WASH. REV. CODE ANN. § 5.60.050 (1963). In 1986, an amendment to this statute deleted the words "children under ten years of age." Thus, section 5.60.050 now classifies as incompetent only those intoxicated and "of unsound mind," as well as persons "incapable of receiving just impressions of the facts." WASH. REV. CODE ANN. § 5.60.050 (Supp. 1989).

express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.³³

In a jurisdiction which uses the factors listed above to assess competency, voir dire questions should cover a wide area yet indirectly produce important information on the subject of competency. For instance, a trial judge has provided a vivid illustration of how the competency voir dire should be conducted in a jurisdiction which has adopted the "full inquiry" rule:

- Q. What is your name?
 A. Katherine Anne Craig.
 Q. How are you feeling today, Katherine?
 A. Fine.
 Q. What are the names of your mother and father?
 A. — — —
 Q. Do you have any brothers and sisters?
 Q. Do they live at home?
 Q. By the way, how do you spell your name?
 Q. How old are you, Katherine?
 Q. When is your birthday?
 Q. How did you get here today?
 Q. Do you know what building you are in now?
 Q. What town are you in now?
 Q. Where do you live?
 Q. What school do you go to?
 Q. How far do you live from school?³⁴

The trial judge noted that competency assessing questions should be not only simple and easy to answer for the child, but should also help to relax the child through familiarity. Certain topics must be covered to form a basis for a competency determination and to enable the interrogator to pursue other important questions.³⁵ These questions include:

1. General questions about the home and members of the family;
2. Questions about his schooling, including his grade, present teachers, former teachers, subjects studied, class standing, grades received in former years, regularity of promotion,

33. *State v. Allen*, 70 Wash. 2d 690, 692, 424 P.2d 1021, 1022 (1967) (child's age of six did not, as a matter of law, disqualify child as a witness). *See also State v. Hunsaker*, 39 Wash. App. 489, 693 P.2d 724 (1984) (four-year-old child and two-and-a-half-year-old child not presumed incompetent based on age alone).

34. *Stafford, The Child as a Witness*, 37 WASH. L. REV. 303, 315 (1962).

35. *Id.* at 316.

failures, if any, favorite subjects, attendance record and extracurricular activities. If the child is of preschool age, or is very young, he should also be tested on his ability to count, read and spell simple words;

3. Questions about his attendance at church or Sunday school, including his frequency of attendance, names of his teachers, pastors and location of the church;

4. Questions to demonstrate his knowledge of the difference between the truth and a falsehood, that it is wrong to lie and the consequences of telling a lie; and

5. Lastly, the child should be asked some questions to dispel the possibility of coaching. A child that has been coached is suspect. In this regard, the following type of questions would be appropriate.

Q. Have we met before, Katherine?

A. Yes.

Q. Where?

A. At your office.

Q. When was that?

A. Last Saturday.

Q. Was anyone else in the room?

A. Yes.

Q. Who?

A. My dad and my sister Joan.

Q. What did we talk about?

A. About what I'd seen at the wreck.

Q. Did I tell you about the wreck, or did you tell me?

A. I told you.

Q. Did I tell you what to say in court?

A. Yes.

Q. What did I tell you to say?

A. To tell everything I know.

Q. Did I tell you anything else?

A. You said to tell the truth.³⁶

A child witness should also be asked questions relevant to the subject on which she is testifying. Thus, for a child testifying about her observations of an automobile accident, the pivotal test should not be current intelligence, proper orientation in time and space, or memory of irrelevant everyday or academic learning

36. *Id.* at 316-17. Although this voir dire addresses suggestibility, no facts about the number, nature, and scope of pretrial interviews are sought or elicited. Furthermore, the "Shirley Temple" responses reinforce our worst fears about coaching.

but the accuracy of a witness' perception and memory of the past observed event.³⁷

C. The "No Inquiry" or Federal Approach

In view of the weaknesses of both the oath-understanding and full-inquiry approaches, it is not surprising that critics have called for their abandonment. By far the most powerful critic was John Wigmore, then Dean at Northwestern University School of Law. In 1940, he wrote:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth.³⁸

Forty years later, the Wigmore position was incorporated into the Federal Rules of Evidence. Under the federal approach, no special precautions need be taken insofar as a child witness is concerned, either as to his appreciation of the duty to tell the truth or the accuracy of his present perceptions of the event that is to be remembered. Although every witness is administered an oath in the federal system,³⁹ there is no separate requirement

37. See *Edmondson v. United States*, 346 A.2d 515 (D.C. App. 1975). The defendant asserted that the failure of a seven-year-old witness to recall, during voir dire, the name of her kindergarten teacher who had taught her the previous year demonstrated her incompetency. Rejecting this argument, the court observed that the proper test was the "child's ability to recollect the events about which she was to testify." *Id.* at 516.

38. 2 J. WIGMORE, *supra* note 5, § 509, at 600. Wigmore paraphrases Chief Judge Campbell in *Hughes v. Detroit, G.H. & M.R.R.*, 65 Mich. 10, 31 N.W. 605 (1887).

39. Rule 603 states: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." FED. R. EVID. 603.

that a child be questioned about the significance of the obligation to tell the truth.⁴⁰

The Federal Rules of Evidence also abolish all age-bound presumptions of incompetency.⁴¹ When a child is offered as a witness, opposing counsel has only the general grounds for challenge which would govern the testimony of any proffered witness. These objections include irrelevancy, such as lack of personal knowledge, or prejudicial or cumulative evidence.⁴²

As one federal circuit court correctly predicted in 1979:

If these views [of the Advisory Committee which drafted the Federal Rules of Evidence] are to be rigorously adhered to, there seems no longer to be any occasion for judicially-

40. Rule 603 relies on the form of the oath or affirmation to reinforce the duty to tell the truth. The Advisory Committee rejected the view that a voir dire into oath-understanding and acceptance of its duty was authorized under this Rule. Apparently, appreciation of the duty to tell the truth is foreclosed as a potential challenge. This stance may be viewed as acceptance of Wigmore's suggestion that "[t]he true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness whenever such a stimulus is feasible." 6 J. WIGMORE, *supra* note 19, § 1827, at 413.

41. Rule 601 provides:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

FED. R. EVID. 601. As Weinstein and Berger have commented:

Since Rule 601 abolishes all grounds for disqualifying a witness (except when state law furnishes the rule of decision), a preliminary examination pursuant to Rule 104(a) for the purpose of determining competency is usually no longer required. This does not mean, however, that the trial judge no longer has any power to keep a witness from testifying. It merely means that the judge must focus on the proffered testimony rather than the proposed witness; instead of ruling on the basis of competency the judge must recast the problem in terms of relevancy.

