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46. Wrongful acquittals of sexual abuse.

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Wrongful Acquittals of Sexual Abuse

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Abstract

Ross Cheit's book *The Witch-Hunt Narrative* highlights the difficulties of prosecuting child sexual abuse. Drawing examples from a single case, Alex A., we examine the ways in which false acquittals of sexual abuse are likely to occur. First, prosecutors tend to question children in ways that undermine their productivity and credibility. Second, prosecutors have difficulty in explaining to juries the dynamics of sexual abuse and disclosure, making children's acquiescence to abuse and their failure to disclose when abuse first occurs incredible. Third, attorneys undermine children's credibility by pushing them to provide difficult to estimate temporal and numerical information. A post-script to the Alex A. case illustrates the costs of wrongful acquittals.

Keywords

child abuse, prevention of child abuse, child sexual abuse

This article discusses how wrongful acquittals in child sexual abuse are likely to occur, focusing on the difficulties that children have on the stand. Our approach pays tribute to Ross Cheit's masterful book, *The Witch-Hunt Narrative* (Cheit, 2014). Cheit discusses what went wrong in the high-profile

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child sexual abuse prosecutions in the 1980s and 1990s, challenging simplistic claims about the innocence of the accused in those cases. He identifies a double tragedy; adults who were probably innocent were sometimes swept up in overzealous investigations, at the same time that those investigations often undermined prosecutors' abilities to secure convictions against defendants who were probably guilty.

Cheit was careful not to claim that the defendants in the cases he explored were guilty "beyond a reasonable doubt"; rather, he emphasized that his goal was to determine whether prosecutors were justified in bringing charges. We wish to pursue a similarly modest claim: Children's testimony often appears unconvincing and incredible for reasons having little or nothing to do with the factual guilt of the defendants. As a result, trial verdicts may be only weakly diagnostic of the truth.

Acquittals are largely invisible. Although criminal trials are public, the vast majority of cases receive no public notice and are particularly invisible when an acquittal occurs. Acquittals are in general immune from appeal, because rules against double jeopardy prevent the state from trying the defendant again. Transcripts of acquittals are difficult to obtain, because court reporters are not required to turn their notes into a transcript unless there is an appeal.

Difficult but not impossible, as we found when we set out to examine what actually happens in child sexual abuse prosecutions. We systematically assessed sexual abuse trials that took place in Los Angeles County from 1997 to 2001 in a series of papers, some of which we cite here. We found that approximately 17% of the jury trials ended in acquittals, and we have examined the factors that predict whether acquittals occur (Stolzenberg & Lyon, 2014a). In this article, in contrast, the approach we take is more case study than systematic statistical analysis, akin to Cheit's approach. Indeed, we will focus most of our attention on a single case, Alex A., which was outside the scope of our research sample, but that we came across for reasons we discuss below.

Alex A's acquittal highlights a number of problems with eliciting children's testimony about abuse. The child witnesses were asked closed-ended questions that did not encourage elaboration, rendering their reports less detailed, and probably less credible. Their behavior with respect to Alex A. appeared inconsistent and unconvincing. Alex A. was portrayed as violent and threatening, and yet the child witnesses appeared acquiescent in the abuse, failed to report it to trusted adults, and did not appear to be frightened. They provided inconsistent and often implausible details with respect to when and how many times the abuse allegedly occurred. We will discuss these difficulties, and note how they are representative of problems in prosecuting sexual abuse more generally.

Difficulties in Prosecuting Child Sexual Abuse

In most of the cases that Cheit discussed, the juries convicted. Given doubts about the defendants' guilt, one might assume that prosecution is an easy job. After all, if one can obtain convictions in cases in which young children make bizarre claims, then surely mundane allegations of abuse by older children pose little problem.

However, the difficulties that Cheit discusses apply to cases more generally. Cheit discussed how children's immaturity renders them "much easier targets for defense attorneys on cross-examination" (p. 189). Ironically, the research that highlights the potential for children to be influenced by leading questions, and supports claims that coercive questioning in the high-profile cases may have led to false allegations, is now being used to demonstrate how children are vulnerable to the suggestive questioning of defense attorneys (Zajac, O'Neill, & Hayne, 2012).

Cheit also discussed how children are often too intimidated or too young to testify, how prior sexual abuse by defendants is often kept from the jury, how hearsay from child witnesses is often excluded, and how many states do not allow convictions to be based on a confession. He concludes that "[t]he witch-hunt narrative misrepresents what prosecutors have always known: these cases are extremely difficult to win" (p. 191).

