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Children, Language, and the Law

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CHILDREN, LANGUAGE AND THE LAW*

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I. INTRODUCTION

The preface to David Mellinkoff's classic book, *The Language of the Law*, begins as follows: "The law is a profession of words. Yet in a vast legal literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea."[1]

Thirty-six years later, Peter Tiersma's update and expansion of Mellikoff echoes the view that law comes into being through language but also warns: "Yet there has been remarkably little interaction between language experts and lawyers; neither discipline seems to know very much about the work of the other."[2]

Both Mellikoff and Tiersma (a linguist and a law professor), are quite right. But how did it happen that the fields of linguistics and law are so intertwined and yet have been so ignorant of each other's existence? In my opinion, both fields are at fault. Linguists have been so busy analyzing the structures of various languages and developing their own theories about language that they have not been open to the use of language by the legal profession. Lawyers have been so busy with their individual cases and case law that they have been blind to the field that could help them. Yet the developments in recent years have offered some hope. For at least the past quarter century, a few linguists have extended their interests to law cases and a few lawyers have actually reached out for such help. Today we find a growing literature on the intersection of these two fields, an International Association of Forensic Linguists, and an

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* Editors Note: Many of the examples of interviews used herein come from cases based on the author's personal experience and will not be cited to protect anonymity.
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   1.   DAVID MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963).
   2.   PETER M. TIERSMA, LEGAL LANGUAGE 1 (1999).

academic journal devoted entirely to this topic.[3] Some linguists have been invited to speak at law conferences such as the American Bar Association, the International Trademark Association, and various local law meetings and inns of court. In short, this seems to be a hopeful sign.

Linguistics is the scientific study of both spoken and written language. Both of these are found in the legal arena. Linguists analyze the sounds of language (phonetics), the way words are formed (morphology), the way sentences are constructed (syntax), meaning is accomplished (semantics and pragmatics), the way discourse is structured, how language change takes place, and how geography, culture, and psychology relate to language use.

One thing about language is certain. It is variable. Even people who speak the same language vary their pronunciation, syntax, and vocabulary in ways that relate to their age, gender, education level, regional dialect, race, and many other factors. As people grow older, move from one part of the country to another, acquire education and experience, they tend to change their language usage.

How does this relate to law? In civil cases, much of the language analysis consists of parsing the ways laws, regulations, and contracts are written. For example, linguists have helped in cases of defamation, trademark disputes, and in unraveling the complexity of insurance policies and business contracts.[4] In criminal cases the attention is often on spoken language as it is recorded in police interviews and in undercover operations involving bribery, solicitation, money laundering, narcotics violations, and in deposition or trial testimony.[5]

II. LANGUAGE ACQUISITION AND LAW

The process of language acquisition is central to understanding how adults should talk with and interview children in ways that the children can understand them and give useful answers. The child sex abuse interview is an

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3. *See* THE INT'L JOURNAL OF SPEECH, LANGUAGE AND THE LAW: FORENSIC LINGUISTICS.

4. *See e.g.,* TIERSMA, *supra* note 2; ROGER W. SHUY, LINGUISTIC BATTLES IN TRADEMARK DISPUTES 1 (2002); ROGER W. SHUY, BUREAUCRATIC LANGUAGE IN GOVERNMENT AND BUSINESS (1998).

5. *See e.g.,* ROGER W. SHUY, LANGUAGE CRIMES (1993); ROGER W. SHUY, THE LANGUAGE OF CONFESSION, INTERROGATION AND DECEPTION (1998).

occasion when the language of children is especially critical. In such cases, it is both the language used <u>to</u> the children as well as the language used <u>by</u> the children that are central. It is not even enough to know how children talk and how they understand what is said to them. It is equally important for the person talking to them to know how to do this in ways that the child can understand.

