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## Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem

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**APPOINTING SPECIAL MASTERS TO EVALUATE THE  
SUGGESTIVENESS OF A CHILD-WITNESS INTERVIEW:  
A SIMPLE SOLUTION TO A COMPLEX PROBLEM**

I. INTRODUCTION

A child's memory is different from an adult's memory. It is more malleable and more easily influenced by such innocuous acts as asking if something occurred. Simply asking a child if an event occurred will increase the chance that the child will later say that the event occurred, even if it did not.<sup>1</sup> While this may be a "cute" phenomenon among children in everyday life, it is certainly not "cute" when the child is a witness to a serious crime or is alleged to be a witness to a serious crime. An interviewer can implant a false "memory" of an event into a child's mind by simply asking about it.<sup>2</sup>

Often, for child sexual abuse cases, the child is not just a key witness, the child is the only witness.<sup>3</sup> However, this evidence can be tainted during the investigative process by well-meaning but poorly trained interviewers. Problems can arise when the interviewer uses suggestive techniques that cause the child to truly believe events happened that did not actually happen. To avoid such possibilities, many safeguards are currently in place, such as rigorous training for child witness interviewers; however, problems can still arise. Problems can stem from such obviously suggestive techniques as telling the child that other children are reporting that an event occurred and rewarding the child for also saying such event occurred,<sup>4</sup> to methods as subtle as simply asking if an event occurred. When such problems arise, some courts now have sanctioned pretrial "taint hearings" to gauge the suggestiveness of these

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1. DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS 54 (1998) (citing D.A. Poole & D.S. Lindsey, *Interviewing Preschoolers: Effects of Non-suggestive Techniques, Parental Coaching, and Leading Questions on Reports of Non-experienced Events*, J. EXPERIMENTAL CHILD PSYCHOL. 60, 129-154 (June 1995)).

2. *Id.* (citing D.A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children's Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)).

3. *State v. Michaels*, 642 A.2d 1372, 1382 (N.J. 1994) (citing *United States v. Wade*, 338 U.S. 218, 229 (1967)); DIANE E. PAPALIA & SALLY WENDKOS OLDS, *A CHILD'S WORLD: INFANCY THROUGH ADOLESCENCE* 363 (7th ed. 1996).

4. Such techniques *have* been used and were used to convict a schoolteacher in New Jersey. *See infra* pp. 515-18 and notes 137-65.

interviews.<sup>5</sup> The trial judge presides over these hearings and decides whether the transcripts of the interview and the child's testimony should be admitted into evidence. This is, for obvious reasons, a very important decision. Often the decision to prosecute such an offender is based on the admissibility of the child's testimony. Deciding whether or not an interview has been conducted suggestively requires knowledge of psychology, statistics, experimental methods, and child development that most trial judges do not possess. An adjudicator trained in these technical fields should be appointed to decide these issues. Such a trained adjudicator is referred to as a "special master."

Deciding if an interview was so suggestive that the child's memory is irreparably distorted and the child should not be allowed to testify in court is a difficult decision that will often turn on a multitude of subtle technical issues. A special master, trained in these issues, is better equipped to decide, and should decide, such an issue when so much hangs in the balance. The possibility exists that an untrained judge might exclude a valid interview based on the testimony from an expert for the defense or that an untrained judge might admit into evidence an interview conducted suggestively.

Part II of this Comment consists of background information and a historical overview of the problem of the suggestibility of children in the investigative setting. Part III details the psychological research in the area of suggestibility of children during interviews. Part III also sets forth real-world examples of the effects of suggestive questioning of children. Part IV provides an analysis of the various proposed solutions to the problem of suggestibility of children, including the response of psychological scholars and courts. Part V concludes that New Jersey's solution of taint hearings should be conducted by specially trained adjudicators. Part V also outlines the procedure that should be followed for the appointment of such an adjudicator.

## II. BACKGROUND AND HISTORICAL REVIEW OF SUGGESTIBILITY OF CHILDREN

### A. *Psychological Research: An Analogy to Witness Interviewing*

Perhaps the greatest confound<sup>6</sup> to any experiment involving people is the situation in which the people realize the goal of the researcher and "play[]

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5. *People v. Michael M.*, 618 N.Y.S.2d 171, 175 (N.Y. Sup. Ct. 1994); *Michaels*, 642 A.2d at 1382.

6. Confounds, or "confounding variables," are variables that are unintentionally manipulated and produce some effect during an experiment along with the treatment. MARK MITCHELL & JANINA JOLLEY, *RESEARCH DESIGN EXPLAINED* 220 (3d ed. 1996). For purposes of this discussion, the "hypothesis-guessing" confounding variable is most applicable. *Id.* at 221. When an experimental group has guessed what effect is "supposed" to occur, it creates an impurity in the measurement of the variables. *Id.* Basically, the experiment begins to measure

along.”<sup>7</sup> A person who has realized the researcher’s goal will tend to answer the researcher’s questions in a manner the person believes is desired by the researcher.<sup>8</sup> For this reason, most psychological studies are designed so that the subject<sup>9</sup> and even the researcher are unaware of the hypothesis.<sup>10</sup> These dangers are present when a police officer is interviewing a child regarding criminal activity.<sup>11</sup> However, it would be virtually impossible to eliminate the researcher’s and child’s awareness of the reason for the encounter.<sup>12</sup> Although the situations involved during a criminal interview and a psychological experiment are clearly not identical, the analogy is equally clear. As a child picks up on an interviewer’s goals, ideas, or biases,<sup>13</sup> the likelihood that the child will try to answer “correctly,” by telling the interviewer what the child believes the interviewer wants to hear, increases.<sup>14</sup> Because of this threat that a child interviewee will discover the reason for the encounter and try to please the interviewer by answering as desired, there is considerable reason to attempt to reduce another confound of the interview process: the suggestiveness of the interview, particularly for a child interviewee.<sup>15</sup>

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the effect from the treatment as well as how much the experimental group has figured out the hypothesis.

7. *Id.* at 9, 57.

8. *Id.* This effect is generally well-accepted among psychological researchers as a threat to the construct validity, the extent to which a study is actually manipulating and measuring what it claims to be manipulating and measuring, of an experiment. *Id.* at 8–9. The threat is that when a subject realizes the experimenter’s goal, the answers given will no longer measure the desired information, but rather how much the subject has learned the hypothesis. *See id.* at 17–20. For an extensive analysis of construct validity and psychological research in general see MITCHELL & JOLLEY, *supra* note 6.

9. *Id.* at 180. This is referred to as a “blind study.” *Id.*

10. *Id.* at 73. This is usually achieved by commissioning another person, unaware of the goal of the research, to gather the data. *Id.* If either the subject or the researcher is unaware of the goal, it is a “single blind” study; if both are unaware of the goal it is “double blind.” *Id.* at 180. This effect of knowledge of an experiment’s goal is quite powerful; it is often the basis for double-blind testing of new, experimental drugs, to be sure a patient’s improvement is due to the drug and not his or her belief that the drug will work. *Id.* at 73.

11. *See* PAPALIA & OLDS, *supra* note 3, at 363.

12. While it may be true that a child would not realize, at first, why he or she is being questioned, it is equally true that the interviewer would know why he is speaking to the child and eventually, if the interview is to be productive at all, the child will realize why he or she is being questioned.

13. The form of the interview questions is the most obvious way to introduce such bias, however, it can stem from the interviewer’s tone of voice, facial expressions, or an overall accusatory context of the interview. U.S. DEPT. OF JUSTICE, INTERVIEWING CHILD WITNESSES AND VICTIMS OF SEXUAL ABUSE 2 (4th prtg. 2002) [hereinafter DEPT. OF JUSTICE PAMPHLET].

14. *See* POOLE & LAMB, *supra* note 1, at 67.

15. For an exhaustive discussion of the suggestibility and believability of trauma survivors in general, as well as the effects of trauma on the human mind, see TRAUMA & MEMORY (Linda

Young children are particularly susceptible to suggestive questions; therefore, there can be danger implicit in an improperly conducted interview of a child.<sup>16</sup> Child abuse is a crime that must often rely almost exclusively on the testimony of the child reporting it.<sup>17</sup> This implicates a “major social policy” concern.<sup>18</sup> Adults who abuse children must be held responsible, but incorrect testimony could subject innocent adults to extreme punishment.<sup>19</sup> While the actual number of false allegations<sup>20</sup> is highly contentious, the implications are clear: There is a very real possibility that innocent adults are being punished for sexual abuse that never occurred and, because of the dilemma of suggestive interviews of children, guilty adults are going unpunished when the only evidence against them, a child’s statements, is not admitted at trial.<sup>21</sup> The Supreme Court of New Jersey stepped forward to address the former problem directly and indirectly addressed the latter problem.<sup>22</sup>

*B. Courts Begin to Take into Consideration the Suggestibility of Children*

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M. Williams & Victoria L. Baynard eds., 1999). This paper focuses on the legal issues surrounding the suggestibility of children interviewees, which tends to increase as the age of the child decreases. See PAPALIA & OLDS, *supra* note 3, at 363 (citing Stephen J. Ceci & Maggie Bruck, *Child Witnesses: Translating Research into Policy*, SOCIAL POL’Y REPORT, Fall 1993, at 7).

16. Martine B. Powell et al., *The Effects of Repeated Experience on Children’s Suggestibility*, 35 DEVELOPMENTAL PSYCHOL. 1462, 1462–77 (1999).

17. PAPALIA & OLDS, *supra* note 3, at 363. Child abuse is “a crime that by its nature is often without corroboration” beyond the child’s testimony. Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403, 408 (1993) [hereinafter *Historical Review*].

18. PAPALIA & OLDS, *supra* note 3, at 363.

19. *Id.*

20. POOLE & LAMB, *supra* note 1, at 18. False allegations, explicit allegations of abuse that are false, are believed to occur by most researchers. *Id.* at 17–19. The reasons for such beliefs range from suggestive interview procedures, to a child’s desire to live with one parent in a custody hearing, to bribes. *Id.* The numbers are equally varied; obviously no exact number will ever be calculated. However, estimates range from 5% to 35% of all reported abuse cases. *Id.* at 17–18.

21. See *State v. Michaels*, 642 A.2d 1372, 1382 (N.J. 1994). Kelly Michaels, a college student who was working at a day care, is one possible example. She is either an innocent person subjected to a trial for child abuse spanning two years and who served five years of a forty-seven year sentence before a New Jersey Appellate Division Court reversed her conviction due to “unreliable perceptions, or memory caused by improper investigative procedures,” *State v. Michaels*, 625 A.2d 489, 517 (N.J. Super. Ct. App. Div. 1993), or she is a child abuser who was set free forty-two years early because of the same “unreliable perceptions, or memory caused by improper investigative procedures.” *Id.* Regardless of what the correct answer is, the case of Kelly Michaels is clearly a tragedy.

22. *Michaels*, 642 A.2d at 1382. More accurately, discerning the suggestive interviews also makes it easier to discern the nonsuggestive interviews.

In *State v. Michaels*, the court recognized that “[i]f a child’s recollection of events has been molded by an interrogation, that influence undermines the reliability of the child’s responses as an accurate recollection of actual events.”<sup>23</sup> The court held that when an interview is so tainted by the interviewer, the transcripts (and other evidence) of such interviews may be inadmissible at trial.<sup>24</sup> Further, the court held that a tainted interview could even cause the child’s in-court testimony to be excluded at trial.<sup>25</sup> The *Michaels* court, therefore, held “that to ensure defendant’s right to a fair trial a pretrial taint hearing is essential to demonstrate the reliability of the . . . evidence [obtained during an interview of a child].”<sup>26</sup> While New Jersey’s idea of taint hearings has not been widely accepted,<sup>27</sup> courts often accept the reasoning as valid,<sup>28</sup> and at least one state, New York, has employed the use of a *Michaels* taint hearing.<sup>29</sup> The resistance to taint hearings is mostly based on resistance to psychology experts as “soft scientists”<sup>30</sup> and judges’ beliefs that the credibility of witnesses is in the sole discretion of themselves and juries, regardless of the subtle science involved in the suggestibility of children.<sup>31</sup>

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23. *Id.* at 1377. For a detailed discussion of the facts of *Michaels* see *infra* pp. 516-19.

24. *Id.* at 1380 (ignoring, for the time being, any possible hearsay problems).

25. *Id.* at 1382.

26. *Id.* The form of this pretrial taint hearing involves two stages of burden-shifting, which ultimately requires the state to prove by clear and convincing evidence that a child’s testimony is reliable. See *infra* pp. 524-25 and notes 217-30.

27. *Bourdon v. State*, Nos. A-7689, A-7699, 2002 WL 31761482, at \*2 (Alaska Ct. App. Dec. 11, 2002) (holding that Alaska has never adopted *Michaels* and that the defendant in this case had ample opportunity to present the evidence of suggestibility to the judge and jury at trial); *Commonwealth v. D.J.A.*, 800 A.2d 965, 974 (Pa. Super. Ct. 2002) (rejecting a *Michaels* taint hearing and expert testimony as to the credibility of child witnesses); *State v. Olah*, 767 N.E.2d 755,760 (Ohio Ct. App. 2001) (holding that it is no error to deny a defendant a pretrial taint hearing); *In re Dependency of A.E.P.*, 956 P.2d 297, 304 (Wash. 1998) (holding that any attack on the credibility of a child witness can be addressed by a court during the competency hearing; therefore, no separate taint hearing is required); *cf. Ardolino v. Warden, Maine State Prison*, 223 F.Supp.2d 215, 238-39 (D. Me. 2002) (reviewing the history of *Michaels* and stating that it is unlikely the reasoning would prevail in Maine).