3 J. WEINSTEIN & M. BERGER, *supra* note 8, § 601[04], at 26.

42. Rule 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Although relevant, some evidence may be excluded on preliminary examination under Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. As Weinstein and Berger, however, have noted:

If there is doubt about the existence of unfair prejudice, confusion of issue, misleading, undue delay, or waste of time, it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge.

1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 403[01], at 10 (1988).

ordered psychiatric examinations or competency hearings of witnesses—none, at least, on the theory that a preliminary determination of competency must be made by the district court.⁴³

Since the adoption of the Federal Rules in 1979, the trial court's refusal of a preliminary hearing has been affirmed in all cases in which the competency of an adult witness was challenged;⁴⁴ the sole case in which a hearing was held and a challenged witness was found incompetent was reversed on appeal.⁴⁵ Thus, questions about the past or current accuracy of a child witness' perceptions are credibility issues to be tested by cross-examination and weighed by the trier of fact. This federal approach to child competency has now been adopted in fourteen states.⁴⁶

Under the no-inquiry approach of the Federal Rules, the voir dire mechanism is now like an appendix, an atrophied vestigial organ of problematic function. Perhaps the reliability risks of adult witnesses justify this no-inquiry approach because data on adults' unreliability may not be as compelling as the data regarding children.⁴⁷ We are still willing to presuppose that an adult's

43. *United States v. Roach*, 590 F.2d 181, 186 (5th Cir. 1979). However, the court notes that a defendant might urge that a psychiatric examination is necessary to challenge the credibility of the witness. *Id.* at n.9.

44. *See, e.g., United States v. Gutman*, 725 F.2d 417 (7th Cir. 1984) (trial court refused to require psychiatric examination of government witness who had experienced incident of mental illness year before trial); *United States v. Martino*, 648 F.2d 367, 384 (5th Cir. 1981) (trial court granted request for psychiatric examination regarding a witness' current competency, but refused examination into mental condition at the time of the alleged offenses); *Shank v. Naes*, 102 F.R.D. 14 (D. Kan. 1983) (trial court did not bar depositions and interrogatories in motion for summary judgment despite deponent's mental incompetency).

45. *United States v. Villalta*, 662 F.2d 1205 (5th Cir. Dec. 1981) (accuracy of an informant-witness' ability to speak Spanish challenged because his testimony concerned negotiations conducted entirely in Spanish).

46. 3 J. WEINSTEIN & M. BERGER, *supra* note 8, § 601[06]. *See, e.g., WIS. STAT. ANN.* § 906.01 (West 1975). According to the Wisconsin revision committee's notes, the adoption of the federal approach

remove[s] from judicial determination the question of competency and admissibility; judicial determination of sufficiency and the jury assessment of the weight and credibility survive. The effect of the change is the shift to opponent's emphasis from a *voir dire* attack on competency to a cross-examination and introduction of refuting evidence as to weight and credibility.

Id. (Judicial Council Committee's Note). *See State v. Olson*, 113 Wis. 2d 249, 253, 335 N.W.2d 433, 436 (1983).

47. *See Johnson & Foley, Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISSUES 33 (1984) (common assumption that children's reliability is less than that of adult's).

memory stabilizes rather closely in time to any occurrence and that she can usually reproduce an account of her experiences with comparable accuracy at trial.⁴⁸ Any special deficit of a particular adult witness can be exposed by a face-to-face confrontation with, and cross-examination by, the adverse party. This seems to be an efficient judicial process because we are comfortable making the critical assumption that testimony from most adults is not flawed by substantial reliability risks.

In contrast, modern evidentiary machinery is grossly inefficient if the time of the courts is wasted hearing children's testimony entitled to little or no probative weight. The occasional inefficiency of the unreliable adult witness may be tolerable⁴⁹ but unreliable child witnesses are a much more predictable phenomenon.⁵⁰ The Federal Rules fail to take this more frequent unreliability into account.

The federal warts-and-all approach to witness credibility makes critical assumptions about our legal process. First, it assumes that the adversarial system produces equal prowess so that cross-examination will be conducted effectively. Second, it assumes that cross-examination is capable of exposing the reliability risks

48. See, e.g., *United States v. Watson*, 599 F.2d 1149, 1159 (2d Cir. 1979). *Watson* is an example of the rare case in which such assumptions are explicitly expressed. Dissenting from the panel opinion, Judge Friendly cites the work of Ebbinghaus, which states that "memory declin[es] along an asymptotic curve, with most loss occurring within a few days and almost no further decline in the time span here at issue [the five-year statute of limitations]." *Id.* at 1159 n.1. (Friendly, J., dissenting). Judge Oakes challenged the continuing validity of the Ebbinghaus curve, insofar as adult memory is concerned: "In general . . . 'psychologists no longer think in terms of the curve of forgetting. Forgetting is a function of many factors and there are many curves of forgetting.'" *United States v. Muse*, 633 F.2d 1041, 1052 (2d Cir. 1980) (en banc) (Oakes, J., dissenting).

49. See, e.g., *United States v. Hyson*, 721 F.2d 856 (1st Cir. 1983). During the testimony of an informant called as a prosecution witness in a drug distribution conspiracy trial, defense counsel moved for a physical examination to determine whether the witness was currently under the influence of drugs. The trial court demurred, simply asking the witness whether he took drugs as a practice or had consumed any medication on this particular day. On the second day, when the witness "had difficulty speaking," the court inquired further and secured his consent to an examination. The examining physician later testified that the witness had been under the influence of phencyclidine when testifying which caused him to be in "an acute confusional state." The court ordered the doctor's testimony and conclusions read to the jury and instructed them that the second day's testimony was stricken and not to be considered. *Id.* at 683.

50. See, e.g., Chance & Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 J. SOC. ISSUES 69 (1984); Marin, Holmes, Guth & Kovac, *The Potential of Children as Eyewitnesses*, 3 LAW & HUM. BEHAV. 295 (1979) [hereinafter *Children as Eyewitnesses*].

of any witness' testimony. In the case of child witnesses, both assumptions further rest upon a shaky assumption that lawyers are fully aware of the reliability risks inherent in children's testimony.⁵¹

Third, the federal approach perhaps assumes that there are strong professional restraints causing an attorney to reject some potential witnesses in advance based upon the attorney's assessment of their likely unreliability.⁵² Cynics might observe that counsel is checked only when she perceives her child witness is unreliable *and* when that unreliability is likely to be demonstrated by a knowledgeable opponent. In any case, the federal approach presumes no efficiency gain from fashioning legal incentives to screen potential witnesses more carefully.