It is very difficult to obtain consistent and complete factual reports from children about what happened in the past.[6] Their language is not yet fully acquired, their experience and concepts about topics such as sex are still underdeveloped, and their emotional stress is obviously great. Unlike undercover sting operations, it is virtually impossible to obtain tape recordings of sexual abuse as it actually occurs. More commonly, a child reports an unusual event to a parent or other adult. The effort to capture what happened, therefore, depends on the ability of adult interviewers to get the child to retell the event. But this effort is constrained by the children's ability to use language, their ability to understand the questions asked them, their flaws in memory, and their language skills in offering an adequate description.

III. INTERVIEWING CHILDREN

Although most of the attention to language in legal matters concerns adult writing and speech, there are important occasions when the language used to and by children in sexual abuse cases is critical. It is this topic that frames this paper.

Somebody has to interview the child to try to discover the facts in the case. Law enforcement officers are not usually trained in how to talk with young children. Their work is to interrogate adult suspects in criminal cases, for which there are many guidelines available,[7] none of which explain the special

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    6.   Gail S. Goodman, Elizabeth Pyle Taub, David P.H. Jones, Patricia England, Linda K. Port, Leslie Rudy & Lydia Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims in* MONOGRAPHS OF THE SOC'Y FOR RESEARCH IN CHILD DEV. 1992, at 12 (Series 229, Vol. 57, No. 5); Gail S. Goodman, *Children's Testimony in Historical Perspective*, 40 JOURNAL OF SOCIAL ISSUES 9, 21 (1984).

    7.   FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (John Gardner ed., 3rd ed. 1986); ARTHUR AUBRY & RALPH CAPUTO, CRIMINAL INTERROGATION (3rd ed. 1980); DAVID M. NISSMAN, ED HAGEN & PIERCE R. BROOKS, LAW OF CONFESSIONS (1985); CHARLES E. O'HARA & GREGORY O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (Revised 5th ed. 1988); GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1993); DAVID ZULAWSKI & DOUGLAS WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND

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requirements for interviewing children.

IV. THE INVESTIGATIVE INTERVIEW VS. THE THERAPEUTIC INTERVIEW

Recognizing that interviewing children in the investigative interview is not usually appropriate and that police are not often skilled in talking with children, law enforcement agencies have turned for help from child psychologists and social workers, often part of a child protection team. This has proved to produce certain benefits but in many ways it also presents serious problems, since social workers have training in the therapeutic interviewing but not in the type of investigative interview that can serve as legal evidence. It is clear that information interviews done by social workers should not be contaminated by approaches that characterize a therapeutic interview. My experience in analyzing child sexual abuse interviews reveals that many social workers often mix in bits and pieces of therapeutic conversation. Near the beginning of one interview, the child protection team worker told the child:

"Well, we're going to protect you."

"We're not going to let him do that to you anymore."

"We don't want him to do that to you, do we?"

This may be acceptable therapeutic interview practice, but it contaminates the investigative reason for the interview. One would hope that such a distinction might have been clear to both police and social workers. Such comments can be challenged by the defense, and should be, since the investigative interviewer's task is fact finding rather than accusation.

V. LINGUISTIC PROBLEMS IN INTERVIEWING CHILDREN

What many social workers seem to lack in their child sexual abuse interviews is an adequate understanding of child language—how to talk to them and how to understand what they are saying. Although there are many references describing how to deal with children in the child interview context, the best advice on how to deal with the linguistic differences between adults and children is found in Walker's *Handbook on Questioning Children*.[8] Following are some of the language

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INTERROGATION (1993).

8. ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (2nd ed. 1999).

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problems Walker and others identify when interviewing small children.

A. Prepositions

English prepositions are one of the most difficult aspects of language for outsiders to learn. Even fairly competent second language learners continue to be puzzled by them. Regional dialects are often distinguished by the way prepositions are used. First language learning by children is no different. As they acquire their native language, they pass through various stages of learning it. As very young children, they have a more limited vocabulary, a rather rough idea of syntax, and a level of experience that is far from adult. It would seem obvious, therefore that adjustments to this learning stage would be made by adults.