28. *English v. State*, 982 P.2d 139, 146 (Wyo. 1999) (agreeing with the logic of *Michaels*, yet finding no place for a taint hearing in Wyoming law).

29. *People v. Michael M.*, 618 N.Y.S.2d 171, 177-78 (N.Y. Sup. Ct. 1994) (holding that a hearing should be held to determine if a child was subject to an unduly suggestive or coercive interview and if the testimony is therefore unreliable); Julie A. Jablonski, *Where has Michaels Taken Us?: Assessing the Future of Taint Hearings*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 49, 57-58 (1998) (noting that the trend of cases seems to be developing toward acceptance of taint hearings).

30. See Emily L. Baggett, Note, *The Standard Applied to the Admission of Soft Science Experts in State Courts*, 26 AM. J. TRIAL ADVOC. 149, 155 (2002).

31. *English*, 982 P.2d at 145 (“[O]nce the child’s competency is called into question by either party, it is the duty of the court to make an independent examination of the child to

While there has been some resistance to *Michaels* among legal scholars,<sup>32</sup> the idea of taint hearings seems reasonable to many authors<sup>33</sup> and has been heralded as a societal good by others.<sup>34</sup>

Regardless of the perceived propriety or impropriety of the *Michaels* decision<sup>35</sup> or its acceptance among legal scholars, the fact remains that at least *some* jurisdictions are conducting taint hearings for children alleging abuse<sup>36</sup> and acceptance of the principles in *Michaels* by more jurisdictions seems imminent.<sup>37</sup> This Comment does not debate the propriety of taint hearings but rather will address the procedure that should be adopted for taint hearings in jurisdictions that currently, or in the future will, employ them. With so much

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determine competency.”); *Bourdon*, 2002 WL 31761482, at \*2 (holding that a criminal defendant can raise the issue of suggestiveness on motion at trial before or after the child’s testimony has been admitted). The *Bourdon* court has clearly disregarded the effect such testimony would have on jurors and the near impossibility of the jury disregarding such testimony even if told it was suggestive and should be disregarded.

32. Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL’Y & L. 479, 543 (1997) (“We need desperately to overcome the efforts to let abuse go unaddressed by the legal system, and resist the campaign to discount or submerge these criminal acts.”); Lisa Manshel, *The Child Witness and the Presumption of Authenticity After State v. Michaels*, 26 SETON HALL L. REV. 685, 762–63 (1996) (arguing that *Michaels* permits a defendant to overcome easily the presumption of a child’s truthfulness and that children should be allowed to testify regardless of the suggestibility of their interviews and the jury should decide their credibility); John E.B. Myers, *Taint hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 877 (1994) (“[T]he New Jersey court’s decision breaks new and troubling ground.”).

33. Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 LAW & CONTEMP. PROBS. 97, 126 (2002) (concluding that while the research on children’s suggestibility has undoubtedly done good, that within the confines of the adversarial system the research could do great harm and may be more likely to mislead than educate); see also Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 87 (2000) (reasoning that children should be allowed to testify in all but the most extreme cases of suggestiveness).

34. Jablonski, *supra* note 29, at 58–63 (arguing that the trend is toward accepting the *Michaels* decision and that jurisdictions that do not follow *Michaels* do so on weak reasoning, contrary to precedent, and do not address the issue); Karol L. Ross, *State v. Michaels: A New Jersey Supreme Court Ruling with National Implications*, 78 MICH. B. J. 32, 35 (1999) (arguing that the *Michaels* decision is proper for a civilized society that claims to protect constitutional rights for all parties).

35. Although the debate as to the propriety of *Michaels* is intense, once one accepts that some jurisdictions conduct these taint hearings, one’s attention should turn to *how* these taint hearings are conducted.

36. *E.g.*, *People v. Michael M.*, 618 N.Y.S.2d 171 (N.Y. Sup. Ct. 1994); *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

37. Jablonski, *supra* note 29, at 57–58.

at stake during taint hearings,<sup>38</sup> a taint hearing is certainly an exceptional circumstance for which the presiding judge should have a firm understanding of the complex psychological issues at play during child-witness interviews. However, the jurisdictions that allow taint hearings require the trial judge to preside over the hearing.<sup>39</sup> The issues involved here require special expertise in the psychology of interviewing (or at least training in the social sciences, experimental design, and statistics),<sup>40</sup> which is simply outside the ken of most judges.<sup>41</sup> Therefore, when a trial court has deemed it necessary to conduct a taint hearing, this hearing should be presided over by an impartial judge with special training and special expertise in this technical and hotly contested area of psychology.<sup>42</sup> Such a technically trained adjudicator is often referred to as a “special master.”<sup>43</sup> This Comment will follow suit.

### III. PSYCHOLOGICAL RESEARCH AND THE PRESUMPTION OF INNOCENCE

38. As discussed, *supra*, the stakes are clear: innocent adults punished as child sex offenders or child sex offenders freed as innocent adults. One need only consider the case of Kelly Michaels to be assured of the exceptional circumstances in play here. *Historical Review*, *supra* note 17, at 403–04.

39. *Michael M.*, 618 N.Y.S.2d at 810–11; *Michaels*, 642 A.2d at 1384–85.

40. Although judges often state that judging the credibility is solely within their discretion or the discretion of the jury, despite any suggestive interview techniques, the multitude of guides published to aid in the interview of children, *e.g.*, INTERVENING IN CHILD SEXUAL ABUSE (Kathleen Murray & David A. Gough eds. 1991); DEPT. OF JUSTICE PAMPHLET, *supra* note 13; POOLE & LAMB, *supra* note 1, and the proliferation of research published in this field, *see generally*, *Historical Review*, *supra* note 17, at 403; Ceci & Bruck, *supra* note 15, would seem to suggest that the suggestibility of children is not within the ken of the average judge or juror.

41. While the proportion of judges with degrees in psychology has not been compiled, the statistics for incoming first year students at law school is indicative of the background of attorneys, which is ultimately the pool from which judges are selected. Most statistics do not even have a “psychology” category of its own and such majors are lumped into the “other” category or the “sciences” category. *See* SAINT LOUIS UNIVERSITY SCHOOL OF LAW, 2003–2004 CATALOG 2 (2003) (“other” undergraduate majors totaling 1.8%); PROFILE OF THE STUDENT BODY, Boston College Law School, at <http://www.bc.edu/schools/law/admission/profile/> (last visited Feb. 1, 2004) (“science” undergraduate majors totaling 8%). The schools that have a “psychology” undergraduate category are in the 5% range of law students with a psychology undergraduate degree. CLASS PROFILE, Columbia Law School, at [http://www.law.columbia.edu/prosp\\_students/jd\\_prog/applic\\_inf/Class\\_Profile](http://www.law.columbia.edu/prosp_students/jd_prog/applic_inf/Class_Profile) (last visited Feb. 1, 2004); ADMISSIONS PROFILE, University of Cincinnati Law, at <http://www.law.uc.edu/admissions/majors.html> (last visited Feb. 1, 2004). “[T]his research area is developing rapidly and is riddled with a host of complex issues that necessitate a broad understanding of design, statistics, and theory not likely possessed by someone outside the research community.” Ceci & Bruck, *supra* note 15, at page 19.

42. *See* Ceci & Bruck, *supra* note 15, at 19.

43. FED. R. CIV. P. 53; *see also* National Childhood Vaccine Injury Act, 42 U.S.C. § 1396 (2000); Magistrates Act, 28 U.S.C. § 636 (2000); Civil Rights Act of 1964, 42 U.S.C. § 1983 (2000); *People v. Superior Court (Laff)*, 23 P.3d 563, 584 (Cal. 2001).



There is an immense amount of research regarding the suggestibility of child witnesses,<sup>44</sup> and there is an equally immense amount of commentary regarding this research.<sup>45</sup> The research is “developing rapidly” and is “riddled with a host of complex issues” that necessitate such a “broad understanding of design, statistics, and theory not likely possessed by someone outside the research community” that an exhaustive review would be impossible.<sup>46</sup> The context of greatest concern regards the issue of rates of false positives and false negatives of abuse.<sup>47</sup> “[A] false positive is the error that arises when abuse did not occur but the system concludes that it did, and a false negative is the corresponding error that arises when abuse did occur but the system concludes that it did not.”<sup>48</sup> These errors are of obvious concern to our legal system: A false positive possibly subjects an innocent person to some of the harshest penalties of our legal system,<sup>49</sup> while a false negative frees a dangerous person to possibly harm another child. There are obviously extremes on either side of the false positive/false negative argument.<sup>50</sup> However, it should be apparent that both of these situations present a grave injustice. The question then becomes to what extent our legal system is designed to prefer one type of false report over another.

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44. See, e.g., Powell et al., *supra* note 16; Yael Orbach & Michael Lamb, *Enhancing Children's Narratives in Investigative Interviews*, 24 CHILD ABUSE & NEGLECT 1631 (2000); Ann-Christin Cederborg et al., *Investigative Interviews of Child Witnesses in Sweden*, 24 CHILD ABUSE & NEGLECT 1355 (2000); Michael E. Lamb & Kathleen J. Sternberg, *Conducting Investigative Interviews of Alleged Sexual Abuse Victims*, 22 CHILD ABUSE & NEGLECT 813 (1998). See generally Ceci & Bruck, *supra* note 15; *Historical Review*, *supra* note 17.

45. Ceci & Friedman, *supra* note 33; Henderson, *supra* note 32; Lyon, *supra* note 33.

46. Ceci & Bruck, *supra* note 15, at 19.

47. Ceci & Friedman, *supra* note 33, at 71. While there are any number of applications of this research to other interview contexts, this paper focuses on the issue of self-reported abuse against children. Additionally, there are many ways in which a child could provide false information, which are of little importance to the issue of false positive or false negative reports of abuse, such as the reporting of untrue “peripheral details.” Orbach & Lamb, *supra* note 44, at 1634. Peripheral details are defined as “details about [an] incident [of abuse], which [are] not allegation-specific or plot related,” such as the color of the defendant’s shirt. *Id.* Obviously, it is possible to report such things falsely, but whether a defendant’s shirt was blue usually has little to do with the defendant’s guilt.

48. Ceci & Friedman, *supra* note 33, at 71.

49. *Id.* at 75–76 (“A false conviction in a child sexual abuse case may have some particularly nasty consequences, including destruction of a family and exposure of the defendant to intense public opprobrium and even physical danger.” (citations omitted)). Additionally “a child abuse finding against a parent or parents where no abuse has occurred is as harmful and devastating to the subject child as is the failure to find child abuse where such has occurred.” *Id.* at 75 n.216 (quoting *In re Smith*, 509 N.Y.S.2d 962, 963 (N.Y. Fam. Ct. 1986)).

50. Some seem to argue that any attempt to uncover false positives is an example of how “the criminal law continues to disadvantage the relatively powerless and perpetuate the dominant ideologies of the powerful.” Henderson, *supra* note 32, at 479.

Section A discusses the meaning of the presumption of innocence of a criminal defendant and the ramifications this suggests for a preference to release a guilty party, rather than convict an innocent party.<sup>51</sup> Section B outlines some of the laboratory research on the suggestibility of children.<sup>52</sup> Section C gives a detailed explanation of the real world examples of suggestibility of children, including an expansive look at the facts of *Michaels*.<sup>53</sup>

#### A. *The Presumption of Innocence*

An initial issue must be discussed before first delving into the matter of the values our legal system places on false positives or false negatives. The issue is the “goal” of researchers in this field. While some have argued that the research is “pro-child abuser” or “pro-defendant,”<sup>54</sup> one should consider the ramifications of such research *and* the values to be discussed in this section, before concluding that the research is “pro-child abuser.” First, a large amount of the research in this area is focused on the creation of a nonsuggestive protocol for the interview of children.<sup>55</sup> This “protocol research” is designed to decrease *both* false positives and false negatives.<sup>56</sup> Second, the “protocol research” tries to reduce the risk that children’s testimony will not be believed and that guilty abusers will then be set free.<sup>57</sup> Research has shown that jurors

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51. *See infra*, pp. 507.

52. *See infra*, pp. 509.

53. *See infra*, pp. 516.

54. Henderson, *supra* note 32.

55. *E.g.*, Orbach & Lamb, *supra* note 44, at 1633. One such example is the work of Doctors Yael Orbach and Michael Lamb at the National Institutes of Child Health and Human Development (NICHD), in Bethesda, Maryland, and their “NICHD Investigative Protocol.” *Id.* The NICHD Investigative Protocol was developed to promote nonsuggestive interviews of children. *Id.*

56. *Id.* at 1631–33. Less suggestive questioning has been shown to increase both the detail provided by children and the accuracy of this detail. *Id.* at 1631–32. Suggestive questions, and even simple “yes/no” questions, tend to increase the likelihood of false information, probably because children are more likely to guess at “yes/no” questions and to acquiesce to the interviewer’s suggestive questions. *Id.* at 1632. Therefore, the use of nonsuggestive questions to elicit more correct answers decreases the risk of false positives or false negatives, by getting at the truth more accurately.