Finally, the free-for-all no-inquiry rule gives very little guidance to attorneys deciding whether to produce a child witness. More importantly, the adoption of such a laissez-faire position means that we must forego the opportunity to be more efficient in the future. Echoing Wigmore, we can only continue to hear testimony "for what it's worth." Established rules of evidence can cause counsel to take pretrial precautions to ensure the probative value of any witness. However, unless the inducements are sufficiently high—an easier method of admissibility—or the costs are

51. In fact, extant studies of lawyers' awareness of social science data, including the potential reliability risks in children's testimony, demonstrate that lawyers are only slightly more knowledgeable than the average juror. See Note, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 736–37 (1985).

52. See, e.g., *In re Schapiro*, 144 A. D. 1, 9, 128 N.Y.S. 852, 858 (1911) ("attorney is an officer of the court upon whom rests the responsibility of preventing false or perjured testimony and calling only those witnesses whom he believes to be truthful witnesses"). The ABA Model Rules of Professional Conduct proscribe the knowing use of false or perjured testimony. "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983). Similarly, "[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." *Id.* at Rule 3.4(b).

An attorney is given discretion when confronted by potential testimony which he reasonably believes might be false but does not actually know is false. In this more often occurring situation, the Comments to the Model Rules of Professional Conduct offer only equivocal guidance: "Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate." *Id.* at Rule 3.3 comment 14.

Informal restraints, such as fears of drawing a reprimand or irritating the court, might dissuade an attorney from offering testimony of doubtful probative value.

sufficiently high—inadmissibility—the probative quality of testimonial evidence is unlikely to improve.

II. THE APPROPRIATE USE OF THE VOIR DIRE

A. *The Rules of Evidence as an Index of Skepticism*

If the purpose of a trial is to discover the truth about some disputed event or transaction, then the function of evidentiary rules must be to sort unreliable from reliable evidence.⁵³ At the risk of oversimplification, the rules of evidence are based on the degree of skepticism evoked by particular types of proof. Collectively, the rules operate to distinguish when evidence is absolutely barred from consideration, when a threshold showing of probative worth is required as a precondition for admissibility, and when evidence is freely admitted.

The rules distinguish between testimonial evidence and documentary or physical evidence. For certain nontestimonial evidence, the American system still requires demonstrations of reliability such as foundational proofs of authenticity and accuracy. As a result of Wigmore's still palpable influence, the clear trend of the last century, however, has been to lower the barriers to admission of testimonial evidence.

To illustrate this difference, compare the evidentiary rules' treatment of a photograph with that given to eyewitness testimony. A photograph becomes probative only upon proof that it is accurate and truly represents what it purports to show. The rules reflect skepticism about the accuracy of the camera's resulting picture.⁵⁴ Thus, threshold certification requires that the photograph is an accurate portrayal by a witness who has personally observed the scene or expert verification that the process that produced the picture was reliable. The court must be provided testimony that the machine was in good working

53. Of course, many of our evidentiary rules are premised upon the need to insulate lay juries from unreliable, and hence prejudicial, forms of evidence. We are willing to presuppose that seasoned judges are more immune to the prejudicial effects of unreliable evidence when making their fact findings in bench trials. Required preventive proofs can insulate both a jury and judge from unreliable evidence.

54. Although photography is now a well-established process whose ordinary reliability is commonly accepted, when the technology was new, elaborate preventive proofs were required. See, e.g., *United States v. Hobbs*, 403 F.2d 627 (6th Cir. 1968) (requiring comparison between film negative and resulting print and proof that retouching by manual or chemical means had not occurred).

order and that nothing intervened during the film's development to distort the image.⁵⁵

If a witness verbally depicted the same scene, the rules do not seek similar assurances of reliability before receiving the account of his memory picture. Some testimonial reliability risks—specific misperceptions like “seeing” a light blue car viewed at twilight as beige—may not become apparent until the account is probed by cross-examination or until it is contradicted by other witnesses. These credibility risks are weighed most efficiently by the trier of fact because the risks usually are not apparent in advance of receiving the witness' testimony. More importantly, minor testimonial discrepancies do not necessarily skew the reliability of other aspects of the witness' account.

Other reliability risks involving complex judgments beyond the capability of the average layman—such as asking a farmer the speed of the jet immediately before it crashed into his pasture—can distort the truth of the testimony. This type of reliability risk suggests the need for a special showing of expertise through a truncated voir dire. Unless the necessary expertise is demonstrated, the court will preclude this line of inquiry.⁵⁶

Hearsay rules also utilize a mini-voir dire procedure. Collectively, the hearsay rule, with all its grafted exceptions, discriminates among types of out-of-court declarations. Unless there is a threshold showing of exceptionality, we are content to exclude such testimony because experience of centuries has demonstrated substantial reliability risks in reporting out-of-court statements. Each exception represents an a priori judgment that a specific type of statement was made under circumstances that overcome the general skepticism and insure the statement's reliability.⁵⁷

Still other reliability risks, such as memory-fade and memory distortion, can infect a witness' entire account. This most serious type of reliability risk suggests that a threshold inquiry should be conducted and, if it confirms the presence of wholesale distortion, the court should exclude the testimony. We use the shorthand term “incompetency” to refer to this last constellation of factors which can produce wholly unreliable testimony.

55. FED. R. EVID. 901(b)(1), (9) and FED. R. EVID. 1001. For a discussion of these two bases for admissibility, see 3 C. MCCORMICK, MCCORMICK ON EVIDENCE § 214 (3d ed. 1984).

56. See FED. R. EVID. 701, 702; C. MCCORMICK, *supra* note 55, at § 13.

57. See FED. R. EVID. 801, 803, 804.

B. The Function of the Voir Dire Process

Wigmore's competency inquiry⁵⁸ suggests a camera metaphor; courts should treat human memories like photographs. Was the camera capable of taking pictures—accuracy of sensory perception? Was the photograph accurately processed—recollection? Is the resulting picture an accurate representation of the observed scene—truthful communication? The problem with this broad formulation, which persists today in jurisdictions using competency examinations of children, is that it invites an abstract evaluation of a witness' cognitive abilities without providing guidance on how to assess the exceedingly complex matters of human perception, recollection, and communication.

