EVALUATING AND ADMITTING EXPERT OPINION TESTIMONY IN CHILD SEXUAL ABUSE PROSECUTIONS

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INTRODUCTION

Recent research shows that much of the expert evidence offered by prosecutors in child sexual abuse trials is unreliable.¹ The issue of the reliability of expert evidence in child sexual abuse trials has already reached the Supreme Court, which in *Idaho v. Wright*² mandated that courts develop criteria of reliability to test expert evidence before admitting it in child sexual abuse trials when a defendant's Sixth Amendment confrontation right is implicated. This Note provides courts guidelines for assessing the validity of an abuse investigation to determine when expert evidence from an investigative interview should be admissible.

Legal concerns about the reliability of expert evidence in child sexual abuse cases stem from the debate within the scientific world. Social scientists are engaged in a highly polarized debate about how child sexual abuse allegations should be investigated. On one side are child advocates³ who care passionately about helping sexually abused children reveal their experiences to investigative authorities. On the other side are mental health professionals and social science researchers who care passionately that inappropriate investigative techniques and bad science have labeled unabused children as abused and have led to false accusations and prosecutions. As one commentator has stated: "No problem in child and adolescent psychiatry stirs up more heated discussion than

1. See *infra* Part III.

2. 110 S. Ct. 3139 (1990); see also *Maryland v. Craig*, 110 S. Ct. 3157 (1990). In *Craig*, Justice Scalia argued in an impassioned dissent that courts should be particularly insistent in protecting innocent defendants from false child sexual abuse allegations and discussed at length the reliability problems created by children's suggestibility in child sexual abuse prosecutions. Justice Scalia, joined by Justices Brennan, Stevens, and Marshall, was dissenting to the majority holding that a defendant's Sixth Amendment confrontation right can be overridden by societal interests in protecting abused children from further trauma. See *id.* at 3175-76 (Scalia, J., dissenting).

3. For the purposes of this Note, the term "child advocate" refers to any person who testifies exclusively for the prosecution or who consistently takes a prosecution-oriented viewpoint when writing or discussing child sexual abuse.

does child sexual abuse. . . . [O]ur emotions are racing well ahead of our research projects."⁴

The debate has far-ranging implications for the legal system. It raises the specter that unreliable evidence is routinely admitted in child sexual abuse prosecutions and that innocent defendants face prosecution and conviction because of unreliable expert testimony. Legal professionals and the justice system need to be aware of the research and ideology that lie behind this debate so that they can best adopt a method for reaching just outcomes in abuse cases.

Because child sexual abuse investigations are often poorly conducted and child sexual abuse is overdiagnosed,⁵ courts need to take an active role in determining the reliability of expert testimony before admitting it into evidence. Careful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable.⁶ A number of studies have shown that children will lie when they have a motivation to lie,⁷ that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe,⁸ and that inappropriate post-event questioning can actually change a child's cognitive memory of an event.⁹ Even the studies that concluded that children are resistant to suggestion found a small percentage of children who were not.¹⁰

The social science literature also raises grave concerns that the use of anatomically detailed dolls¹¹ during investigative interviews can lead interviewers to believe that abuse has occurred when in fact it has not. For instance, in one study in which the abuse evaluator was blind to the abuse status of the children, the evaluator had a sixty-seven percent false-

4. Lenore C. Terr, *Child Sexual Abuse: Why the Controversy?*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 788, 788 (1989).

5. See, e.g., Kathleen M. Quinn et al., *Resolved: Child Sex Abuse Is Overdiagnosed*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 789, 789 (1989) (stating that "inadequate investigations lead to an overdiagnosis of child sexual abuse") (debate among four professionals, Kathleen Quinn, Diane Schetky, Lucy Berliner, and Maria Sauzier).

6. See *infra* Part III.

7. See *infra* Part III(B)(1).

8. See *infra* Part III(B)(2).

9. See *infra* Part III(B)(4).

10. See *infra* Part III(B)(3).

11. See *infra* Part III(A). Anatomically detailed dolls are commonly used in child sexual abuse investigations. As the name suggests, these dolls have genitals. Some people believe that the use of these dolls in interviews aids children's abilities to recount sexually abusive events.

positive rate (sixty-seven percent of those she said were abused were not abused).¹²

Because of the serious implications of the controversy surrounding child sexual abuse trials, courts do a disservice to children and to defendants if they allow "a battle of the experts" in the courtroom instead of making preliminary determinations of the evidence's reliability. Not only are many defendants unable to afford experts, but much of the harm is done before trial—both to the falsely accused defendant and to any child who has been falsely labeled as abused.

Part I discusses the major criticisms levied at the handling of abuse investigations and the danger of courts naively assuming that young children are incapable of false accusations of sexual abuse. Part II discusses evidentiary and constitutional issues associated with child sexual abuse trials, such as the admissibility of an expert's testimony concerning information gained from an abuse investigation. Part II focuses on *Idaho v. Wright*,¹³ the Supreme Court decision that gives courts guidelines to follow when admitting hearsay testimony under the Confrontation Clause. Part III discusses recent social science studies that have evaluated the reliability of using anatomically detailed dolls to determine whether child sexual abuse has occurred, investigated children's suggestibility, and examined the incidence-rate of false allegations of child sexual abuse. Part III also addresses the common problems of abuse investigations—problems of suggestivity, interviewer bias, and pursuit of an agenda. Part IV discusses how the research findings of Part III affect the evaluation process that courts must undertake before admitting expert opinion testimony¹⁴ in child sexual abuse prosecutions. Part IV also gives courts guidelines to follow in determining whether the investigation was conducted properly.

I. WHY CHILD SEXUAL ABUSE INVESTIGATIONS ARE UNDER FIRE

Child sexual abuse was once a largely ignored and unrecognized crime.¹⁵ Since the 1970s, however, there has been a growing awareness of child sexual abuse and reports of it have skyrocketed. In 1976, a total

12. George M. Realmuto et al., *Specificity and Sensitivity of Sexually Anatomically Correct Dolls in Substantiating Abuse: A Pilot Study*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 743, 745 (1990); see also *infra* Part III(A).

13. 110 S. Ct. 3139 (1990).

14. This Note does not attempt to give guidelines for syndrome evidence, social framework evidence, or for medical evidence of physical sexual abuse.

15. See Douglas J. Besharov, *Unfounded Allegations—A New Child Abuse Problem*, PUB. INTEREST, Spring 1986, at 18, 19 ("[C]hild maltreatment was a social problem largely hidden from public view. Few abused or neglected children were reported to the authorities.") (author is the founding director of the National Center on Child Abuse and Neglect (NCCAN)).

of 7559 reports of sexual abuse were made to reporting agencies. In 1986, the last year for which comprehensive national figures are available, that number had increased to 200,000.¹⁶ Since 1986, agencies have reported an ever-increasing number of incidents.¹⁷ Prosecutions for child sexual abuse have increased concurrently with the number of reports.¹⁸ Traditionally, child sexual abuse was seen as best handled by the family and juvenile courts.¹⁹ Today, an allegation of child sexual abuse is viewed as a matter for the criminal courts.²⁰ Many reforms have been instituted to improve the prosecutability of child sex abuse cases. These reforms have included admitting psychological expert testimony, providing interdisciplinary teams to investigate allegations of abuse, establishing special child abuse prosecution units, assigning the same prosecutor to all stages of a case, abolishing corroboration requirements, and extending statutes of limitations.²¹

Typically, abuse evaluators²² act as the investigative arm of the prosecutor's office. Decisions to prosecute are partly based on an evaluator's determination that the child has been abused.²³ Even though prosecutors rely on the evaluations made by social workers, the legal world has paid surprisingly little attention to the way these social workers handle their investigations. In the scientific world, researchers have criticized both the qualifications of the social workers and the validity of their investigative techniques. For instance, Kathleen M. Quinn, a child psychiatrist at Case Western Reserve University, has found that "improper investigatory techniques are leading to premature and incorrect

16. L.B. Suski, *Child Sexual Abuse: An Increasingly Important Part of Child Protective Service Practice*, 3 PROTECTING CHILDREN 3 (1986).

17. See NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1989 ANNUAL FIFTY STATE SURVEY (1990), reported in *Examining Proposed Legislation to Authorize Funds for Certain Child Abuse and Neglect Provisions: Hearings Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Sen. Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 71, 77 (1990) (stating that in 1989, 2,400,000 cases of child abuse were reported nationally and that 16% (386,400) of those reports involved child sexual abuse).

18. See, e.g., Douglas J. Besharov, *Protecting the Innocent: the McMartin Preschool Case*, NAT'L REV., Feb. 19, 1990, at 44, 44.

19. See Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 208, 209 (Stephen J. Ceci et al. eds., 1989).

20. See *id.*

21. *Id.* at 210; see also *infra* note 245.

22. Abuse evaluators, who are often social workers, work for a variety of agencies (including the Department of Social Services) or for quasi-independent child protection teams.

23. See DONALD C. BROSS ET AL., THE NEW CHILD PROTECTION TEAM HANDBOOK 391-94 (1988).

assessments of the child's experiences and to overdiagnosis of child sexual abuse."²⁴ She pinpoints the major problems facing professionals as "lack of professional resources and training, lack of investigatory independence, improper interviewer techniques and behaviors, inadequate data bases, contamination of cases by external influences, and failure to understand the nature of false allegations."²⁵ The errors Dr. Quinn mentions translate into evidentiary unreliability when "experts" base their testimony on interviews plagued with these problems.

Courts should take seriously the accusations that those agencies charged with the responsibility of investigating abuse charges often do a poor job.²⁶ In some cases a diagnosis of sexual abuse is made even when the child has said nothing at all about being abused. In one publicized case in Hennepin County, Minnesota, a psychotherapist's diagnosis of sexual abuse was based solely on one child's spontaneous adamant denial that her father had molested her. She stated, "[s]uch an explicit and emphatic denial is atypical in a 4-year-old, even a precocious one" and concluded that the child must have been abused.²⁷ In another case, a social worker determined that the child had been sexually abused after a one-hour interrogation in which the child failed to recount any sexual abuse and there were no physical signs of abuse. The social worker decided that the child was suffering from Child Sexual Abuse Accommodation Syndrome (CSAAS) and was being secretive about the abuse.²⁸

24. Quinn et al., *supra* note 5, at 789.

25. *Id.*; see also *id.* at 791 (statement of Dr. Diane Schetky, a psychiatrist who has testified in criminal, family, and juvenile court proceedings):

[M]any clinicians continue to make a hasty or ill-considered diagnosis of child abuse. Common errors include bias and failure to obtain both parental sides of the story, failure to consider what else is going on in the child's life, failure to inquire about prior sexual abuse in the child or parents' lives, misinterpretation of medical findings, inadequate time spent with the child or too many prolonged interrogations of the child, the use of biased, either/or coercive or age inappropriate questions, techniques that introduce leading or educational materials, differential reinforcement of responses, and selective interpretation of the child's behavior. . . . It is my contention, based on numerous case reviews, that some clinicians are performing inadequate evaluations. These inadequate investigations lead to an overdiagnosis of child sexual abuse, particularly where young children are involved.

26. See *id.* at 791; see also HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE 19-47 (1988); David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases*, in PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 19, at 184, 204.

27. Elissa P. Benedek & Diana H. Schetky, *Problems in Validating Allegations of Sexual Abuse, Part 2: Clinical Evaluation*, 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 916, 918 (1987).

28. Evaluation performed by Duke Child Protection Team on July 17, 1989. Based on this evaluation, criminal charges were filed, but dropped 16 months later. Dr. Roland Summit first coined the term "Child Sexual Abuse Accommodation Syndrome." He identified the "syndrome" as consisting of five behavioral characteristics: secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction. See Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983); see also Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383 (1989). Levy

*Idaho v. Wright*²⁹ provides an example of an abuse allegation that surfaced only after the child had been questioned by a professional (in this case, a pediatrician).³⁰ The original statement about sexual abuse had come from Wright's older daughter who said that the younger child had been abused. The pediatrician interviewed the younger child after she had been taken from her home and had spent the previous night in police custody. After being asked a series of highly leading questions, the child's only statements about abuse was one "yes" answer and an ambiguous statement concerning abuse. At trial, the pediatrician stated that "[s]he would not elucidate . . . what kind of touching was taking place, or how it was happening."³¹ This is obviously not a situation in which a child has spontaneously told a story of having been abused. Therefore, the trial court made a grave error in admitting the testimony without first determining if the pediatrician conducted the interview in a way that was not unduly suggestive. Because of that error, the Supreme Court overruled the trial verdict.³²

Furthermore, courts have often naively admitted testimony based on abuse investigations. When admitting a pediatrician's testimony about a child's out-of-court statements, one court stated that "[t]he nature of the statements . . . fall outside the general believability that a child could . . . or would make them up. This is simply not the type of statement . . . that one would expect a child to fabricate."³³ This court's attitude is based on common sense—it seems logical that a child would not make up

provides a succinct criticism of using CSAAS in courtroom testimony. He points out that Summit formulated the diagnostic description in a paper whose purpose was not to provide a sexual abuse test, but to improve therapy and advocacy for children. Summit reported his clinical findings but did not provide data in the article that showed how he had made the determination that CSAAS exists. He did not provide any information from which an informed judgment can be made as to whether symptoms of the "syndrome" might be validly considered determinative or even corroborative of sexual abuse. He also failed to disclose whether children's developmental levels affect how the syndrome is manifested. *See id.* at 392. In addition, because the syndrome has not been researched enough to qualify as a valid phenomenon, it is not listed in the American Psychiatric Association's *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R)* (APA ed., rev. 3d ed. 1987), the diagnostic bible for clinicians. Even assuming that the syndrome is valid, many of the identifying features of the syndrome could be exhibited by a child who has not been abused. For example, a child who is being secretive about the abuse and refuses to reveal it would be indistinguishable from a child who has not been abused. Furthermore, Summit identified all the children in his sample as being the victims of incest. Behavioral characteristics of incest victims cannot necessarily be generalized to behavior characteristics of victims of extra-familial abuse. Victims of extra-familial abuse likely face less intra-familial pressure to keep the abuse secret or to recant once they do reveal the abuse, and probably have fewer conflicting emotions when revealing the abuse.

29. 110 S. Ct. 3139 (1990).

30. For a synopsis of the pertinent facts of the case, see *infra* note 49.

31. *Wright*, 110 S. Ct. at 3144.

32. *See id.* at 3145.

33. *State v. Giles*, 772 P.2d 191, 194-95 (Idaho 1989) (quoting unpublished trial transcript).

a story about being sexually abused. In reality, however, children can be influenced by adults to produce false allegations—either through an adult's misinterpretation of what a child has said, hysteria about the possibility of abuse, or through maliciousness on the part of the adult.³⁴ Some of the studies examining children's suggestibility have found children to be prone to conforming their stories to the beliefs of the questioning adult.³⁵ In addition, in legitimate cases of abuse, children sometimes name a person other than the true perpetrator.³⁶ Furthermore, as Drs. Benedek and Schetky have pointed out, "[a]s there is more media coverage of sexual abuse, parents and the professional community are more likely to suspect sexual abuse as a cause for symptom formation, even when sexual abuse has not occurred."³⁷ It is highly important, then, to look at the circumstances from which the original allegation sprang to determine whether a child spontaneously reported being abused, or whether the abuse allegation came after adult questioning.