57. *See id.* at 1633. During a press conference held after a jury had acquitted a defendant of sexual abuse, many jurors claimed that “they believed that some of the children had been abused, but were unable to reach a guilty verdict because of the suggestive way the kids had been interviewed.” Ceci & Bruck, *supra* note 15, at 2. It seems clear that at least some jurors, then, will find a child’s story insufficient to convict a defendant if the child’s story was elicited in a suggestive manner. “[O]nly improvement in the average quality of investigative interviews are [sic] likely to bring about improvement in our ability to protect children.” Lamb & Sternberg, *supra* note 44, at 821.

are more likely to believe a child's statements if they are shown to be in response to nonsuggestive questions.<sup>58</sup> Therefore, the attacks made by researchers on suggestive questions can be seen as a warning to prosecutors about the dangers that inhere in relying on suggestive techniques to secure convictions.<sup>59</sup> Finally, when one realizes that the vast majority of researchers in this field recognize the dangers of suggestive questions,<sup>60</sup> that courts realize this danger as well,<sup>61</sup> and that suggestive interviews are generally viewed as improper,<sup>62</sup> one can recognize that there is a very real possibility that suggestive interviews will cause an important part of a prosecutor's evidence to be excluded at trial. Research designed to reduce the suggestiveness of child witness interviews can then be seen as an attempt to cause better interviews to be conducted and therefore lead to the admission of better evidence<sup>63</sup> and more of a child's own thoughts at trial.<sup>64</sup> The research aids the search for truth by promoting more accurate fact-finding.

Finally, one must consider that the "beyond a reasonable doubt" standard, which applies in all criminal cases, reflects the view that our legal system fears the risk of a false positive more than the risk of a false negative.<sup>65</sup> The United

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58. See Ceci & Bruck, *supra* note 15, at 2. Ceci & Friedman, *supra* note 33, in a rather complicated fashion discuss this issue in terms of a "likelihood ratio," in which jurors inherently examine the chance that a claim is true or false. *Id.* at 76–81. A basic premise can be extracted that if an interview is suggestive, and the jurors become aware of this, the perceived likelihood that an allegation is false will increase and with it increases the likelihood that a child will not be believed. *Id.*

59. *Id.* at 85.

60. *Id.* at 45 ("Virtually all research in the scientific mainstream . . . pays at least some attention to the dangers of both false positives and of false negatives."); Cederborg et al., *supra* note 44, at 1355 (noting that there is a strong consensus among experts that as much information as possible should be elicited by nonsuggestive means).

61. *E.g.*, State v. Michaels, 642 A.2d 1372, 1377 (N.J. 1994); English v. State, 982 P.2d 139, 146 (Wyo. 1999).

62. Idaho v. Wright, 497 U.S. 805, 826 (1990).

63. Cederborg et al., *supra* note 44, at 1360. Cederborg, Orbach, Sternberg, and Lamb note that suggestive interviews are likely to be inadmissible in court and that they seek to decrease suggestibility in interviews to gain more admissible testimony. *Id.*

64. *Id.* The use of suggestive questions is likely to contaminate an interview with the interviewer's ideas, whereas nonsuggestive questions elicit more of the child's memory. *Id.* at 1359; DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2; Ceci & Friedman, *supra* note 33, at 46. For a more complete discussion of suggestive interviews see *infra* pp. 509-516.

65. *In re Winship*, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for *reducing the risk of conviction resting on factual error.*") (emphasis added). "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure [because] [t]he accused during a criminal prosecution has at stake interests of immense importance." *Id.* The loss of liberty is of obvious importance as well as the stigmatization inherent in a criminal conviction, which is probably greater in a child abuse case than in any other. *Id.*; Ceci & Friedman, *supra* note 33.

States Supreme Court in *In re Winship*<sup>66</sup> stated “explicitly . . . that the Due Process Clause protects [an] accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”<sup>67</sup> The Court found it critical that the “moral force” of the law not be diluted by doubt of whether or not “innocent men are being condemned.”<sup>68</sup> United States Supreme Court precedent reiterates that this standard reveals a policy determination that “it is far worse to convict an innocent man than to let a guilty man go free.”<sup>69</sup> Without belaboring the point, regardless of the propriety of the “beyond a reasonable doubt” standard, this *is* the standard of criminal trials in America, and this suggests a preference to free a guilty person rather than convict an innocent person.

With this preference in mind, it seems that research concerning the suggestibility of child witnesses serves at least two constitutional purposes: helping to assure the “moral force”<sup>70</sup> of our criminal justice system and helping to assure a more pure testimonial standard for children used at trial to achieve convictions for the guilty. While one may argue that this standard is “pro-defendant,”<sup>71</sup> this is the constitutional approach<sup>72</sup> and any attack on the research as “pro-child abuser” ignores the testimonial benefits to children that stem from non-suggestive interviews.<sup>73</sup> With this in mind, one should look at what a suggestive interview consists of.

#### B. Examination of the Research on the Suggestibility of Children

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66. 397 U.S. at 364.

67. *Id.*

68. *Id.*

69. *Id.* at 372 (Harlan, J., concurring); see Ceci & Friedman, *supra* note 33, at 74. Indeed, Ceci & Friedman argue that the Court’s preference to free guilty persons rather than convict innocent persons is clear. In *Schlup v. Delo*, 513 U.S. 298, 325 (1995), the Court favorably quoted THOMAS STARKIE, EVIDENCE 756 (1824), in stating that the standard of “beyond a reasonable doubt” reveals a determination that it is better that ninety-nine offenders should go free than to convict one innocent man. Ceci & Friedman, *supra* note 33, at 74.

70. *Winship*, 397 U.S. at 364.

71. This is not the only example of such treatment of defendants in our legal system. For example, consider briefly the Supreme Court’s Fourth Amendment Doctrine, discussed in *Mapp v. Ohio*, 367 U.S. 643 (1961). “[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court” or a federal court. *Id.* at 655. Under the Fourth Amendment, then, even if incriminating evidence is discovered by law-enforcement officers, that evidence is inadmissible against the defendant. While this may be “pro-defendant,” that is the price paid for constitutional protections.

72. *Winship*, 397 U.S. at 363; Ceci & Friedman, *supra* note 33, at 74.

73. Some commentators suggest that believability and admissibility of the child’s testimony are two of the most obvious benefits lost. See, e.g., Ceci & Bruck, *supra* note 15, at 2; Ceci & Friedman, *supra* note 33, at 76–81; Cederborg et al., *supra* note 44, at 1360.

The history and research about suggestibility of children during interviews is immense.<sup>74</sup> While an evaluation of the entire body of research on suggestibility of children would be impossible, some general principles can be derived quite easily. First, suggestive interviews increase the likelihood that unreliable information will be obtained; the likelihood of this result increases as the suggestiveness of the interview increases.<sup>75</sup> What constitutes a suggestive interview is a complex issue, involving many factors, including the form of the interviewer's questions,<sup>76</sup> repetition of the interviewer's questions,<sup>77</sup> the interviewer's tone of voice and facial expressions,<sup>78</sup> the general accusatory context of the interview,<sup>79</sup> questions that stereotype an accused,<sup>80</sup> and other factors.<sup>81</sup> The rate at which children respond to suggestive questions with false positives is not completely clear. However, there is a "strong consensus" among researchers that questions should be formed in the least suggestive way possible.<sup>82</sup> The research of Gail Goodman, purported to be the "scholar most favored by child advocates" for her position that false positives rarely occur, has provided "strong evidence that children, especially young children, are suggestible to a significant degree."<sup>83</sup>

One group of researchers<sup>84</sup> categorizes the form of suggestive questions on a continuum of suggestiveness, placing questions in one of four general categories.<sup>85</sup> Invitations, the least suggestive, consist of utterances, questions,

74. See *Historical Review*, *supra* note 17.

75. POOLE & LAMB, *supra* note 1, at 66–69; Lyon, *supra* note 33, at 113. Some techniques are believed to increase false information by more than fifty percent. Ceci & Friedman, *supra* note 33, at 54.

76. Cederborg et al., *supra* note 44, at 1360; Orbach & Lamb, *supra* note 44, at 1631–33; DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2.

77. Ceci & Friedman, *supra* note 33, at 42; Lyon, *supra* note 33, at 108; POOLE & LAMB, *supra* note 1, at 55–56.

78. DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2.

79. *Id.*; POOLE & LAMB, *supra* note 1, at 67.

80. POOLE & LAMB, *supra* note 1, at 63–64 (specifically addressing the vilification of Kelly Michaels by interviewers during the *Michaels* case).

81. Such factors include repeated interviews. Ceci & Friedman, *supra* note 33, at 55.

82. Cederborg et al., *supra* note 44, at 1355–56.

83. Ceci & Friedman, *supra* note 33, at 46–47. Goodman's studies have found that young children incorrectly answer misleading questions as often as 40% of the time. *Id.* at 50. The rate of incorrect answers is as high as 16% for six- to ten-year-olds and as high as 9% for eleven- to fifteen-year-olds. *Id.* Even Goodman's lowest rate was about 3%, which is still a substantial risk. *Id.* at 52.

84. The National Institute of Child Health and Human Development in Bethesda, Maryland, is one such organization. It is a government-funded research facility.

85. Cederborg et al., *supra* note 44, at 1357. Ranging from least to most suggestive, respectively, the categories are invitations, directive questions, option-posing questions, and suggestive questions. *Id.*

or statements that prompt free-recall of the child.<sup>86</sup> Invitations do not limit the child's focus in any way and consist of statements such as: "Tell me everything that happened."<sup>87</sup> Directive questions are slightly more suggestive than invitations. These questions provide details about an event that the child has already mentioned and ask for more information.<sup>88</sup>

Option-posing questions are next. These questions can be dangerous because they provide a child with a limited number of options, or "yes/no" answers, such as asking "Did he touch you?" or asking "Did he touch you on your arm or leg?"<sup>89</sup> Option-posing questions are possibly the most interesting and difficult to understand of the suggestive questions. For example, researchers have shown that children are likely to attempt to answer option-posing questions, regardless of their knowledge of the answer, because they feel they are being "helpful" or "cooperative."<sup>90</sup> Experiments in which there were no "correct" answers have shown that children will typically choose the last option from the choices or, in response to "yes/no" questions, will simply say "yes" if the answer is unknown, even if they are explicitly told that it is alright to answer with "I do not know."<sup>91</sup> Additionally, even when the correct answer is "no," children are simply more likely to answer "yes/no" questions with a "yes" response.<sup>92</sup>

Finally, questions that strongly communicate the answer expected, such as starting an interview by saying "We know he touched you in a bad place, tell us about it," are defined as suggestive questions.<sup>93</sup> Questions that insert assumed information are also defined as suggestive, if the child has not previously stated the information.<sup>94</sup> Perhaps one of the most shocking experiments in this area had more than fifty percent of the children producing

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86. *Id.* Inviting the child to recall the information without inserting any bias is the key. *Id.*

87. *Id.* Obviously there is some focus to the questioning. The interviewer should attempt to gain that focus non-suggestively, using the child's guidance.

88. *Id.* Sometimes called "cued recall," these questions can become suggestive if the interviewer mistakenly asks about events the child has not mentioned. This suggestiveness usually comes from the reality that the interviewer has spoken with others about the abuse and knows some of the surrounding facts. Whether these facts are true or not, it is more reliable to get them first from the child, during the interview. This leads to a less suggestive interview.

89. *Id.* A child will usually pick one of the limited options, even if it is not true. The child likely thinks that the adult knows the answer and that one of the options is the answer.

90. POOLE & LAMB, *supra* note 1, at 53–54.

91. *Id.* The child, in trying to answer correctly, believes that "I don't know" is certainly not the "correct" answer. *Id.*

92. *Id.* at 54. This concept is probably outside the general knowledge of jurors.

93. Cederborg et al., *supra* note 44, at 1357–58. These are the questions typically viewed as "leading" in legal terms, such as: "He forced you to do that, didn't he?" *Id.* at 1357.

94. *Id.* Even if it is a confirmed fact, the mantra is: Get the child to say it with free recall first. This helps the reliability, both actual and perceived, of the interview. *Id.*

false narratives about events that never occurred.<sup>95</sup> For example, children were asked: “Think real hard, and tell me if this ever happened to you. Do you remember going to the hospital with a mousetrap on your finger?”<sup>96</sup> Children that had never, in fact, had such an experience provided narratives “rich with details” and, surprisingly, more than a quarter of the children later refused to admit that the event never occurred.<sup>97</sup> It is reasonably well-accepted that there is a substantial chance of false positives when interviews are conducted with suggestive questions, even if the “suggestive question” is simply to ask for a “yes/no” answer. Additionally, researchers tend to agree that free-recall questions should be used as much as possible before any option-posing questions are used, to avoid contamination of the interview with possible inaccuracies caused by “the form of the question.”<sup>98</sup> However, research shows that interviewers in real-world settings often begin an interview with a suggestive question.<sup>99</sup>

The dangers of suggestive questions can be exacerbated by repeating them.<sup>100</sup> While repetition of questions is often allowed in the legal setting,<sup>101</sup> repeating questions during interviews of children presents a couple of specific dangers. First, a child will perceive that he or she has answered “wrong” and he or she will try to answer “correctly” by giving a different answer.<sup>102</sup> Second, a child is more susceptible to change his or her answer and acquiesce to suggestive questions if they are repeated.<sup>103</sup> An interviewer’s tone of voice and expression can suggest the “correct” answer to children as well.<sup>104</sup> Although somewhat intuitive, the general communication style an interviewer takes can greatly affect the interview.<sup>105</sup>

The basic advice to interviewers is that “[t]wo communications styles are inappropriate when interviewing children for forensic purposes: talking as if they were adults, and talking as if they were children.”<sup>106</sup> A skilled interviewer should develop a linguistic style that is structured to make sense to children, considering their development, social and cultural background, and many other

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95. POOLE & LAMB, *supra* note 1, at 61. Narratives are stories that sound real. The child sometimes creates “real-sounding” stories to accompany the false answers to these questions. Such stories add an element of reality to the answer.