More troubling, as Wigmore's formulation goes, is the lack of emphasis upon the most critical component, accurate recollection. Few witnesses, including children, lack sensory perception and the ability to communicate. Most witnesses, especially children, experience memory-fade and potential memory distortion.

Despite the availability of the voir dire, the procedure is not used to disqualify the entire testimony of a child witness by states that follow the federal approach. Perhaps the most powerful reason for not using testimonial voir dire, as it is currently practiced, is because it does not focus on the real reliability risks of children's testimony. Given our historic experience with such a voir dire simulacrum, the federal approach might appear preferable. Unless a preliminary showing is able to test for and to eliminate a specific reliability risk, it is probably more efficient to hear proffered testimony, consider the holes created by even a bumbling cross-examination, and decide whether all, most, or some facts are credible.

The voir dire mechanism will be an efficient sorting procedure only if two requirements are met: first, we must be able to identify with some precision those reliability risks in testimony which ought to prevent admissibility of a witness' account; and second, we must be able to design a brief interrogation which will test for and eliminate specific reliability risks.

C. Reliability Risks in Children's Testimony

A considerable body of knowledge about the development of human cognitive processes has developed during the past decade.

58. See *supra* text accompanying note 5.

Children's capacity for observation and memory, skills critical to competent testimony, has enjoyed a renaissance of social science interest.⁵⁹ Overtime, seven reliability risks potentially inherent in children's eyewitness accounts have been touted.⁶⁰ These are: lack of sensory capability; lack of attentiveness; perceptual deficits; inability to perform complex cognitive tasks; propensity toward fantasy, sometimes even a complete inability to differentiate real and imagined events; memory-fade; and susceptibility to suggestions, particularly those made by authority figures.⁶¹

The first three risk factors, sense capacity, attentiveness, and perception, all fall within Wigmore's capacity for observation requirement. The empirical data of the last sixty years discount any special, child-related risks insofar as sensory capability or attentiveness is concerned.⁶² The five senses of sight, smell, touch, hearing, and taste appear to be keenest in early childhood. Similarly, developmental studies confirm that children are attentive observers of their world. In fact, young children appear to "encode" or make a more detailed initial mental record than do adults. With age comes a tendency to attend only to the "core details" of action. Adults ignore apparently irrelevant, peripheral information.⁶³ Because reality does not so neatly sort into relevant

59. The renewed interest in the memory capabilities of children was apparently sparked by a symposium sponsored fifteen years ago by the Society for Research in Child Development. For a retrospective summary of research from then until now, see ORNSTEIN, *Introduction: The Study of Children's Memory*, in *MEMORY DEVELOPMENT IN CHILDREN* 1—15 (P. Ornstein ed. 1978).

60. See generally 40 J. SOC. ISSUES 1 (G. Goodman ed. 1984). Existing social science data is only briefly described in this Article. A more comprehensive analysis of the reliability problems inherent in children's testimony is set out in McGough, *For What It May Be Worth: Enhancing the Probative Value of Children's Testimony* (1987) (available through author). See also McGough & Hornsby, *Reflections Upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of Stincer*, 47 LA. L. REV. 1255, 1258—61 (1987).

61. Psychic trauma has also been suggested by many experts as a potential memory distorting factor. Discussion of this reliability risk has been omitted because no systematically conducted empirical studies exist. There is, however, a substantial body of anecdotal and impressionistic literature. See Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984); Brown & Kulik, *Flashbulb Memories*, 5 COGNITION 73 (1977); Pynoos & Eth, *Developmental Perspective on Psychic Trauma in Childhood*, in *TRAUMA AND ITS WAKE* 36 (C. Figley ed. 1984). If the child witness has been the victim of some violence, this research indicates that the voir dire should explore the possibility of traumatic distortion of the account and expert testimony of evaluation should be freely received. See Terr, *The Child As a Witness*, in *CHILD PSYCHIATRY AND THE LAW* 207, 220 (D. Schetky & E. Benedek ed. 1980).

62. See Johnson & Foley, *supra* note 47 at 33—34.

63. See Neisser, *The Control of Information Pickup in Selective Looking*, in *PERCEPTION AND ITS DEVELOPMENT: A TRIBUTE TO ELEANOR J. GIBSON* 201 (A. Pick ed. 1979); Johnson & Foley, *supra* note 47, at 36.

and irrelevant detail, a child may be the only witness capable of providing a fact critical to resolving a legal dispute.

The third risk concern, perceptual acuity, is more complicated. Any account of an observation is dependent upon the mental ability to label the items or events observed and to sort sensory intake into categories similar to those used by others making the same observations. The older, more worldly wise person possesses a larger, more sophisticated mental sorting mechanism than a toddler. Yet, on sorting tasks, such as color, elemental identifying characteristics, and basic object categorization, even four-year-olds appear to be reliable in their use of descriptive data which they do in fact recall.⁶⁴

The fourth reliability risk, children's inability to undertake cognitively complex tasks such as estimating speed or distance, is demonstrably real. Beginning with Piaget's research,⁶⁵ young children have been shown to be unreliable when asked to make judgments involving relativity or comparison. Furthermore, recent data suggest that mastery of time and space assessments occurs significantly later than at ages seven or eight as Piaget postulated.⁶⁶ Most trial court judges are intuitively aware of this cognitive limitation and would suppress any attempt to elicit such testimony from a child. Thus, this reliability risk does not pose any practical difficulty for the legal system and does not imperil the validity of children's descriptive testimony.

The empirical data on these four factors suggests that if counsel, judge, and jury were summoned to the side of a six-year-old immediately following an event and then questioned her about what she had seen, heard, or smelled in categorical language she could understand, they should attribute great weight to her account. Indeed, they should prefer her account to that of a similarly situated adult unless the dispute involves anchovies or camshafts or other phenomena presumably beyond her ken.

Unfortunately, there is usually no early examination of a child witness, and disputes that ripen into lawsuits rarely come to trial quickly. These facts of life force us to confront the most serious reliability risks—memory-fade, fantasizing, and suggestibility.

64. Perlmutter & Ricks, *Recall in Preschool Children*, 27 J. EXPERIMENTAL CHILD PSYCHOLOGY 423, 432–35 (1979).

65. See J. PIAGET, *THE CHILD'S CONCEPTION OF TIME* (1927); J. PIAGET, *THE CHILD'S CONCEPTION OF MOVEMENT AND SPEED* (1946).