II. EVIDENTIARY AND CONSTITUTIONAL CONCERNS OF EXPERT TESTIMONY

The evidentiary problems surrounding child sexual abuse cases stem from the central role that expert witnesses play in child sexual abuse trials. This Part explains the special reliability concerns associated with expert witnesses in child sexual abuse trials and discusses the evidentiary and constitutional issues that pertain to a court's decision to admit expert testimony about child sexual abuse.

34. See Jeffrey H. Gallett, *Judicial Management of Child Sexual Abuse Cases*, 23 FAM. L.Q. 477, 482 (1989) (author is a judge of the Family Court of the State of New York) (noting that some of the sexual abuse allegations in the author's courtroom are manufactured by the parents and the child or that in some cases the problem is not that children or parents are lying but that the facts are misconstrued); see also Daniel C. Schuman, *False Accusations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 5 (1986) (giving case descriptions of family dynamics where abuse was wrongly alleged); Alayne Yates & Tim Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation*, 145 AM. J. PSYCHIATRY 989 (1988) (giving case descriptions of children who falsely alleged that they had been abused).

35. See, e.g., Alison Clarke-Stewart et al., *Manipulating Children's Interpretations Through Interrogation* (paper presented at the Biennial Meeting of the Society for Research on Child Development, May 2, 1989), reported in Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Prosecutions*, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY 99 (John Doris ed., 1991) [hereinafter SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS]; see also Stephen J. Ceci, *Age Differences in Suggestibility: Narrowing the Uncertainties*, in CHILDREN'S EYEWITNESS MEMORY 79, 82 (Stephen J. Ceci et al. eds., 1987) [hereinafter Ceci, *Age Differences*].

36. David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27 (1987).

37. Benedek & Schetky, *supra* note 27, at 917.

The outcome of child sexual abuse trials often turns on the credibility of the examining expert who testifies to her conclusions about the child's abuse status and to the child's out-of-court hearsay statements and actions. In these trials, especially those that involve young children, expert witnesses are often the primary evidentiary vehicle for presenting the prosecution's case. If the child does not testify, as frequently occurs in sexual abuse cases involving young children, the expert may be the only witness to testify to the child's out-of-court hearsay allegations.³⁸ Additionally, there is often little or no corroborating evidence to support a child's allegations.³⁹ It is therefore critical to the truth-seeking function of a trial that the expert's testimony be reliable.

Even when the child does testify, the expert is still essential to the court's truthfinding role. Not only does the expert serve to corroborate the child's testimony, but she can also be used by the prosecution to testify to a spectrum of issues—including offering an opinion as to whether the child was sexually abused, the truthfulness of the child, the truthfulness of children in general when alleging sexual abuse, the identity of the abuser, and the child's statements to the evaluator during the investigative interview.⁴⁰ In many cases, courts must grapple with complex evidentiary issues when determining the admissibility of testimony because the child's hearsay statements do not fall neatly into established hearsay exceptions. To cope with these problems, many states have created special child hearsay exceptions,⁴¹ or have expansively interpreted

38. In many jurisdictions, the medical exception to hearsay evidence rules has been expanded to encompass such statements. See Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 257 (1989). Children's statements to other individuals are usually difficult to fit into traditional hearsay exceptions. See generally Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988).

39. Bulkley, *supra* note 19, at 209-10.

40. See Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155 (1988) (delineating areas in which expert testimony has been allowed); see also *State v. Wise*, 390 S.E.2d 142 (N.C. 1990) (holding that although expert testimony is not admissible on the credibility of a witness, it was admissible for the expert to testify that the child was "genuine"); Dirk Lorenzen, Comment, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1068-71 (1988) (suggesting that experts act to elicit and preserve the testimony of children to compensate for children's cognitive limitations on their abilities to testify competently).

41. At least 20 states have adopted special child hearsay exceptions. See Graham, *supra* note 38, at 534 (summarizing each state's statutory hearsay exception). For example, Arizona's child hearsay exception statute provides:

[A] statement made by a minor who is under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:

1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.

Under the Sixth Amendment Confrontation Clause, a defendant has the right to confront his accuser.⁴⁵ Although the Supreme Court has declined to interpret the Clause to provide an absolute right of the defendant to face his accuser,⁴⁶ it has required that the out-of-court statements contain "particularized guarantees of trustworthiness"⁴⁷ if they do not fall within a firmly rooted hearsay exception.

The *Idaho v. Wright*⁴⁸ decision specifically addressed trustworthiness problems and admissibility when a child abuse investigator testifies to a child's hearsay statements. Because the child did not testify at trial, the defendant challenged the expert's hearsay testimony about the child's allegations as violative of his right to confront his accuser. Under the facts in the case,⁴⁹ the Supreme Court held that the admission of the

45. U.S. CONST. amend. VI.

46. See, e.g., *Maryland v. Craig*, 110 S. Ct. 3157, 3170 (1990) (holding that "although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there is a 'case-specific finding of necessity' ") (citation omitted). See also *White v. Illinois*, 60 U.S.L.W. 4094, 4095 (U.S. Jan. 15, 1992) (holding that the Confrontation Clause permits admission of hearsay testimony without a showing that the declarant is unavailable).

47. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

48. 110 S. Ct. 3139 (1990).

49. In *Wright*, Laura Wright and her boyfriend Robert Giles were charged and convicted of lewd conduct with Wright's two daughters, who were five and two years old, respectively, at the time of the alleged abuse. (The older daughter was from a previous marriage and Giles was the father of the younger daughter.) The allegation surfaced when the older daughter allegedly told her father's girlfriend (Cynthia Goodman) that Giles had had sexual intercourse with her while Wright held her down and that she had seen Giles and Wright do the same thing with her younger sister. Goodman reported these disclosures to the police the next day and took the older daughter to the hospital where she was examined by Dr. Jambura, a pediatrician. Police and welfare officials took the younger daughter, Kathy, into custody that day. Dr. Jambura examined and interviewed her the following day. *Id.* at 3143. The following testimony was held inadmissible:

A. [by Dr. Jambura] . . . I . . . proceeded to just gently start asking questions about, 'Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?' And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. [by the prosecutor] Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?'

A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And 'Does daddy play with you?' Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.

Q. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

traditional hearsay exceptions (such as the medical exception)⁴² to accommodate children's statements that would otherwise not be admissible. In addition, children's hearsay statements may come in under a general catchall exception,⁴³ or when the investigator testifies to the underlying basis of her opinion.⁴⁴

A. Idaho v. Wright: *Child Sexual Abuse, Hearsay, and the Confrontation Clause*

The evidentiary issues associated with child sexual abuse cases take on a constitutional dimension when the child does not testify at trial.

2. Either of the following is true:

(a) The minor testifies at the proceedings.

(b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

ARIZ. REV. STAT. ANN. § 13-416 (1989). Similarly, the California Evidence Code provides:

[A] court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse. . . .

(c) The minor child is found to be unavailable . . . or refuses to testify.

CAL. EVID. CODE § 1228 (West Supp. 1991).

42. See FED. R. EVID. 803(4) (excepting from the prohibition against admission of hearsay "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment"). State evidence codes often closely track the Federal Rules of Evidence. Many states have adopted the federal rules either without modification, or with some modification. See EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE vii (3d ed. 1984) (noting that the federal rules have been adopted in over half the states "largely without change of substance"). See, e.g., ILL. ANN. STAT. ch. 38, para. 115-13 (Smith-Hurd 1990):

In a prosecution for violation of [sexual assault statutes] statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule.

See also State v. Nelson, 406 N.W.2d 385 (Wis. 1987):

[W]e do not believe that, because a child is only three or four years of age at the time he or she goes to a doctor, the child is unable to comprehend that the child is involved in the process of receiving diagnosis or treatment. . . . Just as a child three or four years of age understands that statements made to a physician will be used by that physician to ease the physical pain of the child, we conclude that such a child also understands that statements made to a psychologist will be used by the psychologist to ease the emotional or psychological injuries of the child.

Id. at 391.

43. See FED. R. EVID. 803(24) (admitting "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness"); IDAHO R. EVID. 803(24) (same language).

44. See FED. R. EVID. 705 ("The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."); IDAHO R. EVID. 705 (substantially the same).

child's hearsay statements to a pediatrician violated the defendant's Confrontation Clause rights because the totality of the circumstances did not indicate that the child's statements contained "particularized guarantees of trustworthiness."⁵⁰ The Court stated that if the statements had fallen under a firmly rooted hearsay exception there would be no need for further inquiry into their reliability.⁵¹ *Idaho v. Wright* thus created an affirmative duty for courts to evaluate whether an expert's testimony to a child's hearsay statements contain "particularized guarantees of trustworthiness" before admitting the testimony into evidence whenever a defendant's Sixth Amendment confrontation right is at issue.

The reasoning in *Idaho v. Wright* is not limited to cases in which the child does not testify at trial. The *Wright* Court was concerned with the reliability of expert testimony in any context. The Court acknowledged that "hearsay rules and the Confrontation Clause are generally designed to protect similar values"⁵² and that "hearsay statements [that] do not fall within a firmly rooted hearsay exception . . . are presumptively unreliable."⁵³ Therefore, the *Wright* Court's mandate that trial courts must look for indicia of reliability is applicable whenever an expert testifies to a child's hearsay statements, whether or not the child testifies.

This conclusion is also supported by the Supreme Court's holding in *Ohio v. Roberts*,⁵⁴ another case involving a Confrontation Clause challenge to hearsay testimony. In *Roberts*, the Court held that the prosecution must produce or demonstrate the unavailability of the witness and the witness's hearsay statements must bear "adequate 'indicia of reliability.'"⁵⁵ The Court further stated that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."⁵⁶

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

Id. at 3143-44.

50. *Id.* at 3146 (quoting *Roberts*, 448 U.S. at 66). The Court considered the need for "particularized guarantees of trustworthiness" because the child's statements were admitted under Idaho's residual hearsay exception, IDAHO R. EVID. 803(24). For Idaho's residual hearsay exception, see *supra* note 43.

51. See *Wright*, 110 S. Ct. at 3149.

52. *Id.* at 3146 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

53. *Id.* at 3148 (quotation omitted).

54. 448 U.S. 56 (1980).

55. *Id.* at 66.

56. *Id.* The Court did not provide a precise definition of "firmly rooted" nor did it set out any guidelines for determining when an exception is "firmly rooted." It merely stated that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within

In *White v. Illinois*,⁵⁷ the Court clarified its holding in *Roberts*, and held that the Confrontation Clause is satisfied when the "proffered hearsay has sufficient guarantees of reliability to come within in a firmly rooted exception to the hearsay rule."⁵⁸ The *White* opinion thus eliminated the requirement that the prosecution must either produce the declarant at trial or the trial court must find the declarant is unavailable.⁵⁹

Therefore, under both *White* and *Roberts*, hearsay that is not admissible for Confrontation Clause purposes would also not be admissible as hearsay, whether or not the child testifies in court. That is, it is virtually impossible for an out-of-court statement that does not bear indicia of reliability when the Confrontation Clause is implicated to overcome its "presumptive unreliability" as hearsay. Despite the *Roberts* holding, some courts have declined to require "indicia of reliability" in the hearsay statements unless the defendant has raised his Sixth Amendment confrontation right as an issue.⁶⁰ This seems to be the wrong result. The Supreme Court in *Roberts*, *Wright*, and *White* merely declined to constitutionalize evidentiary rules;⁶¹ it did not say that evidentiary rules and reliability concerns can be ignored unless a defendant's constitutional rights are at issue.

The Supreme Court in *Idaho v. Wright* acknowledged that "hearsay rules and the Confrontation Clause are generally designed to protect similar values,"⁶² and that they "'stem from the same roots.'"⁶³ Most recently, in *White*, an opinion written by Chief Justice Rehnquist, the

them comports with the 'substance of the constitutional protection.'" *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

57. 60 U.S.L.W. 4094 (U.S. Jan. 15, 1992).

58. *Id.* at 4097.

59. *Id.* at 4095.

60. See, e.g., *State v. Wright*, 775 P.2d 1224 (Idaho 1989); *State v. Giles*, 772 P.2d 191 (Idaho 1989). These two decisions by the Idaho Supreme Court illustrate this point. Giles and Wright were codefendants who were tried and convicted within the same trial. *Wright*, 775 P.2d at 1225. The defendants filed separate appeals, both raising on the issue of the pediatrician's testimony concerning the child's hearsay statements. *Id.* Giles's appeal failed to frame the issue as violating the Confrontation Clause. *Id.* The Idaho Supreme Court affirmed Giles's conviction, but reversed Wright's conviction. *Id.* The court, in rejecting Giles's appeal found the hearsay statements to have sufficient indicia of reliability. *Giles*, 772 P.2d at 194-95. In finding merit in Wright's appeal, the court concerned itself with the lack of procedural safeguards in the pediatrician's interview and found it to be "presumptively unreliable." *Wright*, 775 P.2d at 1227. The *Wright* decision was appealed to the U.S. Supreme Court, which affirmed the Idaho Supreme Court's reversal of the conviction. See *Idaho v. Wright*, 110 S. Ct. 3139 (1990).

61. See *Wright*, 110 S. Ct. at 3148 ("[W]ere we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.").

62. *Id.* at 3146.

63. *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

Court found that the Confrontation Clause has a role in "restricting the admission of hearsay testimony."⁶⁴ Hearsay rules and the Confrontation Clause, in the Court's view, are both designed to ensure that proffered testimony is reliable.⁶⁵ For instance, the medical exception to the hearsay rule is "based on a combination of two elements—trustworthiness and necessity."⁶⁶ Extending the medical exception to include statements made by children to a wide range of professionals investigating sexual abuse charges undermines the medical exception's relationship to its underlying rationale.⁶⁷ Ability to cross-examine the child does not recast an expert's repetition of an untrustworthy statement into a trustworthy statement. Therefore, the *Wright* Court's reasoning should not be interpreted to mean that had the same statements come in as a medical exception, instead of under a catchall exception, there would be no need to look for "particularized guarantees of trustworthiness." First, that would be a mere relabeling of statements that would otherwise be held to be "presumptively unreliable." Second, the extension of the medical exception to include statements made to mental health professionals investigating abuse allegations is a recent extension of the medical exception rule and is therefore not "firmly rooted."⁶⁸

Similarly, the *Wright* Court's requirement to look for "particularized guarantees of trustworthiness" when the Confrontation Clause is implicated applies with equal force when the child/witness is available to testify. To illustrate, some of the social science research indicates that suggestive interviews will change children's cognitive memory of an

64. *Id.* at 4096.

65. *Id.* at 4097.

66. Mosteller, *supra* note 38, at 260. For sources that discuss the rationale underlying hearsay exceptions, see *id.* at 260 n.7.

67. *Id.* at 283.