96. *Id.*

97. *Id.*

98. Cederborg et al., *supra* note 44, at 1355–56.

99. *Id.* at 1359.

100. Ceci & Friedman, *supra* note 33, at 42; POOLE & LAMB, *supra* note 1, at 55–57.

101. Subject to the limits for harassment.

102. POOLE & LAMB, *supra* note 1, at 56; Lyon, *supra* note 33, at 108.

103. POOLE & LAMB, *supra* note 1, at 56.

104. DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2.

105. POOLE & LAMB, *supra* note 1, at 153.

106. *Id.*

linguistic characteristics.<sup>107</sup> Certainly such an extensive grasp of linguistic communications is beyond the ken of most people, jurors and judges alike.

An accusatory context or stereotype of the suspected abuser can also lead to false positives and increase a child's susceptibility to suggestive questions.<sup>108</sup> An accusatory context involves interviewers characterizing the behavior of a suspect as "bad" or telling a child that he or she is there to "help the interviewer catch the bad people" and attempting to elicit more information.<sup>109</sup> This will typically cause a child to shade his or her narrative towards more and more "bad" behavior of the suspect.<sup>110</sup> A stereotype of the defendant as a "bad person" can be particularly damaging. One shocking study involved the stereotype of a visitor to a classroom as "clumsy."<sup>111</sup> Children falsely reported "clumsiness" as much as seventy-two percent of the time in response to suggestive questions when the interviewer had previously implanted ideas that a visitor was "clumsy."<sup>112</sup> This can have a particularly noticeable effect when stereotypes are implanted outside of the interview context, such as by parents during a custody dispute; yet, in that context, it is often hard to realize that the stereotypes have been implanted.<sup>113</sup> Thus, it seems that a suggestive interview can be an elusive concept.

As a general rule, younger children are more susceptible to suggestive techniques.<sup>114</sup> Although young children "are capable of preserving and accurately reporting memories over time,"<sup>115</sup> there are differences between young children's abilities to accurately recall events, mostly regarding their ability to focus on specific events.<sup>116</sup> However, the most important factor of age is that, for all levels of suggestive interviews, the effects are more

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107. *Id.* at 153–54. This topic is immense; it encompasses intricate ideas such as an understanding of the typical adult-child conversation, language development of children, principles of vocabulary and vocabulary development, word syntax, cultural values of body language, and other things. *Id.* at 153–80. For an in-depth review of these topics see POOLE & LAMB, *supra* note 1.

108. DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2–3; POOLE & LAMB, *supra* note 1, at 61–64. Sometimes called "interviewer environment" and "social pressure," the context of an interview should not be designed to clearly tell the child why he or she is being interviewed. *Id.*

109. POOLE & LAMB, *supra* note 1, at 62.

110. *Id.*

111. *Id.* at 63 (citing Leictman & Ceci study 1995).

112. *Id.* at 64. The highest percentage was seventy-two percent for the suggestive interviews; however, the "clumsy" stereotype had an effect on all groups. *Id.*

113. *Id.* Stereotypes that the other parent is "bad" can easily be fostered, consciously or subconsciously, in these situations, especially if the separation is less than cordial.

114. Ceci & Bruck, *supra* note 15, at 7; Orbach & Lamb, *supra* note 44, at 1632.

115. Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2137 (1996).

116. POOLE & LAMB, *supra* note 1, at 35.



profound for younger children.<sup>117</sup> A confusing issue for this factor is that the effect of suggestiveness is based on the general development of the child, not specifically his or her age. Therefore, when considering the suggestiveness of an interview, one should consider the development level of a child, a factor that is not easily deducible by mere intuition.<sup>118</sup> An analysis of the suggestiveness, therefore, requires some understanding of the developmental stages of children.<sup>119</sup> In this context, age of a child will, typically, *actually* refer to the child's development, more than literally referring to the child's age.<sup>120</sup> Research has shown younger children to be more susceptible to suggestive questions,<sup>121</sup> to be more likely to follow the patterns regarding "yes/no" questions,<sup>122</sup> and to be more susceptible to stereotypes of defendants,<sup>123</sup> as well as all the other factors discussed in this section. Therefore, while "preschoolers should [not] be deemed incompetent to testify . . . the circumstances surrounding their recollections should be considered with [their development age] in mind."<sup>124</sup>

Third, it appears that the number of interviews affects the accuracy of a child's answer to questions and also increases the risk that suggestive questions will elicit unreliable answers.<sup>125</sup> Repetitions of interviews stem from several sources. Often several agencies are involved in the investigation, causing fragmentation that leads to multiple interviews.<sup>126</sup> There will likely be a need to interview a child multiple times as new information becomes available.<sup>127</sup> Further, informal "interviews" by parents or others who want to discuss the events with their children function as "repeat interviews."<sup>128</sup> "The impact of

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117. Anderson, *supra* note 115, at 2137; DEPT. OF JUSTICE PAMPHLET, *supra* note 13, at 2.

118. *See generally* Powell et al., *supra* note 16; PAPALIA & OLDS, *supra* note 3. Certainly age is typically a good measurement of development of children generally. Powell et al., *supra* note 16. However, it is equally certain that not all children develop at the same rate. PAPALIA & OLDS, *supra* note 3.

119. *See generally* PAPALIA & OLDS, *supra* note 3, at 35. Developmental psychology is probably outside the general knowledge of the average juror.

120. For example, research that refers to "younger children" or even that uses young age groups refer, more accurately, to "less developed children."

121. Ceci & Bruck, *supra* note 15, at 7. They will, therefore, be more likely to acquiesce to the question. *Id.*

122. *See supra* notes 84–88 and accompanying text. They will therefore be more likely to choose the last option or say "yes" if they do not know the answer (or even if they do know the answer). POOLE & LAMB, *supra* note 1, at 53–55.

123. Anderson, *supra* note 115, at 2137–38.

124. *Id.* at 2138.

125. *Id.* at 2144–46; POOLE & LAMB, *supra* note 1, at 55–57.

126. Anderson, *supra* note 115, at 2144.

127. *Id.* at 2145.

128. POOLE & LAMB, *supra* note 1, at 55.

repeat[ing] [questions] is not uniform.”<sup>129</sup> The effects vary with the number of interviews, the intervals between interviews, and the types of questions that are repeated.<sup>130</sup> As the number of interviews increases, there is simply a greater risk that some “improper” questioning will occur, and there is a “greater likelihood that a child’s memory . . . is distorted by . . . the interviewer.”<sup>131</sup> Also, as the number of interviews increase, the chance that questions will be repeated increases, and as questions are repeated a child is more likely to think that previous answers were “wrong” or to acquiesce to an interviewer’s suggestiveness.<sup>132</sup>

One rather intriguing study involved the effect of “yes/no” questions that implanted an idea of an imagined event in the memory of children over repeated interviews.<sup>133</sup> An actor, “Mr. Science,” performed science experiments for a group of young children.<sup>134</sup> After the presentation, the children were asked: “Did Mr. Science put something yucky in your mouth?”<sup>135</sup> The children were later interviewed a second time. At this second interview the children were again asked if Mr. Science had put something yucky in their mouth. For one study, twenty-six percent of the three-year-olds and thirty-two percent of the four-year-olds falsely reported that Mr. Science had, indeed, “put something yucky in [their] mouth[s],” and even went on to describe this event, though the only source for a memory of this event was that a previous interviewer had asked the child about “Mr. Science” and the “yucky” thing.<sup>136</sup> It is believed that this effect is caused by children’s inability to distinguish between information that is “familiar because it was mentioned

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129. *Id.*

130. *Id.*; Powell et al., *supra* note 16, at 1475.

131. Anderson, *supra* note 115, at 2144–45.

132. POOLE & LAMB, *supra* note 1, at 55–56; *see also supra* notes 96–101 and accompanying text.

133. POOLE & LAMB, *supra* note 1, at 54 (citing D. A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children’s Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)).

134. *Id.* (citing D. A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children’s Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)).

135. *Id.* (citing D. A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children’s Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)). Of course he had not. Mr. Science merely came and performed science experiments for the children. *Id.*

136. *Id.* (citing D. A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children’s Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)). This is an example of a “narrative.” The child falsely says “yes,” then goes on to add credence to his or her claim by saying how it happened. Mr. Science never “put something yucky” in the children’s mouths, yet the children went on so say how he did it, what it tasted like, and even posited reasons for why he would do that, among other things.

in a prior interview and information that [is] familiar because the event had been experienced.”<sup>137</sup>

This effect can be made worse by long intervals between interviews.<sup>138</sup> Misinformation that is implanted in this way is also exacerbated as time from the event increases because memory of the event decays and blends with the information implanted by the interviewer.<sup>139</sup> “Even in the typical sexual abuse case, it is not uncommon for the alleged child victim to be interviewed several times by a variety of agencies;” therefore, it is key to consider the suggestiveness of an interview in light of the number of interviews conducted *before* the subject interview.<sup>140</sup> Thus, it appears that a “suggestive interview” must be viewed from the totality of three general factors: suggestiveness of the interview generally, the child’s age, and the number of interviews, all of which can be affected by many sources and can have an interrelated effect.

### C. Real World Examples of Suggestibility and Interview Techniques

Lest one should think that such egregious transgressions and misinformation could only occur in the laboratory setting, with researchers attempting to confuse children, one should look to some real-world examples. Researchers using the continuum of suggestive questions<sup>141</sup> have used transcripts of actual child sexual abuse interviews to show both the extent of suggestive and option-posing questions used with an inherent lack of free recall questions and the extent to which interviewers use such questions early in the interview (often as the first question), even after being warned of the dangers of such questions (false positives and that the legal system will exclude the evidence).<sup>142</sup> Typically, fifty-three percent of all questions in an interview will be suggestive or option-posing, while only five percent will be of the free recall variety.<sup>143</sup> While these numbers may be astonishing, they are

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137. POOLE & LAMB, *supra* note 1, at 54. (citing D. A. Poole & D.S. Lindsey, *Effects of Parental Suggestions, Interviewing Techniques, and Age on Young Children’s Event Reports*, Presented at the NATO Advanced Study Institute (June 1996)).

138. Powell et al., *supra* note 16, at 1474–75.

139. *Id.* at 1475. Referred to as “trace theory,” this refers to the “traces” of memory that exist in one’s memory. *See id.* at 1473, 1475. The theory suggests that false details are easier to implant as time passes because the traces of memory are stronger when an event is more recent, while the traces decay as time passes. *Id.* at 1475. For an expansive discussion of “trace theory,” as well as the effect of repeated experiences on suggestiveness, see *id.* at 1463.

140. Anderson, *supra* note 115, at 2145; *see also* POOLE & LAMB, *supra* note 1, at 55 (noting that often children are interviewed between twelve and thirty times during the course of an investigation).

141. *See supra* notes 80–95 and accompanying text.

142. Cederborg et al., *supra* note 44, at 1355–56, 1359.

143. *Id.* at 1359 (listing statistics for typical United States interviewers).

not as concrete of an example as the interviews conducted in the *Michaels* case.

“The interrogations undertaken in the course of [the *Michaels*] case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies.”<sup>144</sup> The spark of the investigation was a rather ambiguous statement made by a child, while having his temperature taken rectally, that that was “what [his] teacher does to [him] at naptime at school.”<sup>145</sup> Some argue that this could have been a misinterpretation of an ambiguous statement as an allegation of abuse, in a social climate that was ripe for such a misinterpretation.<sup>146</sup> Regardless of whether this first incident was a misinterpretation, the court in *Michaels* and the researchers are in agreement that virtually none of the other children volunteered any information about the alleged abuse.<sup>147</sup> All of the children were interviewed by investigators that had *no* training in the interviewing of children.<sup>148</sup> These investigators conducted repeated interviews of the children using no free recall questions to elicit any abusive information.<sup>149</sup> Investigators routinely became frustrated with the children.<sup>150</sup> The children were often “asked blatantly leading questions that furnished information the children themselves had not mentioned.”<sup>151</sup> Investigators combined this with social peer pressure, often stating that “other children had told [them] that Kelly [Michaels, the defendant,] had done bad things to children.”<sup>152</sup>

This created an exponential growth in the number of children making allegations also enlarging the magnitude of the allegations.<sup>153</sup> At first, more children reported “temperature taking,” then being touched with a spoon, then

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144. *State v. Michaels*, 642 A.2d 1372, 1379 (N.J. 1994). For an interesting and in-depth review of every facet of the *Michaels* case from the perspective of an attorney for Kelly Michaels, see Robert Rosenthal, *State of New Jersey v. Margaret Kelly Michaels: An Overview*, 1 PSYCHOL. PUB. POL’Y & L. 246 (1995).

145. POOLE & LAMB, *supra* note 1, at 19 (internal quotations omitted).

146. *Id.* For an intriguing discussion of the social environment of the 1980s and why it was ripe for such misinterpretations, see *id.* at 21–31.

147. *Michaels*, 642 A.2d at 1379; *Historical Review*, *supra* note 17, at 403–04; Rosenthal, *supra* note 144, at 252 (“[N]one of the other children made any reports of abuse until after [the police] began questioning them.”).