One might think that accommodations for child witnesses (such as remote testimony via closed-circuit television) overcome the difficulties children face in the courtroom. However, Cheit emphasized that because of the onerous preliminary requirements, and prosecutorial concerns that appellate courts will find the accommodations violative of the defendants' constitutional rights, the technology "is almost never used" (p. 189). Even if prosecutors are confident they can justify using the technology, they are unlikely to do so, feeling that jurors are more likely to be swayed by seeing the child live in the courtroom (Myers, Redlich, Goodman, Prizmich, & Imwinkelried, 1999).

We believe that Cheit could have painted an even darker picture of the difficulties of prosecuting child sexual abuse. Cheit discussed a number of ways in which the states have loosened the requirements for prosecuting sexual abuse to facilitate prosecution. For example, he described the elimination of corroboration requirements, the liberalization of competency rules, and relaxation of rules regarding the date at which abuse occurred. Yet both practical concerns and legal requirements limit the effects of these legal reforms.

Although corroboration is not a legal requirement, prosecutors are reluctant to bring a case to trial solely based on the testimony of a child (Stolzenberg & Lyon, 2014a). Hence, prosecutors seek corroboration before filing, anticipating jurors' reluctance to convict on the basis of a child's testimony. Indeed,

the Supreme Court has recognized that “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim” (*Pennsylvania v. Ritchie*, 1987, p. 60).

Although children generally no longer have to demonstrate their basic competency (which assesses their ability to relate experiences that they remember), their truth–lie competency is still an issue in most cases (Lyon, 2011). They are expected to correctly answer questions about the difference between the truth and lies and the importance of telling the truth. Unsurprisingly, given prosecutors’ lack of training in developmental psychology, their questions are routinely unnecessarily difficult (Evans & Lyon, 2012). Indeed, most of the difficulties we identify with questioning in this article arise because of prosecutors’ questions. The courts will rarely disqualify a child who makes it to the stand, but prosecutors use testimonial incompetency as a means of screening out cases, and defense attorneys use children’s conflicting answers to competency questions as a means of undermining their credibility (Evans & Lyon, 2012).

Although exact dates are not required of child witnesses, courts still expect children to provide approximate dates, and defense attorneys are free to ask temporal questions as a means of testing children’s credibility (Wandrey, Lyon, Quas, & Friedman, 2012). Indeed, we will elaborate on children’s difficulties in providing temporal information below.

The Alex A. Acquittal

We will illustrate the difficulties of prosecution and the likelihood of wrongful acquittals through a case study (*California v. Alex A.*, 2000–2001). Alex A.’s trial for felony sexual abuse took place over 5 days in December 2000 and January 2001. The alleged victims were two girls, both 9 years old at the time molestation was alleged to have occurred. Catherine was the daughter of the defendant’s then girlfriend, Elizabeth, and Alexis was Catherine’s cousin and friend. Both girls testified that the defendant molested them while he was babysitting. In early 1999, Alex A. babysat Catherine almost every Friday night for several months, while the mother worked as a school janitor. In the latter half of 1999, he babysat Alexis in the afternoons while Alexis’ mother worked.

Alex A. had made some incriminating statements to the police, acknowledging touching Catherine’s thighs while bathing her and applying sun block. Family members of the victims had claimed to find child pornography in a room where Alex A. had stayed. The primary witnesses in the case, however, were the children.

Catherine was living with her father and her brothers at the time of the alleged molestation, and she would visit her mother on weekends. She

testified that the molestation had occurred in the bedroom, bathroom, and occasionally the living room of her mother's apartment. The alleged acts included oral sex, both fellatio and cunnilingus, digital penetration of her vagina, penetration of her vagina with an object, and penile penetration, apparently of her labia. The object Catherine described was a small piece of rubber intravenous tubing that she testified Alex A. had obtained from his workplace, a medical supply company. Alexis testified to less invasive molestation limited to fondling of her chest and vaginal area. Both girls testified that at least on one occasion Alex A. had digitally penetrated them while the three watched television in the bedroom of Elizabeth's apartment.

Catherine did not tell anyone about the abuse until December of 1999. Alexis had not disclosed any abuse at that time. After Catherine disclosed to her mother, her mother contacted Alexis's parents, and Alexis acknowledged, after initially denying abuse, that Alex A. had also touched her. There was no medical evidence of abuse. A search for other forensic evidence would be futile; Alex A. acknowledged having been with the girls.

The defense was quite typical of sexual abuse cases (Stolzenberg & Lyon, 2014a). The defense attorney argued that the girls were conspiring with their parents to get the defendant. He noted that they delayed in disclosing the abuse, that had been questioned repeatedly by family members and professionals, and that their stories had changed over time. The jury deliberated for 1½ days, asking for a read back of Catherine's testimony. Alex A. was acquitted on January 5, 2001.