68. See *Cassidy v. State*, 536 A.2d 666 (Md. Ct. Spec. App.), *cert. denied*, 541 A.2d 965 (Md. 1988). The court in *Cassidy* was critical of expansions in the medical hearsay exception analysis, stating:

[F]or the first time in the history of hearsay law, the state of mind of the hearsay declarant is effectively ignored. . . . The mind of the declarant had been the 'ever-fixed mark' from which our gaze never wandered. In [United States v.] Renville, [779 F.2d 430 (8th Cir. 1985)], we are suddenly and unbelievably reckoning the value of the hearsay not upon the state of mind of the hearsay declarant, but upon the state of mind of the hearsay auditor.

Id. at 687. The court then held that a two year old child lacked the maturity to understand or to appreciate the link between her statements and proper treatment. See *id.* at 680. For an excellent analysis of the underlying rationale of the medical exception and how it should be applied to achieve more accurate results, see Mosteller, *supra* note 38. The *White* decision also involved the admissibility of expert evidence under the medical exception when the Confrontation Clause is implicated, but the Court specifically took "as a given . . . that the testimony properly [fell] within the relevant hearsay exception[]." *White v. Illinois*, 60 U.S.L.W. 4094, 4096 n.4 (U.S. Jan. 15, 1992). Therefore, the Court did not examine the issue of whether the expert's testimony contained 'sufficient indicia of reliability' to be admissible.

event.⁶⁹ In such a situation, no amount of cross-examination would shake a child's credibility because that child would not be consciously lying. This situation particularly cries out for courts to evaluate expert testimony before admitting it into evidence.

The *Wright* Court gave only minimal guidelines concerning circumstances that indicate reliability. Significantly, the Court held that reliability-indicating circumstances include only those that surround the making of the statement. The Court thus rejected the State's argument that the totality of the circumstances that indicate reliability should include other evidence presented at trial that corroborates the truth of the expert's hearsay testimony.⁷⁰ Although the Court refrained from applying an "artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant,"⁷¹ it nonetheless identified five factors that it considered relevant to determine the admissibility of a child's statements made during the interview. Those factors indicating reliability include spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate.⁷² The Court stated, however, that those factors are not exclusive and that courts therefore "have considerable leeway in their consideration of appropriate factors."⁷³ When the Court applied those factors to the facts of the case, it found that the child's statements to the pediatrician were inadmissible because of the "[s]uggestive manner in which [the pediatrician] conducted the interview . . . [and the possibility] that '[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.'"⁷⁴

69. See, e.g., Charles J. Brainerd et al., *Fuzzy Trace Theory and the Development of Forgetting*, in MONOGRAPHS FOR THE SOCIETY OF RESEARCH IN CHILD DEVELOPMENT (forthcoming 1992) referred to in Ceci, *infra* note 164; see also Charles Brainerd & Peter A. Ornstein, *Children's Memory for Witnessed Events: The Developmental Backdrop*, in SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS *supra* note 35, at 10; *infra* note 198 and accompanying text.

70. See *Wright*, 110 S. Ct. at 3148-50. The Court specifically rejected the State's contention that the medical evidence of abuse was a pertinent corroborating factor, stating that such medical evidence "sheds no light on the reliability of the child's [out-of-court allegations] regarding the identity of the abuser" and that "[t]here is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement." *Id.* at 3151. The Court concluded that "the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial." *Id.* at 3150.

71. *Id.* at 3148. By not creating an "artificial litmus test," the Court rejected the Idaho Supreme Court's requirement that the interview needed procedural safeguards such as videotaping.

72. *Id.* at 3150.

73. *Id.* For additional factors that courts should consider, see *infra* Part IV.

74. *Wright*, 110 S. Ct. at 3152 (quoting *State v. Robinson*, 735 P.2d 801, 811 (1987)).

Therefore, the Supreme Court's decision in *Wright* to exclude the pediatrician's testimony because the interview was unduly suggestive specifically obligates courts to look into the underlying validity of the investigative interview before admitting the child/witness's hearsay statements when that child will not testify in court. Furthermore, courts should evaluate the expert's testimony whether or not the child testifies because evidentiary rules assume that hearsay is presumptively unreliable unless it contains indicia of reliability.

B. *Expert Opinion Testimony That the Child/Witness Has Been Sexually Abused*

Because expert testimony in child sexual abuse cases is so important, it is essential that courts make a determination that the testimony is legally relevant and not misleading to the factfinder before admitting it into evidence.⁷⁵

Federal Rule of Evidence 703 allows opinion testimony by experts if it is based on facts or data *reasonably relied upon* by experts in the field.⁷⁶ State rules have similar requirements.⁷⁷ Alternatively, some courts follow the *Frye* test, which requires that before evidence of a novel scientific principle is admissible, the scientific principle must "have gained general acceptance in the particular field in which it belongs."⁷⁸ In the context of child abuse, this means that the investigation needs to be conducted in a way that is recognized as valid by the social science community.⁷⁹ Under *Frye*, the court must make the preliminary examination of the expert's testimony to ascertain whether it is in accordance with a sufficiently reliable body of scientific or technical knowledge.⁸⁰ If an evaluative interview has not been conducted properly, it follows that it cannot

75. See FED. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

76. FED. R. EVID. 703 (emphasis added).

77. See, e.g., IDAHO R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those . . . of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.").

78. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

79. There has been widespread criticism of how sexual abuse investigations are typically handled. See, e.g., WAKEFIELD & UNDERWAGER, *supra* note 26; Quinn et al., *supra* note 5; Raskin & Yuille, *supra* note 26, at 184. Therefore, courts should look outside the community of experts who handle child abuse investigations and look to see if the investigations conform to norms of the psychological community as a whole.

80. See, e.g., *United States v. Gould*, 741 F.2d 45, 49 (4th Cir. 1984) (stating that it is reasonable to consider the issue of reliability of the testimony as a foundational test of relevance).

be reasonably relied upon as forming the basis of an opinion that the child has been abused.⁸¹

In many child sexual abuse trials, for example, the expert's testimony is wholly or partially based on the child's interaction with anatomically detailed dolls in the investigative interview. The social science literature, however, shows that courts have been premature in admitting such testimony because the dolls have not proven to be reliable indicators of abuse.⁸² If the dolls are not reliable assessment tools, they are not legally relevant, and testimony based upon their use should be inadmissible. As Professor Mosteller has pointed out, "[r]elevancy exists if the principle involved itself is valid and the technique used is an effective method for producing the result indicated under the proper operation of that principle."⁸³ Because proponents of the use of dolls have not demonstrated their scientific probativity and because there is a high degree of danger that their prejudicial impact substantially outweighs their probativity, all information gained from the use of dolls during interviews should be excluded.⁸⁴

81. For a discussion of the factors that a court should consider in determining whether an abuse investigation was properly conducted, see *infra* Part IV.

82. For a discussion of the studies that have examined the validity of anatomically detailed dolls as an assessment tool in determining whether a child has been sexually abused, see *infra* Part III(A). Part III(A) concludes that the proponents of doll use have not convincingly demonstrated that the dolls are valid assessment tools.

83. Robert P. Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, LAW & CONTEMP. PROBS., Autumn 1989, at 85, 102.

84. Some state courts have shared this conclusion; others have not. See, e.g., *In re Amber B.*, 236 Cal. Rptr. 623, 629 (Ct. App. 1987) (reversing dependency adjudication based upon doll-assisted testimony in absence of proof that doll testimony is admissible under *Frye* rule). The testimony that had been allowed in the trial court illustrates why the California appellate court was correct in holding that the testimony should have been inadmissible. In that case, the child demonstrated behaviors with the dolls that all of the studies have found to be normal interactions of nonabused children. See *infra* Part III(A)(2). At the trial level, the expert testified that he believed the child had been abused because:

During two of Dr. Raming's examinations Amber placed her index finger in the vaginal and anal openings of the doll and pushed and twisted her finger vigorously. According to Dr. Raming, Amber's behavior with the doll 'is fairly consistent with molested children. This is not the usual type of behavior one would see in children who are in a stage of age appropriate sex exploration. . . . [W]hen children this age describe or graphically demonstrate anal or vaginal penetration, it's pretty much assumed that the child learned that from experience and not from . . . sex exploration with other children.'

236 Cal. Rptr. at 625. Researchers have consistently found, however, that normal children actively explore and manipulate the dolls' genitalia. See, e.g., Lois Jampole & M. Kathie Weber, *An Assessment of the Behavior of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls*, 11 CHILD ABUSE & NEGLECT 187 (1987).

Other state courts have allowed testimony where an abuse determination was made on the basis of a doll interview. See, e.g., *State v. Fletcher*, 368 S.E.2d 633 (N.C. 1988):

We cannot find that the use of anatomical dolls is inherently open to suggestiveness by the examiner . . . [W]e see no need to have an expert evaluate the use of anatomical dolls or explain it to a jury; . . . it is precisely because the use of the dolls can be readily understood

The social science research supports excluding from evidence information gained from improperly conducted abuse investigations. If an investigation is conducted improperly, it is difficult, if not impossible, to determine whether the allegation is truthful.⁸⁵ An improper investigation contaminates the court's truthseeking abilities and can forever obscure a court's ability to reach a proper determination of guilt or innocence. Lower courts that have allowed an expert to give an opinion that a child was sexually abused have implicitly assumed that the interview was properly conducted.⁸⁶ By not rigorously examining the validity of the investigation, the courts have left it to the defense to challenge the prosecution's expert on cross-examination. Taking a more affirmative stance by excluding testimony under Rule 703 or the *Frye* test is the better approach because it safeguards the rights of innocent defendants, protects the rights of children who have been improperly labeled as abused, and provides a systemic remedy that will serve to improve the quality of abuse investigations.

III. THE SOCIAL SCIENCE RESEARCH FINDINGS AND IMPLICATIONS FOR CHILD SEXUAL ABUSE PROSECUTIONS

Children who have been sexually abused must be encouraged to seek help and to confide in a trusted adult. However, inappropriate interviewing techniques can undermine the credibility of true accounts of abuse. Improper investigations can also lead to false allegations, trials tainted by unreliable evidence, and to the conviction and imprisonment of innocent people. This Part discusses in depth the social science research regarding whether anatomically detailed dolls are reliable investigatory tools, whether children are suggestible and can be led to make false accusations of abuse, and problems of interviewer bias in investigatory interviews.

by everyone involved, especially the child, that they are so often employed in the investigation of child abuse.

Id. at 636-37.

85. See *infra* Part III.

86. See, e.g., *In re Cheryl H.*, 200 Cal. Rptr. 789, 801 (Ct. App. 1984) (finding in a civil custody case that the expert's interviews with the child were "both a proper and sufficient basis for [the psychiatrist's] opinion [that the child] had been sexually abused"); *State v. Hester*, 760 P.2d 27, 31-32 (Idaho 1988) (admitting expert testimony concluding that the child had been sexually abused); *State v. Bailey*, 365 S.E.2d 651, 657 (N.C. Ct. App. 1988) (ruling that expert may testify that child had been sexually abused without violating rule against giving opinion on credibility of witness or concerning guilt of defendant). But see *Allison v. State*, 353 S.E.2d 805, 808 (Ga. 1987) (stating that had defense counsel objected, testimony by expert witness that the child/witness had been sexually abused—based upon two interviews with the child, observations of her, and discussions with the child's counselor—would have been inadmissible).

A. *The Controversy Surrounding the Use of Anatomically Detailed Dolls in Investigative Interviews*

Using anatomically detailed dolls⁸⁷ to encourage children to recount abuse is a highly controversial technique. Increasingly, research has shown that the dolls are unreliable assessment tools. This Section will discuss all the studies that have examined the reliability of anatomically detailed dolls as an investigatory tool in child sexual abuse cases.

1. *Overview of the Reliability Problems Associated with Anatomically Detailed Dolls.* Many agencies rely on anatomically detailed dolls when diagnosing sexual abuse in young children. According to one survey, ninety-four percent of child protective workers and forty-six percent of law enforcement officers presently use or intend to use anatomical dolls in their assessments of sexual victimization of young children.⁸⁸ The use of dolls at these agencies became prevalent despite an absence of baseline data about how non-sexually abused children interact with the dolls.⁸⁹ The dolls are used because investigators assume that they will assist a child in reporting an abusive experience. If a child is reluctant or unable to verbalize embarrassing events, it is thought that she will demonstrate with the dolls what has happened to her.⁹⁰

Those who oppose the use of the dolls in investigative interviews claim that the dolls themselves suggest sexual themes in a child's play. That is, the children interact with the dolls in explicitly sexual ways whether or not the children have any sexual experience. Gabriel states:

Many persons working in the child protection field are untrained in play therapy and do not know about the projection-evoking properties of toys. The result has been that material produced by children in this manner can appear to confirm suspicions of sexual abuse when it may actually be no more than a normal reaction to the dolls and the situation.⁹¹

87. Anatomically detailed dolls are usually made of plastic or cloth, are about 20-25" in length, have thread for pubic hair, and have mouths with tongues. The female dolls have protruding breasts, and red anal and vaginal openings. The male dolls have penises, scrotums, and red anuses.

88. Barbara W. Boat & Mark D. Everson, *Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations*, 12 CHILD ABUSE & NEGLECT 171, 173 (1988).

89. See Levy, *supra* note 28, at 400 (pointing out that 129 civil and criminal appellate cases concerning the use of anatomically detailed dolls had already been decided before the first study of any kind was publicized on the validity of the dolls).

90. Alayne Yates & Lenore Terr, *Anatomically Correct Dolls: Should They Be Used as the Basis for Expert Testimony?*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 254, 256 (1988) (debate between two child psychiatrists on the scientific reliability of anatomically detailed doll interviews).

91. R.M. Gabriel, *Anatomically Correct Dolls in the Diagnosis of Sexual Abuse of Children*, 3 J. MELANIE KLEIN SOC'Y 40, 42 (1985), quoted in WAKEFIELD & UNDERWAGER, *supra* note 26, at 203-04.

King and Yuille point out that "the dolls serve the function of a suggestive question with young children. The genitals and orifices of the dolls suggest a play pattern to children, and that play may be misinterpreted as evidence for abuse."⁹² Furthermore, although protocols have been developed about how to interview with the dolls, these protocols vary and most agencies do not follow them. Wakefield and Underwager say that "[w]ithout standardized procedures there is no way of determining what effect the procedures have on the responses elicited."⁹³ Some professionals acknowledge that they have used the dolls in a manner designed to encourage—even to impel—children to make accusations.⁹⁴

Another reason that use of the dolls has become so widespread is that they seem to provide a shortcut means of getting to the truth of the matter. Many researchers contend that this is inappropriate because there can be no shortcut means of determining whether a child has been abused.⁹⁵

Even proponents of the dolls admit that there are severe limitations to their use because the people who use them are poorly trained.⁹⁶ In one survey of professionals who use the dolls, the researchers found that only

92. Mary Ann King & John C. Yuille, *Suggestibility and the Child Witness*, in CHILDREN'S EYEWITNESS MEMORY, *supra* note 35, at 31.