66. Siegler & Richards, *Development of Time, Speed, and Distance Concepts*, 15 DEV. PSYCHOLOGY 288 (1979).

Indeed, all other potential risks of unreliability pale in comparison to memory-fade.

Human memory has three distinct stages, acquisition—the intake of data about an observed event, retention—the period of time during which the perceived data are stored in the mind, and retrieval—the process by which the stored data is recalled by the observer.⁶⁷ A weakness during any of these stages diminishes memory.

Individuals suffer memory loss and, upon reflection, can usually identify a cause. “Acquisition stage” failure occurs when the individual was not paying attention to what was said or done, or was watching some new or unfamiliar activity.⁶⁸ “Retention stage” failure occurs when the event took place long ago and was no longer fresh so details had slipped away. Even if the events themselves were memorable, the circumstances surrounding the questioning may have been misunderstood or occurred during a time of distraction or tension, resulting in “retrieval stage” failures. We acknowledge that adult memory occasionally can fail because of these variables; there is now a significant body of research indicating that children’s memory is weaker and more fragile than adults’ at each of these stages.⁶⁹

The greatest difference between adult and child memory occurs in retention. Scientists agree that children are able to recall less information than adults when a significant period of time has passed before they are asked to relate the event.⁷⁰ However, the finding that children’s “long-term” memory is weak is especially striking because “long-term” memory, to a social scientist, is likely to mean only a few weeks or even a day.⁷¹ It seems plausible

67. Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 52, 54 (1984).

68. Some research indicates that the more familiar a child is with certain events, the greater the retention of specific details. See Chi, *Knowledge Structures and Memory Development*, in CHILDREN’S THINKING: WHAT DEVELOPS? 73 (R. Siegler ed. 1978).

69. See Loftus & Davies, *supra* note 67, at 54. “[I]n general, children have greater difficulty than adults in retrieving information from long-term memory.” For further confirmation that memory-fade appears to be age-related, see ORNSTEIN, *supra* note 59.

70. Chance & Goldstein, *supra* note 50, at 79–80.

71. See, e.g., Dempster, *Conditions Affecting Retention Test Performance: A Developmental Study*, 37 J. EXPERIMENTAL CHILD PSYCHOLOGY 65, 68 (1984) (24 hours); Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUM. BEHAV. 201, 204 (1980) (5 days); Bach & Underwood, *Developmental Changes in Memory Attributes*, 61 J. EDUC. PSYCHOLOGY 202, 293 (1979) (48 hours); *Children as Eyewitnesses*, *supra* note 50, at 298 (30 minutes and 2 weeks); Hasher & Thomas, *A Developmental Study of Retention*, 9 DEV. PSYCHOLOGY 281, 281 (1973) (1 week).

that significant delay before recall creates a serious risk of unreliability in the trial testimony of children.⁷²

Furthermore, a strand of memory weakened over time is more susceptible to twisting or fragmentary substitution of key links resulting from either the child's own imaginative reconstruction or the influence of others. The delay-ridden legal system should be greatly concerned by data indicating that children are more prone to memory self-distortion or to memory manipulation by influential persons than are adults.

Fantasizing by child witnesses has been suspected for centuries.⁷³ Until recently, few empirical studies examined a child's inability to distinguish real from imagined events. Social scientists now believe that children do not have a generalized inability to make this distinction. The most intriguing finding is that confusion between remembered actual events and imagined events varies according to the type of action recalled. For example, children displayed significant difficulty, which decreased with age, in distinguishing between their own thoughts or plans (imagined speech and action) and what they actually said or did.⁷⁴ Consequently, the reported research serves at least to caution us that a child's account of what *he* said or did at a particular moment in the past needs to be well probed for imagined action.

Nonetheless, after ten years of research on fantasy, experimental psychologists concede that perhaps the inquiry most critical to the legal system has yet to be conducted:

An important question, both for theory and for courtroom testimony, is whether children only have difficulty with mem-

72. Although some additional memory loss occurs as time passes, a simple linear extrapolation may not be appropriate. It is possible, though as yet unproved, that after an initial sharp decline, children's memory stabilizes rather quickly after an initial sharp loss just as was once thought true of adult memory. See Hutchins & Schlesinger, *Some Observations on the Law of Evidence—Memory*, 42 HARV. L. REV. 860, 866 (1928). But there is a lack of research on the impact of lengthy delays upon the memory capacity of children.

73. As Sir James Fitzjames Stephen commented in 1863:

[Fantasy is] a considerable evil, for infancy the strength of the imagination is out of all proportion to the powers of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming what has passed.

J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 287 (1863).

74. See Johnson & Foley, *supra* note 47 at 37–38. A striking finding of these studies is that a child apparently encounters no difficulty in distinguishing between what he actually saw or heard another do or say from the other's actions or speech that the child was asked to imagine. See *id.* at 44.

ories that involve themselves as agents or whether the same pattern would be found with another agent. Would children have the same difficulty separating what they saw someone else do from what they only imagined that person doing? We are currently investigating this question.⁷⁵

Even greater concern is raised by the empirical data on children's suggestibility. In five recently reported experiments, children observed a film or a live enactment of a scene and then were questioned.⁷⁶ Suggestive questions based on incorrect facts were interjected to see if the child's personal recall remained unshakable. Only one of these studies concluded that children were not significantly more prone to suggestibility than young adults.⁷⁷ The other studies found a correlation between suggestibility and age.⁷⁸ It should be underscored that none of these memory accuracy or suggestibility experiments tested children after a retention period greater than two weeks.⁷⁹

III. REFORM OF THE CHILD WITNESS QUALIFICATION PROCESS

A. *Refurbishing the Administration of the Oath*

Experimentation with the rituals used to deter false accusations has almost come full circle. The Anglo-American tradition began with no oath and we counted on earthly punishment to deter perjury — trial by ordeal and trial by combat. Only later was perjury made a crime and a witness was required to demonstrate an appreciation for divine retribution before giving testimony.⁸⁰ Now the trend is toward reducing the oath to sheer liturgy.⁸¹

75. *Id.* at 45.

76. See Loftus & Davies, *supra* note 67, at 59–62.

77. *Children as Eyewitnesses*, *supra* note 50, at 304.

78. Loftus & Davies, *supra* note 67, at 59–62.

79. *Id.* at 63.

80. See Rowley, *supra* note 12, at 487–88.

81. The ABA Committee on the Improvement of the Law of Evidence suggested modifications in procedure that arguably would enhance only the ritual function of the oath. The Committee concluded that to

ensure the maximum efficacy of the oath: (1) It should be administered by the judge, not the clerk (2) It should be repeated word for word by the witness (3) It should be administered anew to each witness on coming to the stand, not to a group and in advance and (4) The judge and all persons in the courtroom should stand while the oath is pronounced.