Since prepositions are function words, it might seem that they would not be all that important in interviewing children. We tend to take them for granted and we don't feel that they have meaning in the same way that nouns or verbs do. But this actually makes them even more important. They offer subtle but important semantic distinctions, ones that children don't often understand.

Children learn to use prepositions in a relatively sequenced order. There are four types of prepositions, categorized by semantic content. Children acquire the adult use of these semantic differences in the following order:

1. Locative Prepositions

These indicate location in two or three dimensional space. When we say, "The doll is on the grass," we are indicating where the doll is located in space, a two dimensional relationship. But when we say, "The doll is in the grass," we are indicating three dimensions: the doll on the grass but also surrounded by the grass. Three dimensional preposition meaning is obviously more complex than two dimensional meaning.

2. Connective Prepositions

Such prepositions show the relationship of two or more things to each other, a connection. Examples are: "Put it with the dollies," or "I had on my pajamas."

3. *Attributive Prepositions*

These prepositions carry the meaning of attribution, one dimension being the attribute of another (rather than being located with it or connected to it). Examples are: "She is ready for her bath" and "What's this a picture of?"

4. *Agentive Prepositions*

These carry the meaning of an agent of the action, as opposed to an attribute, location, or connection. One person or thing is the agent for doing something to someone or something else. Examples are: "He did that to you," "Did he touch you with his finger?" and "Show me with the dolls."

In child sexual abuse cases that I have worked on, prepositions have played a very important role in determining what the children understand. For example, the case of a three-year-old girl is instructive. In a twenty minute interview, the child protection team interviewer used seventy-seven prepositions and the child used twenty, with the following distribution:

	Interviewer	Three-year-old
Locatives	46 (60%)	14 (70%)
Connectives	11 (14%)	6 (30%)
Attributives	9 (12%)	0
Agentives	11 (14%)	0

From this three-year-old's use of preposition it is clear that she had learned how to use locatives and, to a lesser extent, connectives, but she is right on the normal acquisition schedule in not learning to use attributive and agentive prepositions. As one might suspect in such a case, the crucial issues were about attribution and agency. The social worker used them to try to establish who abused the girl and how he did it.

In a child sexual abuse case it is extremely important to learn who did it and how it was done. If the child has not yet acquired the attributive and agentive meanings of prepositions, there is little likelihood of producing a meaningful response to questions that use them. One could ague that, in most language learning, receptive competence (the ability to understand) is learned before productive competence (the ability to use). To address this issue, we can analyze the responses to questions containing agentive and attributive prepositions. Criteria for

determining the child's comprehension include consistency of responses to the same questions, whether the child responded at all, and the relevance of such responses. In the above case the child answered all of the questions containing attributive and agentive prepositions inadequately in terms of these criteria, indicating clearly that she had no receptive competence here. She gave no indication of understanding the questions.

B. *Pronouns and Indexicals*

Another category of language that adults take for granted and don't give much thought to consists of pronouns and other indexicals (called "deictics" by linguists). Indexicals point to something.[9] The problem with words like "she," "that," "you," and "here," is that these words have no meaning unless they refer to something else,[10] an obviously complex task for young children to recognize and keep track of.

Some children may have these basic capabilities straight by age three or four,[11] but many others do not. One of the hardest things to acquire about them is that certain pairs of indexicals contrast with each other. It is not until about age five or six that children recognize that the following pairs contrast with each other:[12]

here/there
this/that

According   to   some   child   language   researchers, understanding that the pronoun and the following noun refer to the same person may not be learned until middle school age, so a sentence in which the pronoun, "he," refers to two different people, as in:

"He showed you his arm where he was hurt, didn't he?"
(man 1)   (man 2)   (man 2)   (man 1)

can even mystify most adults, much less children.[13]

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9.   *Id.* at 26.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 27.

