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## A Suggestion on Suggestion

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# A suggestion on suggestion

BY RICHARD D. FRIEDMAN AND  
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"The Suggestibility of Children: Scientific  
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**Young children** have historically been viewed as particularly vulnerable to suggestion. Within the mainstream scientific community, scholars agree that young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others. At the same time, children may hesitate to disclose matters such as sexual abuse without significant prompting. In some circumstances, these frailties aggravate the already difficult task of determining whether a child's statement is truthful. This matter is of immense concern because of the large number of young children who are interviewed each year during the course of abuse and neglect investigations. The vulnerabilities of young children have far-reaching implications for the juvenile and criminal justice systems. Arguably, these vulnerabilities may affect how an investigator should interview the child; whether she should be allowed to testify in court; whether her hearsay statements should be admitted; whether expert evidence concerning her vulnerability should be admitted; and whether a criminal conviction based principally on her testimony should be allowed.

Recently, however, a number of scholars have vigorously criticized this mainstream view. These scholars have chastised scientific researchers for fueling what they deem to be a backlash against believing children's claims of abuse. They believe that for at least two reasons the results of the scientific research have little bearing on the real world. First, they argue that there is scant empirical evidence to support the assumption that child-abuse interviewers often employ highly suggestive interviewing techniques that are potentially damaging to the accuracy of children's statements. Second, they argue that these techniques, even if commonly used in interviews, would not result in suggestibility errors of the magnitude that scientific studies suggest. Those studies, Thomas Lyon says, "neglect the characteristics of child sexual abuse that both make false allegations less likely and increase the need to guard against a failure to detect abuse when it has actually occurred."

In our full *Cornell Law Review* article, we summarize and analyze the principal findings of psychological research concerning children's suggestibility as well as other factors that may affect the credibility of a child's allegation of abuse. We demonstrate that what Lyon characterizes as a "new wave" of research is actually a broad and long-standing scientific mainstream. We argue that the results of this research do, indeed, raise significant concerns for the real world of abuse and abuse investigation and thus engender significant legal implications.

Part I of the full article briefly describes the history and current state of research into children's suggestibility. In this part, we argue that, although psychological researchers disagree considerably over the degree to which the suggestibility of young children may lead to false allegations of sexual abuse, there is an overwhelming consensus that children are suggestible to a degree that, we believe, must be regarded as significant. In presenting this argument, we respond to the contentions of revisionist scholars, particularly those recently expressed by Professor Lyon. We show that there is good reason to believe the use of highly suggestive questions remains very common, and that these questions present a significant possibility that children will make false allegations even on matters such as sexual abuse.

Part II develops a framework, using Bayesian probability theory, for considering the findings described in Part I. We argue that there is merit to the traditional — and constitutionally compelled — view that an inaccurate criminal conviction is a far worse result than a failure to reach an accurate conviction, and that this perspective should inform the design of legal systems. With this in mind, we explain that even relatively slight probabilities of false allegations are potentially significant. Moreover, we show that the very substantial probability that a child who has been abused will fail to reveal the abuse tends, perhaps counter-intuitively, to diminish the probative value of an allegation of abuse when it is actually made.

In the discussion below, taken from Part III of the longer article, we turn to discussion of the legal implications of our analysis.

## Suggestive interview techniques

Scientific research demonstrates that suggestive questions, including techniques such as coaching, bribes, and threats, increase the probability that the child will make an allegation of abuse regardless of whether it actually occurred. If in the end the child would make an allegation, then for two reasons it is preferable that this occur without suggestive questioning. First, an unprompted allegation is more powerful, persuasive evidence than a prompted allegation and therefore more likely to lead to a conviction if the defendant is in fact guilty. For this reason, the self-interest of the investigative and prosecutorial authorities should lead them to avoid suggestive questions when possible. Second, if the child does make an unprompted allegation, it is unlikely to result in an inaccurate conviction, because in most circumstances children are very unlikely to make a false allegation without suggestive questioning.

It is preferable, therefore, to avoid suggestive questioning until the child has told all that she is likely to tell without suggestion. But for at least two reasons we do not believe that investigators should avoid suggestive questioning altogether. First, the information that they gain through suggestive questioning may be useful for purposes other than criminal prosecution — for example, the determination of custody arrangements or the appropriateness of a restraining order. Because the governing standard of persuasion is lower in these settings than in criminal prosecutions, information obtained by suggestion is more likely to be decisive than in a criminal setting. Second, even in criminal prosecutions, an allegation procured by suggestive questioning may, depending particularly on the strength of the rest of the case, be decisive in carrying the prosecution's burden of persuasion.

We recommend, therefore, that investigators avoid suggestive questions until they are confident that the child has told all she is likely to tell without prompting. Interviewers should attempt to limit repetition of closed (i.e. yes/no) questions within the interview, and investigative authorities should, to the extent feasible, avoid multiple interviews with multiple interviewers. Furthermore, interviewers should adopt categorical rules against the use of techniques that have

been demonstrated to create particularly significant risks that a child will make a false allegation. Thus, interviewers should not offer rewards or other positive reinforcement for favored answers, threaten punishment or create negative reinforcement for disfavored ones, vilify the accused, or (unless the child has raised the matter first) refer to statements by the child's peers. Though suggestive questions are sometimes useful, the use of these techniques is always improper.