3 J. WEINSTEIN & M. BERGER, *supra* note 8, § 603[1], at 6–7 (summarizing 63 REP. OF THE AM. B. A. 586 (1938)).

However, the Advisory Committee in its Note to Rule 603 did not adopt even these

Predictably, the next change will be the elimination of the oath altogether from trial procedures.

An oath serves three functions: an evidentiary function to provide a foundation for later prosecution for perjury; a cautionary function to remind the witness of the enforceable demand for truth; and a ritual function to establish solemnity for the witness' forthcoming role in the trial's search for truth and to underscore the cautionary function.⁸² If the witness approaches the stand unaware of his enforceable duty to give truthful testimony, both the cautionary and ritual functions of the oath are arguably inoperative.

Insofar as adult witnesses are concerned, the law may well indulge in its favorite fiction that every person is presumed to know the law, including the prohibition against perjury. That same presumption ought not apply with equal vigor when a child witness is before the court. The duty of a child witness to report accurately requires some minimal instruction from the court concerning the potential penalties for false testimony.

Empirical studies support the conclusion that moral development progresses with increasing age from the most primitive stage of reward-gain and punishment-avoidance to the adult conscience.⁸³ Even preschoolers quickly learn to modify their behavior when they can associate, through appropriate warnings, a proscribed action with certain costs. Although other types of appeals, such as the approval of important adults or calls for justice or fairness may induce truthfulness in older children, the earliest acquired

modest suggestions. In fact, the Note provides no clue about either the content of the oath or the procedures to be followed in the administration of the oath. Furthermore, it is unlikely that many courts will follow suggestions (1) and (4). (2) may add something and might well be followed, though it is not in many courts. The main point to be observed in most courts is that the clerk who administers the oath take it seriously. He should stand upright, face the witness and repeat the oath from memory slowly and deliberately. While the oath is taken the judge should put aside all his other work, face the witness and observe his demeanor in a way that makes it clear the court expects him to tell the truth.

Id. at 7. That only such minimal advice is thought viable underscores the virtual emptiness of today's oath requirement.

82. This classification scheme is borrowed from Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941) (applying classification scheme to probate law). For a historical overview of the purpose of an oath, see *In re R.R.*, 79 N.J. 97, 107-11, 398 A.2d 76, 81-82 (1979).

83. See, e.g., T. LICKONA, *supra* note 28, at 12. The six stages of moral development proposed by Lickona are summarized by Perry & Teply, *supra* note 22, at 1387.

internalization—avoidance of punishment—is not extinguished by later moral development.⁸⁴

For example, we still make appropriate use of “deterrent effect” when we sanction the violation of general rules of adult human conduct. Consequently, notice of penalties for false testimony is a valid means of capturing the moral sensibilities of all children who are to serve as witnesses.

Although criminal perjury penalties apply if cross-examination or other evidence proves testimony false, the usual oath does not include even a reminder that truth is an enforceable societal demand.⁸⁵ Perjury is a crime in every American jurisdiction and is now included within every state’s definition of a delinquent act.⁸⁶ It does not matter that child witnesses may be below the age of criminal accountability. If we are seriously concerned about truthful accounts, aside from issues of the accuracy of the original perceptions, we ought to be prepared to file delinquency charges against any properly warned child who knowingly gives false testimony.

The cautionary aspect of the oath is essential to reinforce the oath’s significance for child witnesses. Due process may require notice of potential punishments for perjury before a child testifies. Although there is no similar duty to warn an adult before he commits a crime, surely there is a heightened duty to insure that a child is fairly apprised of the consequences of falsity when she is placed in jeopardy.⁸⁷ Notice of criminality might also be required as part of a threshold showing of the willfulness element in any subsequent perjury prosecution.

84. *Id.* at 17.

85. *See State v. Zamorsky*, 170 N.J. Super. 198, 406 A.2d 192 (1979). The appellate court affirmed the admissibility of testimony of a six-year-old victim, despite the fact that she had not been administered a formal oath. The voir dire clearly elicited information that the child realized that “little girls that don’t tell the truth” get “punished” and thus served the purpose of the administration of the oath. *Id.* at 202, 406 A.2d at 194.

86. *See, e.g., TEX. FAM. CODE ANN.* § 51.03(c) (Vernon 1986) (“Nothing in this title prevents criminal proceedings against a child for perjury.”); UNIF. JUVENILE COURT ACT, § 2(2) (1987) (defining a “delinquent act” as “an act designated a crime under the law, including local [ordinances or resolutions] of this state, or of another state if the act occurred in that state, or under federal law”). *Cf. Note, The Competency of Children as Witnesses*, 39 VA. L. REV. 358, 368–69 (1953) (reviewing early precedent holding that children could not be punished for the offense of perjury).

87. The due process rights of a child defendant to notice and the privilege against self-incrimination were recognized in *In re Gault*, 387 U.S. 1 (1967). *See generally* S. DAVIS, RIGHTS OF JUVENILES, 5-1–5-49 (rev. ed. 1986).

Perhaps the two most important adjustments in current practice should be that the oath administration format be one of instruction rather than interrogation and the responsibility for securing oath awareness should shift from counsel to the court. The court should inform any child witness, in words the child can comprehend, that she is expected to answer truthfully all questions asked. The court should instruct the child explicitly that if she does not know the answer to any question, the court will expect her to say that she does not know the answer rather than guess about what might have happened. A substantial body of research on child interviewing shows that children often misperceive a duty to supply an answer to every question.⁸⁸ While knowledgeable counsel already may have given this instruction to a child witness,⁸⁹ it is important to have it authoritatively underscored by the court. The court should also reassure the child that she should not worry about how others receive what she has to say or attempt to please the lawyers, the judge, or anyone else in giving her testimony. Instead, she should give only those facts which

88. Although empirical data demonstrates this tendency in children, researchers disagree why it occurs. Some attribute this tendency to the "demand characteristic" of all direct questioning. For example, asking a child whether a person had blonde, brunette, or black hair indirectly suggests that hair color is important and something she should be able to provide. An adult may resist this implicit demand; a younger child may misinterpret the interviewer's intentions and end up providing what he or she feels is an appropriate answer." Dent & Stephenson, *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses*, 18 BRIT. J. OF SOC. AND CLINICAL PSYCHOLOGY 41-51, summarized in King & Yuille, *Suggestibility and the Child Witness*, in CHILDREN'S EYEWITNESS MEMORY 24, 27 (S. Ceci, M. Toglia & D. Ross ed. 1987).