C. *Vocabulary*

It is obvious that young children have a smaller vocabulary than adults, but it's not commonly understood that children's meanings of words familiar to most adults may take a quite different slant. The following are some of the vocabulary items that do this:

1. *"Touch"*

The most commonly cited troublesome word in the child sexual abuse literature is "touch." Adults understand this to refer to many kinds of contact, but children up to about six years old often understand it to mean only contact with a finger.[14] So, if asked whether a person touched her privates, a young girl may deny this, even if genital to genital contact had actually happened. Interviewers of small children are often unaware of this developmental feature of children's language.

Some of the other confusing vocabulary noted by Walker and others, all based on research in child language acquisition, include:

2. *"Ahead of" and "Behind"*

Adults are encouraged to avoid using these terms with children under seven when they refer to time and/or space.[15]

3. *"Any" and Its Compounds*

A question using "anyone" or "anything" of young children often yields a 'no' response, whether true or not.[16] It is just too non-specific to generate consistent answers.

4. *"Ask"*

The difference between asking and telling is confused in most children up to eight to ten years old, partly because "ask" can be both a request and a command.[17] For example, children may consider "Did he ask you to come to his house?" to refer to a command when the questioner thinks it's an invitation.

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14. WALKER, *supra* note 8, at 36.
15. *Id.* at 27.
16. *Id.* at 28.
17. *Id.* at 29.

5. *"Before" and "After"*

Children up to age seven use these to indicate time references long before they have a clear sense of their difference.[18] If the events are familiar, the child can use them accurately, but for unfamiliar events they can get pretty murky.[19] They should not be used for space relations at all (for example, "come before the court") since the answers are usually unreliable.

6. *"Know"*

Most very young children can tell you what they know. But keep in mind that "know" has a range of meanings even to adults. Sometimes it can mean certainty but at other times it means something like "I think" or "I bet" (as in "I know it's going to rain tomorrow since I just washed my car"). Up to nine years old, be wary of what children mean when they say "I know."[20]

7. *"Let" and "Make"*

A sentence like, "He let me do it" (permission) and "He made me do it" (coercion) can be mixed up by preschool aged children.[21]

8. *"More" and "Less"*

There are two meanings of these words: repetition ("more ice cream") and comparison ("more like that" and "more than that"). Children under six have only the meaning of repetition.[22] Up to age ten using either "more" or "less" in questions to children can yield useless data.[23]

9. *"Promise"*

Sentences like "Will you promise me to tell the truth" are easily confused by children up to 10 years old.[24] Richardson cites a case in which the child's response to a judge who asked

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18. *Id.*
19. *Id.*
20. WALKER, *supra* note 8, at 32-33.
21. *Id.* at 33.
22. *Id.*
23. *Id.*
24. *Id.* at 34-35.

this question was "I'm sure you will."[25] The problem is not with the concept of truth-telling as much as it is in having two nouns in the sentence. Simply dropping the "me" in that sentence, "Do you promise to tell the truth," gets rid of this problem.

10. "Remember"

Many children up to age eight or nine believe that in order to remember something, you first have to have forgotten it.[26] Only then can they "remember" it.

11. "Some" and "All"

Very young children use these words but they don't learn their contrastive meaning until about six or seven.[27] Many don't understand that "all" can contain "some." They can deny that they know "some" or "something," reasoning that they really know "all" of it.[28]

12. "Yesterday" and "Tomorrow"

For many preschoolers, "yesterday" is anything that happened in the past and "tomorrow" means something that hasn't happened yet.[29] "Today" is pretty certain in their minds but interviewers should be very wary of using words like "yesterday" and "tomorrow."

D. Passive Verbs

Three-year-olds tend to ignore passives in favor of subject-verb-object word order.[30] They have learned that subject actors usually come first in sentences, so they tend to extend this principle to interpret sentences that they are unfamiliar with, passive constructions. Using this generalization about how syntax works, young children can misunderstand the first nominal, "you," as the actor in the following exchange:

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25. Gina Richardson, Interviewing Children: A Linguistic Approach, Remarks at Children's Justice Act Training for Child Abuse Professionals, National Center for Prosecution of Child Abuse, (1992, 1994).