Poor Questioning

One of the benefits of the high-profile cases discussed by Cheit was that they inspired a generation of research on how child interviewing can be improved. The most well-researched approach to interviewing children about sexual abuse is the National Institute of Child Health and Development (NICHD) structured protocol, which was developed on the basis of lab and field research documenting child witnesses' abilities and vulnerabilities (Lamb, Hershkowitz, Orbach, & Esplin, 2008). The protocol includes interview instructions, narrative practice, an open-ended introduction to the abuse allegation, and an emphasis on open-ended questions throughout the interview. In our training, we teach the 10-step interview (Lyon, 2005, 2014), which is based on the NICHD protocol (with some modifications, such as a promise to tell the truth). Key elements of these protocols have been endorsed by the American Professional Society on the Abuse of Children (APSAC, 2012).

Interview Instructions

Both the NICHD protocol and the 10-step interview include instructions that encourage the child to indicate when she does not know the answer or understand a question. Research has found that if children are given the instructions, and given practice in responding when they can and cannot answer a question, then their performance often improves (Lyon, 2014). Unfortunately, there is little evidence that children are given effective instructions on the stand. We found “don’t know” instructions in only 11% of the cases we examined, “don’t understand” instructions in 17% (Ahern, Stolzenberg, & Lyon, 2015). Children were virtually never provided instructions with practice (1%), which appears necessary for the instruction to be effective (Lyon, 2014).

In the Alex A. trial, both Catherine and Alexis promised to tell the truth, which is standard practice for child witnesses in California. With respect to instructions, however, the court focused on the need to answer questions out loud, consistent with our findings regarding cases in general (Ahern et al., 2015). To its credit, however, the court took the unusual step of giving Catherine (9 years old at the time) a “don’t understand” instruction.

I want you to take your time and listen to the questions carefully. Make sure that you understand the questions before you attempt to answer them. If at any time you do not understand a question, you should not answer it but instead what you should do is ask the men who are asking you the questions for some kind of clarification until you do understand them (*California v. Alex A.*, 2000-2001).

Unfortunately, the instruction itself was probably difficult to understand (e.g., the reference to “clarification”), and no examples or feedback were provided. It was therefore likely ineffective, and may have been counterproductive, because the jury, having heard the instruction, would be less likely to attribute any inconsistencies in the children’s testimony to the difficulty of the questions.

Narrative Practice

Another important phase of the NICHD protocol and the 10-step interview is narrative practice, in which the interviewer asks the child to narrate a non-abusive event utilizing open-ended questions before discussing the allegation. Research has demonstrated that narrative practice increases the amount of information that children questioned about abuse disclose in response to open-ended questions (Sternberg et al., 1997).

Although attorneys recognize the need to initially ask child witnesses non-abuse questions to allow them to settle in and become comfortable with testifying, they tend to ask closed-ended questions rather than encourage narratives (Ahern et al., 2015). This was apparent when the prosecutor began questioning Alexis: Q. What grade are you? A. Fifth. Q. Are you on Christmas break right now? A. Yes. Q. When do you have to go back to school? A. January 2nd. Q. Are you looking forward to going back? A. Yeah. Q. How come? A. Because I miss going to school. Q. Do you like school? A. Yes. Q. What's your favorite subject? Do you have a class you like the best? A. I like art. Q. You like art? A. Yes. The reader should note that yes/no questions predominated, as did "yes" responses. The wh- questions were very specific, and answered briefly. The question "When do you have to go back to school" is also risky, because many children will not know dates, and a failure to respond could undermine the rapport building. We discuss the questions about time more fully below. The most effective question was the shortest: "How come?" This question is closest to a type of question recommended by the protocols in which the questioner simply asks the child to elaborate on something the child has just said.

Even closed-ended questions before engaging the child in a description of abuse may help to put the child at ease. However, other potential benefits are lost. Rather than teach the child to provide narrative responses, the questions teach the child to let the attorney take the lead. The research shows that this will extend to the abuse narrative. Furthermore, the predominance of "yes" responses may suggest to the jury that the child is excessively acquiescent, and the lack of elaboration means that the jury is unable to hear the child in her own words.

Open-Ended Questions About Abuse

Properly prepared, children disclosing abuse need not be asked leading questions to disclose. For this reason, protocols and guidelines recommend that interviewers transition to the discussion of abuse by asking a question such as "Tell me why you are here today" and follow up with questions such as "Tell me everything that happened" and "You said [child's words]; tell me more about that." Researchers have found that open-ended questions elicit longer and more detailed responses from children disclosing abuse (Lamb et al., 2008). We have found that most questions asked in court are closed-ended, predominantly questions that can be answered "yes" or "no" (Andrews, Lamb, & Lyon, 2015).