Other researchers have attributed this tendency to the child's developing ability to make inferences. Children struggle to bring order out of confusion, to make sense of questions, and to provide answers to adults' questions. Researchers interviewed five- and seven-year-olds using nonsensical questions, such as "Is milk bigger than water?" or "Is red heavier than yellow?" An adult predictably would at best be puzzled, or at worst, refuse to answer the question while perhaps exhibiting some anger at such a waste of his time. In contrast, "virtually all the children responded in a serious, reasoned manner, stating for example, 'Milk is bigger because it has more color' or 'Yellow is heavier because the red cushion is smaller than the yellow cushion there.'" Hughes & Grieve, *On Asking Children Bizarre Questions*, in EARLY CHILDHOOD DEVELOPMENT AND EDUCATION (M. Donaldson, R. Grieve & C. Pratt ed. 1980).

89. Counsel is advised to prepare a child for cross-examination by cautioning him not to guess:

The child should be told that it is acceptable to say, "I don't know." Unlike at school, where "I don't know" gets the child in trouble, in the courtroom the child is not required to know the answer to every question. The child may be told that if a question is confusing or incomprehensible, the child can ask the cross-examiner to repeat the question.

J. MYERS, CHILD WITNESS LAW AND PRACTICE 46 (1987).

she personally remembers.⁹⁰ The child is not responsible for the outcome of the trial; she is responsible only for telling accurately what she knows about the dispute. Finally, the court should instruct the child that if she gives false testimony, she could become subject to juvenile court prosecution for perjury and would face appropriate penalties.⁹¹

The prospect of relating such sophisticated concepts to a child in language appropriate to his understanding is daunting to those who have not had occasion to do so. Most juvenile court judges, however, are highly skilled in interacting with children in court and their expertise should be sought to devise pattern instructions adaptable to the needs of particular cases. We already require juvenile courts to "Boykinize"⁹² a delinquent child who seeks to

90. Recent data indicates that younger children are significantly more likely than older children to embellish their recall of an event with unobserved but likely detail. In interpreting such findings, one researcher provides this advice:

[I]f third-graders add more extraneous information to their recall because they assume that "more" means "better," and try to please an adult by increasing the size of their production, then they should be cautioned against this tendency with prequestioning instructions. The child could be warned that the investigator does not want more information but rather accurate information. It may be that, given such instructions, young children can reduce their additions, in contrast to children who did not receive these instructions.

Saywitz, *Children's Testimony: Age-Related Patterns of Memory Errors*, in *CHILDREN'S EYEWITNESSES MEMORY* 47 (S. Ceci, M. Toglia & D. Ross ed. 1987).

91. See, e.g., *Payne v. State*, 487 So. 2d 256, 263 (Ala. Crim. App. 1986). A mentally impaired fifteen-year-old was permitted to testify after the trial court had conducted a voir dire and had instructed the child on the law of perjury:

I want you to listen carefully. There is such a thing in law called perjury. And perjury is the giving of testimony that is false, once one has taken an oath in Court to tell the truth, nothing but the truth, the whole truth. If one, having sworn and taken an oath, that they will tell the truth before a Court, then intentionally misrepresents the facts by telling a lie, to any question asked in the Court, he can be found guilty of the crime of perjury, and for that offense as an adult could be imprisoned, or as a juvenile could also be detained, the equivalence of being imprisoned. So, I instruct you that is the penalty for the offense of perjury. You are expected to tell the truth at all times to all questions that are asked you. I have concluded, though, he is competent to testify as a witness before the Court.

Id. at 263. The problem with this attempted instruction is that it is probably only vaguely understood by this defendant or any other child. Further translation into simpler language is needed.

92. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court held that the trial court must conduct an examination into voluntariness, including "an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences" in order to insure that a guilty plea was voluntarily entered. *Id.* at 244 n.7 (quoting *Commonwealth ex rel. West v. Rundle*, 428 Pa. 102, 105-06, 237 A.2d 196, 197-98 (1968)).

enter a guilty plea, including instructions about the maximum and minimum penalties which can be imposed.⁹³ Basic instruction about the duties imposed by the oath is a much less complicated task than apprising a child of the waiver of rights guaranteed by the Constitution.

B. *Refocusing the Voir Dire*

Modern empirical data on reliability risks do not indicate that the ancient disqualification of children as a class is justified. The data do permit us, however, to refine our assessment of the reliability risks peculiar to children.

Data on memory-fade and children's heightened susceptibility to imagining and suggestion point to the need for pretrial processes that would insure recording children's accounts soon after observed events. Many states already have enacted special videotaping statutes which make such early recordings admissible into evidence.⁹⁴ Most of these states, however, confine videotaping procedures to criminal prosecutions,⁹⁵ or narrower still, to sexual abuse prosecutions.⁹⁶ Furthermore, many states,⁹⁷ including

93. See, e.g., *In re Jarrell*, 395 So. 2d 1382 (La. Ct. App.), *rev'd*, 399 So. 2d 583 (La. Supp. 1981).

94. ALA. CODE § 15-25-2 (Supp. 1988); ALASKA STAT. § 12.45.047 (1984); ARIZ. REV. STAT. ANN. § 13-4251 to -4253 (Supp. 1988); ARK. STAT. ANN. § 16-44-203 (1987); CAL. PENAL CODE § 1346 (West 1982); COLO. REV. STAT. § 18-3-413 (1986); FLA. STAT. ANN. § 92.53 to .55 (West Supp. 1989); HAW. REV. STAT. § 626 Rule 616 (1985); KAN. CRIM. PROC. CODE ANN. § 22-3434 (Vernon Supp. 1989); KY. REV. STAT. ANN. § 421.350 (Michie/Bobbs-Merrill Supp. 1988); LA. REV. STAT. ANN. § 15.440.1 to .6 (West Supp. 1989); MINN. STAT. § 595.02(3), (4) (1988); MONT. CODE ANN. § 45-15-401 (1987); NEV. REV. STAT. ANN. § 174.227 (Michie 1986); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1988); N.M. STAT. ANN. § 30-9-17 (1984); N.Y. CRIM. PROC. LAW § 190.32 (McKinney 1989); OKLA. STAT. ANN. tit. 22, § 753 (West Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1988); S.D. CODIFIED LAWS ANN. § 23A-12-9 (1988); TENN. CODE ANN. § 24-7-116 (Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 38.071 (Vernon Supp. 1989); VT. R. EVID. 807 (Supp. 1988); WIS. STAT. ANN. § 967.04(7)(a) (West Supp. 1988).