148. *Michaels*, 642 A.2d at 1379.

149. *Id.* The “abusive” facts were elicited through other, more suggestive, questions. *Id.* at 1379–80.

150. *Id.* They often became angry, saying such things as “[t]ell me what happened . . . I’ll make you fall on your butt again.” *Id.* at 1387 (alterations in the original).

151. *Id.* at 1380. As previously discussed, this is the most suggestive question possible, and with repeated interviews, it can be particularly harmful.

152. *Id.*

153. Rosenthal, *supra* note 144, at 251–52.

a child imparted that a “nude pile-up game” was played.<sup>154</sup> Quickly other children agreed that such a game occurred and added that Kelly would play “Jingle Bells” naked.<sup>155</sup> Soon allegations began that Kelly would insert knives, spoons, forks, and Lego building blocks into them.<sup>156</sup> Next allegations of peanut butter and jelly being smeared on children and licked off began, followed by instances of children being forced to urinate and defecate on Kelly while she would force them to eat feces.<sup>157</sup> Each time a new allegation was alleged by a child, other children would be specifically asked about the activity, often being told that other children had told investigators about the event. Slowly, each child would acquiesce and say that it had occurred.<sup>158</sup>

Perhaps the most shocking part of the allegations is that during the seven months this abuse was alleged to have occurred, while knives were being “inserted into [children’s] rectums, vaginas, and penises . . . [not a] single injury was reported on a single child that indicated any of these alleged acts.”<sup>159</sup> Further, not a single parent reported smelling any odd smells of peanut butter or feces on their children or any odd behavior associated with abuse.<sup>160</sup> No pediatricians seen during the seven months of alleged abuse noticed any abusive signs.<sup>161</sup> No one at the day care noticed any of these strange activities, and FBI laboratory tests showed no signs of “human protein” consistent with the “nude pile-up game” or the allegations of urination and defecation.<sup>162</sup> Despite all of these inconsistencies, parents were told that an investigation was ongoing “regarding serious allegations” of abuse, told of other children’s tales, and asked to be aware of signs of abuse on their children.<sup>163</sup>

The last “straw” of the investigation, for the court, seemed to be the obvious lack of impartiality by the police. One interviewer stated that it was “his professional and ethical responsibility to alleviate whatever anxiety [the children had] as a result of what happened to [the children].”<sup>164</sup> Guided by their zeal and personal beliefs that abuse occurred, the interviewers did not challenge the outlandish tales of abuse and proceeded to vilify Kelly in the

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154. *Id.* at 252.

155. *Id.* Each time a new “fact” was uncovered, the investigators would begin asking the other children if it happened. *Id.* Usually, after some time, the children would say that it happened and add to the tales. *Id.*

156. *Id.*

157. *Id.*

158. *Michaels*, 642 A.2d at 1379–80; Rosenthal, *supra* note 144, at 251–52.

159. Rosenthal, *supra* note 144, at 252.

160. *Id.* at 253.

161. *Id.*

162. *Id.* at 253–54

163. *Historical Review*, *supra* note 17, at 404.

164. *State v. Michaels*, 642 A.2d 1372, 1379 (N.J. 1994) (internal quotations omitted).

interviews.<sup>165</sup> Investigators repeatedly told the children that Kelly was “bad” and had done “bad things”; not surprisingly the children eventually “took the bait” and reported the “bad things” she had done.<sup>166</sup> “In sum, the record contains numerous instances of egregious violations of proper interview protocols.”<sup>167</sup> Despite these facts, Kelly was convicted on one hundred and fifteen counts of various abuse and sentenced to forty-seven years of imprisonment.<sup>168</sup>

Kelly was eventually released, due to these “egregious violations,” after five years of imprisonment; however, it should be clear that *something* went wrong in this case. Perhaps Kelly was a child abuser. If so, she should be finishing her forty-seven-year term. More likely, she was an innocent day-care teacher. If so, she should not have spent five years in jail, as well as all the years of investigation and her trial.<sup>169</sup> Some suggestions to address the problems of the *Michaels* case should be examined.

#### IV. PROPOSED SOLUTIONS TO THE COMPLEX PROBLEM OF SUGGESTIVE INTERVIEWS

Section A of Part IV explains some of the methods, proposed by psychological scholars, to reduce the problem of suggestive interviews. Section B analyzes the solution proposed by the New Jersey Supreme Court to address the problem of suggestive interviews of children.

##### A. *Psychological Scholars Propose Methods to Improve Interviews*

Most researchers note the reality that suggestive hearsay will not be admissible at trial,<sup>170</sup> and they are also concerned with possible false positives.<sup>171</sup> Therefore, many researchers pose possible solutions for how to minimize the problems that occurred in the *Michaels* case. The major suggestions consist of training, formulating a uniform investigative protocol, and recording interviews. Most researchers realize that “only improvement in the average quality of investigative interviews are [sic] likely to bring about improvements in our ability to protect children.”<sup>172</sup> To this end, numerous

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165. *Id.* at 1379–80.

166. POOLE & LAMB, *supra* note 1, at 64. One child acquiesced and agreed that Kelly had done “bad things,” but when pressed further, stated she did not know what the “bad things” were because “[Kelly] only did them to [another child].” *Michaels*, 642 A.2d at 1385.

167. *Michaels*, 642 A.2d at 1380.

168. *Id.* at 1375.

169. The investigation began in early 1985, and Kelly was convicted on April 15, 1988. Rosenthal, *supra* note 144, at 248–49, 262.

170. *See, e.g.*, Cederborg et al., *supra* note 44, at 1360.

171. Ceci & Friedman, *supra* note 33, at 45.

172. Lamb & Sternberg, *supra* note 44, at 821.

training guides have been developed to educate and aid interviewers.<sup>173</sup> Greatly simplified, the advice is to: (a) use free recall questions as much as possible and, if option-posing and suggestive questions are necessary, to use them at the end of interviews so that the transcripts of earlier portions of the interview might be admissible; (b) try option-posing questions before suggestive questions; and (c) try to quickly revert to free recall questions if option-posing or suggestive questions are necessary.<sup>174</sup>

However, despite training efforts, interviewers will often revert to suggestive techniques of interviewing.<sup>175</sup> To alleviate this, two suggestions are often made. First is the creation of a universal investigative protocol to guide interviews while interviewing children.<sup>176</sup> The protocol would function as a “cheat sheet” of questions to ask children and to help interviewers maintain a free recall interview for as long as possible.<sup>177</sup> Second, many have suggested mandatory recording of interviews.<sup>178</sup> Recording such interviews has many benefits, including a fresh account from the child, the fact that the tape can be shared among agencies, reducing the need for repeated interviews, and the existence of an easy way to check the interview for suggestiveness.<sup>179</sup> “Undoubtedly, the research on suggestibility has done a lot of good”<sup>180</sup> with regard to training; however, there has yet to be developed an ideal “nonsuggestive interview,” and taking into consideration the many factors of development, interviewer question form, timing and number of interviews, and necessity, it is unlikely that one will ever develop. Therefore, the question remains how courts should address the issue when a defendant claims that an alleged child victim has been suggestively interviewed, to the point of creating a false positive. The answer provided by the New Jersey Supreme Court was to conduct a pretrial taint hearing.<sup>181</sup>

#### B. *New Jersey Supreme Court Proposes Monitoring Interviews with Taint Hearings*

The Supreme Court of New Jersey addressed the issue of whether or not a particular interview (or battery of interviews) of a child (or children) was

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173. *E.g.*, POOLE & LAMB, *supra* note 1; DEPT. OF JUSTICE PAMPHLET, *supra* note 13; INTERVIEWING IN CHILD SEXUAL ABUSE, *supra* note 40.

174. Lamb & Sternberg, *supra* note 44, at 820–21.

175. Orbach & Lamb, *supra* note 44, at 1631–33.

176. *Id.* at 1632–33.

177. *Id.* at 1633.

178. Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 941 (1993).

179. *Id.* at 941–42.

180. Lyon, *supra* note 33, at 126.

181. *State v. Michaels*, 642 A.2d 1372, 1382–83 (N.J. 1994).

suggestive in *Michaels*, holding that a pretrial taint hearing should be conducted wherein the trial court can make a ruling on the suggestiveness of the interview and thereby decide if the transcript of the interview (and other evidence of the interview) should be excluded from trial and even if the child should be excluded from testifying at trial.<sup>182</sup> This Section first looks at the New Jersey Supreme Court's decision and reasoning and then turns to the procedure mandated for these taint hearings.

### 1. The Reasoning of *State v. Michaels*

Kelly Michaels argued that “the interview techniques used by the state in [her] case were so coercive or suggestive that they had a capacity to distort substantially the children’s recollections of actual events and thus compromise the reliability of the children’s statements and testimony based on their recollections.”<sup>183</sup> Kelly argued that the interviews were so poorly conducted that the reliability of the statements made during the interviews, as well as any future testimony of the child might give, was patently unreliable.<sup>184</sup> The basic premise is that the suggestive interviews made the transcripts unreliable and any future testimony the children might give would be riddled with the same “impurities” from the interviewers that exist in the transcripts.<sup>185</sup> The court began by noting that its precedent was clear: “children, as a class, are not to be viewed as inherently suspect witnesses.”<sup>186</sup> The court, however, recognized the dangers inherent in improper interviews of children because “our common experience tells us that children generate special concerns because of their vulnerability, immaturity, and impressionability, and our laws have recognized and attempted to accommodate those concerns, particularly in the area of child sexual abuse.”<sup>187</sup> From this concern, the court also stated that the impact of improper interviewing has a greater effect on children.<sup>188</sup> The *Michaels* court avoided the issue of “whether children as a class are more or less susceptible to

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182. *Id.*

183. *Id.* at 1377.

184. *Id.* at 1375. This phenomenon, often referred to as “false memory syndrome,” states that once a researcher or interviewer has suggestively implanted the idea of an encounter in a subject’s or patient’s mind, that person will believe that it occurred and speak of it as if it actually occurred thereafter. DANIEL L. SCHACTER, *SEARCHING FOR MEMORY* 250–52 (1996). For an exhaustive series of essays on the fragile and not-so-fragile aspects of the human mind, see *id.*

185. As discussed, *supra* pp. 511–12, an interviewer’s suggestive language can become part of the child’s memory. If the child’s in-court testimony is thought of as simply a repeated interview, the danger is obvious: Just as the later interviews will contain the misinformation, the child’s testimony in court will contain the same misinformation.

186. *Michaels*, 642 A.2d at 1376; Rosenthal, *supra* note 144, at 269.

187. *Michaels*, 642 A.2d at 1376.

188. *Id.* at 1378.



suggestion than adults”<sup>189</sup> by focusing on the interview techniques used by the state in its investigation.

The court’s analysis began by favorably citing research that found that coercive and suggestive interviews can shape a child’s responses and that “[i]f a child’s recollection of events has been molded by an interrogation, that influence undermines the reliability of the child’s responses as an accurate recollection of actual events.”<sup>190</sup> The court noted the factors that can weigh on suggestiveness.<sup>191</sup> The New Jersey Supreme Court is not alone in recognizing that improper interrogations can have a negative effect on children’s testimony; “[o]ther courts have recognized that once tainted the distortion of [a] child’s mind is irremediable.”<sup>192</sup> The court felt that the fact that the research is virtually unanimous in its view of dangers of improper interview techniques and that so much effort is put into training of interviewers and into the productions of protocols for interviewing helped to bolster the conclusion that improper techniques for interviewing lead to inadmissible testimony.<sup>193</sup>

Finally, the New Jersey Supreme Court looked to United States Supreme Court precedent that is in accord with the belief that improper interrogations of children lead to inadmissible testimony.<sup>194</sup> The case of *Idaho v. Wright*,<sup>195</sup> addressed the admissibility of a child’s hearsay in light of the suggestive technique used to elicit this hearsay.<sup>196</sup> Unlike *Michaels*, *Wright* dealt with the exclusion of the hearsay testimony of the child only.<sup>197</sup> The court found that the hearsay statements of the child should be excluded under the Sixth Amendment Confrontation Clause doctrine.<sup>198</sup> The Confrontation Clause,

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189. *Id.* at 1376–77.

190. *Id.* at 1377.

191. *Id.* The court reviewed the research and noted that lack of interviewer neutrality, leading questions, a lack of control over peer pressure, the use of repeated questions, the vilification of the suspect, the interviewer’s tone of voice, and promised rewards, among other factors, could undermine an interview. *Id.*

192. *Michaels*, 642 A.2d at 1377–78 (citing *State v. Wright*, 775 P.2d 1224, 1228 (Idaho 1989) (“Once this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other.”)).

193. *Michaels*, 642 A.2d at 1378.

194. *Id.*

195. 497 U.S. 805 (1990).

196. *Id.* at 814–17.

197. *Id.* at 814–16. In this case all parties and the court agreed that the young hearsay declarant was not capable of communicating with the jury. *Id.* at 809. For this reason, the Court did not need to address the question of the child testifying in court after the suggestive interview techniques had been used on the child.

198. *Id.* at 826–27. The defendant in *Wright* had challenged the witness’s testimony under the Sixth Amendment preference for a “face-to-face” confrontation with the witness. *Id.* at 812–14. The Court stated that the Sixth Amendment is not violated when (1) the witness is shown to be unavailable, a fact stipulated by both parties, *id.* at 809, and (2) the statement bears sufficient

basically, protects the right of a criminal defendant to confront and cross-examine those who testify against the defendant. Hearsay is implicated in the Confrontation Clause because a criminal defendant does not have the chance to confront the declarant of a hearsay statement in court.