Catherine's initial disclosure of abuse in the Alex A. trial illustrates the limitations of closed-ended questioning: Q. Okay. While he was babysitting

you, did he ever touch you in a way that you didn't like? DEFENSE ATTORNEY: Objection. Leading, Your Honor. THE COURT: Overruled. You may answer that question. THE WITNESS: Yes. Q. Okay. Where did he touch you? A. In my private area. Q. Okay. Is the private area your groin area right—do you understand? DEFENSE ATTORNEY: Objection. Leading, Your Honor. THE COURT: The objection is sustained. What is your private area? Where is it? THE WITNESS: Down here. (Indicating.) THE COURT: Okay. The witness is pointing to the area between her legs. PROSECUTOR: Thank you, Your Honor. THE WITNESS: Yes. Q. What would he do? Would he touch you over your clothes or under your clothes? A. Under.

One can see how little Catherine contributed by extracting her words: "Yes. In my private area. Down here. Yes. Under." The questions are yes/no, forced choice (questions that use the word "or"), and specific "where" questions, leading to one- or two-word responses. The open-ended question—"What would he do?"—was left unanswered, for the attorney followed up with a forced-choice question. The limitations of the testimony were not lost on the jurors. As one juror explained, "everything was yes, yes, yes" (Fisher & Araballo, 2002).

The Dynamics of Abuse and Disclosure

Child sexual abuse offenders do not typically violently rape children; instead they utilize more seductive methods. Child sexual abuse commonly begins with gradually progressive touching to desensitize the child to abuse, while showering the child with attention, love, and affection to maintain compliance and prevent disclosure (Kaufman et al., 1998; Lang & Frenzel, 1988; Leclerc, Proulx, & Beauregard, 2009). As a result, abuse is rarely painful (Goodman, Taub, Jones, & England, 1992), and in part because they acquiescence to the less serious acts, children often blame themselves for the abuse. Violence, threats, and force are only used when necessary, and most commonly to ensure secrecy rather than compliance (Gray, 1993; Smith & Elstein, 1993).

Although prosecutors are advised to explain to the jury how offenders accomplish abuse without violence, as well as why children might be motivated to delay disclosure (Lanning, 2010), research suggests that these are areas where prosecutors struggle. Although in most cases children describe repeated abuse by perpetrators they knew, and likely trusted, prosecutors usually fail to ask children any questions about the seduction or grooming process (doing so in only 38% of cases), instead asking nearly twice as often about specific commands that perpetrators made during abusive acts (Stolzenberg & Lyon, 2014b).

When the dynamics of abuse go unexplained or are unconvincingly explained, jurors may misinterpret the facts of the case. Examining trial verdicts, we found evidence that jury members expect child sexual abuse to be akin to violent rape. Jurors were 3 times more likely to acquit if the child had ongoing contact or interactions with the defendant after the alleged abuse began, and 7 times more likely to acquit if there were no allegations of force (Stolzenberg & Lyon, 2014a). Taken together, these findings suggest that prosecutors miss opportunities to explain the dynamics of abuse and disclose when presenting cases of child sexual abuse.

In Alex A.'s trial, the prosecutor presented the abuse as analogous to a violent rape, charging Alex A. with aggravated sexual assault, necessitating proof of force. Yet in many ways the facts as revealed by Catherine and Alexis did not support this description of sexual abuse. Catherine and her mother testified how Alex A. would buy Catherine gifts, and give her special attention among her siblings. Catherine and Alexis described abuse that appeared progressively more serious. Catherine's had progressed to penetration, whereas Alexis described fondling, and case records reveal that other victims had been identified who described still less serious abuse. (Notably, however, the jurors were not told about these other victims.) Catherine described how Alex A. showered with her, sometimes asking her to wash his body, fondled and digitally penetrated her, made initial attempts at intercourse, and gave her a piece of rubber intravenous tubing that he asked her to "practice" inserting into her vagina. This perfectly aligns with what research suggests is a natural progression in child sexual abuse—perpetrators desensitize children to touching that begins as innocuous, and gradually increases in inappropriateness, ensuring the child's compliance, and often the child's participation.

When questioning Catherine about her time with Alex, the prosecutor characterized her as being under Alex A.'s complete control. He asked her how long Alex would "keep" her in the bedroom. He ignored her descriptions of her feelings about the abuse, instead hoping to evoke evidence of active physical resistance: Q. How would you react when the defendant would be touching you? A. I was scared, and I was just hoping it would be over soon. Q. Did you ever—did you ever try to get away? A. Yes. Q. Why don't you go ahead—why don't you tell me what you would do. The discussion then turned to Catherine's actions, rather than her feelings, with an aim toward establishing that she put up a fight—something that children are unlikely to do given their relationship with the perpetrator and prior seduction (Smith & Elstein, 1993). By presenting the case as a forceful assault, the prosecutor rendered incomprehensible the scenes described by Catherine and Alexis where they would passively lie on the bed with Alex A., watching TV while he fondled them in turn.