26. WALKER, *supra* note 8, at 36.

27. *Id.*

28. *Id.*

29. *Id.* at 37.

30. *Id.* at 43.

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Interviewer asks	Child understands
"Were you chased by him?"	"Did you chase him?"

If the interviewer gets a 'no' response, it could mean only that the child didn't understand the passive construction. In a child sexual abuse interview, such confusion can change the nature of the case drastically.

As children mature, they begin to understand passives with action verbs, such as "chased" in the above example, but they continue to confuse passives in non-action verbs, such as "love."[31] In exchanges such as the following, the child's understanding can be quite different from the intent of the question:

Interviewer asks	Child understands
"Was he loved by his mother?"	"Did he love his mother?"

It is generally agreed that children don't command the full use of passives until ages ten to thirteen, and some even later.[32] Obviously, interviewers should avoid passives at all costs.

E. Negation

Negativized questions are most likely to be misunderstood at almost any age.[33] The more negatives in a sentence, the harder it is to comprehend. Strategies for answering negativized questions are not developed until age nine.[34] Even then, however, things can get dicey. Children learn to understand negatives in main clauses long before they recognize them in dependent clauses, as the following shows:[35]

Interviewer asks	Child understands
"You could see that he was not at home?"	"You could not see that he was at home?"

Most people think of negatives as the words, "no" or "not" attached to verbs. But there are actually three ways to express

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31.   *Id.* at 43-44.
32.   WALKER, *supra* note 8, at 44.
33.   *Id.* at 42.
34.   *Id.* at 43.
35.   *Id.*

negation, all of which can cause problems of understanding:[36]

1. Syntax negation	Adding "no" or "not" to verbs
2. Morphological negation	Using negative morphemes as: un- (unusual, unhappy) im- (impossible, impolite) ir- (irreverent, irresponsible)
3. Semantic negation	The negative is hidden within the meaning of the word, as in: hardly, unless, forget, deny

Obviously, adults who interview children should be careful to be sparing and prudent in their use of negatives and they should never put more than one negative into their questions.

F. *Other Confusing Language*

It goes without saying that children should not be expected to understand and respond to legal jargon, Latinate words, complex sentences, abstract terms, sentence embedding, compound questions, ambiguity, and the lawyer's favorite—tag questions (as in "you were there, weren't you?").[37] Nor do children do well when the topic is changed abruptly, or with questions that ask them why they did something.[38] Needless to say, many adults don't do well with these either.

G. *Misinterpreting what the Child Says*

When people say things in ways that can't be totally understood, we have at least three strategies available to us to figure out their meaning.

1. Ask them what they meant. With young children, this is not often very productive.

2. Repeat what they say and ask for confirmation. With children, this requires special care to repeat the child's exact words.

3. Infer the meaning and frame of reference, plowing ahead as though this inference is correct. This strategy can be very dangerous to use even with adult conversation but even more so with children.

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36. *Id.* at 42.
37. *Id.* at 38-41, 44, 48-49.
38. WALKER, *supra* note 8, at 51, 61-62.

To illustrate the problems of interviewing small children, the following is part of a transcript of a child protection team member's interview with a three-year-old girl in a sexual abuse case. In it the interviewer commits many of the cardinal errors of interviewing children. She does not repeat the child's words accurately, she infers (guesses at) the child's meaning, she abandons the investigative interview in favor of the therapeutic interview, she uses vocabulary that the child has not yet acquired, and she fails to grasp the child's frame of reference, or schema.

Interviewer	Three-year-old child
Did your daddy put his pee-pee in your mouth?	
	Nah.
He did?	
	Yeah. They don't let me play with it anymore.
We're not going to let him do that to you anymore. We don't want him to do that, do we?	
	Nope.