93. WAKEFIELD & UNDERWAGER, *supra* note 26, at 208; see also Sue White et al., *Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls*, 10 CHILD ABUSE & NEGLECT 519, 520 (1986) ("[One] of the more pressing problems created by the use of the anatomical dolls [is] the lack of structured procedures to guide the interview process.").

94. See, e.g., Gillian Douglas & Christine Willmore, *Diagnostic Interviews as Evidence in Cases of Child Sexual Abuse*, 17 FAM. L. 151 (1987) (reporting on one agency's use of the dolls):

Since children are often very reluctant to talk about the matters in issue, the interviewer applies a degree of coaxing and pressure on the child to overcome this reticence. This encouragement to answer may involve leading or hypothetical questions or questions designed to elicit a different answer to one already given. It is felt by the clinic that such pressure is necessary to enable the child finally to make statements against another family member; as one of the clinic staff has put it, it is necessary to match the trauma which the child has suffered through the abuse by placing equal pressure on the child to talk about what has occurred.

Id.

95. See, e.g., Yates & Terr, *supra* note 90:

For diagnostic purposes in ordinary child psychiatric practice, . . . there is nothing superior to unstructured play and open-ended questions. These elicit the most, the "cleanest," information from youngsters.

These open-ended techniques take time, and they require high levels of training and expertise to administer. Sexually anatomically correct dolls, on the other hand, seem to allow for shortcuts both in time and in training The anatomically correct dolls make but one request, "play sex." Many children seem to respond to them at once, even when untrained criminal investigators administer the doll sessions. The additional and tempting codicil: "Tell me, Did someone do something like this to you?" gathers up even more fast answers from certain children. And so a large, enthusiastic cohort of law enforcement and social personnel have come to rely upon this method for the main, and in some instances the only, method of investigation when preschoolers are alleged to have been sexually abused.

Id. at 256.

96. See *id.*:

forty-three percent of the child protection workers and forty-seven percent of the law enforcement officers had even minimum training in the use of the dolls.⁹⁷ About three-quarters of the mental health professionals, but only one-quarter of the physicians, reported any training.⁹⁸ Very few doll users had access to a manual or to a set of guidelines.⁹⁹ The situation is actually worse than this because the researchers defined training as including any written or taped instructions, workshops or courses, presentations at professional meetings, or simply discussions with a supervisor or colleague.¹⁰⁰ Furthermore, most interviewers had only one session with a child to determine whether that child had been abused.¹⁰¹ This situation is even more distressing when one considers that expert testimony is often based on conclusions obtained solely from a child interview conducted with anatomically detailed dolls.¹⁰²

A survey by researchers Boat and Everson revealed two more highly troubling findings—professionals had widely varying views as to what they would consider indicative of abuse. The survey asked the evaluators what they would endorse as convincing evidence of sexual abuse in three to five year old children. They found wide variation among the professionals as to what sorts of behaviors of the child would be “very convincing” evidence of abuse and what sorts of interactions with the dolls would be considered normal and not indicative of abuse. Their survey also shows substantial percentages of the professionals found certain interactions with the dolls to be indicative of abuse, where most of the literature is in agreement that these are normal behaviors. For instance, all of the studies demonstrate that children with no known history of abuse actively explore the dolls’ genitals, including digital penetration of the orifices.¹⁰³ Despite this, many of the child protection workers in Boat’s survey would find some of these explorations to be indicative of

The majority of individuals who use the anatomically correct dolls are employed by public agencies and have little or no training in child development, child assessment, mental health, or human sexuality. Their credentials often consist of a weekend workshop in sexual trauma assessment. Yet the dolls are only as good as the people who use them. We need thoroughly qualified, skilled examiners who are comfortable in the playroom. Examiners need enough time to develop a relationship with the child. The child should spontaneously explore the dolls and their genitalia if the results are to be relatively uncontaminated. Examiners must have the ability to elicit a sexual history from the child so that the data obtained from the child’s play with the dolls can be placed in perspective.

Id. at 255.

97. Boat & Everson, *supra* note 88, at 173.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 174.

102. *See id.*

103. *See, e.g.,* Jampole & Weber, *supra* note 84, at 190.

abuse. Table One illustrates what the investigators thought were abuse-related behaviors.¹⁰⁴

The controversy and the concerns expressed even by proponents of dolls mean that it is crucial that legal professionals examine and evaluate the empirical research on anatomical dolls before courts should admit expert testimony based on doll-use interviews.

2. *Description and Discussion of the Anatomical Doll Studies.* Because of the controversy surrounding the use of the dolls, researchers have designed a number of studies to look at how abused and nonabused children interact with the dolls, whether the dolls themselves are suggestive of sexual play, and how evaluators categorize children based upon their interactions with the dolls. There have only been eleven studies of anatomical dolls, and this Note will discuss all of them. The studies, taken together, show that the dolls have failed to be reliable indicators of abuse.

a. *Can evaluators accurately classify children as abused or nonabused when observing children's interactions with the dolls?* One highly important question pertaining to the reliability of the dolls is whether an evaluator, who is unaware of the abuse status of the children, can accurately identify those who have been abused by how the children

104. Boat & Everson, *supra* note 88, at 171:

TABLE ONE
JUDGMENTS ABOUT NORMALCY OF BEHAVIORS OF 2-5 YEAR OLDS WITH
ANATOMICAL DOLLS

Child's Behavior with the Dolls	Child Protection Worker % Normal	Mental Health Pro % Normal	Doctor % Normal	Law Enforcement % Normal
Undressing the doll	98	94	100	100
Staring at the doll's genitals	95	94	85	94
Touching dolls' breasts	98	100	92	75
Touching dolls' genitals	97	100	92	88
Touching dolls' anal area	94	100	92	63
Showing dolls kissing	89	82	77	75
Avoiding dolls or anxious behavior	48	59	46	50
Placing dolls on top of each other (lying down)	48	29	39	6
Digital penetration by child to doll	14	12	23	21
Showing vaginal penetration	9	6	15	13
Showing anal penetration	9	6	15	13
Showing oral-genital contact	9	6	15	6
Showing genital-genital contact	9	6	15	6

Nonabused children have demonstrated all these behaviors with the dolls. Most children stick their fingers in the orifices and yet this is seen as not normal by 86% of the child protection workers, 88% of the mental health professionals, 77% of the doctors, and 79% of the law enforcement personnel.

interact with the dolls. Only one study, by researchers Realmuto, Jensen, and Wescoe,¹⁰⁵ has been conducted on this issue. In the study, the evaluator, who was unaware of each child's abuse status, had high error rates in categorizing the children. She had a sixty-seven percent false-positive rate (sixty-seven percent of those she said were abused were not abused). The researchers concluded that an evaluation based on the use of the dolls cannot replace a complete and comprehensive psychiatric evaluation. They concluded that "[w]ork with children is a process of cumulative understanding so that shortcuts and abbreviated assessments . . . raise questions regarding ethics and standards for mental health professionals."¹⁰⁶

b. Do abused and nonabused children interact with the dolls differently? Five studies have compared how nonabused and abused children interact with the dolls. All of these studies found that a significant percentage of the nonabused children engaged in sexualized play with the dolls. In the study conducted by McIver, Wakefield, and Underwager,¹⁰⁷ the researchers were unable to distinguish any differences in the behavior and responses to the dolls between the abused and the nonabused children. Forty-four percent of the nonabused and thirty percent of the abused spontaneously talked about and/or touched the

105. Realmuto, *supra* note 12. Fifteen children, three to eight years of age, were recruited for participation in a structured interview with the dolls. Five nonclinic controls (children who were recruited from a group of children involved in a longitudinal study of normal child development), four psychiatric nonabused controls (children who were being evaluated by the clinic for hyperactivity and depression but who had no history of sexual abuse), and six sexually abused children participated. Designation as sexually abused was decided after review of a comprehensive psychiatric evaluation and court and police records by two independent clinicians. Corroboration from all sources of information was necessary for a case to be assigned to the sexually abused group. All subjects were interviewed for 20 minutes by a senior female child psychiatric resident who was well acquainted with the interview protocol and who was blind to the abuse status of the children. None of the children was asked abuse-related questions.

106. *Id.* at 745.

107. William McIver et al., *Behavior of Abused and Non-abused Children in Interviews with Anatomically-Correct Dolls* (1987) (unpublished manuscript), cited in WAKEFIELD & UNDERWAGER, *supra* note 26, at 206-07. In that study, the sample consisted of 50 nonabused children and 10 abused children. The interviewer was aware of the abuse status of the children, but two raters who categorized the children were not. The abused children had never before been interviewed by counselors, police, or anyone else outside their immediate families. The children were interviewed individually and encouraged by open, non-leading questions to say whatever they wanted and to do whatever they wanted with the dolls. Seven of the children (six nonabused and one abused), following the initial portion of the interview, were asked deliberately leading questions, cues, modeling, and reinforcement in an attempt to elicit sexual behaviors with the dolls. The interviewer asked questions such as "Can you show me?" "How else could they go together?" and then reinforced the responses with "Uh huh," and "Anything else?" The researchers said the behaviors engaged in by the interviewer in this portion of the interview were similar to those observed in typical videotaped interviews of allegedly sexually abused children.

dolls' genitals, and sixty-two percent of the nonabused and fifty percent of the abused placed the dolls in clear sexual positions and/or played with the dolls in an overtly aggressive manner.¹⁰⁸ Seven of the children were asked leading questions; of these, six responded to the cueing.¹⁰⁹ As this portion of the interview progressed, the children continued to demonstrate more and more aggressive and sexual behaviors.¹¹⁰

In the McIver study, the researchers found it noteworthy that the sexual and aggressive behavior was obtained with comparatively subtle questions and cues.¹¹¹ In a typical real-world interview involving the dolls, a large proportion of the interview consists of leading questions, modeling, and selective reinforcement.¹¹² These researchers concluded that the dolls should not be used because they provide a modeling effect. The researchers said that "[a]ll of the social learning literature shows that one of the most powerful ways of teaching children is by modeling. . . . The child is being taught to produce the responses favored and reinforced by the interviewer."¹¹³

A study conducted by Debra Colin¹¹⁴ reached results similar to those of the McIver study. This study compared thirty-five nonabused children to a group of thirty-five children who were suspected to have been abused. The level of sexualized play with the dolls was similar for both groups. Of the thirty-five children who were suspected to have been abused, four children inserted their fingers into the dolls' genital/anal orifices, one demonstrated masturbation, and two simulated intercourse.¹¹⁵ Likewise, of the thirty-five nonabused children, nine inserted their fingers into the genital/anal orifices, one demonstrated intercourse, and six rubbed the dolls together.¹¹⁶ The researchers concluded that the differences between the two groups were inconclusive and that "no clear-cut profile of doll play by children referred for evaluation of sexual abuse was established."¹¹⁷

108. This play included placing one doll on top of another doll in the "missionary position," sticking a male doll's penis in one of the openings (oral, vaginal, anal), wrestling, spanking, throwing, or hitting the dolls or having one doll do these to another doll. *Id.* at 207.

109. *Id.* at 207.

110. *Id.* at 208.

111. *Id.*

112. *Id.*

113. *Id.* at 209-10.

114. Debra S. Cohn, *Anatomical Doll Play of Preschoolers Referred for Sexual Abuse and Those Not Referred*, 15 CHILD ABUSE & NEGLECT 455 (1991). Thirty-five two- through six-year-olds referred to a hospital child abuse clinic were compared to 35 controls who were matched on sex, race, and age. *Id.*

115. *Id.* at 461.

116. *Id.*

117. *Id.* at 465.

Three other studies found differences in how the majority of abused children and nonabused children interacted with the dolls, but some of them are difficult to interpret because the researchers failed to report specifically how the children interacted with the dolls.¹¹⁸ In those studies that described the children's behaviors, significant percentages (up to twenty percent) of the nonabused children interacted sexually with the dolls.¹¹⁹

The first study was conducted by White, Strom, Santilli & Halpin.¹²⁰ It found that most of the nonabused children interacted with the dolls in a way that was either not suspicious or only ambiguously suspicious for abuse, and that the children who were suspected of having been abused interacted with the dolls in a way that was either ambiguously suspicious or that aroused low-level suspicion of abuse.¹²¹ The researchers concluded that interviewing children with anatomical dolls using a structured protocol was helpful in differentiating between abused and nonabused children.¹²² Unfortunately, the report does not describe specific behaviors engaged in by any of the children.¹²³ Another problem with the study is that the researchers failed to substantiate whether the children in the sexually abused group had actually been abused.¹²⁴ Because of these shortcomings, this study at best provides weak support for the validity of doll-based interviews. Furthermore, this study specifically addressed the need for a structured interview protocol and does not support in any way the validity of an unstructured doll interview.

The second study, conducted by August and Forman,¹²⁵ which has been interpreted by some professionals as supporting doll use provides

118. White, *supra* note 93; Robin L. August & Bruce D. Forman, *A Comparison of Sexually Abused and Nonsexually Abused Children's Behavioral Responses to Anatomically Correct Dolls*, 20 CHILD PSYCHIATRY & HUM. DEV. 39 (1989); Jampole & Weber, *supra* note 84.

119. Jampole & Weber, *supra* note 84, at 190.

120. White, *supra* note 93. The study compared 25 nonabused children with 25 children who had been referred to a child protection agency because of a suspicion of abuse—i.e., the abuse was not actually known to have occurred. The children were between the ages of two and five years old. Almost all of the nonabused children were white, from intact families, and the children of the employees of a research hospital. The allegedly abused children were racially diverse and from diverse living situations. The researchers created a structured doll interview protocol that required the interviewer to be blind to the details of a child's abuse history. *Id.* at 521.

121. *Id.* at 523-26.

122. *See id.* at 528.

123. Further problems with the White report are revealed by the Everson and Boat study which found that children of different socioeconomic/racial backgrounds may have different normative responses to the dolls than do white, middleclass children. Therefore, this study may have made invalid comparisons. *See* Everson & Boat, *infra* note 137, at 740-41.

124. *See* White, *supra* note 93, at 520.

125. August & Forman, *supra* note 115. The researchers compared 16 allegedly abused girls to 16 nonabused girls. The girls were five to eight years old. The children who were suspected of having been abused were drawn from one of four evaluation or treatment programs for sexually

some evidence that abused and nonabused children behave differently toward the dolls when left alone with them. The two groups displayed different levels of aggression toward the dolls, and a different number of references to the dolls' "private parts."¹²⁶

This study cannot be said to support the theory that children who have been sexually abused interact with the dolls differently than nonabused children for two reasons. First, the researchers did not describe the specific behaviors observed. Second, when a researcher was present in the room with the children, the study found that there was no statistical difference between the two groups in aggression toward the dolls or in references to "private parts," but that there were statistical differences in their degree of avoidance of the dolls.¹²⁷ The findings thus conflict depending on the setting, children alone or researcher present, and also indicate that an interviewer's presence may cause children to alter their behavior with the dolls.