The trial judge similarly imposed his preconceptions of violence onto Catherine's report. The court questioned Catherine about her testimony that Alex A. inserted pieces of intravenous tubing into her vagina: Q: And how did that feel? A: I didn't like it. Q: Did it hurt at all? A: No, it did not hurt. The implicit assumption was that it ought to hurt, and Catherine's denial likely undermined her credibility. The judge's assumption reveals both a general misconception that sexual abuse is typically painful, and a failure to understand the purpose of the rubber tubes. Practice with the tubes would ensure that Alex A. could move onto more serious abuse without pain and without resistance.

Most children delay disclosing sexual abuse (Sas & Cunningham, 1995; Stolzenberg & Lyon, 2014b). Once children acquiesce to less serious abuse, they feel as if they are partly to blame, and this deters them from disclosing. Moreover, perpetrators will explicitly warn children that they will be blamed if they disclose, or that they will not be believed (Smith & Elstein, 1993). In some cases, perpetrators will utilize overt threats of violence to the child or the child's family if she discloses (Gray, 1993; Smith & Elstein, 1993).

Catherine and Alexis were no exception. Catherine did not disclose abuse for several months, until after her mother stopped dating Alex A. She explained that a friend had told her about disclosing abuse, and that this gave her the courage to disclose. Catherine also revealed Alexis's abuse, who at that time had not disclosed. Alexis's parents confronted her, and she initially denied the abuse before acknowledging that Alex A. had molested her as well.

Catherine's and Alexis's reasons for delay were not fully discussed. It is likely that Alex A. used various seductive methods to encourage the children's compliance and non-disclosure. For example, Alex A.'s tendency to give Catherine gifts was never linked by the prosecutor to the dynamics of disclosure. At trial, when the prosecutor asked Catherine about her reasons for not disclosing, Catherine stated, "I got scared. And one time he threatened me and he said I would kill your mom or hurt your family." This is the type of threat that a perpetrator would make after abuse has become more serious and reoccurred many times. Unfortunately, the prosecutor's next questions were attempts to date when these threats were made, instead of more fully discussing Catherine's disclosure process.

In contrast, the defense attorney repeatedly asked Catherine about her initial failure to disclose, expressing to the jury how surprising it is that if the abuse actually happened, Catherine did not come forward sooner. Catherine's delay in disclosing until her mother was no longer dating the defendant was used by the defense as a basis for suggesting that her mother had put her up to the allegation. Indeed, a juror who stepped forward to explain the verdict

noted that she believed Alex A.'s ex-girlfriend had been "trying to frame him" (Fisher & Araballo, 2002). Catherine's impetus for disclosure, her friend's report, was characterized by the defense as providing the where-withal to fabricate an allegation.

The dynamics of seduction, as well as the reasons for the children's delayed and inconsistent disclosures, should have been more central in the prosecution's presentation of the case. Instead of helping the jury understand why a child would feel conflicted toward a perpetrator and about disclosing abuse, the prosecutor presented the case as analogous to violent rape. This made the children's apparently normal interactions with Alex A. incomprehensible.

The defense attorney capitalized on this point in his closing argument. He focused on "the fact that during this whole period she didn't tell anyone," and challenged Catherine's continued contact with Alex A. after abuse had begun:

That, again, doesn't make sense. If you have a girl who is being abused every weekend—and I mean for two to three hours locked in a room, being threatened with her family is going to be killed if she says anything, I would picture in my mind a child who would be clinging to either her mother, her brothers, somebody, and that it would be something that people would notice.

Time

Another challenge faced by attorneys questioning child witnesses is reliably identifying the timing of the allegation. Placing past events in time is a difficult cognitive task, requiring sophisticated executive functioning. Dating memories involves the integration of information from autobiographical memories with knowledge of conventional temporal concepts (see Friedman, 2013 for a review). Attorneys typically fail to realize the complicated nature of temporal questions and often ask children about time because they believe the timing of abuse to be legally relevant. For instance, in some cases, the timing of an offense may be relevant for determining what charges will be brought by the prosecution, or for the defense's ability to provide an alibi (Australian Law Reform Commission, 2010; Bradley, 2007; Queensland Law Reform Commission, 2000; *R. v. Radcliffe*, 1990). However, contrary to popular belief, in many cases, asking the child about the timing of alleged abuse is not legally necessary. If the child was repeatedly abused by someone who had frequent access, many courts have recognized that an alibi defense is not available, minimizing the need to date abusive acts (*California v. Jones*, 1990). In addition, when dates are needed, the potential dates of the abuse are often available by asking caretakers or other adults, obviating the need to ask the child. Nevertheless, attorneys rarely recognize these alternatives, and

child witnesses are routinely asked questions about time and dates (Guadagno & Powell, 2009).