There is nothing particularly novel about these recommendations. Although some interviewers may ignore them in practice, they are essentially textbook principles, much elaborated in manuals for interviewers — including one by the National Center for the Prosecution of Child Abuse, in cooperation with the National District Attorney's Association and the American Prosecutor's Research Institute. Interestingly, for all that Lyon and other child advocates contend that suggestive questioning is often necessary to prompt an accurate statement and that (nevertheless) troublesome questioning does not often occur in real practice, they do not argue anything different. They do not, for example, argue that investigators should feel free to ask suggestive questions without restraint.

## Witness taint and competence

In *State v. Michaels* (642 A.2d 1372, 1378 [N.J. 1994]), the New Jersey Supreme Court held that if the defendant presents "some evidence" that the [child's] statements were the product of suggestive or coercive interview techniques," then the prosecution must demonstrate by clear and convincing evidence at a pretrial "taint hearing" that, "considering the totality of the circumstances surrounding the interviews, the statements or testimony [of the child] retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques." If the prosecution fails to satisfy this burden, then the court must exclude the child's testimony, as well as her prior statements alleging abuse.

Some courts outside New Jersey have occasionally followed *Michaels* in requiring

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taint hearings, but more commonly courts simply consider these issues in determining the competency of the child to give testimony. For our purposes, the difference is not particularly significant. Either way, the bottom-line issue is whether the court should preclude the child from giving live testimony about the abuse because she has been subjected to a substantial degree of suggestion.

Although Ceci coauthored the *amicus* brief that some have credited with persuading the *Michaels* court, we agree in general with Lyon and John E.B. Myers that children's suggestibility should not usually prevent them from being heard as witnesses, even if the circumstances indicate that the child was subjected to strong forms of suggestion. We have two basic reasons for reaching this conclusion.

First, a child's statement alleging abuse has significant value in proving that abuse. Nothing we have said indicates the contrary. Our argument supports the proposition that the suggestibility of the child *may* account for her allegation of abuse in some circumstances. The allegation itself is thus not conclusive evidence that abuse occurred. But the allegation may yet be important, even decisive evidence, at least when there is other evidence supporting it. In our longer article, we have argued that in some settings there is a greater than minuscule probability that the child would make the allegation even though it was false, and therefore the statement is not conclusive evidence, or nearly conclusive evidence, that the abuse occurred as described by the child. But we have not argued that the statement should not alter a reasonable fact-finder's assessment of the probability of guilt. Plainly, it is often very significant evidence, even in the face of significant suggestion.

Second, we believe that the dignity of the child is fostered by allowing her to tell her story first-hand in the proceeding that will resolve the truth of her allegation.

Against these considerations, three basic arguments may be made for excluding the testimony of the child. We will call these the reliability argument, the best evidence argument, and the wrongful conduct argument.

1. According to the *reliability argument*, on which *Michaels* principally depended, if the child has been subjected to significant suggestion, her testimony may be so unreliable that it should be rejected. We certainly agree that often the child's testimony may not be reliable in the sense of being virtually conclusive. Indeed, in some circumstances, the testimony may not even be reliable in the weaker sense that the denominator of the likelihood ratio — the probability that the child would testify as she has even though the testimony is false — is very small. But notwithstanding some judicial statements to the contrary, reliability in neither sense is, or should be, the general standard for the admissibility of live testimony. Rather, the governing principle is that, at least within broad bounds, the credibility of witnesses is for the jury to determine.

In an earlier age, courts excluded the testimony of many potential witnesses, including the parties themselves, on the ground that bias or some other factor would make their testimony unreliable. The modern, vastly preferable view recognizes that such an exclusionary approach has huge costs in loss of valuable information. Cross-examination, impeachment, rebuttal, and recognition by the fact-finder of defects of the testimony — sometimes with the assistance of expert testimony — are the mechanisms that we hope will prevent the testimony from leading the fact-finder astray. Testimony of the parties is extremely unreliable, if for no reason other than self-interest, but it is universally allowed today. Indeed, a criminal defendant has a constitutional right to present his own testimony, even, in at least some circumstances, if it has been tainted by suggestion. In general, witnesses who claim firsthand knowledge do not have to pass through a reliability screen, even when testifying against a criminal defendant. Witnesses with a grudge against the defendant, witnesses whose perception of the events at issue may have been impeded by stress, bad lighting, or weak eyesight, witnesses with faulty memory, and witnesses who have been offered some inducement (such as a reduction of sentence) to testify — all these are allowed to testify about what they assert they perceived, without the court first determining that their evidence is reliable. Courts should not hold the testimony of children to a more stringent standard.

A reliability standard for the admissibility of testimony misconceives the basic theory of evidence. To warrant admissibility, an

individual item of evidence does not have to point reliably in the direction the proponent claims. "A brick is not a wall," and every witness need not hit a home run, in the classic aphorisms. That is, a single piece of evidence including the testimony of a witness, does not have to support the prosecution's entire case but need only provide one of the building blocks for the case. Prosecution evidence, not reliable in itself because there is a substantial probability that it would arise even if the defendant were innocent, may in conjunction with other evidence make an overwhelming case.