The last study to compare abused and nonabused children's interactions with the dolls found that twenty percent of the nonabused children, two of the ten studied, interacted sexually with the dolls¹²⁸ and that ninety percent of the abuse group demonstrated sexual behaviors with the dolls. In the nonabuse group, an eight year old child demonstrated sexual intercourse between herself and a doll and a four year old demonstrated oral sex between herself and a doll.¹²⁹ The researchers qualified their own findings by noting that the abused children had been interviewed previously regarding abuse. These prior interviews may have affected their behavior in the research setting.¹³⁰ Although there were substantial differences in the percentage of children who demonstrated

abused children in Dade County, Florida and therefore had already undergone abuse-related interviews prior to this study. The children were allowed to interact alone with the dolls and then later with an interviewer.

126. *Id.* at 43.

127. *See id.*

128. Jampole & Weber, *supra* note 84, at 190. The study compared 10 allegedly sexually abused children with 10 children who were not abused, ranging in ages from three to eight years old. The children comprising the abuse group had been determined to have been abused after a series of investigative interviews by the Louisiana Department of Health and Human Resources and/or by the Jefferson Parish Sheriff's Office. None of them had been interviewed with the dolls before this study. In the study, the observer was blind to the abuse status of the child (although the person who interacted with the dolls was not), but the researchers did not report the accuracy of the observer's categorization of the children. The specific behaviors engaged in by both sexually abused and non-sexually abused children included penetrating the dolls' genitals with fingers, demonstrating intercourse between the doll and child, demonstrating dolls having oral sex with child, and demonstrating intercourse between the dolls.

129. The authors considered penetration of the doll with the child's fingers to be "a natural wish to explore new playthings" and did not include this behavior as a sexual act. *Id.* at 190.

130. *Id.*

sexual behaviors in each of the two groups, the fact that twenty percent of nonabused children interacted sexually with the dolls demonstrates the need for extreme caution in admitting testimony concerning a child's interactions with the dolls.

c. *What are the normative responses of nonabused children when interacting with anatomically detailed dolls?* Four studies exclusively examined how nonabused children interact with the dolls. These studies came to widely varying conclusions as to the validity of the dolls as investigative tools. For example, Gabriel, who observed nineteen nonabused children with the dolls and other toys, found that the "children showed several behaviors which could have been interpreted by other interviewers as indicating likely sexual abuse. Around half of the children showed overt interest in the genitals and/or unusual interactions with the genitals."¹³¹ The researcher concluded: "[O]n the evidence of the dolls alone, when used as part of a 'fishing expedition' exercise, the suspect will almost always be found 'guilty', especially if the examiner is already biased in that direction."¹³²

Other researchers, although not rejecting outright the notion that the dolls may someday prove to be reliable, have concluded that research on anatomical dolls is still too inconclusive to permit the dolls to be used as a diagnostic tool. In a study of ninety-two nonabused children conducted by Glaser and Collins,¹³³ five children engaged in explicit sexual play,¹³⁴ five children showed aggression between the dolls, and six showed affection between the dolls.¹³⁵ The researchers concluded: "At present, insufficient information exists to permit play with the dolls to be regarded as a clinically reliable screening test for sexual abuse."¹³⁶

131. Gabriel, *supra* note 91, at 210.

132. *Id.*

133. Danya Glaser & Carole Collins, *The Response of Young, Non-Sexually Abused Children to Anatomically Correct Dolls*, 30 J. CHILD PSYCHOL. & PSYCHIATRY 547 (1989). Their sample consisted of 92 nonabused English two to six year olds, of which five refused to play with the dolls. Most of the children were between the ages of three to five, 52% were girls, and 48% were boys. *Id.* at 550. The children were encouraged to play with the dolls, to undress the dolls, to name the doll's body parts, and to identify two functions of each body part. *Id.* at 552-53. For most of the play session, the children engaged in free play with the dolls. *Id.*

134. It was later learned, however, that three of these children had seen either some pornographic literature or a teenage sibling having intercourse. *Id.* at 556-57. One four year old girl who had no previous exposure to sexual materials attempted to join the genitalia of the dolls and was giggly and excitable when she played with the dolls. *Id.* at 556.

135. *Id.* at 557.

136. *Id.* at 559.

The doll study conducted by Everson and Boat¹³⁷ indicates that children from diverse racial and socioeconomic backgrounds may have different normative responses to the dolls than do white, middleclass children. Their study of 209 nonabused children, ranging in age from two to five years old, found that a significant minority of the nonabused children engaged in sexualized play with the dolls. For example, twenty-five percent of the five year olds placed the dolls in suggestive positions and sixteen percent of the five year olds placed them in clear intercourse positions.¹³⁸ A few of the children placed an unclothed doll up to their own genitals and actually simulated intercourse through movement.¹³⁹ The most common child-to-doll activity involved the child mouthing a doll's penis.¹⁴⁰ Everson and Boat also found that explicit sexualized play was found to be highest among the older, poor, black males.¹⁴¹ Their findings indicate that differential norms may be required for interpreting the anatomical doll play of children from varying backgrounds.

Everson and Boat, however, came to a troubling conclusion—that their study stands as “substantial evidence against the argument that anatomical dolls are too suggestive for use in sexual abuse evaluations with young children.”¹⁴² The conclusion is disturbing because many of these nonabused children would have been identified as abused by the child protection workers. For instance, forty-one percent of the five year olds placed the dolls in either suggestive or clear intercourse positions. If one compares this to the survey of abuse investigators conducted by Boat and Everson, ninety-one percent of the child protection workers would have identified these children as abused.¹⁴³ Furthermore, the children in the study were not subjected to a suggestive interview environment other

137. Mark D. Everson & Barbara W. Boat, *Sexualized Doll Play Among Young Children: Implications for the Use of Anatomical Dolls in Sexual Abuse Evaluations*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 736 (1990). The 209 children studied were recruited from diverse socioeconomic and urban/rural backgrounds. Sixty-eight percent of the children were white and 32% were black. The researchers established an interview protocol that included periods of free play and structured questions from the interviewer. *Id.* at 738-39. During free play exploration of the dolls, the children were asked to, “Show me what the dolls can do together.” The researchers were particularly interested in whether the children would engage the dolls in suggestive or clear sexual positioning. Suggestive intercourse positioning was defined as deliberate placement of unclothed dolls in sexual positions but without insertion of the penis, verbal descriptions of intercourse, or sexual movement of the dolls. Clear intercourse positioning was defined as deliberate placement of unclothed dolls in a sexual position with either insertion of penis in vagina, mouth, or anus; verbal description of intercourse; or sexual movement (“humping,” as the researchers put it). *Id.* at 740.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Twenty-seven percent (four of 15) of the older, poor, black males had the dolls demonstrating clear intercourse positioning.

142. *Id.* at 741.

143. See *supra* note 104, Table One.

than the cue, "Show me what the dolls can do together,"¹⁴⁴ and yet a substantial number, fifty-eight of the 209 children, put the dolls in suggestive or clear intercourse positions.¹⁴⁵

The Sivan study is the only study to find that the suggestiveness of the dolls is negligible or nonexistent.¹⁴⁶ These researchers attempted to determine what children would do in free play with the dolls and intentionally did not try to resemble a child abuse investigation. These researchers found that although the sexual body parts of the dolls were inspected by many children, role playing of explicit sexual behavior was not observed.¹⁴⁷ They also found that less than one percent of the observed interactions were aggressive.¹⁴⁸ It is important to note, however, that the researchers explicitly did not attempt to find how children would respond to the dolls in an environment that resembled an abuse investigation. Therefore, it is unknown how these children would have interacted with the dolls if they had played with the dolls while being asked abuse-related questions.

d. Do misleading questions affect children's accuracy when they use anatomical dolls to aid in responding to the questions? One study, conducted by Goodman and Aman, examined whether doll-use affects children's answers when asked misleading and suggestive questions about an event.¹⁴⁹ In this study, eighty children, ages three and five years old, experienced a social interaction with a male confederate and were later tested under one of four recall conditions: reenactment with

144. Everson & Boat, *supra* note 137, at 739.

145. *Id.* at 740.

146. See Abigail B. Sivan et al., *Interaction of Normal Children with Anatomical Dolls*, 12 CHILD ABUSE & NEGLECT 295 (1988). One hundred forty-four middleclass children, ranging in age from three to eight years, were observed in a playroom containing the dolls under four conditions: with an adult present and the dolls dressed; without an adult present and the dolls dressed; with an adult present and the dolls undressed; and without an adult present and dolls undressed. *Id.* at 296-98.

147. *Id.* at 302.

148. *Id.* at 301.

149. Gail S. Goodman & Christine Aman, *Children's Use of Anatomically Detailed Dolls to Re-count an Event* 61 CHILD DEV. 1859 (1990). Specifically, the researchers found that misleading and suggestive questions affected the children's accuracy in all age ranges and all conditions, and that the inaccuracies increased when the dolls were used. Three year olds' inaccurate responses ranged from 33% when asked specific, but not misleading, questions in the no-doll condition, up to 48% when they were asked specific questions in the anatomical doll condition. *Id.* at 1865 (Table 2). When the three year olds were asked misleading questions in the anatomical doll condition, their inaccurate responses increased to 52%. *Id.* at 1866 (Table 3). The five year olds fared better. When they were asked specific questions in the no-doll, no cue condition, 26% responded inaccurately. Those inaccurate responses declined slightly to 23% when asked specific questions in the anatomical doll condition. *Id.* at 1865 (Table 2). When the five year olds were asked misleading questions in the no-doll, no-cue condition, 20% responded inaccurately. Their inaccurate responses in the misleading question, anatomical doll condition increased slightly to 21%. *Id.* at 1866 (Table 3).

anatomically detailed dolls, reenactment with regular dolls, free recall with visual cues, or free recall without visual cues. The children were asked a variety of specific and misleading questions, some of them dealing with acts associated with abuse.¹⁵⁰ The researchers found that any sort of cueing negatively affected some children's accuracy and that the three year olds were more suggestible than the five year olds.¹⁵¹ Furthermore, the use of the anatomical dolls had the most adverse impact on the accuracy of their accounts: Fifty-two percent of the three year olds and twenty-one percent of the five year olds responded inaccurately when asked misleading questions when the anatomical dolls were used.¹⁵² Goodman attributes some of the inaccuracy to the fact that some of the children did not understand the term "private parts." However, this does not account for the fact that the three year olds' inaccurate answers increased when the anatomical dolls were used—that is, thirty-six percent responded inaccurately to misleading questions in the no-doll, no-cue condition; that percentage increased to fifty-two when the anatomical dolls were used.

In synthesizing the findings of these various studies, it is apparent that the proponents of doll use have not demonstrated that the dolls are a valid assessment tool. Before the use of the dolls can be established as a reliable indicator of abuse, researchers need to demonstrate that evaluators can accurately categorize children as abused or nonabused.¹⁵³ Specific procedures would have to be adopted and followed by investigators¹⁵⁴ to ensure that there is strong interrater reliability in how children are categorized.¹⁵⁵ In addition, further studies need to be performed on the differences in normative responses of children from diverse socioeconomic and racial backgrounds.¹⁵⁶ Based on these studies, which represent the scholarly research in this area, it is unrealistic for child protection teams to use the dolls—particularly as their primary or only means of gathering information about a child's alleged abuse. No one

150. The misleading questions included, "He took your clothes off, didn't he?," "He kissed you, didn't he?," and "How many times did he spank you?" *Id.* at 1866.

151. *Id.*

152. *Id.*

153. See *supra* notes 105-14 and accompanying text. The Realmuto study found that the categorizer had a 67% false-positive rate, and the McIver study was unable to differentiate behavioral responses of abused and nonabused children.

154. This is a basic requirement of any diagnostic test. See, e.g., 1 JAY ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 206 (3d ed. 1981).

155. See *id.* at 251-88. The Boat and Everson survey of child abuse investigators, see *supra* note 88, demonstrates that this is a particularly acute need.

156. See Everson & Boat, *supra* note 137.

assessment tool can possibly carry that burden.¹⁵⁷ For example, Rorschach ink blots¹⁵⁸ may be valid in helping to determine an individual's mental condition, but no ethical clinician would rely on that test alone to assess a person's mental state. In fact, the widespread use of the anatomical dolls indicates that child protection workers themselves have overvalued their probativity.¹⁵⁹ Whether or not children are suggestible when the dolls are used, there is a strong danger that abuse evaluators read too much into children's exploration and interaction with the dolls, consequently inaccurately labeling nonabused children as abused.¹⁶⁰

B. *The Research on Children's Suggestibility*

Although child advocates have stated that leading questions are a necessary component of getting a full disclosure of abuse from a young child,¹⁶¹ the research on children's suggestibility indicates that suggestive interviews increase the likelihood of false allegations. Proponents of leading questions, however, deny that leading questions influence a child's answer. Professor Myers has stated that "the developmental limitations of young children sometimes necessitate careful use of specific and, at times, leading questions. Furthermore, modern research discloses that young children are more resistant to suggestive questioning

157. See 1 ZISKIN, *supra* note 154, at 207.

158. In the Rorschach test, individuals are asked to describe in detail their impressions of a series of inkblots. The subjects' interpretations of inkblot shapes are used as keys to understand dimensions of the subjects' personalities. ANN L. WEBER, *INTRODUCTION TO PSYCHOLOGY* 106 (1991).

159. See Yates & Terr, *supra* note 90. Dr. Terr recounts an experience that illustrates this point:

I watched a television tape recently that shows a policeman administering a sexually anatomically correct doll interview to a three year old in a small room furnished with only two chairs and one set of dolls. When the youngster hesitated a moment after fiddling with the genitalia of the adult male doll, the officer asked, "Did your daddy do anything like that to you?" Such a question, asked in the midst of such stimulating, unusual play, might, I think, elicit any kind of answer from a confused young child, an answer, perhaps, having little to do with this particular youngster's life experiences. On the tape I watched, the boy answered, "Yes, Daddy did," and the prosecutor who presented the tape told us that he had obtained a criminal conviction of the boy's father on the basis of this. But, *was* the boy really sexually abused? I felt at a loss to know.

Id. at 256.

160. See *supra* note 104, Table One.

161. See, e.g., BROSS ET AL., *supra* note 23, at 182 (stating that suggestive and leading questions are appropriate interviewing techniques for young children); Kathleen C. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 473 (1984) ("If the child does not provide detail of sexual abuse spontaneously, sometimes it can be elicited by asking such questions as 'Did he touch your privates?' 'Did he put his finger inside?' A less preferable alternative is for the evaluator to relate what she/he thinks happened and ask the child to respond 'Yes' or 'No' to each statement."); see also WAKEFIELD & UNDERWAGER, *supra* note 26, at 36 (finding that, after reviewing over 100 videotapes of various investigative interviews across the country, leading questions and other types of error-inducing questioning—including closed questions, modeling, pressure, rewards, aids, and paraphrasing—occur from 50% to 80% of the time in the typical interview of the child witness).

than many adults believe.”¹⁶² Professor Myers’s assertion, however, is not supported by the research evidence concerning suggestibility. One can reach his conclusion only by reading the research selectively and by ignoring the studies that show that there are potentially serious social and cognitive hazards connected with interviewing young children with leading questions. This Section discusses nine recent studies on children’s suggestibility. The discussion concentrates on recent studies because they tend to be methodologically superior to earlier studies and because several have been designed to address specifically the reliability of children as witnesses in child sexual abuse cases.