The United States Supreme Court first found that “Idaho’s residual hearsay exception . . . under which the challenged statements were admitted . . . is not a firmly rooted hearsay exception for Confrontation Clause purposes[;]” therefore, the statements would need to show “particularized guarantees of trustworthiness” to be admitted.<sup>199</sup> The Court then went on to find that because of the presumptive unreliability of out-of-court statements and the suggestive questions used to generate the hearsay, there was no reason to find the statements “particularly trustworthy.”<sup>200</sup> The Court based this decision to exclude, in part, on the suggestive interview techniques used by the interviewer.<sup>201</sup> The New Jersey Supreme Court found that United States Supreme Court precedent was in accord that improper interrogations of the type that occurred in *Michaels* indicate the “potential for the elicitation of unreliable information.”<sup>202</sup> The New Jersey Supreme Court summarized by stating that a “sufficient consensus exists . . . to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child’s recollection of events, thereby undermining the reliability of the statements *and* subsequent testimony concerning such events.”<sup>203</sup>

The *Michaels* Court then examined the facts of this particular case<sup>204</sup> and agreed with the appellate court that the interviews appeared “highly improper.”<sup>205</sup> The court then took the “somewhat extraordinary step”<sup>206</sup> of mandating that a pretrial taint hearing be conducted to determine if the “pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence” if the state sought to prosecute its case against Kelly Michaels.<sup>207</sup> However, to bolster the credibility of this decision, the court drew analogies to existing pretrial

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indicia of reliability. *Id.* at 814–15. This “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception[;]” for other cases, a showing of “particularized guarantees of trustworthiness” is required. *Id.* at 815 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980)).

199. *Id.* at 815–17.

200. *Wright*, 497 U.S. at 826.

201. *Id.*

202. *State v. Michaels*, 642 A.2d 1372, 1378 (N.J. 1994) (citing *Wright*, 497 U.S. at 812–13).

203. *Id.* at 1379 (emphasis added).

204. *See supra* pp. 516–19.

205. *Michaels*, 642 A.2d at 1380.

206. *Id.* at 1381.

207. *Id.* at 1380.

eyewitness identification and hypnotically-recalled testimony.<sup>208</sup> Courts have authorized pretrial hearings on the admissibility of pretrial identification testimony believed to be tainted by suggestiveness.<sup>209</sup> A court, therefore, should examine all of the circumstances when determining whether the procedure used to obtain a pretrial identification was suggestive enough to cause an irreparable mistaken identification.<sup>210</sup> At such a hearing, “[i]f the court finds the pre-trial identification procedure unduly suggestive, giving rise to a substantial likelihood of misidentification, the testimony is inadmissible at trial.”<sup>211</sup>

Hypnotically recalled testimony presents a suggestiveness problem similar to child interviews and prior New Jersey precedent authorized a similar taint hearing.<sup>212</sup> A person under hypnosis is vulnerable to suggestion; therefore, a court should conduct a hearing to gauge if unduly suggestive properties inhered during a particular hypnotic episode before hypnotically enhanced testimony can be admitted at trial.<sup>213</sup> In both of these examples, the court saw “extraordinary situations” where police misconduct possibly compromised the judicial system and stated that the court would not back down from assuring the integrity of the judicial system.<sup>214</sup>

The *Michaels* Court therefore found support for its decision to require a taint hearing in United States Supreme Court precedent concerning pretrial hearings on identification procedures.<sup>215</sup> The situations involved are virtually identical. Pretrial identifications and pretrial investigative interviews of child sexual abuse victims are both “critical moment[s] in the course of a criminal

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208. *Id.* at 1381; Jablonski, *supra* note 29, at 53–55. Hypnotically recalled testimony involves the use of hypnosis, usually performed by a trained psychologist, to enhance a person’s recollection. *See id.* at 52–55. The entire procedure is often referred to as a “hypnotic episode” and can make the “individual under hypnosis . . . extremely vulnerable to suggestion, lose[] critical judgment, [or possibly] confuse memories evoked under hypnosis with those recalled prior to the hypnotic state.” *Id.* at 55. Many states have substantial legislative and judicial safeguards in place to govern the admissibility of such hypnotically induced testimony. Andrew J. Hickey, *Evidence—Rhode Island Courts Require Preliminary Hearing When Determining Admissibility of Expert Proffered Repressed Memory Testimony* *State v. Quattrocchi*, 681 A.2d 879 (R.I. 1996), 31 SUFFOLK U. L. REV. 771, 772–74 (1996).

209. *Michaels*, 642 A.2d at 1381 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977) (authorizing hearing to determine admissibility of in court identification testimony because of pretrial suggestiveness)).

210. Jablonski, *supra* note 29, at 54 (citing *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967)).

211. *Id.*

212. *Michaels*, 642 A.2d at 1381 (citing *State v. Sugar*, 417 A.2d 474 (N.J. 1980)); *see also* Jablonski, *supra* note 29, at 54–55 (citing *State v. Hurd*, 432 A.2d 86, 97–98 (N.J. 1981)).

213. Jablonski, *supra* note 29, at 55.

214. *Michaels*, 642 A.2d at 1381.

215. *Id.* at 1382 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

prosecution.”<sup>216</sup> In both instances, a case can be dismissed if damaging information regarding a suspect is not acquired; however, both are “riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”<sup>217</sup> Additionally, both types of testimony are virtually impossible to overcome, particularly because in both situations the witness is “absolutely convinced of the accuracy of [his or her false] recollection.”<sup>218</sup> Because of this conviction, the credibility<sup>219</sup> of the witness will be virtually impeccable, despite the falsehood of the person’s statements. Credibility, in this context, is the witness’s “truth-telling demeanor,” typically decided by a jury.<sup>220</sup> After determining that a taint hearing would be in order, the *Michaels* Court turned to the mechanics of such a hearing.

## 2. Procedure for Taint Hearings Outlined by *State v. Michaels*

The basic issue to be decided at the taint hearing is “whether the pretrial events . . . were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on the defendant’s guilt.”<sup>221</sup> The court addressed the issue of whether the interview technique was so improper as to distort the children’s recollections and compromise the out-of-court and in-court statements of the children by adopting a two-step, burden-shifting structure.<sup>222</sup> The initial burden is on the defendant to produce “some evidence” that the child’s statements were the product of improper interviewing<sup>223</sup> to trigger a pretrial hearing.<sup>224</sup> The court noted, without limiting the grounds that may trigger a taint hearing, that:

[T]he kind of practices used here—the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions—constitute more than sufficient evidence to support a finding that the

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216. *Id.* (citing *United States v. Wade*, 388 U.S. 218, 230 (1967)).

217. *Id.* (quoting *Wade*, 388 U.S. at 230). The parallels between a pretrial identification, where a victim or witness actually points a finger at the suspect and a child sexual abuse interview, where the child points out the abuser, are obvious.

218. *Id.* Eyewitness identifications and a child saying that the suspect abused him or her are powerful types of evidence. This power is generally made more convincing if the witness or child is convinced that the identification is correct and believes it.

219. *Michaels*, 642 A.2d at 1382.

220. *Id.*

221. *Id.* at 1382–83.

222. *Id.* at 1377–85.

223. *Id.* at 1383. This keeps with the idea that children are presumed to be no less reliable than other witnesses. *Id.*

224. *Michaels*, 642 A.2d at 1383.

interrogations created a substantial risk that the statements and anticipated testimony are unreliable, and therefore justify a taint hearing.<sup>225</sup>

The burden would then shift to the proponent of the evidence to prove the reliability of the testimony by “clear and convincing evidence.”<sup>226</sup>

The court then went on to state that *both* the state and the defendant are permitted to offer expert testimony regarding the practices used in the interviews.<sup>227</sup> The court further cautioned that the testimony should be limited to an attack on (or the support of) the interview techniques, not the credibility of the child.<sup>228</sup> Further, the court held that the state can demonstrate that the child’s statements are reliable by offering independent indicia of reliability that supports the child’s statements.<sup>229</sup> This element keeps the focus on the totality of the circumstances, which must be examined to decide whether events have “irremediably distorted” the child’s testimony and memory.<sup>230</sup> Finally, the court held that if any portions of a child’s testimony are found by the judge to be sufficiently reliable for admission at trial, then it is for the jury to decide the probative value of the evidence, and, to that end, experts may again be called to testify as to the methods of interviewing used in the investigation.<sup>231</sup> New York, which has adopted the *Michaels* taint hearing, also follows these same procedures for conducting the hearings.<sup>232</sup>

While there has not been a rush to adopt the procedure of taint hearings advocated in *Michaels*, at least one state has adopted this process, and it has been suggested that a trend will develop in that direction.<sup>233</sup> Therefore, although there are certainly jurisdictions that do not employ taint hearings,<sup>234</sup> the question for the jurisdictions that currently employ them becomes *how*

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225. *Id.* Virtually all of the sorts of techniques which were discussed in this Comment as being too suggestive.

226. *Id.* This standard was chosen to serve “to safeguard the fairness of a defendant’s trial without making legitimate prosecution of child sexual abuse impossible.” *Id.* at 1384. The court based this decision largely on its conclusion that the improper interviews were based largely on over-zealousness and ineptitude rather than bad faith. *Id.*

227. *Id.* at 1383.

228. *Id.* While this may seem counter-intuitive, an attack on the techniques is not a direct attack on the credibility of the child. Children are generally no less credible than adults; it is only after suggestive techniques are used on kids that their testimony becomes suspect. Therefore, the taint hearings are merely to judge the suggestiveness of the interview. *See supra* pp. 513-20.

229. *Michaels*, 642 A.2d at 1383.

230. *Id.* at 1383–84.

231. *Id.* at 1384. Again, the experts are not allowed to testify to the jury directly about the credibility of a child witness.

232. *See, e.g.*, *People v. Michael M.*, 618 N.Y.S.2d 171 (N.Y. Sup. Ct. 1994).

233. *Jablonski*, *supra* note 29, at 58.

234. *See supra* notes 28–34 and accompanying text.

these hearings should be conducted. More specifically, this paper addresses the issue of *who* should adjudicate the taint hearing.

#### V. TAINT HEARINGS SHOULD BE CONDUCTED BY AN ADJUDICATOR TRAINED IN PSYCHOLOGY

Whether or not an interview has been conducted in an unduly suggestive manner is a complex issue that takes into consideration a myriad of psychological issues that are beyond the ken of most people.<sup>235</sup> If an interview is found to be suggestive, it will not be admitted into evidence, and quite possibly the testimony of the child interviewed will be excluded at trial as well.<sup>236</sup> However, if an interview is found to be non-suggestive, it will be admitted at trial and the testimony of the child will be a virtually insurmountable item of evidence for a defendant, as well it should be for cases in which abuse has occurred.<sup>237</sup> Thus, the decision of whether an interview was suggestive is quite an exceptional circumstance. A pretrial taint hearing, therefore, is a “critical moment”<sup>238</sup> in the litigation, wherein a judge must make an informed decision about whether the lynchpin of a child sexual abuse prosecution will be admitted.<sup>239</sup> The judge must often decide between the testimony of two competing experts, chosen by each side for his or her particular stance on the suggestiveness of the interview involved.<sup>240</sup> A judge deciding such an issue should have some training in the social sciences, statistics, and experimental methods and ideally some training in the interviewing of child witnesses. Most judges simply do not have this training.<sup>241</sup> When a defendant has made a showing of “some evidence”<sup>242</sup> of improper interviews and a trial judge orders a taint hearing, the judge should

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235. *See supra* pp. 513-20.

236. *See Michaels*, 642 A.2d at 1382–83.

237. *Id.* at 1382 (citing *United States v. Wade*, 388 U.S. 218, 229 (1967)). Although a case where the child’s testimony is excluded may still be successful because physical evidence may still be used to convict the defendant, a child’s testimony that is admitted may be impossible for the defendant to overcome. This is a burden that a defendant should not have to overcome if the interview was suggestive.

238. *Id.* (citing *Wade*, 388 U.S. at 230).

239. If the child’s testimony and the transcript from the child’s interview are both excluded from evidence it is usually the death knell for a case, whereas getting the evidence admitted could be equally destructive to a defendant’s case.

240. *Michaels*, 642 A.2d at 1383; Ceci & Bruck, *supra* note 15, at 19 (noting that often an expert is selected based solely for his beliefs and that this can be dangerous for child sexual abuse cases); Andrew MacGregor Smith, Note, *Using Impartial Experts in Valuations: A Forum-Specific Approach*, 35 WM. & MARY L. REV. 1241, 1247 (1994).

241. *See supra* note 41.