The better standard is whether the prejudicial potential of the evidence outweighs the probative value. It must be constantly borne in mind that the child's testimony that abuse occurred does have substantial probative value. Even if the child was subjected to strong forms of suggestion, the child is significantly more likely to testify to a given proposition if that proposition is true than if it is false, and no research suggests otherwise. In some cases, that probative value may be decisive.

What then of prejudice? The principal prejudice concern is that the jury will overvalue the testimony by so much that the truth-determination process is benefited by exclusion. But to our knowledge, the scientific research provides no indication that juries are likely to overvalue the testimony of a child to this degree. It may well be that, especially absent explanation of the research on suggestibility, a jury would tend to underestimate the probability that the child would make the allegation if it was false (the denominator of the likelihood ratio). Such an error would tend to cause the jury to over-assess the probative value of the testimony. It is much more doubtful, however, that the jury would over-assess the probative value to such an extent that admission of the evidence is worse for the truth-determining process than denying the jury access to this information. After all, jurors are capable of understanding the problem of suggestibility and taking it into account in assessing the testimony, and experimental evidence suggests that they do. Excluding the evidence, which has some probative value, guarantees that the jury will under-assess it. Those who argue for this result, notwithstanding the usual rule that credibility is for the jury, should have the burden of demonstrating that the uncertain prospect of jury over-assessment is significant enough to warrant exclusion.

Moreover, treating a witness as incompetent is a blunderbuss, which should be used only with great caution. We believe that other methods can usually limit the danger of juror overestimation without relying on this weapon. Two of these methods are discussed below. One is expert explanation of suggestibility to educate the fact-finder as to the vulnerability of the evidence. The other, for extreme cases only, is judicial refusal to enter judgment of guilt if the child's allegation provides the only substantial evidence pointing to guilt and the court concludes that there clearly is a significant danger that the allegation was the product of strong suggestion.

We acknowledge that in some contexts, such as coerced confessions and identifications made after official suggestions, courts have spoken of unreliability of testimony as a factor warranting exclusion. We think, however, the argument is generally misplaced, and that, to the extent exclusion is appropriate in those contexts, it is better justified by the two other arguments discussed below.

2. The *best evidence argument* does not rely on the proposition that the evidence is more prejudicial than probative. Rather, it is based on the "best evidence" principle, the proposition that exclusion of proffered evidence is warranted in some settings because it may induce the creation of better evidence. To the extent that interviewers — whether private individuals or government agents associated with the prosecution — regularly conduct interviews of children with the anticipation that prosecutors will use them in abuse cases, the threat of exclusion of the child's testimony for undue suggestiveness may inhibit them from being so suggestive. We believe that this factor, rather than concerns about trustworthiness, underlies the doctrine — invoked often but rarely with success — that in-court eyewitness identification testimony may be so tainted by prior suggestiveness as to be constitutionally inadmissible.

This consideration plays a significant role in the realm of child witnesses. Nevertheless, given the affirmative considerations weighing in favor of admissibility, we do not believe it usually suffices to justify exclusion of the child's testimony.

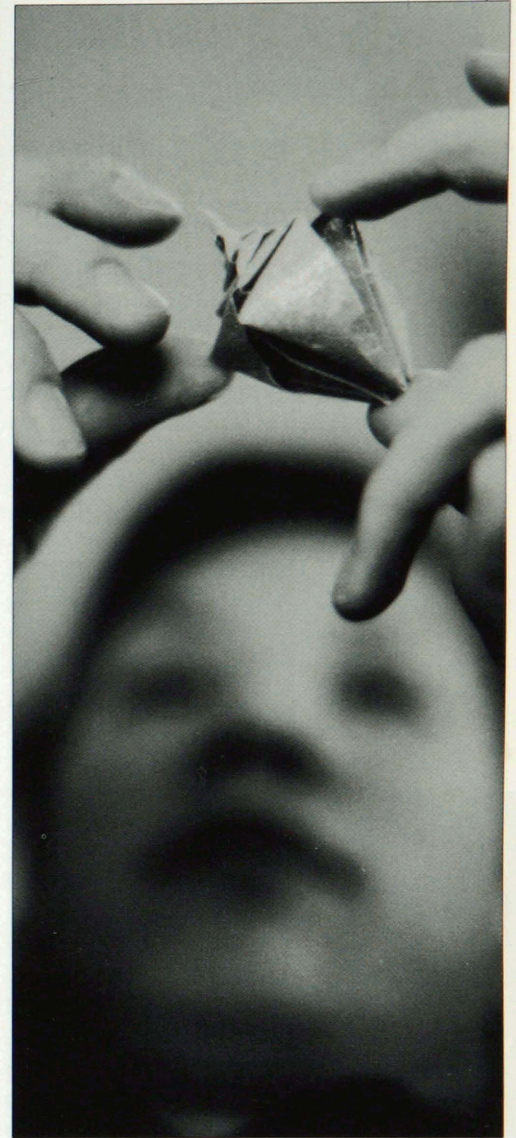
For one thing, many professional interviewers, even those inclined to assist the prosecution, may already have considerable incentives not to conduct interviews in an unduly suggestive manner.