Suggestibility has been defined as the extent to which individuals come to accept and subsequently incorporate post-event information into their memory.¹⁶³ The research that has examined children’s suggestibility tends to be divided into two separate areas of concern. One group examines factors that influence cognitive memory. These cognitive influences include strength of the trace (the duration of the child’s exposure to the event), the length of the retention interval, the child’s ambient stress level, and the possibility of destructive memory changing by post-event questioning. The other body of research examines social influences, including proclivity to conform to the wishes of others, (especially powerful persons who control rewards and punishments), unwitting or unconscious effort to recall in a manner consistent with stereotypes and beliefs, and whether children will lie when they have a motive to do so.¹⁶⁴ Since the late 1960s there have been over seventy-five studies on the suggestibility of children.¹⁶⁵

One major difficulty faced when interpreting the studies is that researchers have failed to reach a consensus on the key issue—some have concluded that children are impervious to suggestion; others have concluded that children have difficulty distinguishing reality from fantasy.¹⁶⁶

162. *Amici Curiae* Brief of American Professional Society on the Abuse of Children et al. at 15-16, *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (No. 89-260).

163. Gisli H. Gudjonsson, *The Relationship Between Interrogative Suggestibility and Acquiescence: Empirical Findings and Theoretical Implications*, 7 *PERSONALITY & INDIVIDUAL DIFFERENCES* 195 (1986).

164. See Stephen J. Ceci, *The Suggestibility of the Child Witness: A Synthesis Emphasizing the Most Recent Research* 22 (rev. ed. 1990) [hereinafter Ceci, *Suggestibility Synthesis*] (unpublished manuscript). This Note does not discuss the effects of stress on children’s memory.

165. *Id.* at 16. During the 1980s, approximately five times more research was conducted on this topic than in all of the prior years of this century combined. *Id.* at 5, 16.

166. See, e.g., Gail S. Goodman et al., *Child Sexual and Physical Abuse: Children’s Testimony*, in *CHILDREN’S EYEWITNESS MEMORY*, *supra* note 35, at 1; see also WAKEFIELD & UNDERWAGER, *supra* note 26, at 85; D. Stephen Lindsay & Marcia K. Johnson, *Reality Monitoring and Suggestibility: Children’s Ability to Discriminate Among Memories from Different Sources*, in *CHILDREN’S EYEWITNESS MEMORY*, *supra* note 35, at 92; Alvin A. Rosenfeld et al., *Fantasy and Reality in Patients’ Reports of Incest*, 40 *J. CLINICAL PSYCHIATRY* 159, 161 (1979).

Professor Stephen J. Ceci, a researcher in basic memory at Cornell University, suggests adopting a more centrist approach. He concludes from the research that children can lie when the researcher provides a motive to lie, that they can modify their stories to fit what the adult questioner believes to have happened, and that, in some instances, post-event suggestions can change a child's cognitive memory of an event.¹⁶⁷ After examining the studies conducted on children's suggestibility, Ceci's approach appears to be the most defensible and free of advocacy-tainted research.

1. *Can Children Be Motivated to Lie?* In a study recently completed by Ceci, he found that children can lie about abuse when they have a motive to do so. In his two-phased experiment, he tested the influence of five motivational factors: personal aggrandizement, protecting a loved one, avoiding embarrassment, sustaining a game, and conforming to a stereotype.¹⁶⁸ Ceci found that even small material and psychological rewards were extremely effective in motivating children to lie about previous events. For example, in one manipulation, over fifty percent of the nursery school children lied about who had won a game in order to obtain a gumball.¹⁶⁹ Certainly, none of the experimental manipulations was even remotely reminiscent of the powerful emotional and material pressures that are often placed on children who testify in court proceedings about sexual assault.¹⁷⁰ Thus, this study indicates that it is naive to assume that children cannot be motivated to produce false accounts of abuse.

One of the manipulations in the Ceci study has particularly serious implications for child abuse prosecutions. In the study, some of the children were kissed by their parents while being bathed the evening before being interviewed by the researchers.¹⁷¹ At the start of the interview, the children were told that it was "very naughty" for an adult to kiss them

167. Ceci, *supra* note 164, at 44-45. Ceci also notes that researchers holding both extreme views tend to design studies that are advocacy packaged in the guise of science. *Id.* at 7.

168. *Id.* at 37. The first phase of the study was an intensive case study of 10 three to four year old children. The second phase was conducted among a larger group of three to four year olds. After the adult experimenters spent 20 hours developing close relationships with each of the children, they brought the children in pairs to a laboratory that had the appearance of a playroom. The study was designed in two parts, a play period during which several manipulations were carried out, and two subsequent interrogations—one by a confederate playing the role of a nursery school teacher, and the other by the loved researcher. The interrogations were conducted individually for each child. *Id.* at 37-40.

169. The researchers ruled out simple memory failure as an explanation of the children's erroneous claims because it was clear from the control group's responses that the children knew exactly who had won the games. *Id.* at 40.

170. *Id.*

171. *Id.* at 39.

while they were naked. When asked if they had ever been kissed while naked, most of the children replied that they had not been kissed.¹⁷² On the one hand, this finding supports the idea that children are reluctant to reveal "abuse." It also indicates they can be motivated to lie to protect loved ones (in this case, the parents who kissed them at bedtime). The study suggests, therefore, that we should examine whether a child could be motivated to name someone outside the family when someone inside the family is perpetrating the abuse.

Other researchers have reported findings similar to Ceci's. When the studies are designed so that they provide motivational tilts toward lying, the children will often lie.¹⁷³ This research indicates that courts should consider whether the abuse investigator explored whether a child had a motive to fabricate an abuse allegation when evaluating the reliability of the expert's testimony.

2. *Do Children Change Their Perception of an Event to Conform to Adult Perceptions?* The initial question of whether sexual abuse has occurred is often a matter of how an adult interprets what a child says about an event, as opposed to what the child's factual memory of the event is. Because of the potential for adult influence on children's stories, researchers have examined whether children are susceptible to conforming their stories to fit an adult's perceptions. A study conducted by Clarke-Stewart focused on children's interpretations of events that could be construed as either sexually abusive or innocent.¹⁷⁴ The researchers found that when the adult interviewers contradicted what actually happened to the children, two-thirds of the children changed their stories to conform to the suggestions of the interviewer.¹⁷⁵ Most of the remaining

172. *Id.* at 41.

173. See *id.* (referring to Douglas P. Peters, Confrontational Stress and Lying (paper presented at the biennial meeting of the American Psychology and Law Society, Williamsburg, Va., Mar. 16, 1990); Bussey, Children's Lies: A Developmental Analysis (paper presented at the same meeting); see also Douglas P. Peters, *Commentary: Response to Goodman*, in SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS, *supra* note 35, at 86, 90 (referring to the above unpublished studies and finding that children can be motivated to lie when afraid of reprisal and to keep a secret).

174. Clarke-Stewart et al., *supra* note 35, at 92. In the study, 88 five and six year olds interacted individually with a confederate posing as a janitor. The confederate followed one of two scripts. In one, he cleaned toys, including a doll. In the other, he played roughly and suggestively with the doll. One hour later, another confederate interviewed the children. The interview was either neutral and nonsuggestive, accusatory (suggesting the janitor was playing when he should have been working), or exculpatory (suggesting the janitor was working and not playing). In the latter two, the questions went from mildly to strongly suggestive as the interview progressed. Following the first interview, each child was interrogated by a second interviewer, who either reinforced or contradicted the first interview. Finally, the children were asked by their parents to recount what the janitor had done. *Id.* at 99-102.

175. *Id.* at 101.

children merged their account of the factual events with the interviewer's suggestions.¹⁷⁶ At the end of the interrogation, only one child answered all the questions accurately.¹⁷⁷ When the second interviewer contradicted the first interviewer, the children again changed their stories.¹⁷⁸ The children's reports to their parents were consistent with the interviewers' suggestions.¹⁷⁹ The researchers also found that the children who were the most suggestible shared several characteristics. They were more suggestible in many contexts, more likely to have parents who placed less value on self-direction, and more likely to have parents who were less strict about lying than other parents.¹⁸⁰ Surprisingly, the more suggestible children (those who most readily incorporated the interviewer's suggestions) had better verbal memories than the children who did not go along with the interrogator's suggestions as quickly.¹⁸¹

Ceci has also tried to assess the degree to which children will try to conform their stories to their perceptions of an adult's wishes.¹⁸² He found that children were more susceptible to modifying their story based upon an adult's post-event suggestion than based upon another child's suggestion. However, even the children who received their post-event suggestions from the older children were susceptible to suggestion.¹⁸³ In another study, Ceci found that even when the child's original memory trace was retained, a majority of the children modified their stories to incorporate the adult's suggestions.¹⁸⁴

Other researchers have found that children's definitions of what it means to lie can distort their testimony. Twenty-nine percent of a group of preschool children told a misleading story when interviewed by policemen after their mothers told them to tell the misleading story.¹⁸⁵ The researchers concluded that a child's understanding of what it means to

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 102.

181. *Id.*

182. Ceci, *Age Differences*, *supra* note 35, at 79. In Ceci's study of 186 children, half were given post-event erroneous information. Of those given the erroneous information, half received it from an adult and the other half received it from an older child. The three year olds who were not given erroneous suggestions recalled the event with 84% accuracy. The three year olds who received the biasing information from an adult recalled the event with 37% accuracy, and those who received the erroneous suggestions from an older child recalled the original event with 53% accuracy. *Id.* at 81-82.

183. *Id.* at 81-82.

184. *Id.* at 85.

185. Ceci, *supra* note 164, at 25, (discussing Jeffrey J. Haugaard et al., *Children and the Truth*, in *SOCIAL AND COGNITIVE FACTORS IN DECEPTION AMONG CHILDREN* (Stephen J. Ceci et al. eds., forthcoming 1992)).

lie is incompatible with the possibility that their loved ones would lie. In other words, because children believe that their mothers are not liars, they believe their mother's version of the event must be the accurate one.¹⁸⁶

Because this research indicates that children do modify their stories to fit adult perceptions, courts should pay particular attention to whether the abuse investigator had a preconceived notion of what happened to the child and then sought the child's confirmation. It also means that the investigator needs to have examined the family situation to see if the child is perhaps endorsing the preconceived ideas of a parent or other significant adult.

3. *Are Children Resistant to Adult Suggestions?* In opposition to the foregoing studies, some researchers have concluded that children are resistant to adult suggestions and difficult to mislead as to whether abuse has happened. Gail Goodman, a researcher at the State University of New York in Buffalo, is a leading proponent of the idea that children are impervious to adult suggestions when recounting abuse. One study she undertook with Saywitz and other researchers was conducted at a medical center where the routine physical check-up included an examination for signs of sexual abuse. In the examination, a physician visually and physically inspected the exterior of the children's anuses and genitals.¹⁸⁷ The children were asked sixty-eight questions, including ten misleading questions.¹⁸⁸ In that study, three of the thirty-six (8.33%) children gave incorrect responses to the abuse questions.¹⁸⁹

Goodman feels that the leading questions are necessary in abuse investigations because the researchers found in this study that the children tended not to report the anal and genital touching in free recall.¹⁹⁰ At the same time, she acknowledges that the children's increased disclosure

186. *Id.*

187. Karen Saywitz et al., *Children's Memories for Genital Examinations: Implications for Cases of Child Sexual Assault* (unpublished manuscript); see also Goodman & Clarke-Stewart, *supra* note 35, at 98. The researchers tested 72 middle- to upper-class, primarily white girls. Half of the children were five years old and the other half were seven years old. Half of the children of each age group underwent anal-genital exams and the other half did not. Saywitz, *supra*, at 3. Before the children were interviewed, the parents read through the questionnaires and struck out those questions they did not want asked of their children. *Id.*

188. Misleading questions included "How many times did the doctor kiss you?", "She didn't have any clothes on, did she?", and "The doctor didn't touch you, did she?" Saywitz et al., *supra* note 187 (Table 3).

189. Goodman & Clarke-Stewart, *supra* note 35, at 98.

190. See *id.* at 99.

of genital contact when asked specific questions comes at the expense of accuracy.¹⁹¹

Before accepting Goodman's conclusion that specific questions are necessary, however, it is important to recognize that the researchers themselves acknowledge that the study tilted the motivational factors toward telling the truth.¹⁹² As Ceci has noted:

Any of the motivational forces are capable of reversing many of the findings that will be reported. This concern is particularly applicable to those studies that have found children to be resistant to post-event suggestions, since none of them to date have employed motivational manipulations that approach in intensity those found in the cases to which they wish to generalize.¹⁹³

Essentially, the Saywitz and Goodman study addressed whether children are capable of recounting an event accurately—not whether children's accounts of abuse are valid. As Raskin and Yuille have pointed out, "[t]he distinction between accuracy and validity is crucial when there is the possibility of motives to report falsely or to fabricate an allegation."¹⁹⁴ In this case, the Saywitz and Goodman study did not address the principal question of whether children can lie about abuse.

Furthermore, some of the children's responses to the misleading questions would have led to suspicions of abuse if the researchers had not already known that the abuse had not occurred. For instance, one child reported that she had been touched on the vagina (when she had not been) and two children claimed to have been touched on the buttocks (when they had not been). One child even elaborated and said that the doctor had tickled her buttocks with a long stick (when the child had not been touched on her buttocks at all).¹⁹⁵

4. *Can Post-Event Suggestion Change a Child's Cognitive Memory of an Event?* Another danger of suggestive interviews is that the post-event suggestions in those interviews may actually change children's cognitive memories of an event. This danger is increased with younger children—those who are six and younger.¹⁹⁶ This possibility is disturbing because suggestive and leading questions are used extensively with young children because it is believed they tend not to recount events fully when asked open-ended questions.¹⁹⁷

191. See *id.*

192. Saywitz, *supra* note 187, at 9.

193. Ceci, *supra* note 164, at 26.

194. Raskin & Yuille, *supra* note 26, at 184.

195. Saywitz, *supra* note 187, at 8.

196. Ceci, *supra* note 164, at 89-91.

197. See, e.g., Goodman et al., *supra* note 166, at 1.

Theorists have hypothesized on how children's cognitive memories can be changed. Brainerd, Reyna, and Howe conceptualize memory traces as a loose bundle of integrated features.¹⁹⁸ They hypothesize that over time and in response to erroneous suggestions, these features begin to loosen until they are nearly disintegrated.¹⁹⁹ Their theory suggests that at least some of the susceptibility of younger children to post-event suggestion involves actual trace construction. Ceci accounts for individual and group differences in suggestibility in terms of the strength of the memory trace for the original event (the stronger the trace is, the harder it will be to distort it) and the strength of the trace of the erroneous suggestion (the stronger it is, the more likely it will lead to trace alteration or weakening).²⁰⁰ If this theory is correct, then no amount of subsequent questioning would undo the damage brought about by the erroneous information.²⁰¹

Of course, this hypothesis has serious implications for any trial when a young child has been interviewed with suggestive and leading questions. Even if the child were to testify, no amount of cross-examination would disturb the child's credibility because the child would be testifying to what she believes the truth to be. The *McMartin* Preschool trial in 1986-1990 may possibly be an excellent illustration of this theory at work.²⁰² In that case, the jurors thought the children were credible witnesses when recounting the abuse but ultimately voted not guilty because of the suggestivity and coerciveness of the interviews.²⁰³ One juror explained: "If we had not seen those tapes [of the children being interviewed], I would have been able to believe their testimony a little more."²⁰⁴ It is possible that the children were credible witnesses because they were not consciously lying.²⁰⁵

198. Ceci, *supra* note 164, at 22; see also Brainerd & Ornstein, *supra* note 69 at 10, 17 (hypothesizing that memory storage failure is a matter of memory trace fading); Elizabeth Loftus et al., *Creating New Memories That Are Quickly Accessed and Confidently Held*, 17 *MEMORY & COGNITION* 607-16 (1989) (stating that misleading post-event information competes with original information in such a manner that it alters the underlying memory so that the original memory is "erased" through a destructive updating process).