242. *Michaels*, 642 A.2d at 1383.

also appoint a technically trained adjudicator,<sup>243</sup> trained in the above-mentioned sciences, to conduct the hearing. Before 2004, the Federal Rules of Civil Procedure referred to such adjudicators as “special masters,” and this paper will do the same.<sup>244</sup>

When a case involves technical, scientific issues, the appointment of special masters has been forthcoming.<sup>245</sup> Special masters have been appointed for environmental issues,<sup>246</sup> taxation issues,<sup>247</sup> accounting issues,<sup>248</sup> and many other issues.<sup>249</sup> The National Childhood Vaccine Injury Act (NCVIA) provides a good framework for the special master proposed herein: It provides for the mandatory appointment of a special master for complicated vaccine injury cases and provides for deferential review of the special master’s findings.<sup>250</sup> The case of *Terran v. Secretary of Health and Human Services*<sup>251</sup> presents a great example of the use of a special master. In *Terran*, a young girl, Julie Terran (Julie), began having seizures shortly after her third diphtheria-pertussis-tetanus (DPT) vaccination.<sup>252</sup> Causation issues developed because Julie was also mentally retarded and shortly after birth had surgery to remove a meningocele lump from her skull.<sup>253</sup> When suit was filed against the pediatrician who administered the DPT vaccination, the case was referred to a special master pursuant to the NCVIA.<sup>254</sup>

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243. “Special master” is the language used in Federal Rule of Civil Procedure 53 for such adjudicators. FED. R. CIV. P. 53. The suggestion for a specially trained judge stems from this rule, which refers to a person technically trained to sit as judge for specific issues. FED. R. CIV. P. 53.

244. *Id.*

245. *Goins v. Hitchcock* I.S.D, 191 F. Supp.2d 860, 866–67 (S.D. Tex. 2002) (discrimination issue); *Heatley v. Internal Revenue Service*, No. 6:01CV-1044-ORL22DAB, 2002 WL 31934322, at \*6 (M.D. Fla. Dec. 18, 2002) (taxation issue).

246. *Sierra Club v. United States Army Corps of Eng’rs*, 701 F.2d 1011, 1042 (2d Cir. 1983); *In re “Agent Orange” Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983). *In re “Agent Orange” Product Liability Litigation* is a particularly good example of a court’s reliance on special masters to help with litigation. The court used at least eight different special masters for various parts of the trial from discovery to appeal. Edward V. Di Lello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 486 (1993).

247. *Heatley*, 2002 WL 31934322, at \*6.

248. *Goins*, 191 F. Supp.2d at 866–67.

249. Di Lello, *supra* note 246, at 486; *see also* D.E. Ytreberg, Annotation, *What are “Exceptional Conditions” Justifying Reference Under Rule of Civil Procedure 53(b)*, 1 A.L.R. FED. 922 (1969).

250. 42 U.S.C. §1396 (2000); 42 U.S.C. §300aa–12(e)(2)(B) (2000); *see generally* Elizabeth A. Breen, Note, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM. & MARY L. REV. 309 (1999).

251. 195 F.3d 1302, 1317 (Fed. Cir. 1999).

252. *Id.* at 1306.

253. *Id.*

254. 42 U.S.C. §1396 (2000); *Terran*, 195 F.3d at 1307.

The special master in *Terran* addressed complicated factual issues and conducted a “*Daubert* hearing”<sup>255</sup> on the plaintiff’s proposed scientific theory of causation.<sup>256</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, provides a framework of factors for deciding when expert testimony or scientific evidence should be admitted at trial.<sup>257</sup> The court in *Terran* found that the special master had appropriately used the *Daubert* test to decide the admissibility of the plaintiff’s theory of recovery.<sup>258</sup> “The special master found that the *Daubert* inquiry raised serious questions about the testimony, and thus concluded that the proffered theory of causation was not sufficiently reliable.”<sup>259</sup> Further, the special master made factual findings regarding the temporal order of the vaccine and Julie’s other medical conditions and rejected the plaintiff’s arguments that Julie exhibited a “unique seizure disorder.”<sup>260</sup> Taking all these factors into consideration, the special master denied recovery.<sup>261</sup> The United States Court of Appeals for the Federal Circuit then held that without a finding that the special master’s findings of law and fact were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” it was compelled to affirm the special master’s findings.<sup>262</sup>

A procedure similar to the one outlined by the NCVIA and utilized in *Terran* would help ensure the fair adjudication of child sexual abuse cases, when the suggestiveness of the child’s interview is in question. Section A consists of a look at the sources of legal authority for courts to appoint special masters. Section B concludes that the appointment of a special master to adjudicate a pretrial taint hearing will not run afoul of any constitutional provisions. Section C provides that the appointment of a special master to adjudicate a taint hearing will not cause undue delay or expense. Court-appointed experts are examined and analyzed as an inferior solution to the appointment of a special master in Section D. Finally, a procedure for the appointment of a special master to adjudicate taint hearings is proposed in Section E.

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255. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

256. *Terran*, 195 F.3d at 1316.

257. *Daubert*, 509 U.S. at 592–95. The factors include: (1) whether a theory or technique can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error and whether there are standards for controlling the error; and, (4) whether the theory or technique enjoys general acceptance within a relevant scientific community. *Id.*

258. *Terran*, 195 F.3d at 1316.

259. *Id.*

260. *Id.* at 1317.

261. *Id.*

262. *Id.* (quoting 42 U.S.C. §300aa-12(e)(2)(B) (1994)).



A. *Courts Possess Ample Legal Authority to Appoint Special Masters*

Judges can turn to at least four sources for the legal authority to appoint a technically trained adjudicator to help decide issues.<sup>263</sup> First, the authority to appoint highly-trained individuals already exists in the rules of civil procedure for most jurisdictions, including the Federal Rules of Civil Procedure.<sup>264</sup> Federal Rule of Civil Procedure 53 allows judges to appoint a special master by the consent of the parties, if a difficult accounting or computation of damages is necessary, if a matter will be particularly time-consuming, or for “some exceptional condition.”<sup>265</sup> Federal Rule of Civil Procedure 53 was amended, effective December 1, 2003; however, it retains the “exceptional condition” language.<sup>266</sup> Special masters, under the amended rule, have authority to decide factual issues and make special reports to the presiding trial judge.<sup>267</sup> While the amended rule altered the standard of review, requiring trial courts to review the special master’s findings *de novo*,<sup>268</sup> it remains to be seen what deference the court will give such findings, in light of the more deferential standard of review originally applied. Special masters have been appointed to many types of issues pursuant to Federal Rule of Civil Procedure 53.<sup>269</sup> Most, if not all state jurisdictions have a counterpart to Federal Rule of Civil Procedure 53, allowing judges to appoint special masters for similar situations.<sup>270</sup> Clearly then, courts realize that there are often matters that are simply beyond the scope of judges.

Courts also have the power to appoint a special master if the parties consent to such an appointment.<sup>271</sup> Most commentators and courts agree that appointment of a special master under this power is subject to less formal constraints than under Federal Rule of Civil Procedure 53.<sup>272</sup> The third source

263. Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 943–44 (1994).

264. E.g., FED. R. CIV. P. 53(a) (2004); FLA. STAT. ANN. § 1.490 (West 2004).

265. FED. R. CIV. P. 53(a) (2004).

266. Compare FED. R. CIV. P. 53(a)(1)(B)(i) (2003) (amended 2003), with FED. R. CIV. P. 53(a)(1)(B)(i) (2004).

267. FED. R. CIV. P. 53(a) (2004); Di Lello, *supra* note 246, at 486–87; 28 FEDERAL PROCEDURE, LAWYER’S EDITION § 64:57 (2004).

268. FED. R. CIV. P. 53(g)(4). Federal Rule of Civil Procedure 53, as originally written, provided for a special master’s decisions to be reviewed on an abuse of discretion standard. FED. R. CIV. P. 53 advisory committee’s note.

269. Di Lello, *supra* note 246, at 486; 28 FEDERAL PROCEDURE, LAWYER’S EDITION § 64:57; see generally Ytreberg, *supra* note 249.

270. E.g., FLA. STAT. ANN. § 1.490 (West 2004).

271. Farrell, *supra* note 263, at 943.

272. *Id.* at 943 n.54. Obviously, such appointments cannot contravene legislation or public policy concerns.

of power to appoint a special master is from specific legislative acts.<sup>273</sup> For example, the Magistrates Act provides that magistrate judges may be appointed as special masters,<sup>274</sup> and the Civil Rights Act of 1964 allows for appointment of a special master if the case cannot be set for trial within 120 days.<sup>275</sup> The appointment of special masters is even mandatory under some federal statutes, such as the NCVIA.<sup>276</sup> For matters involving injuries to children believed to be caused by vaccines, a special master, with medical knowledge, is to be appointed to determine whether there is a substantive claim of causation of the injury against the vaccine manufacturer.<sup>277</sup> Finally, courts have the “inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . .” including the “authority to appoint persons unconnected with the court . . . with or without the consent of the parties,” to simplify and clarify issues and to make tentative findings.<sup>278</sup>

Special masters are often lawyers, possessing special knowledge in the field; however, they need not be members of the bar.<sup>279</sup> Federal Rule of Civil Procedure 53 does not require that the special master be a member of the bar,<sup>280</sup> nor do the state rules which allow the appointment of a special master.<sup>281</sup> Special masters are held to the same standards of professional conduct a judge would be; however, anyone can be appointed to be a special master if the court deems it appropriate.<sup>282</sup> A special master appointed for a taint hearing should follow this custom. While it would be nice to appoint a special master who is trained in the law, the most important factor for fairly deciding the issues of admissibility in a taint hearing is psychology training. The special master should first and foremost be trained in psychology, then, if possible, trained in the law. Obviously, some legal training should be afforded such adjudicators so that the hearing can comport with the law. A legal degree is not necessary, though. Appointment of a special master who is not legally trained is not uncommon, nor is legal training necessary because of the limited

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273. *Id.* at 943.

274. 28 U.S.C. § 636(b)(2) (2000).

275. 42 U.S.C. § 2000e-5(f)(5) (2000).

276. 42 U.S.C. § 300aa-12(c) (2000); Breen, *supra* note 250, at 318.

277. Breen, *supra* note 250, at 317–18.

278. *In re Peterson*, 253 U.S. 300, 312–13 (1920).

279. Compare FED. R. CIV. P. 53 (2003) (amended 2003) with FED. R. CIV. P. 53 (2004); see also JEAN M. NAFFKY, 45 FLA. JUR. 2D *References* § 6 (2004).

280. Compare FED. R. CIV. P. 53 (2003) (amended 2003) with FED. R. CIV. P. 53 (2004).

281. FLA. STAT. ANN. § 1.490 (West 2004); see also NAFFKY, *supra* note 279, at § 6.

282. Compare FED. R. CIV. P. 53 (2003) (amended 2003), with FED. R. CIV. P. 53 (2004); see also NAFFKY, *supra* note 279, at § 6. Under Federal Rule of Civil Procedure 53, a special master is required to follow the same rules of conduct that a judge is required to follow, including remaining neutral, not having a relationship with a party, and not maintaining any *ex parte* contact with a party, among other requirements. FED. R. CIV. P. 53(b)(2) (2004).

evidentiary focus of the pretrial taint hearing and because the more stringent rules of the Federal Rules of Evidence do not apply in these pretrial situations.<sup>283</sup>

Appointment of a special master in child-interview circumstances would be appropriate to address the problem of competing experts chosen solely for their favorable stance to one side or the other.<sup>284</sup> A special master with training in this area would be able to make better sense of the evidence and be less persuaded by a “hired gun” expert.<sup>285</sup> With this in mind, the next issue is whether or not the appointment of a special master in a criminal, pretrial taint hearing, would run afoul of the Constitution.

*B. Appointment of Special Masters to Adjudicate Taint Hearings Does Not Violate the Constitution*

Special masters are appointed to “remedy a decisionmaker’s insufficient technical background.”<sup>286</sup> The fact that the proceeding is criminal, rather than civil, does not make an adjudicator’s lack of technical expertise irrelevant. In fact, because the structure of the criminal trial is such that it reflects a concern for protecting the rights of the criminal defendant, a well-trained adjudicator is even more necessary in criminal proceedings.<sup>287</sup> A taint hearing is a preliminary hearing on issues of admissibility of evidence at trial: A matter within the province of judges, as provided in Federal Rule of Evidence 104(a).<sup>288</sup> Particularly for admissibility matters, such as the testimony of a child, which would greatly influence a juror’s decision regardless of the suggestiveness of the interview, a judge should decide the matter of admissibility.<sup>289</sup> Because it would be virtually impossible for a jury to

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283. FED. R. EVID. 104(a) (stating that for such pretrial evidentiary hearings the rules of evidence do not apply). Thus, the special master need not be specifically trained in the many rules of evidence in order to correctly conduct such a hearing.

284. Ceci & Bruck, *supra* note 15, at 19; Smith, *supra* note 240, at 1247.

285. Ceci & Bruck, *supra* note 15, at 19; Smith, *supra* note 240, at 1247.

286. *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1583, 1593 (1995).

287. William P. Haney, III, *Scientific Evidence in the Age of Daubert: A Proposal for a Dual Standard of Admissibility in Civil and Criminal Cases*, 21 PEPP. L. REV. 1391, 1431 (1994); *see also supra* pp. 510-13 (discussing the use of special masters in criminal proceedings).

288. FED. R. EVID. 104(a).

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

*Id.*

289. ALLEN ET AL., EVIDENCE 235 (3d ed. 2002) (discussing the role of the judge in admissibility decisions).

disregard the testimony of a child, even if they found that the techniques were too suggestive, the judge should decide such issues of admissibility and screen out suggestive interviews.