Strong suggestiveness, as we have pointed out, is in some circumstances counterproductive in that it reduces, rather than increases, the useful information yielded by the question. It also makes the child's statements less persuasive. Moreover, strong suggestiveness opens the statements up to attack by defense experts and defense counsel. In this light, it is not clear that the threat of exclusion will add very much incremental incentive to avoid undue suggestion.

Furthermore, as we indicated in Part I, suggestive questioning has a proper role in investigations of child abuse, because in some settings it generates reports of abuse that open-ended questions might not. Investigations often look not only towards criminal prosecutions, but towards civil proceedings aimed at protecting the child and others. It may be unfair to the interviewer, and in any event it will likely chill her investigation, if she is put on a tightrope — one step too passive, and she may miss a truthful report of abuse; one step too aggressive, and the court will exclude the child's testimony.

A best evidence rule, using the harsh sanction of exclusion of evidence, depends on predictability, which requires that a rule operate in a crisp, bright-line manner. We have argued that categorical rules are possible with respect to ploys, such as bribes, threats, ridicule, and peer pressure, that research has shown to create particularly significant risks of false allegations. Generally, however, delicate, fact-based judgments are more appropriate in this area than bright-line rules. Interviewers must take the circumstances of the particular case into account in deciding the degree of suggestiveness appropriate at any given point in a given interview. The interviewer must balance the risk of losing information by remaining too open-ended against the risk of producing false information by being too suggestive.

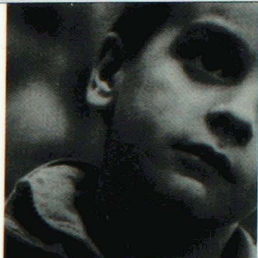


In short, the best evidence argument may warrant excluding the child's testimony in extreme cases, in which any reasonable interviewer should know that her questioning was unduly suggestive. We believe, however, that it would be difficult or impossible to make the court's decisions both predictable and sensible if they exclude the child's testimony in less extreme cases.

3. The *wrongful conduct argument* contends that the prosecution should not benefit from evidence that it or those associated with it secured by acting in a reprehensible way. It thus resembles the argument made by Justice Holmes and others in support of the exclusionary rule for evidence secured by unconstitutional search, that it is "less evil than some

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*Strong suggestiveness, as we have pointed out, is in some circumstances counter-productive in that it reduces, rather than increases, the useful information yielded by the question. It also makes the child's statements less persuasive. Moreover, strong suggestiveness opens the statements up to attack by defense experts and defense counsel.*



criminals should escape than that the government should play an ignoble part.” We do not dispute the principle, but we believe it has rather narrow application in the realm of child interviewing. When an interviewer recklessly or intentionally follows a course that raises a significant risk of leading a child to a false memory of abuse, the interviewer’s conduct may be deemed sufficiently wrongful to provide a strong argument for exclusion of the child’s testimony. But we do not contend that this degree of irresponsibility characterizes most interviews, even most highly suggestive ones.

In sum, the arguments for exclusion of the child’s testimony have substantial weight only in extreme cases, and even then only the best evidence and wrongful conduct arguments carry significant force. The reliability argument, the one principally emphasized by *Michaels*, is unpersuasive. Thus, in extreme cases, when the interviewing technique violates clearly established norms or amounts to an intentional or reckless usurpation of the child’s memory — and *Michaels* appears to have been such a case — exclusion is justifiable. In other cases, it is not.

## Hearsay

Often the child makes an allegation before trial, but does not testify at all at trial or does not testify to the full substance of the earlier allegation. If the prosecutor offers the prior statement into evidence the defendant will likely object that it is barred by the rule against hearsay and by his right under the Sixth Amendment to the Constitution to “be confronted with the witnesses against him.”

In recent years, most jurisdictions have relaxed the application of the hearsay rule so far as it would exclude out-of-court statements by children that allege abuse and are offered to prove the abuse. Some courts have accomplished this end by stretching the limitations on the hearsay exceptions for excited utterances and for statements made for medical diagnosis or treatment. Others have invoked the residual or “catch-all” exception to the hearsay rule now expressed in Federal Rule of Evidence 807. Also, some states have adopted hearsay exceptions specifically tailored for children of “tender years.” Because the Supreme Court has, to a large extent, conformed the confrontation right to the prevailing law of hearsay, the Confrontation Clause as now construed poses only a slight additional barrier to

admissibility; the Clause will be satisfied if the statement fits within a hearsay exception that is deemed “firmly rooted” or, if the statement fails to meet that test, if it is deemed to have sufficient “particular guarantees of trustworthiness.”

Indeed, the Court has repeatedly stated that hearsay law and the confrontation right protect “similar values,” and the principal value perceived is the need to weed out unreliable hearsay evidence from the reliable. According to the Court, the confrontation right is “primarily a functional right that promotes reliability in criminal trials.” Thus, jurisdictions taking a receptive attitude towards hearsay statements by children alleging abuse against them have done so on the grounds that the statements are reliable. In the case of a statement made by a very young child, two factors have been particularly influential — first, the apparent absence of a motive for the child to lie and, second, the apparent unlikelihood in some settings that the child could develop a plan to deceive or to concoct her account if it did not in fact reflect abuse she had actually suffered.