95. See, e.g., California, New York, and Texas statutes cited in *supra* note 94. The Commissioners on Uniform State Laws struck a strange middle course by permitting videotapes as an exception to the hearsay rule in cases in which a child witness was to give testimony about "sexual conduct or physical violence performed by or with another on or with that minor or any [other person]." UNIF. R. EVID. 807(a)(i) (adopted Nov. 1986).

96. See Alaska, Arkansas, California, Colorado, Montana, New Mexico, Rhode Island, South Dakota, and Vermont statutes cited *supra* note 94.

97. ALASKA STAT. § 12.40.110 (Supp. 1988); ARIZ. REV. STAT. ANN. § 13-1416 (Supp. 1988); ARK. STAT. ANN. § 16-41-101(25)(a) (1987); CAL. EVID. CODE § 1228 (West Supp. 1989); COLO. REV. STAT. § 18-3-411(3) (1986); FLA. STAT. ANN. § 90.803 (West Supp. 1989); ILL. ANN. STAT. ch. 38, § 115-10 (Smith-Hurd 1986); IND. CODE ANN. § 35-39-4-6 (Burns 1985); KAN. CIV. PROC. CODE § 60-460(dd) (Vernon Supp. 1989); KY. REV. STAT. ANN. § 421.355

Georgia, have recently expanded the hearsay exceptions to permit the admission of children's statements of abuse provided the court finds that "the circumstances of the statement provide sufficient indicia of reliability."⁹⁸ If, as the data suggest, a child's memory is most reliable when it is fresh, these special procedures for capturing and preserving the child's early account should be expanded to all types of legal proceedings.⁹⁹

In litigation lacking a videotaped record of a child's early statement, the voir dire is the next best mechanism available for determining if distortions exist, albeit after the fact. Despite convincing empirical data, the federal approach totally discounts the possibility of any inherent reliability risks in the testimony of child witnesses. The "oath understanding" voir dire similarly permits an abstract avowal of the truth to override such inherent reliability risks, that is, distortions over which even the most God-fearing child may have no control. The "full inquiry" voir dire is not reliability risk specific; it allows a court to ask the right questions, but it also permits many wrong ones which have little or no bearing upon testimonial accuracy.

The limited voir dire of a child witness is appropriate but its focus should be on the presence of the interrelated reliability risks of memory-fade and its bedfellows fantasization and suggestibility. A brief inquiry focused on the opportunities for distortion that may have occurred between the observation and the trial can resolve these concerns. The burden of laying a foundation of reliability should be on the party offering the child's testimony into evidence. An appropriate statute or court rule might read:

Admissibility of Children's Testimony. No child shall be permitted to testify unless the court finds after preliminary

(Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1988); MINN. STAT. § 595.02(3) (1988); MO. ANN. STAT. § 491.075 (Vernon Supp. 1989); NEV. REV. STAT. ANN. § 51.385 (Michie 1986); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); TEX. CRIM. PROC. CODE ANN. § 38.072 (Vernon Supp. 1989); UTAH CODE ANN. § 76-5-411 (Supp. 1988); VT. R. EVID. 804(a) (Supp. 1988); WASH. REV. CODE ANN. § 9A.44.120 (1988).

98. O.C.G.A. § 24-3-16 (Supp. 1988). Georgia's statute derives from the Washington statute which has served as a prototype for many other jurisdictions. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1984).

99. Reform of the pretrial processes is another subject to be explored. It is sufficient to suggest here that enhancing the reliability of children's testimony requires changes in both the pretrial processes and the voir dire procedure. See McGough & Hornsby, *supra* note 60, at 1300-03 for some suggested reforms.

examination, that the child is able to give reliable testimony based on the following criteria:

- (1) The age of the child at trial and age at the time of the observed event or transaction;
- (2) The length of time between the observation and the child's first report to an adult;
- (3) The circumstances and results of all interviews, including recorded interviews which are not being offered as evidence, which have been conducted with the child about his observations by anyone, including those conducted by members of the child's family;
- (4) Any variations in the child's account which have occurred in the interval between the first report and the trial;
- (5) Evidence concerning the motive, inclination, and opportunity for any interviewer to influence the child's current proposed trial testimony;
- (6) The existence of other apparent motives of the child to falsify; and
- (7) The existence of corroborating evidence that the child had the opportunity to observe the event in question.¹⁰⁰

If substantial time has elapsed since the observed event, the trial court should properly be concerned about a child's recall ability. If coaching is suspected, the court also should question any adults suspected of influencing the child.¹⁰¹ As one commentator has cautioned:

[H]uman memory does not operate like a camera, gathering every detail for later recall exactly as it was perceived. Rather, it is an active, reconstructive process in which images are constantly altered through the integration of new experiences and interpretations. A person can unknowingly integrate post-event information to fill gaps or replace forgotten or poorly remembered details, with imagination frequently playing a significant role. The result can be distorted or totally incorrect recall.¹⁰²

IV. CONCLUSION

Debates on competency and the voir dire have focused on the wrong issues. The struggle of the last two centuries has concerned

100. The catalyst for this proposal is contained in the official comments to UNIF. R. EVID. 807, 13A U.L.A. 237 (Supp. 1989).

101. See *Davis v. State*, 348 So. 2d 1228 (Fla. Dist. Ct. App. 1977).

102. Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 724 (1985).

whether special prevenient proofs for child witnesses ought to be abandoned altogether or, instead, retained for some limited purpose, though that purpose has never been well-defined. The classic approach of legal commentary has been to analyze the substantive components of truthful testimony using Wigmore's categories: capacity for observation, recollection, communication, and moral responsibility.

This Article proposes an oath ceremony that would establish a meaningful dialogue between the trial court and the child. The role of the court should shift from being merely an arbiter of the adequacy of counsel's interrogation of the child to being the child's advisor who explains the nature of the duty imposed by the oath. The proposed voir dire makes a fundamental and appropriate shift in focus from determining a child's general capacity at the time of trial to the pretrial processes used to receive or record his account and the opportunities, if any, for distorting his memory. The focus should be on the narrow issue of reliability risk assessment rather than on some abstract notion of age-related competence. The potential distortions of memory-fade, fantasization, and suggestibility deserve to be treated as substantial matters for serious pretestimony inquiry.