Research examining the development of children's temporal understanding has found that children have serious difficulty dating past events, especially with respect to the narrow time scales required by the legal system (e.g., locating a specific day of the week or month of the year; Friedman, 1991). Only a small number of studies have examined children's ability to date events more than a year old. Results from these studies show that grade school children sometimes exhibit remarkably good ability to identify the year, season, and even month of remote events (Bauer, Burch, Scholin, & Guler, 2007; Friedman, Reese, & Dai, 2011; Pathman, Larkina, Burch, & Bauer, 2013). However, there are reasons to doubt the applicability of these findings to children's ability to date abuse. First, laboratory studies focus on unique events so as to reduce potential confusion. Most child witnesses are testifying about repeated abuse. Second, studies focus on events that were nominated by a parent or the child. These will disproportionately be events that are well remembered by both parent and child, and the subject of shared conversations. Unless and until it is disclosed, sexual abuse is shrouded in secrecy.

One study has examined 6- to 10-year-olds maltreated children's ability to answer temporal questions about their changes in foster placement and their visits to dependency court (Wandrey et al., 2012). These events are not as secretive and as sporadic as sexual abuse, of course, but they are repeated, emotionally salient, and largely negative. Only about 50% to 60% of children recalled their age at the time of their first and most recent court visits and placement changes (most of which occurred within the past few years), and they were largely at chance in recalling the month of these events.

Recognizing that children may have difficulty in dating abuse, some courts have suggested that they ought to be able to estimate time with respect to landmark events, such as the child's birthday or a major holiday (*R. v. R.W.*, 2006; *U.S. v. Tsinmahijinnie*, 1997). However, this approach raises its own problems. First, questions about landmarks use terms like "near," "around," or "during that period," and these terms are undefined. What determines whether an event occurs "around" another event? Second, most landmarks re-occur, and this complicates the question. Unless one specifies which occurrence of a landmark one is referring to, the event in question will have a different temporal relation to each occurrence of the landmark. For example, if the landmark is Halloween, and at the time of the event in question Halloween has just passed, then it is quite near and just after last Halloween and not near but well before next Halloween. It is not until late childhood that children demonstrate an understanding of the cyclical nature of conventional

temporal scales (e.g., months of the year; Friedman, 1977). We have found that 6- to 10-year-old maltreated children exhibit a prospective bias, such that they interpret questions about recurring landmarks as referring solely to forthcoming events. Hence, they would deny that an event was “near” their birthday, even if it came shortly after their last birthday (McWilliams, Quas, & Lyon, 2016).

Developmentally insensitive questions were asked throughout the Alex A. trial. To time the termination of abuse, the prosecutor asked Catherine to date her mother’s break up with Alex A. (“Do you remember what month they broke up?” “Was it the wintertime, summertime?”), and Catherine was unsure (“Around winter or spring, March, April”). These questions were unnecessary, because the information could easily have been obtained from Catherine’s mother. Alexis was similarly challenged by the prosecutor’s temporal questions. The prosecutor attempted to date Alexis’s abuse by asking “Was this when you were in fourth grade?” Alexis replied “Third.” However, Alex A. babysat Alexis in late 1999, when she was in the fourth grade. Again, the accurate dates could easily have been obtained from Alexis’s family.

The prosecutor also asked both Catherine and Alexis to date events with respect to recurring landmarks. He asked the witnesses to date several events (e.g., Catherine’s mother’s breakup) in relation to Halloween, Thanksgiving, the 4th of July, and even Labor Day. The girls typically denied knowing (“I can’t remember”) or expressed uncertainty (“I think it was before Halloween”).

The prosecutor’s questions suggested that the girls ought to know the dates of the various events they described. They gave license to the defense attorney to ask his own temporal questions (“Do you remember any holiday around there? Was it near Halloween . . . Near the 4th of July?”), and elicit the same uncertainty (“No, not that I remember.” “I don’t really remember what month”). Potentially more damaging were his questions asking Catherine to date when Alex A. gave her the intravenous tube: Q: Okay. Now, when did Alex first show you this tube? A: I don’t remember. Q: Okay. Was it like right before he split up with your mother? A: Maybe in the middle. Q: In the middle? A: Yeah. Q: Okay. A: Not very sure. Q: So would that be in the—you said that they split up, you thought, sometime in the spring, March or April? A: Yeah. Q: So the middle that would be, they were together a year, so that would maybe September or October? A: Yes. The problem was that in September Alex A. no longer worked for the medical supply company.