The scientific research, however, indicates that in some circumstances children’s statements are not particularly reliable. Compared to general hearsay, a statement made by a child who has been subjected to strong forms of suggestion may be notably unreliable. The apparent absence of a motive to lie is of significance only to the extent the defendant, in attempting to reconcile the fact that the child made the statement with his theory that the statement is false, contends that the child lied. The defendant may, however, contend principally not that the child lied but that suggestive questioning led her to believe honestly that the assertion was truthful. Also, suggestive questioning may make it far more plausible that the child would state a false account of abuse that one would not otherwise expect from a young child who was not abused. For obvious ethical reasons, researchers have refrained from trying to inculcate false memories of abuse; however, there is ample anecdotal evidence that field interviewers sometimes ply child witnesses with information that could be construed as indicative of sexual abuse. Some of this information, if later incorporated into the child’s disclosure, would be considered outside her ordinary realm of knowledge, and so viewed by fact-finders as a strong indication that abuse occurred.

We emphasize two points. First, we are not arguing that all children's statements are unreliable. How reliable a statement is depends on all the circumstances, including — as we have suggested above and throughout our longer article — the nature of the interviewing process to which the child has been subjected. For example, sometimes a child, without any prompting, articulates a detailed and plausible account of abuse soon after the alleged event and, still without prompting, consistently adheres to that account. In such a situation, the child's statement may be very reliable.

Second, even if the statement appears unreliable, that does not necessarily mean that a court should exclude it under an ideal doctrine of hearsay and confrontation. Friedman has argued for some years that the law of hearsay and confrontation is in a most unsatisfactory state. The chief errors, in his view, lie in conforming the confrontation right to the law of hearsay and in perceiving both as based principally on the need to improve the reliability of evidence. This conjunction results both in hearsay law that is often overly restrictive and in a confrontation right that is insufficiently protective of defendants. We do not attempt to develop this argument in full here. But a system that, according to Friedman, would be far superior to the present one could admit many hearsay statements by children without making the admissibility decision depend on a determination of reliability.

## Expert evidence

Traditionally, courts have been loath to allow expert witnesses to testify about factors affecting the credibility of percipient witnesses. Courts were afraid that experts would usurp one of the central functions of the jury, to evaluate the credibility of witnesses. In recent decades, however, courts have been more willing to allow experts to testify about factors that might affect the credibility of a witness in a given situation and that might otherwise be insufficiently understood by a jury. In criminal cases, either the prosecution or the defense may urge the need for expert testimony. For example, a defendant may introduce expert testimony on the vulnerabilities of eyewitness testimony. A prosecutor might introduce expert testimony concerning rape trauma syndrome to help explain the complainant's

delay in making her allegation of rape.

Similarly, in child sexual abuse cases, prosecutors often offer, and courts often admit, expert evidence to bolster the complainant's credibility. As Myers has stated, "Courts permit expert testimony [among other reasons] to explain why sexually abused children delay reporting abuse, why children recant, why children's descriptions of abuse are sometimes inconsistent, why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following the assault, [and] why a child might run away from home. . . ."

Myers endorses the use of such testimony, which often fits within the rubric of child abuse accommodation syndrome, on the ground that "[t]o the untutored eye of a juror, such behavior may seem incompatible with allegations of sexual abuse." We agree that such testimony on behalf of the prosecution is proper at least after the defendant attacks the child's credibility — and sometimes even before, if the grounds on which the jury might doubt her credibility are already apparent.

Often, however, it is the defense in child sexual abuse cases that wishes to introduce credibility-related expert testimony, usually to show that the child's statements may have resulted from suggestive questioning. Many courts have admitted such testimony, but some courts still exclude it or confine it rather narrowly. Lyon, while not expressing any opinion on the frequent use by prosecutors of expert testimony to bolster a child's credibility once it has been attacked, expresses doubt about the need for defense expert testimony on suggestibility.

We believe that if evidence supports the conclusion that an interviewer subjected the child to a given set of suggestive influences, then the court should allow the defense to present the testimony of a well-qualified expert as to the plausible effects of those influences.

The research on suggestibility discussed in this article gives an expert ample basis on which to express an opinion that should easily satisfy the "gatekeeping" scrutiny of the trial court as outlined by *Daubert v. Merrell Dow Pharmaceuticals Inc.* (509 U.S. 579, 597 [1993]). Indeed, if the "general acceptance" test of *Frye v. United States* (293 F. 1013, 1014 [D.C. Cir. 1923]), which still prevails in some states, is sensibly applied, such expert opinion should easily satisfy that test as well. As Part I of our full article shows, this research



has used the scientific method of testing, has been extensively subjected to the rigors of publication and review, and has gained broad acceptance in the scientific community. Naturally, as in any area of the social sciences (and some of the hard sciences as well), there is not unanimity on all significant points, and on some points there is a range of interpretations. But a court should not exclude testimony by a qualified expert reflecting an opinion held by a clear majority, or even by substantial proportion, of professionals in the field simply because others hold divergent views. If that were the standard for exclusion, fact-finders would virtually never have the benefit of the experts' knowledge. Thus, we find unpersuasive the rather mysterious opinion of the Eighth Circuit in *United States v. Rouse* (111 F.3d 561 [8th Cir. 1997]), which held that the trial court had acted within its discretion in allowing the defense expert to testify on the basis of his own research, but not on the basis of the research of others.