Judges have wide latitude in the admissibility of evidence,<sup>290</sup> and it is well established that such questions of law are within the purview of judges,<sup>291</sup> so one cannot argue that such an appointment of a special master would run afoul of a defendant's right to a trial by jury.<sup>292</sup> A preliminary evidentiary hearing, conducted by a judge, is required by justice for admissibility questions concerning such issues as hypnotically induced testimony<sup>293</sup> and pretrial identifications.<sup>294</sup> It is also required when a child may have been interviewed suggestively.<sup>295</sup>

The power to appoint special masters is limited by Article III of the United States Constitution, which provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court."<sup>296</sup> The Constitution prevents the "reference of a fundamental issue of liability to an adjudicator who does not possess the attributes [of an] Article III [judge]."<sup>297</sup> A taint hearing does not decide the ultimate issue of liability, only admissibility of evidence; therefore, a delegation of power to a special master does not violate Article III.<sup>298</sup> In fact, to allow an adjudicator not trained in technical matters to decide such technical issues could arguably violate substantive fairness concerns.<sup>299</sup> Furthermore, Article III judges retain the power to select and appoint such special masters; thus, the judge continues to retain ultimate control over the

290. Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 758 (1993).

291. *Id.* at 747. See also ALLEN, *supra* note 289, at 235–45; Merle Faye Hoffman, Comment, *The Murky Waters Get Murkier—Admissibility of Evidence of Extraneous Misconduct in Child Sexual Abuse Cases*, *Montgomery v. State*, 810 S.W.2d 372 (*Tex. Crim. App.* 1991), 34 S. TEX. L. REV. 181, 184–85 (1993) (discussing the factors a judge should weigh in determining the admissibility of evidence).

292. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). Additionally, this is certainly the type of evidence a criminal defendant would want excluded from a jury if the interview was conducted suggestively.

293. Hickey, *supra* note 208, at 773–74; see also *supra* pp. 523–24.

294. See *supra* pp. 523–24.

295. *State v. Michaels*, 642 A.2d 1372, 1382 (N.J. 1994); see also *supra* pp. 519–24 (discussing pretrial taint hearings).

296. U.S. CONST. art. III, § 1, cl. 1.

297. *Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992) (citing *In re Kimberly v. Arm*, 129 U.S. 512, 524 (1889)).

298. Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMP. J. 235, 296–97 (1997) [hereinafter *Widener Symposium*].

299. *Id.* at 297.

proceedings.<sup>300</sup> Finally, as early as 1932 in *Crowell v. Benson*, the United States Supreme Court acknowledged the power of judges, in some cases, to appoint special masters to assist the court.<sup>301</sup> While the Court noted such special masters were usually advisory in nature, it also acknowledged that “it has not been the practice to disturb their findings when they are properly based upon evidence . . . and the parties have no right to demand that the court shall redetermine the facts thus found.”<sup>302</sup>

Therefore, a deferential use of special masters in taint hearings does not present any constitutional problems. The only argument against special masters that remains is the possibility of undue cost and delay.

### C. *Special Masters Will Not Cause Undue Delay or Increase Costs*

Federal Rule of Civil Procedure 53 warns courts to consider the additional expense and delay that may attend the appointment of a special master; however, some argue that the appointment of a special master in virtually any case actually decreases the cost and certainly decreases the time necessary to complete a trial.<sup>303</sup> Efficiency and cost-saving arguments are based on the speed with which a knowledgeable special master would be able to absorb and interpret the expert’s testimony.<sup>304</sup> Thus, there would be a cost-saving benefit from shorter trials *and* less billing time for experts and attorneys, as well as a reduction in court costs and the many other expenses associated with a trial.<sup>305</sup>

Added delay and expense probably stems from the addition of the pretrial taint hearing itself.<sup>306</sup> Taint hearings are necessary to prevent a misapplication of justice when an interview was conducted suggestively.<sup>307</sup> The additional delay and expense of a taint hearing cannot outweigh the egregiousness of admitting such damning evidence, if the evidence is tainted. The last issue to be addressed is why the appointment of a special master is preferential to the use of a court-appointed expert under Federal Rule of Evidence 706.

### D. *Appointment of a Special Master is a Better Solution than Appointment of a Court-Appointed Expert*

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300. *Id.* at 296.

301. 285 U.S. 22, 51–52 (1932).

302. *Id.* The *Benson* court was referring to equity and admiralty cases. *Id.* at 51. However, this shows that deferential use of special masters is no new idea in American jurisprudence.

303. See FED. R. CIV. P. 53(a)(3); Di Lello, *supra* note 246, at 473 (arguing that such special masters would “bring about better, faster, more efficient and less expensive adjudication of factual issues involving technical evidence.”); *Widener Symposium*, *supra* note 298, at 296–97.

304. See Di Lello, *supra* note 246, at 473; *Widener Symposium*, *supra* note 298, at 296–97.

305. See Di Lello, *supra* note 246, at 473; *Widener Symposium*, *supra* note 298, at 296–97.

306. This is in contrast to simply admitting or excluding the evidence without the hearing.

307. See *State v. Michaels*, 642 A.2d 1372, 1377–78 (N.J. 1994).

Federal Rule of Evidence 706 provides that the court may appoint its own experts.<sup>308</sup> The Rule does not limit the parties' abilities to call their own experts; it merely provides the authority for judges to appoint an impartial expert to assist the court.<sup>309</sup> The expert can be used to educate the judge on fundamental concepts, to assess the methods used by other experts, to find facts in complex scientific cases, to limit massive discovery requests, or to assess claims, as well as any other areas with which a technically untrained judge might need assistance.<sup>310</sup> Special masters and court-appointed experts are often used for similar purposes and their roles often overlap;<sup>311</sup> however, for the purposes of taint hearings, the appointment of a special master is just a better option.

A special master should be appointed to solve the problem of an untrained adjudicator deciding difficult technical issues presented by two opposing experts. Appointment of a court-appointed expert does not solve this problem; it merely adds another chef to stir the soup of suggestibility. The ultimate issue of an untrained judge deciding the admissibility of a child's testimony is not avoided. Despite the presence of the court-appointed expert, a judge could still be led astray by a "hired gun" expert, chosen solely for his or her stance on the issue.<sup>312</sup> Appointing an expert under Federal Rule of Evidence 706 to educate the judge on fundamental concepts of the technical issues leads to at least two more problems: undue delay and incomplete knowledge. Appointment of a court-appointed expert will lead to undue delay during a taint hearing because the expert will need to take the time to educate a judge on the issues, while a special master could simply decide the issues based on the technical knowledge already possessed by the special master. Also, education of the judge necessarily will involve incomplete training and knowledge because the expert can only teach some of his or her knowledge of psychology and statistics to the judge.<sup>313</sup> A special master, on the other hand, requires no

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308. FED. R. EVID. 706(a).

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.

*Id.*

309. FED. R. EVID. 706(a); Samuel H. Jackson, Comment, *Technical Advisors Deserve Equal Billing with Court Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Center Agree?*, 28 ENVTL. L. 431, 442 (1998).

310. FED. R. EVID. 706(a); Jackson, *supra* note 309, at 443–44.

311. Jackson, *supra* note 309, at 443–44.

312. Ceci & Bruck, *supra* note 15, at 19; See Smith, *supra* note 240, at 1247.

313. Of course, it would be possible to have the court-appointed expert teach the court *all* of his or her knowledge in the field of psychology and statistics; however, this would exponentially increase the delay of the trial.

additional technical training to understand the technical issues at play during a taint hearing and would possess a more complete grasp of the issues than could be taught to an untrained judge in a timely manner.

Finally, the appointment of a court-appointed expert would likely achieve essentially the same results as the appointment of a special master, except with a large increase in delay and a decrease in fairness. A judge is likely to view the expert she appointed as a “super-neutral” “super-expert” and to value her expert’s opinion over other experts’ opinions.<sup>314</sup> So, first of all, it is likely the court-appointed expert’s opinion would be the decision of the court, as would be the special master’s opinion, except with the undue delay inherent in training the judge in the technical matters. Additionally, a court-appointed expert is not likely to be present during the parties’ experts’ testimony for reasons of expense.<sup>315</sup> Therefore, the court-appointed expert would lack the opportunity to consider the theories of the other experts during their testimony. The court-appointed expert would also not have a chance to question the other experts. The special master would be given ample opportunity to witness the testimony of the experts and to question the parties’ experts during the taint hearing. This will lead to a more well-informed special master, which will lead to fairer decisions about admissibility at taint hearings than could be achieved through the use of court-appointed experts. Finally, the procedural aspects of appointing a special master to a taint hearing should be addressed.

#### *E. Proposed Procedure for the Appointment of a Special Master*

The appointment of a special master in pretrial taint hearings is necessary to protect children and defendants alike.<sup>316</sup> The master should be selected from an impartial group, with knowledge of the psychological issues at play. Many psychologists have recommended “monitoring groups” to watch over experts used during the course of a trial,<sup>317</sup> and such protections should be in place for special masters as well. Attorneys with psychological training, particularly in the field of interviewing, would make the most ideal candidates; however, special masters need not be attorneys,<sup>318</sup> and it would be inappropriate to so

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314. Developments, *supra* note 286, at 1591.

315. The expert could be present to view all the testimony, but the cost of court-appointed experts, borne by the courts, would likely rise quite quickly. FED. R. EVID. 706(b).

316. Both children and defendants will be protected because the special master will be able to make a more well-informed decision whether to exclude. This would decrease the risk that non-suggestive interviews would be excluded and that suggested interviews would be admitted.

317. Lamb & Sternberg, *supra* note 44, at 821. Such a group would review licensed psychologists and researchers to be sure of professional conduct. *See id.* This would further help reduce the chances of “hired gun” psychology. Ceci & Bruck, *supra* note 15, at 19.

318. Compare FED. R. CIV. P. 53 (2003) (amended 2003), with FED. R. CIV. P. 53 (2004); *see also* NAFFKY, *supra* note 279, at § 6.

limit the pool of possible special masters in this situation. Major cities could select trained professionals from university researchers or practitioners. Smaller jurisdictions will likely still have access to some choice of private practitioners or practitioners associated with hospitals. However, if a jurisdiction has no one to fill this position, it would be the duty of the court to find an appropriate special master, most likely one selected from a pool of candidates maintained in larger jurisdictions.

Persons chosen to be special masters should, as in Federal Rule of Civil Procedure 53, be duly compensated for their time and should be allowed to refuse the position.<sup>319</sup> The decision of a special master, appointed under these circumstances, should be given great deference. Amended Federal Rule of Civil Procedure 53 now provides for *de novo* review of the special master's findings,<sup>320</sup> while the original allowed only for an abuse of discretion standard of review.<sup>321</sup> For taint hearings, the decision of a special master should be afforded the deference provided under the NCVIA.<sup>322</sup> The NCVIA provides that findings of fact or conclusions of law of a special master should not be overturned unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law."<sup>323</sup> The NCVIA provides a great framework for the rule proposed by this Comment. It requires referral to a special master for vaccine injury cases involving children and provides for quite deferential review of the special master's findings.<sup>324</sup> Mandatory referral to special masters for taint hearings and deference to the special master's findings are necessary for justice. The special master is chosen for his or her knowledge of psychology and techniques of interviewing that are not within the ken of most trial judges; therefore, the judge should take a deferential stance to the special master's findings. It should "not [be] the practice to disturb their findings when they are properly based upon evidence . . ."<sup>325</sup>

Finally, the costs of special masters should be born by the state, at least upon a showing of an inability of the defendant to bear the cost.<sup>326</sup> At least

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319. FED. R. CIV. P. 53(h); *see also* FED. R. CIV. P. 53 advisory committee's note (stating that an expert should be compensated).

320. FED. R. CIV. P. 53(g)(3) (2004).

321. FED. R. CIV. P. 53 (2003) (amended 2003); *see also* FED. R. CIV. P. 53 advisory committee's note.

322. 42 U.S.C. § 300aa-12(a); *see generally* Breen, *supra* note 250.

323. 42 U.S.C. § 300aa-12(e)(2)(B) (2000); *Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1317 (Fed. Cir. 1999).

324. 42 U.S.C. § 300aa-12(a), (c)(6)(E) (2000).

325. *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Although it may turn out that the *de novo* review allowed under Amended Rule 53 will be similarly deferential, for taint hearings, a deferential standard should be explicitly set forward.

326. A state prosecution of a defendant should bear such a burden for indigent defendants to assure that all are guaranteed a fair trial.



one state has held that for criminal proceedings, the parties should not and, indeed, cannot be forced to bear the costs of a special master.<sup>327</sup> Such fees were deemed part of the costs of court operations, which must be paid from the public funds allocated to the court unless the legislature has specified otherwise.<sup>328</sup> This would be appropriate for taint hearings to ensure that the cost of a properly trained adjudicator is not too great for defendants to bear. These procedures may, of course, be experimented with in various jurisdictions. The key now is to begin to put these procedures into place to ensure the fair adjudication of charges of sexual abuse against children and to protect the rights of children as well.

## VI. CONCLUSION

The trend is that more and more jurisdictions will eventually follow *Michaels* and conduct pretrial taint hearings when an allegation arises that an alleged child sexual abuse victim has been interviewed suggestively and that child's testimony should be excluded from trial. These decisions weigh immensely on the success of the prosecution of a sex offender. Therefore, when a taint hearing is ordered, a special master should be appointed to oversee the hearing. The special master should be trained in psychology, statistics, experimental methods, and, ideally, in interviewing children. This will allow for the most informed decision on whether or not an interview was unduly suggestive, which will work to protect both children and defendants.

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327. *People v. Superior Court of Los Angeles County (Laff)*, 23 P.3d 563, 587 (Cal. 2001); Dennis S. Newitt, *Who Pays the Special Master's Fees?*, 4 J. LEGAL ADVOC. & PRAC. 285, 287 (2002).

328. *Superior Court*, 23 P.3d at 587.

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