Number

In addition to asking children when an event took place, attorneys will also ask children how many times an event occurred (Lyon & Saywitz, 2006).

Although some research has examined children's developing ability to enumerate simple stimuli (such as the number of sounds over a short interval; Chalmers & Grogan, 2006), enumerating events over extended periods of time is more complex. Research examining adults' ability to enumerate events has found that if the number of target events is small, adults attempt to remember each occurrence and count. However, if the number of occurrences is large (typically more than five or so), they make inferences based on frequency and the time period over which the events took place (Bradburn, 2000; Menon & Yorkston, 2000). Hence, a great deal of understanding about conventional time scales and inferential work is required.

Research confirms children's difficulty in enumerating events. Wandrey and colleagues (2012) examined 6- to 10-year-old maltreated children's ability to provide numerosity information about their placements in foster care and visits to dependency court. Only 14% of children knew how many times they had been to court (the average child had been to court 3.2 times), and only 23% knew the number of places they had lived (the average child had lived in 2.7 places). Similarly, Roberts et al. (2015) found that less than 25% of 4- to 8-year-old children could recall that they had experienced a play event 4 times.

In the Alex A. case, the judge took it upon himself to obtain numerosity information from Catherine: Q: How many times did that happen? A: I don't know. Same—fifty times out of the whole entire year. I don't really do numbers—around—Q: About how many times did it happen all together? How many times did he touch his private part to your private part? A: I don't know how many. Q: Okay. More than once? A: More than once, yes. Q: More than 5 times? A: Yes. Catherine's answer was impressive; she apparently was reasoning that because she saw Alex on weekends, and because there are 52 weeks in a year, the number of molestations was near 50, but when pressed by the judge for an overall number she faltered, leading the judge to resort to yes/no questions.

It was this interaction that the juror later remembered when she complained about the girls' testimony:

They weren't consistent on their story. We know that they were young and we understand they are children but the story was like did he touch you three times, yes, did he touch you five times, yes, did he touch you 50 times, yes. Everything was yes, yes, yes. (Fisher & Arballo, 2002, p. A01)

Post-Script to the Alex A. Acquittal

It is possible that Alex A. was innocent after all, and the reader may legitimately object that we should not be calling the case a wrongful acquittal.

Indeed, it is difficult to criticize the outcome in acquittals more generally; if there was definitive evidence of guilt, the jury probably would have heard it, and found the defendant guilty. The Alex A. case is an example of the price we pay for guarding against the risks of false convictions.

Indeed, one might argue that there is no such thing as a wrongful acquittal, regardless of the defendant's actual guilt. If the jury is properly constituted, weighs legally admissible evidence, and is not convinced beyond a reasonable doubt, surely an acquittal is legally fair. But by this token, imagine that a properly constituted jury, hearing legally admissible evidence, hears a factually innocent defendant's case. Can one argue that a conviction is legally fair? Surely not; any conviction of a factually innocent defendant is wrongful despite the fact that trial procedures were properly followed. Therefore, an acquittal of a factually guilty defendant can be called wrongful as well. Of course, the defendant can offer evidence of his factual innocence to win a new trial, whereas the state is barred by double jeopardy from appealing an acquittal. But the fact that there is legal recourse for the wrongfully convicted defendant but no legal recourse against the wrongfully acquitted defendant does not render factually inaccurate acquittals harmless. Quite the contrary: It heightens the importance of thorough investigation and careful prosecution so that we get it right the first time.

The Alex A. case illustrates just how important it is. In June 2002, 18 months after the Alex A. trial ended, 6-year-old Samantha Runnion was playing outside her home in Stanton, California, when a stranger abducted her. Her friend, Sarah Ahn, who was 5 years old, provided a description to the police that was widely broadcasted. Several days later, the police received several tips that the picture resembled an assembly line worker who lived in Lake Elsinore named Alejandro Avila, the same Alex A. who was acquitted of molesting Catherine and Alexis. After further investigation, Avila was arrested and charged with kidnapping, child sexual assault, and murder.

The heart of the prosecution's murder case was DNA, which included scrapings from under one of Samantha's fingernails (which contained DNA consistent with Avila's profile) and swabs from the passenger side of Avila's car (which contained DNA consistent with Samantha's profile). The other evidence included tire tracks, shoe prints, a footprint, and records of Avila's movements the night Samantha was believed to have been killed. Avila was convicted in April 2005, one of the jurors describing it as an "open and shut" case. He was sentenced to death, and his case is still on appeal (*California v. Avila*, 2014).