The question remains whether, and when, an expert's opinion may assist the jury sufficiently to warrant admissibility. Ultimately, this question depends on an assessment of the probative value and prejudice of the expert evidence. Lyon contends that "jurors likely already know" that "children are suggestible." This argument may seem odd, coming near the end of a long article contending that children are not as suggestible as some interpretations of the research indicate. But Lyon's point seems to be that, while children are indeed suggestible to some degree, jurors do not need expert advice to tell them that, and such advice may in fact cause jurors to overestimate substantially the degree of suggestibility. Myers makes a similar point, saying that "some adults" think children are more suggestible than they actually are.

One can easily accept the proposition — which Lyon supports with survey evidence — that many, even most, potential jurors understand that children are more suggestible than adults, and yet recognize the value of expert evidence. Two points are fairly obvious. First, the same

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surveys reveal that a substantial number of jurors probably do *not* recognize this suggestibility differential. Second, recognizing that children are suggestible, or more suggestible than adults, says little about *magnitude* — how suggestible they are. Perhaps more fundamentally, our full article shows that the suggestibility of children is not a one-dimensional matter that can be summarized adequately by saying that children are [pick your adjective] suggestible. How plausibly a given child might have alleged abuse even if the abuse did not occur depends on the particular situation, including the extent and nature of the suggestive influences to which the child was subjected. There is no reason to assume that the average potential juror, much less the overwhelming majority of jurors, has a good understanding of all the insights that decades of psychological research have yielded. For example, research shows that repeated questions may have a pronounced effect on a child, and that children subjected to suggestive questioning rather frequently make false statements about physical events that would be of central concern to them.

Furthermore, there is little reason to assume that expert evidence on this subject will be unduly prejudicial. There is no plausible basis for believing that allowing the defense to present expert testimony will bias the jury in favor of the defendant, in the sense of making the jury impose an inappropriately high standard of persuasion on the prosecution. The danger to which Lyon seems to be pointing is the possibility that the jury will give excessive weight to the expert's testimony of suggestiveness. But there appears to be no sound basis for concluding that this danger is real — and that the jury will not only overvalue the expert's testimony but will do it so much that the testimony will be substantially more prejudicial than probative. Juries have convicted defendants in many cases in the face of expert testimony on suggestibility presented by the defense.

In assessing the danger of overvaluation, it is important to bear in mind a major theme stressed both Lyon and by us: the degree of a child's testimony is extremely dependent on the particular circumstances

of the case. Thus, if the defense expert is performing her function properly, she will testify only to suggestive influences that the jury could reasonably conclude, on the basis of all the circumstances, were present in the case. For example, if there is no basis for concluding that the child was threatened with negative consequences for failure to describe abuse, then research on the effects of such threats would be irrelevant to the case and should not be included in the expert's testimony. If the defense expert does not exercise self-restraint, the court can ensure that her testimony does not stray beyond the case at hand.

And, of course, the prosecution is not toothless. The prosecutor may cross-examine the defense expert. In doing so, the prosecutor should attempt to expose any over-generalizations that the expert has made or any dubious assumptions on which the materiality of her evidence depends. Moreover, as stated previously, if the defense impeaches the child's testimony, whether by expert testimony or otherwise, the court should allow the prosecution to present its own expert testimony supporting the child's credibility. Likewise, this testimony should be limited to the issues made material by the setting of the case — specifically, to the grounds raised explicitly or implicitly by the defense for being skeptical of the child, or to those that would likely appear plausible to the jury even absent the defense's contention. In short, the adversarial system, through the use of cross-examination and rebuttal witnesses, is resilient and can adequately expose the weaknesses of expert opinions offered by either side.

There does not seem to be any substantial reason to assume that jurors will tend systematically to overvalue defense expert evidence significantly but undervalue prosecution expert evidence — and to do so by enough to warrant exclusion. Some jurors may be confused by the "battle of the experts," of course, and some might unthinkingly treat conflicting expert evidence as a wash, which they can safely ignore. But these are always potential problems when expert witnesses contest each other, whatever the subject. Such problems do not justify insisting that the fact-finder make decisions of enormous importance on the basis of intuition, uninformed by the insights that decades of scientific research have to offer.

## Videotaping interviews

The issue of videotaping interviews with a child witness has generated much discussion. Myers has ably summarized many of the factors for and against videotaping. On the positive side of the ledger, Myers notes that videotaping gives an interviewer incentive to use proper techniques and preserves a record of such use. Perhaps because he is writing from the vantage point of the interviewer, Myers does not mention another equally important argument: if the interviewer does use suggestive techniques, the videotape will reveal it. We have emphasized that the degree to which a child's suggestibility accounts for her allegation of abuse depends very largely on the extent and nature of the suggestive influences to which she has been subjected. If all interviews with the child are videotaped, it will substantially reduce, and in some cases effectively eliminate, uncertainty on this score. An interviewer's notes are an unsatisfactory alternative; if historical accuracy is the goal, there is no substitute for electronically recording interviews.