The context of this exchange was that the interviewer had just removed the toys that the child had been playing with, much to the girl's dismay. The interviewer then abruptly changed the topic to the girl's father's pee-pee. The girl's second response, "Yeah," following on the heels of her first response, "Nah," is actually consistent with the preceding topic of not letting her play with the toys any longer. Apparently unaware of the girl's "toys" schema, interpreted her second, and conflicting, response, "Yeah," as related to the "pee-pee" question. Notice how the interviewer then shifts abruptly back into the therapeutic interview. In terms of conversational strategies, this is referred to as the "hit and run" strategy.[39]

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39.   ROGER W. SHUY, CREATING LANGUAGE CRIMES (forthcoming 2005) (on file with author).

This exchange then continues:

Interviewer	Three-year-old child	Comment
Did your daddy ever touch you there in your butt?		
	No.	The locative, 3 dimensional preposition not yet acquired. "Touch" means with finger.
Did he ever touch you there?		
	Yep.	He touched her there (butt) with his finger(s) at some point in the past (ever).
Did he touch you with his pee-pee?		
	Yeah.	Connective preposition not yet acquired.
Did he put his pee-pee inside your butt?		
	Yep.	Locative 3 dimensional prepostion not yet acquired.
Where were you when he did that?		
	Daddy sets.	Unknown meaning. Question has a dependent clause; child may refer to earlier play with toys, since indexical 'that' is unclear.
And daddy did it?		
	Uh-huh.	Indexical 'it' is unclear; clearly he touched her butt at some time (spanking?).

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Did it hurt you?		
	No.	
Where were you in your house when he did that?		
	Uh, daddy spanked.	Indexical 'that' unclear; girl now clarifies what he did to her butt.
Daddy did what?		
	He spanked his back.	Spanking may refer to previous play with dolls.
He spanked his butt?		
	Yeah.	Inaccurate repetition of girl's words.
How did he do that?		
	They make it work.	Unclear indexical 'that.' Unclear what girl means.
Oh. So did you tell me that your daddy put his—		
	Both sides of my butt, right there.	'Both sides' clarifies the spanking event.
He put it inside your butt?		
	Yeah.	Inaccurate repetition, 3 dimensional locative preposition not yet acquired. Misses girl's frame of reference.

The comment section above points out many problems with this interview. For one thing, the interviewer used the word, "touch," with the three dimensional locative meaning. If "touch" meant "with his fingers" here, as research on child language says it does, then what this would mean to the girl is that her father never touched her butt with his finger inside it. When the interviewer tries to repeat her own question, however, she

does not repeat "in your butt," allowing the child to understand it as the two dimensional locative. That is, the girl agrees that her father has touched her butt with his fingers at some time in the past, which she goes on to clarify as a spanking. The interviewer never picks up on the girl's frame of reference. Interestingly, the man was not even accused of having anal sex with his daughter. The interviewer's use of indexicals is very unclear, as were her three dimensional locative and connective prepositions, which three-year-olds are not likely to know. She also twice misquotes what the child has said in this part of the interview.

H. *Truth vs. Lying*

At trial children are asked questions by prosecutors or defense attorneys, judges (and sometimes the lawyers themselves) where they frequently first try to determine whether or not the child witness knows the difference between the truth and a lie. Research has shown that even before age three some children have a rudimentary knowledge of what deception refers to.[40] By age four they know that lies are non-factual and are something you can get punished for.[41] Even up to age eleven some children confuse lies with mistakes and some will even tell you that swearing is a lie.[42] But for most children, if something matches the facts, it is considered to be true. If it doesn't match the facts, it is considered a lie. This distinction does not account for the difference between lying and simple misstatements of fact. It leaves out the most important criterion of deception, intentionality, which is as true for adults as it is for children.

Despite this definitional criterion (or lacking knowledge of it), judges and lawyers often begin by asking, "Do you know the difference between the truth and a lie?" Sometimes they even give examples that don't distinguish between fact and error, such as, "If I said that I am wearing a red tie, would that be the truth or a lie?" It's certainly not factually accurate but it is not a lie, since there was no clue that it was intended to deceive.