199. Ceci, *supra* note 164, at 22.

200. See *id.* at 24.

201. See *id.* at 23.

202. Many articles have been published about the *McMartin* case. See, e.g., Robert Safian, *McMartin Madness: Ten Days in the Life of the Longest, Most Gruesomely Difficult Criminal Trial Ever*, *AM. LAW.*, Oct. 1989, at 46.

203. For a partial transcript of one of the interviews see *infra* note 208.

204. Besharov, *supra* note 18, at 44.

205. This also means that if those tapes had not been made available to the defense and if they had not been admitted at trial, the defendants might have been wrongly convicted.

5. *Does the Research Reflect How Children Behave in the Real World?* One problem that none of the studies will ever be able to completely overcome is the one of ecological validity. Briefly, ecological validity refers to the generalizability of a study from the research context to the infinitely more complex real world. A legitimate concern is that children's behavior in a research study may have little resemblance to their behavior in reality. Children in the real world are faced with vastly greater complexities than the simple variables created in research laboratories.

The central problem is that it would be unethical and highly abusive to design a test that is fully ecologically valid. Such a test would call for subjecting known, unabused children to the same sort of investigative interview that a suspected abused child submits to. The reason that little motivational research has been conducted is that it is difficult to do such research in an ethically acceptable manner. The children would have to be subjected to degrading and embarrassing manipulations.²⁰⁶

6. *At What Age Do Children Achieve Adult Levels of Resistance to Suggestion?* There is some disagreement among researchers about the exact age at which children achieve adult levels of resistance to suggestion. Ceci has found that it occurs around ages seven to nine.²⁰⁷ An important caveat to remember about this research is that no child in a research situation has ever been subjected to the great pressure to conform her story to an adult's notion of what happened as actually occurs in the real world.²⁰⁸ Therefore, to assume that a child over the age of seven is resistant to suggestion may be erroneous.

206. See Ceci, *supra* note 164, at 26.

207. See *id.* at 82.

208. See WAKEFIELD & UNDERWAGER, *supra* note 26, at 45-47 (describing an interview with an eight-year old boy conducted by Kee MacFarlane in the McMartin Preschool investigations):

She tells him that a lot of other kids have told about the secrets, that the ones who tell are "a big help in figuring things out," and that some of the teachers did "yukky" things. He asks which teachers and MacFarlane tells him that the puppets know and they can tell "the secret machine" (the microphone). The child does not know any secrets and doesn't produce anything that pleases MacFarlane. The puppet on MacFarlane's hand asks, "Are you dumb or smart?" The puppet on the lad's hand responds, "I'm smart." MacFarlane tells him "we're talking to the older kids because they're smartest. They can help. We can figure out these games if you're smart." The lad again says, "I'm smart." MacFarlane tells him, "It was a long time ago. You might not remember . . . We can pretend." The boy says, "I can remember," but only talks about puppets beating each other up. MacFarlane says, "Bird says some of them are naked games." He asks why they played naked games and MacFarlane says, "It was a special school where they play naked games. Remember?" MacFarlane then tells the boy that the mommies and daddies had a special meeting and they know about the secrets but that this child's parents said "We don't know if (name) has a good enough memory." The boy immediately says, "I have a good enough memory." MacFarlane says "Oh great! . . . Let's figure out a naked game . . . Later we can tell the mommies and daddies. Oh, they will be so happy." The boy begins to talk about games he supposedly remembers but none of the teachers are described as naked. The following exchange occurs:

Because the research indicates the reliability of children's accounts of abuse is undermined by suggestive interviewing techniques, courts should be vigilant when evaluating interviews for indications of undue suggestivity. Courts should not be misled by assertions that the use of leading questions with children does not necessarily render responses untrustworthy,²⁰⁹ as this only conceals the real issue. Obviously, a child can accurately respond to a leading question just as a person who has been beaten can make an accurate confession. But in both cases, the technique used in eliciting the statements also creates the potential for inaccurate, unreliable, and untrustworthy responses.

C. Problems Created by Inadequate Assessments, Interviewer Bias, and Other Suggestive Interviewing Techniques

Because the research shows that a significant percentage of children are responsive to adult preconceived ideas of what has happened to the children, it is crucial to be aware of the common pitfalls of investigative interviews and to recognize that interviewers often give children cues as to what they expect the children to relate through means other than leading questions. A major goal for investigators should be to insure that a child's information does not become distorted or falsified by confounding influences.²¹⁰ Furthermore, "[i]t must be acknowledged that all interviews will be influenced to some extent by interviewer behaviors. All investigatory interviewers must be vigilant during the interviewing process to minimize the impact of behavioral factors."²¹¹

Factors of the interview itself that can falsify and confound a child's report include the lack of investigatory independence, pursuit of an

MacFarlane: I thought that was a naked game.

Child: Not exactly.

MacFarlane: Did somebody take their clothes off?

Child: When I was there no one was naked.

MacFarlane: We want to make sure you're not scared to tell.

Child: I'm not scared.

MacFarlane: Some of the kids were told they might be killed. It was a trick. All right, Mr. Alligator, are you going to be stupid, or are you smart and can tell. Some think you're smart.

Child: I'll be smart.

MacFarlane: Mr. Monkey (puppet child had used earlier) is chicken. He can't remember the naked games, but you know the naked movie star game, or is your memory too bad?

Child: I haven't seen the naked movie star game.

MacFarlane: You must be dumb!

Child: I don't remember.

Id. at 45-47.

209. See, e.g., *Amici Curiae* Brief of American Professional Society on the Abuse of Children et al. at 21, *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (No. 89-260).

210. See Kathleen M. Quinn et al., *Influences of an Interviewer's Behaviors in Child Sexual Abuse Investigations*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 45, 45 (1989).

211. *Id.* at 52 (footnote omitted).

agenda, leading, and coercion.²¹² Investigatory independence requires the interviewer to adopt an "objective stance of not allying him/herself with any particular individual involved in the investigation of the allegation."²¹³ The interviewer should also maintain independence by not giving the child verbal and behavioral cues that can contaminate the interview. An example of the latter would be stroking the child's head as a reinforcement for an answer that confirms the interviewer's assumptions about the allegation.²¹⁴

Many investigators are unaware of their own behaviors that can affect the outcome of an interview. For example, Myers denies that interviewers can shape a child's responses in his *amicus brief* for *Idaho v. Wright*:

At one point, the psychologist [testifying for the defendant at trial] contended that children's responses can be easily "shaped." The psychologist went on to state that "one of my colleagues in the Portland area, Bill McGeiver [sic] has found that simply by nodding the head and saying 'um-hum' he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre." . . . It is clear that the McGeiver [sic] findings are not to be found in the scientific literature. *Amici* know of no scientific studies indicating that children or adults can be "shaped" by nodding of the head and saying "um-hum" to make false claims of sexual abuse.²¹⁵

Such a statement shows a gross lack of knowledge of the scientific literature. The fact that the interviewer can give behavioral cues that can affect the outcome of an interaction is well understood in the scientific literature.²¹⁶ It is precisely why, for example, when testing pharmaceuticals, the drugs and placebos are administered with a double-blind. That is, not only does the research subject not know whether she is getting a placebo or the real thing, but also the researcher giving the drugs does not know who is getting the placebo and who is getting the drug.

Pursuit of an agenda can also contaminate the information given by a child during an investigatory interview. All interviewers tend to approach an investigation with some assumptions about the veracity of the

212. Sue White & Kathleen M. Quinn, *Investigatory Independence in Child Sexual Abuse Evaluations: Conceptual Considerations*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 269, (1988).

213. Kathleen Quinn et al., *Child Evaluator's Roles in Child Sexual Abuse Assessments*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 94, 94 (E. Bruce Nicholson & Josephine Bulkley eds., 1988).

214. White & Quinn, *supra* note 212, at 270.

215. *Amici Curiae Brief of American Professional Society on the Abuse of Children et al.* at 21, *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (No. 89-260).

216. See, e.g., I ZISKIN, *supra* note 154, at 163-67 (summarizing studies that show that examiner expectations influence outcomes).

allegations.²¹⁷ The degree to which an agenda is pursued, however, can greatly affect the information given. Quinn has said:

The most counterproductive interviewing occurs when the interviewer has a strong preconceived notion of what occurred that he or she seeks to have the child endorse. . . . The pursuit of an agenda is a major reason for faulty investigations that may result in false positive or false negative assessment of a complaint."²¹⁸

Too often, interviewers pursue an agenda by asking a large number of leading or suggestive questions, asking questions that require only a yes or no answer, asking multiple choice questions, or asking questions that disconfirm what the child has just said.²¹⁹ An example of the last type occurs in the following scenario: An interviewer asks the child, "Who touched your bottom?" When the child responds "My mommy" the interviewer assumes the touching was during hygienic care and does not investigate. She instead follows up with, "Yes, but who else touched your bottom?" When the child says, "My daddy," the interviewer is again displeased with the child's response and says, "Right, but didn't Uncle Joe touch your bottom?"²²⁰ Only the child's assertiveness in correcting this assumption will overcome this interviewer's agenda.²²¹

The phrasing of questions in an interview will have great impact on the reliability of the child's responses. For instance, in the Jordan, Minnesota sexual abuse scandal, a child witness confessed that he had made up detailed stories of abuse because " 'I could tell what they wanted me to say by the way they asked the questions.' "²²²

Coercion is another common technique used in investigative interviews. It includes threats that the child will not be able to see her parents or return home until she tells "what happened", that she can not go to the bathroom until she tells, or by asking repetitive questions. The repetitive questioning communicates to the child that she has been giving incorrect or inadequate answers.²²³

Other influences that may alter the child's statements include factors outside the interview. These include communications between parents and children, media coverage, formal educational experiences regarding child safety and abuse prevention, and other discussions that

217. This is not to suggest in any way that this is wrong. It is probably not humanly possible to leave all biases at the doorstep.

218. Kathleen M. Quinn, *The Credibility of Children's Allegations of Sexual Abuse*, 6 BEHAV. SCI. & L. 181, 185 (1988).

219. White & Quinn, *supra* note 212, at 271-74.

220. *Id.* at 273.

221. *Id.* at 274.

222. Aric Press et al., *The Youngest Witnesses*, NEWSWEEK, Feb. 18, 1985, at 72, 75.

223. White & Quinn, *supra* note 212, at 275.

concern the abuse in the presence of the child. The investigator must evaluate this contamination's impact on how the disclosure was made and the content of the allegations.²²⁴

D. *The Incidence Rate of False Accusations*

Responsible experts on both sides of the sex abuse controversy acknowledge that false accusations exist, but they differ sharply on the extent of the problem. Dr. Maria Sauzier, a child psychiatrist who believes that child sexual abuse is not overdiagnosed but rather is underdiagnosed, has said that "[t]he belief that 'children never lie about sexual abuse' [is] fostered and supported by overzealous and misguided professionals."²²⁵ Predictably, child advocates tend to support a low base-rate for the incidence of false accusations and those on the opposite side tend to endorse a higher incidence rate of false allegations.²²⁶ An evaluator's perception of the base-rate of false allegations affects the accuracy of that evaluator's appraisal of whether a particular child has been abused.²²⁷ There is no way of knowing what the real incidence rate of false accusations is in the population, but those who believe that false accusations occur less frequently than they actually do will make false-positive diagnoses (they will diagnose children as abused when they have not been abused). Conversely, those who believe that the incidence rate is higher than it actually is will make false-negative diagnoses (they will diagnose children as nonabused when they have been abused). However, because we do not know the actual occurrence rate of false allegations, we also cannot conclusively know whether an expert endorses a too-low or too-high base-rate of false accusations. We do know that experts who believe that "children never lie" are outside the boundaries of what is reasonable because every researcher who has attempted to assess the incidence-rate

224. See Quinn, *supra* note 210, at 46.

225. Quinn et al., *supra* note 5, at 794.

226. For example, Rebecca Friend, program coordinator for the Pro Child and Family House in Charlotte, North Carolina, said in a phone interview that she thinks that there are not many, if any, false allegations, and that false allegations would only come from older children. She said that their facility has never encountered a situation where the allegation was false. Telephone Interview with Rebecca Friend (Sept. 6, 1990). Lucy Berliner, director of a sexual assault center in Seattle, Washington, has said: "No competent professional disputes the fact that some small proportion of sexual abuse reports are fictitious." Quinn et al., *supra* note 5, at 793. Berliner's view in 1989 that some reports are fictitious differs from statements that she has previously made. In 1981, she said that "there is no evidence to support the idea that children falsely report sexual abuse." Jon R. Conte & Lucy Berliner, *Sexual Abuse of Children: Implications for Practice*, 62 SOCIAL CASEWORK: J. CONTEMP. SOC. WORK 601 (1981).