Of course, informal communications with the child, such as by her parents or teachers, will not ordinarily be videotaped. These informal communications are often significant sources of suggestion. Similarly, though it might be feasible for a therapist to tape sessions with a child if there is suspicion of abuse, taping therapy sessions as a matter of course would probably be inappropriate. Moreover, even if therapy sessions could be appropriately recorded, the patient-psychotherapist relationship is privileged, which would probably preclude evidentiary use of the tape. Thus, in many cases, a practice of videotaping investigative interviews does not expose all serious possibilities of suggestiveness. But the intractability of some aspects of the problem is a weak argument against mitigating the problem where that is possible. Videotaping considerably narrows the problem of determining the extent of suggestive influences to which the child is subjected, and that is a great benefit.

The arguments on the other side of the ledger are, once again, based in large part on the fear that the jury will overvalue the evidence in favor of the defense. And once again, we believe that keeping potentially useful information away from the jury is an inappropriate means of ensuring that the jurors will not place too much weight on it. The prosecution has ample opportunity,



through the interviewer and expert witnesses, to counter any argument raised by the defense.

Judge Richard Posner has argued the sheer length of interviews leaves an unattractive choice between presenting hours of tape to the jury and risking distortion through editing. But this concern is present whenever a significant amount of evidence is scattered throughout a much larger amount of minimally probative chaff. In practice, we may expect each side to select the excerpts it feels presents its case in the most favorable light and to present evidence and arguments minimizing the importance of the excerpts used by the other side. The court has authority to restrain the parties if the process consumes too much trial time in relation to the probative value of the evidence.

Thus, in accord with most professionals in this field, we believe that it is good practice for official interviewers to videotape interviews conducted with children during an investigation or prosecution of suspected child abuse. Moreover, we believe that, absent exigent circumstances, interviewers should be required as a matter of law to tape such interviews. This is the standard practice in many jurisdictions, and there is no reason why it should not be made mandatory.

In jurisdictions where taping is not required as a matter of law, courts may nevertheless craft evidentiary rules based on a "best evidence" principle that give interviewers strong incentives to follow the practice. The most stringent of these rules would exclude the child's statements, or even her testimony, if the interviews were not taped (again, and throughout this discussion, absent exigent circumstances). This rule, although harsh on its face, would quickly amount in effect merely to an almost absolute requirement of taping. Officials would quickly learn that it is easier to tape than to invite exclusion of evidence, and as a result, very little evidence would actually be excluded. A somewhat softer rule, followed by some courts, makes the failure to videotape the interview a significant factor in determining admissibility of the child's statements or testimony. Other variations would seek to impose the costs of failure to videotape the interview on the prosecution, but without relying on exclusion. Thus, given the failure to record, a defense expert could be allowed to testify as to the potential effect of all suggestive influences to which the child may have been subjected. The court might also instruct the jury that the



interviewer failed to follow proper practice and that the jury should take the failure into account in evaluating the possibility that the child's statement or testimony was the product of suggestion.

## Guidance and control of the jury

Finally, we come to the end of a trial. Judges in criminal cases in federal court, and in some other jurisdictions, are free to comment to the jury on the weight of the evidence, including factors bearing on the credibility of witnesses. Thus, if a witness is a drug or alcohol abuser, or a former accomplice of the defendant, or if she has received or hopes to receive favorable treatment in return for her testimony, the judge may comment on how these factors affect her credibility. Similarly, judges often comment generally about the factors that are believed to affect the credibility of eyewitnesses.

Suppose, then, that a child testifies or makes an admissible out-of-court statement alleging abuse, and evidence supports the conclusions that she was previously subjected to highly suggestive influences. The question arises whether the judge should comment on these influences as potentially affecting her credibility. In most

*Continued on page 108*



*The question remains whether, and when, an expert's opinion may assist the jury sufficiently to warrant admissibility. Ultimately, this question depends on an assessment of the probative value and prejudice of the expert evidence. Lyon contends that "jurors likely already know" that "children are suggestible."*

cases, we do not believe that any judicial comment — either supporting or adverse to the child's credibility — is necessary. We believe it usually suffices if the court affords the parties adequate opportunity to present expert evidence on the likely impact of these influences. In an egregious case involving highly suggestive influences, some judicial comment might be appropriate.

Along with the power to comment on the credibility of witnesses, a trial court also has the authority in a criminal case to refuse to enter judgment on a verdict of guilt, and to remit the prosecution to a new trial, if it is persuaded that the verdict is contrary to the great weight of the evidence. In making this determination, the court is free to consider the credibility of witnesses. Therefore, an accused might argue that a child's statement or testimony is so tainted by suggestion that a verdict of guilty cannot stand. We believe that this argument should usually, but not always, fail.

Suppose that the case is marked by two factors. First, apart from the child's testimony or prior statements, the prosecution has insubstantial evidence as to at least one element of the charge, mostly likely to the fact of abuse. Second, the child was subjected to highly suggestive influences. As Part II of our full article shows, the first factor means that the prosecution must rely heavily on the child's allegation. Indeed, the allegation must carry the prosecution's case the very large distance from the presumption of innocence to the constitutionally mandated standard of proof beyond a reasonable doubt. And the court might conclude, on the basis of the second factor, that the probability that the child would make the allegation even though it is false cannot reasonably be perceived as minuscule. Putting these two considerations together, the court might well conclude that a jury could not reasonably find that the prosecution satisfied its standard of persuasion.