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40. Michael Chandler, Anna S. Fritz & Suzanne Hala, *Small Scale Deceit: Deception as a Marker of Two-, Three-, and Four-Year-Olds' Early Theories of Mind*, 60 CHILD DEV. 1263, 1272 (1989).

41. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 167-68 (Marjorie Gabain trans., 1965).

42. *Id.* at 140-41.

Ekman's research finds that up to "about eight years of age, children consider any false statement a lie, regardless of whether the person who said it knew it was false. Intention is not the issue—only whether information is false or true."[43] To my knowledge, nobody has come up with a court question that overcomes this problem. Perhaps it is folly to even try.

VI. CONCLUSIONS: FIVE KEY GUIDELINES FOR CHILDREN AND THE LAW

It may be true that the law is the same for everyone but it is not true that the way language is used in the legal process always works equally for all. We can't expect our verbal exchanges with children to be identical with the way we speak to other adults. A young child's language and cognitive development is not inferior to that of adults; it is just different because it is still undeveloped. As such, young children's progressive stages of development must be taken into account when adults talk with them. In the case of child sexual abuse interviews with children, five key guidelines are offered.

1. *Make a verifiable record of all interviews.*

Unquestionably, every interview should be video taped, or at least audiotaped. Such practice is recommended by the American Academy of Clinical and Adolescent Psychiatry.[44] Many other experts in child sexual abuse endorse this practice.[45] Notes taken during the interview are simply not adequate since they do not commonly report. the interviewer's questions that yield the child's answers, nor can any misinterpretations of what the child tried to say be verified without a taped record. One study of the accuracy of alleged verbatim note-taking in interviews with children revealed that 66% of the children's utterances were misrepresented in the interviewers' notes and that 57.3% of the interviewer's own substantive utterances were

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43.   PAUL EKMAN, WHY KIDS LIE 69 (1989).

44.   William Bernet, M.D. et al., *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 423, 431 (1997).

45.   STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 242-50 (1995); DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS 56, 117 (2002).

omitted in their notes.[46] In many jurisdictions in the United States today, police departments are requiring audio and video taping of all interviews and interrogations with adult suspects. There is no convincing reason why this should not be a required practice with children as well.

2. *Do an investigative interview, not a therapeutic one.*

This will not be easy, for the reasons cited above. New types of training need to be implemented so that those whose responsibility is to capture the facts in such cases do not slip into the mode they were trained to do.

3. *Let the children tell their own story before shifting into specific questions.*

The open-ended question may be difficult for young children to deal with but starting interviews this way is already advocated in interviews with adults as well as children. The experts cited above all agree with this. The National Guideline Clearinghouse advocates that the interviewer should encourage spontaneous narrative.[47] Poole and Lamb say: "Interviewers should structure conversations around open-ended questions."[48] Virtually all manuals about police interviewing say the same thing, although in actual practice it is sparingly used. Why? It's difficult and time-consuming. Most interviewers are impatient to get to the nub of the crime rather than to let it develop more naturally, even though the resulting evidence is widely considered better.

4. *Observe language signals that the child may have been coached.*

Many such signals can indicate previous coaching. Words used that are beyond the children's developmental level are a good signal. Sometimes there are even overt statements, such as, "Mommie said that he did it," and others.

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46.   Michael E. Lamb, Yael Orbach, Kathleen J. Sternberg, Irit Hershkowitz & Dvora Horowitz, *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 LAW AND HUM. BEHAV. 699, 703-04 (2000).

47.   Bernet, *supra* note 44, at 428.

48.   POOLE & LAMB, *supra* note 45, at 72.

5. Use available knowledge about children's language developmental levels that affect how interviewers ask questions and how children's responses can be interpreted.

This guideline is the primary concern of this paper. Many of the signals of children's ability to use themselves and to understand the language used by interviewers have been given above.