227. See, e.g., 1 ZISKIN, *supra* note 154, at 83-95. This is just a restatement of a basic precept of validity analysis of social science research. This idea can be demonstrated with a simple example: If the true rate of false allegations is 10% and the investigator believes that the rate of false allegations is zero percent, then 10% of the children assessed as abused would actually not be abused.

of false allegations has discovered that false allegations exist.²²⁸ Therefore, courts that allow the testimony of experts who believe that children never lie are necessarily admitting false testimony against innocent defendants more often than courts that do not allow such unreliable testimony. Courts should not qualify these people as experts. Therefore, abuse investigators, as well as the courts, should consider if the allegation is false. The American Academy of Child and Adolescent Psychiatry, in its guidelines for the clinical evaluation of child and adolescent sexual abuse, recommends considering whether or not an allegation is false.²²⁹ In order to determine the credibility of an account, it is essential that the child be evaluated in the context of the family and her development to determine what factors might be influencing the parents' or child's allegations. Evaluators must attempt to understand the present family dynamics, the child's relationship with her parents, and the parents' relationships with one another and with significant others. Equally important is the child's past history of trauma, especially sexual abuse, the child's level of cognitive and emotional development, and the child's credibility.²³⁰

It is particularly difficult to detect when a previously abused child names the wrong person. These cases are complicated by the fact that because of the previous abuse, the child is able to give detailed descriptions of sexual activities. In the Jones and McGraw study of the incidence-rate of false allegations, the researchers found that four of the false allegations made by children in their sample were made by girls who had been previously sexually abused.²³¹

228. Despite this, experts have testified that "children never lie." See, e.g., *State v. Raye*, 326 S.E.2d 333, 335 (N.C. Ct. App. 1985) (holding that pediatrician with 15 years of experience had qualifications superior to jury's for determining whether child would fantasize sexual abuse); see also *State v. D.R.*, 537 A.2d 667, 673 (N.J. 1988) ("The overwhelming opinion of mental health workers, social welfare workers, and police investigators is that children almost never make false [sexual abuse] reports."); *State v. Rogers*, No. 90CRS8256 and No. 90CRS8257 (N.C. Super. Ct. Apr. 26, 1991) (recording testimony of child abuse investigator that "children do not fantasize about sexual abuse").

229. *Guidelines for the Clinical Evaluation for Child and Adolescent Sexual Abuse, Position Statement of the American Academy of Child and Adolescent Psychiatry*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 655 (1988):

The possibility of false allegations needs to be considered, particularly if allegations are coming from the parent rather than the child, if parents are engaged in a dispute over custody or visitation, and/or if the child is a preschooler.

. . . False allegations may arise in other situations as well, such as the misinterpretation of a child's statement or behavior by relatives or caretakers. . . . Children who have experienced prior sexual abuse may sometimes misinterpret actions of adults or accuse the wrong person of abuse.

Id. at 655-56.

230. Benedek & Schietky, *supra* note 27, at 916.

231. Jones & McGraw, *supra* note 36, at 31.

Numerous studies have tried to determine the actual incidence-rate of false allegations.²³² One early study looked at children from intact families in which abuse by the father was alleged. In that study, three out of forty-six (6.52%) children made false allegations of sexual abuse.²³³ Other studies that did not distinguish incest cases from other situations where sexual abuse was alleged found the rate of false accusations to range from three percent to about eight percent. In one sample of 181 children, the researchers found after extensive evaluation that eight percent were false reports.²³⁴ In another study, Jones and McGraw undertook a comprehensive review of 576 reports made to the Denver Department of Social Services. They also found that eight percent were fictitious.²³⁵ Faller described a sample of 148 cases where sexual victimization was alleged and found that three percent were untrue.²³⁶

Other studies that have looked at the rate of false accusations in visitation and custody disputes have found shockingly high rates of false allegations. In one sample, Benedek and Schetky found ten out of eighteen (fifty-five percent) to be false.²³⁷ Green documented four out of eleven (thirty-six percent) as being false.²³⁸ Brant and Sink found three of four (seventy-five percent) to be false.²³⁹

232. The studies used different methods for determining false allegations. Some of the studies did not reveal their methods in making the determination. None of the studies based their determination that an allegation was false on the legal outcomes of the cases. *See, e.g., id.* The Jones and McGraw study identified several factors it considered in determining whether an allegation was true or false. Those factors included unique or distinguishing details in the sexual encounter and/or the surrounding circumstances, the consistency of the child's words and sentence formation with the child's developmental status, whether the account was from the child's perspective, whether and how the child expressed emotion, the child's psychological response, and elements of secrecy, coercion, and threats in the child's account. The researchers also considered family psychological history and the behavior of the child during the period that the abuse allegedly occurred. *Id.* at 32-34.

233. Jean Goodwin et al., *Incest Hoax: False Accusations, False Denials*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 269, 270 (1978).

234. Horowitz et al., *False Accusations of Child Sexual Abuse* (unpublished manuscript 1985), referred to in Mark D. Everson & Barbara W. Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 230, 231 (1989).

235. Jones & McGraw, *supra* note 36, at 31.

236. KATHERINE C. FALLER, *CHILD SEXUAL ABUSE: AN INTERDISCIPLINARY MANUAL FOR DIAGNOSIS, CASE MANAGEMENT, AND TREATMENT* 22, 126 (1988).

237. Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in *EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW* 145, 155 (Diane H. Schetky & Elissa P. Benedek eds., 1985).

238. Arthur H. Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449 (1986).

239. René Brant & Frances Sink, *Dilemmas in Court-Ordered Evaluation of Sexual Abuse Charges During Custody and Visitation Proceedings*, (paper presented at the 31st Annual Meeting of the American Academy of Child Psychiatry, Toronto, Can., Oct. 12, 1984), referred to in Green, *supra* note 238, at 449.

None of the studies can be said to represent fairly the true rate of false accusations. Some are plagued by extremely low sample sizes so that it is difficult to generalize from these studies to the overall rate for untrue allegations. Additionally, it is not accurate to generalize from a study looking at incest in intact families to situations in which the abuse has been alleged against a neighbor, adult friend, or daycare provider. Furthermore, it is difficult to determine if the studies themselves accurately classified the children as abused or nonabused.²⁴⁰

Nonetheless, the studies do illustrate that abuse investigators need to evaluate seriously the veracity of an allegation to perform a valid investigation. They also show the need to understand exactly how an abuse allegation originated. Courts can use the studies to determine just where an investigator's bias is by asking what the investigator believes the rate of false allegations to be. Courts should give heightened scrutiny to testimony by any interviewer of the child who believes the rate of false allegations to be five percent²⁴¹ or less to see that she has fully explored the possibility of a false allegation. If the investigator has not fully explored that possibility, the information gathered in the interview should not be admitted at trial.

IV. GUIDELINES FOR COURTS WHEN ADMITTING EXPERT TESTIMONY BASED ON CHILD SEXUAL ABUSE INVESTIGATIVE INTERVIEWS

The studies surveyed in Part III reveal that investigative techniques in child sexual abuse cases are unreliable. They illustrate the need for courts to proceed with caution before admitting expert opinion testimony in child sexual abuse prosecutions. Anatomical doll studies should warn courts not to admit testimony based on abuse interviews in which the dolls were used. The children's suggestibility studies should make courts vigilant for signs of suggestiveness in the investigative interviews. The studies on the incidence rate of false allegations should motivate courts to question whether the investigative interviewer thoroughly examined

240. See, e.g., Robyn M. Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668 (1989) (discussing the pitfalls of clinical judgments); see also LEE COLEMAN, *THE REIGN OF ERROR: PSYCHIATRY, AUTHORITY, AND LAW* (1984); 1 ZISKIN, *supra* note 154.

241. Five percent is admittedly a somewhat random figure. It was chosen because an expert who endorses the notion that "children do not lie" or that they "almost never lie" probably has not perceived a need to investigate the possibility that the allegation is false and may be less aware of how her interactions with the child may affect the child's account of abuse. For instance, many child protection team manuals exhort the investigators to "presume that the child is telling the truth." See, e.g., Mary Wells, *Guidelines for Investigative Interviewing of Child Victims of Sexual Abuse*, in *SEXUAL ABUSE OF CHILDREN IN THE 1980s* 53 (1986).

the possibility that the child had a motive for producing a false allegation. In short, the research studies illustrate that courts should adhere to conventional evidentiary analysis when admitting hearsay and expert opinion testimony in child sexual abuse prosecutions.²⁴²

Part IV provides courts with some concrete guidelines that will aid them in assessing investigative interviews. There are good reasons for courts to provide a screening function for evidence in child sexual abuse cases. Rather than allowing a "battle of the experts," courts should make preliminary findings about the reliability of the evidence because of the harm to innocent defendants and because the judicial process is potentially harmful to children who have not in fact been abused.²⁴³ Courts should also consider the damaging effect to a child who has actually been abused but where there has been an inept investigation.

A further reason why courts should provide a screening function is that heightened judicial scrutiny will pressure investigators to improve their techniques. Prosecution experts are intimately tied to the decision to prosecute. The Pro Child House in Charlotte, for example, has weekly meetings with the prosecutor's office.²⁴⁴ This interdisciplinary model of cooperation is practiced in a growing number of communities in the United States.²⁴⁵ If the court systematically screens out improperly conducted investigations, it will have a beneficial impact on how children are interviewed by these investigative agencies. One reason that abuse allegations are so superficially investigated is that agencies are chronically underfunded and overwhelmed with cases. However, sloppy investigations have the effect of externalizing the agencies' costs by overburdening the courts, the prosecutors' offices, the penitentiaries, and the defendants; they also do great harm to the children involved.

242. See *supra* Part II (discussing the legal doctrines implicated when courts consider the admissibility of child sexual abuse investigative interviews).

243. See Moisy Shopper, *Letter to the Editor*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 799 (1989). Shopper, a psychologist who testified for the defense in a case, commented:

I would suggest that the children were traumatized by repeated interviews with different interviewers all eager to prosecute and collect allegations but untrained and unaware of their overzealous and coercive attitudes. . . .

To treat false allegations as actuality is not a harmless error, although we have yet to fully research and document the extent of that harm. When there are false allegations the very investigative and prosecutory process, well intentioned but zealously pursued, needs to be recognized as being potentially as harmful as actual sexual abuse. Both are overstimulating, both serve to sexualize relationships, both interfere with and distort the child's relationship with adults, and both undermine the child's developing ego abilities.

Id.

244. Telephone Interview with Rebecca Friend, *supra* note 226.

245. *Id.*; see also Bulkley, *supra* note 19, at 210; Robert E. Cramer, *The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse*, 40 U. MIAMI L. REV. 209 (1985).

The social science research demonstrates that courts should expand the *Wright* Court's list of pertinent factors²⁴⁶ when determining whether to admit expert testimony based on a child sexual abuse investigative interview. This Note suggests five additional indicia of reliability for courts to consider.

First, testimony based on investigative interviews in which anatomically detailed dolls were used should not be admitted into evidence. Proponents of doll-based interviews have not carried their burden of proof in demonstrating that the dolls are reasonably relied upon as indicators of abuse.²⁴⁷ The doll studies demonstrate that significant percentages of nonabused children interact sexually with anatomically detailed dolls. If the court decides not to exclude categorically assessments obtained with the use of the dolls, it should still do so in cases where it was the only assessment tool used. Over-reliance on any one tool is not valid. In addition, courts should be particularly vigilant for other signs of suggestiveness when evaluating an interview where dolls were used.

Second, the court should determine whether the interview(s) were unduly suggestive and leading, as the questions asked may undermine the reliability of the answers received. There is a need for courts to scrutinize child sexual abuse investigations because the research on children's suggestibility has shown that children are suggestible and because child advocates and child protection manuals have advocated using suggestive and leading interviewing techniques.²⁴⁸ Although social science researchers on children's suggestibility have reached varying conclusions—from finding that most children are resistant to suggestion²⁴⁹ to finding that children tend to weave fantasy into reality²⁵⁰—the mainstream of the research has found that children can be motivated to lie²⁵¹ and that they will modify their stories to fit an adult's perception.²⁵² Particularly if the child's first statement about abuse occurred while being interviewed by an abuse evaluator, then a suggestive interview severely undermines any confidence that the abuse allegation is legitimate. Courts should examine not only the actual content of the investigator's questions, but also evaluate the investigator's behavioral factors that could have influenced

246. *Idaho v. Wright*, 110 S. Ct. 3139, 3150 (1990) (listing spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate, but excluding physical evidence of abuse, as factors to consider in admitting hearsay). See *supra* note 70 and accompanying text.

247. See *supra* Part III(A).

248. See *supra* notes 161-205 and accompanying text.

249. See Saywitz, *supra* note 181, at 5-6.

250. See WAKEFIELD & UNDERWAGER, *supra* note 26, at 85.

251. See Ceci, *supra* note 164, at 22.

252. See *supra* Part III(B)(2).

or coerced the child to make an abuse allegation. Courts need to consider whether the investigator appeared to be pursuing an agenda or whether there were other indications of interviewer bias.²⁵³

Third, the court should check whether a full psychological history was obtained from the child both before and after the alleged abuse and whether developmental tests were administered. Understanding a child's behavioral characteristics exhibited before the abuse allegation was made gives the investigator a better understanding of the child's current behavior. Such an investigation can help to determine whether the child had been previously abused²⁵⁴ or if there are other factors in the child's life that can account for a child's symptom formation, such as a divorce or custody dispute or other life disrupting events.²⁵⁵ The developmental tests provide a certain amount of objective information about the child, thus enhancing a clinician's ability to understand a child's behavior. Such objective tests can also help guard against a clinician's pursuit of an agenda and to weed out problems created by the interviewer's biases.²⁵⁶

Fourth, the court should ask whether the investigator has looked at the underlying family dynamics. Requiring investigators to evaluate the family dynamics and to do full psychological and developmental evaluations of the children will lessen the chance that motives to fabricate will go undiscovered or that adult misperceptions are at the root of the child's abuse allegation.²⁵⁷ The abuse investigator needs to have examined as fully as possible how the child's abuse allegation originated and to what sort of questioning the child has already been subjected before the evaluator's interview to ensure that other sources have not contaminated the child's abuse allegation.²⁵⁸

Finally, the court should consider whether the investigator has adequately considered the possibility of a false allegation. This last factor reflects on the probable accuracy of the investigator's diagnosis.²⁵⁹

Sometimes, the abuse investigators do not adequately document their investigations and the court is thus unable to determine the adequacy of an investigation. However, that lack of documentation in itself

253. See *supra* notes 210-24 and accompanying text.

254. Previously abused children are one group who have been identified as being susceptible to false allegations. See, e.g., Jones & McGraw, *supra* note 36, at 31.

255. See *supra* notes 237-39 and accompanying text.

256. See *supra* notes 218-23 and accompanying text.

257. See *supra* notes 175-86 and accompanying text.

258. See *supra* note 224 and accompanying text.

259. See *supra* notes 227-29 and accompanying text.

suggests that the investigation was inadequate. The best sort of documentation would be videotapes,²⁶⁰ so that a court could see fully just how a child's story was elicited—whether there were verbal and behavioral suggestions, whether the child was subjected to repetitive and coercive questioning, and whether the child gave her own account or merely agreed to some of the interviewer's suggestions.

CONCLUSION

Courts need to recognize that even when investigations are thorough and professional, a certain percentage will be false-positives and a certain percentage will be false-negatives. Human psychology is complex and our abilities to know what has happened to a given child are limited. However, we do have the capabilities and knowledge to investigate abuse allegations with much more sophistication than is currently done by the majority of child protection teams. We owe it to children and to innocent defendants to apply what we know.

We need to stop approaching the problem of child sexual abuse emotionally. It is proper to acknowledge that child abuse is repugnant and repulsive. However, because it is an issue where it is so difficult to separate out our moral revulsion when evaluating whether an allegation is true or false, it can be difficult to sift through the evidence and arrive at a just result. This Note is written with the hope of being one step toward achieving more just results.

260. Suggesting that the interviews be videotaped does not mean that these taped interviews should be admissible at trial.