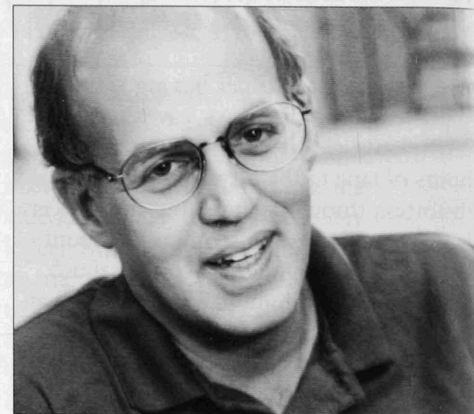
If prosecutors select cases appropriately, cases with both these features will be rare. The judicial power to reject a verdict, even if usually kept in reserve, can be a powerful force ensuring that the prosecutors do indeed make careful selections.

## Conclusion

Research on the suggestibility of children reveals that the degree to which children are suggestible depends to a large extent on how investigators conduct interviews. It also indicates that abuse investigations are often conducted in such a way as to enhance the dangers of suggestibility. We have presented a set of policy recommendations that we believe are consonant with those findings. These recommendations are, we believe, even-handed, reflecting a bias for neither the prosecution nor the defense. The proof of our even-handedness may be that we have exposed ourselves to a two-flank attack. Prosecutors may complain about our recommendations that in some circumstances children's statements regarding abuse should be regarded as unreliable for hearsay purposes, that courts should often be receptive to expert evidence emphasizing the suggestibility of children, that videotaping of interviews should be mandatory, and that occasionally the weakness of a child's statement or testimony should cause the court to refuse to enter a judgment of guilt. Defense lawyers, on the other hand, are likely to complain about our recommendation that, in all but egregious cases, the child should not be rendered incompetent to testify because she was exposed to strongly suggestive interviewing techniques.

We suspect that scholars who have recently challenged the legal significance of the psychological research emphasizing children's suggestibility are not motivated principally by antipathy to policy proposals such as the ones we have presented. Rather, we suspect that they are concerned about a matter of mood. In an earlier day, children's statements were often not taken seriously. As a result, child sexual abuse was under-reported and under-prosecuted. Thus, there is a concern that scientific research emphasizing that children are suggestible will be taken for more than it is worth and lead us back to pervasive and unwarranted devaluation of children's statements and testimony.

We recognize this concern. But we balk at any approach that makes it more difficult to recognize, and thus mitigate, problems in the way children alleging abuse are interviewed. And we confess that we do have a bias of an intellectual sort, which underlies our predilection in favor of allowing both the child and experts to testify. Accurate fact-finding, we believe, is not best achieved by trying to maintain and regulate the fact-finders' ignorance. The best cure for possible misunderstanding is not to keep an area in darkness, but rather to bathe it in light.



**Richard D. Friedman** earned a B.A. and a J.D. from Harvard and a D.Phil. in modern history from Oxford University. His research focuses principally on evidence and U.S. Supreme Court history. He is the general editor of *The New Wigmore*, a multi-volume treatise on evidence, and has been designated to write the volume on the Hughes Court in the *Oliver Wendell Holmes Devise History of the United States Supreme Court*. Professor Friedman clerked for Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit. He was then an associate for the law firm of Paul, Weiss, Rifkind, Wharton & Garrison in New York City. He came to the Law School as a visiting professor in 1987 from *Cardozo Law School* and joined the faculty in 1988. Professor Friedman is the *Ralph W. Aigler Professor of Law*.

**Stephen J. Ceci**, Ph.D., holds a lifetime endowed chair in developmental psychology at Cornell University. He is the author of approximately 300 articles, books, and chapters, and he has given hundreds of invited addresses around the world. Ceci's honors and scientific awards include a Senior Fulbright-Hayes Fellowship and an NIH Research Career Scientist Award, the IBM Supercomputing Prize, three Senior Mensa Foundation Research Prizes, and the Arthur Rickter Award for his work on children's testimony. He currently serves on seven editorial boards. The American Board of Forensic Psychology gave Ceci its Lifetime Distinguished Contribution Award for 2000, and the American Psychological Association announced he is the recipient of its 2002 Lifetime Distinguished Contribution Award for Science and Society. Ceci is a fellow of seven different divisions of the American Psychological Association, as well as a fellow of the American Association of Applied and Preventive Psychology, British Psychological Society, and the American Psychological Society. His book (co-written with Maggie Bruck) *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (1995) is an American Psychological Association (APS) bestseller, and winner of the 2000 William James Award for Excellence in Psychology. He is past president of the Division of General Psychology, and a member of the Advisory Board to the National Science Foundation's Directorate for Social, Behavioral, and Economic Sciences. Ceci is a member of the National Academy of Sciences Committee on Behavioral, Cognitive, and Sensory Sciences, and a former member of the Board of Directors of APS. Ceci is the founder and editor of the new APS journal *Psychological Science in the Public Interest*, which is partnered with *Scientific American*.