Of course, even the subsequent charges against Avila do not prove that he was guilty of the earlier molestation charges. After Avila had been charged in Samantha's death, one of the jurors in the original case stepped forward to

explain the verdict (she is the juror quoted above). Despite having heard the Sheriff of Orange County publicly declare he was “100% confident” that Avila was guilty of rape and murder, she nevertheless maintained Avila’s innocence of the original molestations: “We all 12 walked out of there 100 percent feeling we did justice. We let an innocent man go” (Fisher & Araballo, 2002, p. A01).

The juror in Avila’s first trial may not have been aware of the connections between the two cases. At the murder trial, one of Avila’s sisters testified that he believed that because of double jeopardy, “I could do anything I want to that little girl,” referring to Catherine. That appears to have been his original plan. Samantha Runnion lived across the street from where Catherine had lived with her father, a spot that Avila knew, because he sometimes accompanied Catherine’s mother when she would pick up her daughter for the weekend. It was Catherine’s family who recognized the resemblance between the composite drawing and Avila, and called the police. Indeed, Catherine later told her friends that she felt guilty about Samantha’s death, because she understood that Avila had originally intended to come for her.

Avila’s mistake was his impulsive decision to move from the acquaintance molester to the stranger abductor, subjecting him to forensic evidence that could not be innocently explained, and saving the prosecution the difficulties of relying on the words of a child. Indeed, in Avila’s murder case, the prosecutor acknowledged the flaws in the children’s testimony, concluding “Thank heavens for forensic science” (Luna, 2005). Had Avila been Samantha’s babysitter, rather than her abductor, he could have seduced her and silenced her with little violence, in the same fashion as he did Catherine and Alexis, and the presence of his DNA on her body and in his car would have proven nothing.

Discussion

Using the Alex A. trial as a case study, we have demonstrated the difficulties of proving sexual abuse through the testimony of children. Ironically, the difficulties had less to do with the aggressiveness of the defense, and more to do with the prosecutors’ failure to adapt to the children’s abilities and inability to help the jury understand the dynamics of abuse. The defense picked up on these difficulties and amplified them for the jury. The prosecutor’s failure to ask the child witnesses open-ended questions and failure to give them practice with providing narrative responses before asking about the abuse minimized the productivity of their testimony. The dynamics of seduction, as well as the reasons for the children’s delayed and inconsistent disclosures, should have been more central in the prosecution’s presentation of the case. Instead of helping the jury understand why a child would feel conflicted toward a

perpetrator and about disclosing abuse, the prosecutor presented the case as analogous to violent rape. This made the children's apparently normal interactions with Alex A. unimaginable. Similarly, the prosecutor undermined his own witnesses by trying to extract time and number information. His use of developmentally insensitive questioning techniques resulted in confusing, and often inaccurate, testimony given by Catherine and Alexis regarding the dates and frequency of their abuse. The defense attorney highlighted these errors in his cross-examination, and the prosecution was left with no explanation for the jury as to the reason for these inconsistencies.

The post-script to the Avila case reminds us of the costs of failed prosecutions. Cheit documents other such cases in *The Witch-Hunt Narrative*. One of the most chilling is the Marzolf case. In Marzolf, a boy's stepfather walked into a bedroom and saw the defendant with his hands down the pants of the boy. Five days later, when interviewed by the police, the boy disclosed abuse. Most notably, the boy described how the defendant, his uncle, had him wear "special underwear" that were "too small" for him that he obtained "from a closet"; a search of the defendant's house found colorful bikini briefs in a closet. The Marzolf case was in New Jersey, and one of the legacies of the infamous Kelly Michaels case, one of the day care cases Cheit discussed at length, was the taint hearing, a special procedure in which trial courts may bar children from testifying because of pretrial influences. One of the most prominent suggestibility experts in the country testified at the taint hearing that because of the parents' and the police's influence, the boy should not be allowed to testify. (The case study is worth reading for the insight it provides into the presuppositions of some suggestibility experts, though that is the subject of a separate paper.) Although the trial court refused to bar the boys' testimony, the hearing "took a toll on the boy's family" (p. 393). As Cheit notes, "By the time it was over, the parents did not want to go through an actual trial, having already endured a trial-like hearing that treated them as if they were the defendants" (p. 393). They refused to cooperate further with the prosecution, and the charges were dismissed. Five years later, having moved to Pennsylvania and opening a Karate school, the defendant was charged with possession of child pornography and nine counts of sexual abuse, and ultimately pled guilty to single felony counts of child pornography and abuse. "The case demonstrates the real cost of failing to hold someone like Marzolf accountable for the events in New Jersey; the price was paid by children in Pennsylvania" (p. 393).

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Kelly McWilliams is a developmental psychologist whose work focuses largely on children's eyewitness memory and forensic interviewing. Through laboratory and field research, she has examined current investigative and prosecutorial practices in the legal system, and their influence on the behavior and responses of child witnesses.