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State of New Jersey v. Michaels: The Due Process Implications Raised in Interviewing Child Witnesses

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State of New Jersey v. Michaels: The Due Process Implications Raised in Interviewing Child Witnesses

I. INTRODUCTION

The crime of sexual abuse of children has increasingly become an alarming social problem. This fact is affirmed by a rising number of sexual abuse prosecutions nationally and the recent focus on the subject by legal experts. But in zealous attempts to punish the individuals who perpetrate such heinous crimes, prosecutors often seek convictions of defendants who may have been wrongfully accused. Remembering that the victims of these crimes are children is crucial. Their mental processes are not yet fully developed, and they can be easily influenced to believe what others want them to believe. This pliancy, at the hands of investigators, can be devastating to a defendant in a criminal sexual abuse prosecution. The prosecution can, and often does, elicit incriminating statements from child witnesses and can use them to convict the defendant, regardless of the truth of such statements. The focus, therefore, must be on the interview techniques used by the state's agents, as in the decision of *State v. Michaels*.[1] Indeed, the interview techniques that were employed in *Michaels* led to the reversal of a conviction.

This comment will suggest that constitutional due process protections should be extended to child interviews. That is, defendants accused of sexual abuse of children should be given extra, "last-resort"[2] due process protection.[3] The stage

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1. 642 A.2d 1372 (N.J. 1994).

2. This idea of due process as a "last-resort" protection for defendants stems from the applicaton of the "incorporation doctrine." Simply stated, incorporation is the process through which the Supreme Court has made most of the Bill of Rights guarantees of the United States Constitution applicable to the states. At this point, the Court has given virtually all of the guarantees relating to criminal procedure to defendants in state court proceedings, through "selective incorporation." This method of incorporation did not automatically institute all Bill of Rights guarantees into state proceedings, but rather only those "fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions." Palko v. Connecticut, 302 U.S. 319, 328, 58 S. Ct. 149, 153 (1937). Thus, a state criminal defendant will initially claim that his Bill of Rights guarantees, essentially his Fourth, Fifth, and Sixth Amendment rights, have been violated, since they are specifically applicable to state court proceedings. Upon a denial of protection based on those asserted rights, the defendant may then fall back on the Due Process Clause of the Fourteenth Amendment to claim that his right to a fair trial has been violated.

3. Interviews alone should not trigger a due process implication. It is only when the state attempts to introduce evidence from such interviews that the clause becomes applicable. As the United States Court of Appeals for the Seventh Circuit noted:

> [u]nlike a warrantless search, which may violate a constitutionally protected interest in privacy, the identification of a suspect—whether fair or unfair—does not necessarily affect any constitutionally protected interest of the suspect. The Due Process Clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup—or perhaps

of the prosecution in which incriminating evidence is obtained from witness interviews certainly warrants constitutional protections, no less than interrogations of the accused or witness identifications. Pretrial interviews provide prosecutors with an opportunity to infect the entire proceeding through unfair and unscrupulous processes.

The Due Process Clause of the Fourteenth Amendment protects the defendant like a procedural "guardian angel," ensuring he receives a fair trial. Yet, confusion may still exist concerning what form of protection the clause offers to a defendant. In an excellent statement of the scope of due process protections, the United States Supreme Court has explained, in a comprehensive manner, how the clause has traditionally worked in a criminal setting:

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.[4]

With this concept in mind, this comment will show how the procedures used against the accused in *Michaels* violated her "fundamental fairness" rights and how the Due Process Clause could be used to deter this behavior in the future. A process must be adopted by courts in which the unfair practices surrounding interviews with child witnesses are eliminated, yet the interest of the nation's criminal justice system in prosecuting child abusers is maintained.

II. THE CASE

A. Factual Setting and the Lower Courts' Decisions

Due to the bizarre and unthinkable allegations made by the State of New Jersey, the criminal prosecution of Kelly Michaels was one of intense public scrutiny and emotion. The defendant was a college student who took a job at a daycare center, with the intention of it being only temporary while in pursuit of an acting career.[5] Michaels had no prior experience as a teacher, yet worked for a seven-month period at Wee Care Day Nursery to the satisfaction of her

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> obtained as a result of the showup—is offered at the criminal trial. If that evidence is unfairly prejudicial, the trial judge may have a constitutional obligation to exclude it, or possibly to mitigate its impact by an appropriate cautionary instruction to the jury. But if a constitutional violation results from a showup, it occurs in the courtroom, not in the police station.

United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir.), *cert. denied*, 421 U.S. 1016, 95 S. Ct. 2424 (1975). This concept also applies to police procedures used before trial in obtaining evidence through investigatory interviews.

4. Lisenba v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 290 (1941).

5. *Michaels*, 642 A.2d at 1374.

employer.[6] She was assigned to a classroom in the basement that was separated from adjacent classrooms by a single vinyl curtain. One of Michaels' responsibilities was to supervise approximately twelve children during their "nap time" in this classroom.[7] For seven months, no complaints were received regarding Michaels' job performance or personal behavior from any of her supervisors, coworkers, students, or parents of students. A single statement, however, from one four-year-old student made on the day of Michaels' resignation from Wee Care, led to an Essex County investigation that would eventually produce three indictments totaling over 230 counts of alleged sexual abuse of Wee Care children.[8] After Michaels had been sentenced to forty-seven years in prison by the trial court, she appealed to the Superior Court, challenging the propriety of the prosecutors' behavior in investigating the complaint. Indeed, after a reversal of her conviction, this was the sole issue presented by the state to the Supreme Court of New Jersey.

As in most cases of sexual abuse, the key witnesses in the *Michaels* case were the alleged victims—children between the ages of three and six. The investigators had few other leads to pursue in prosecuting Michaels: other staff members were completely unaware of any misconduct, and the state introduced only limited physical or medical evidence of abuse.[9] Thus, prosecutors had only the alleged child victims and Michaels herself from whom to extract crucial incriminating evidence. A nine-hour interview with Michaels resulted in a strong denial and a consensual polygraph test which indicated she was not lying.[10] The investigators then commenced extensive interviews with the Wee Care children. These interviews, the subject of the future *Michaels* controversy, culminated in accounts by the children of a wide variety of sexual abuses committed by Kelly Michaels, "rang[ing] from relatively minor accounts of

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6. *Id.* at 1374.

7. *Id.* at 1374.

8. *Id.* at 1375. The statement made by the student was at his pediatrician's office while his temperature was being taken rectally. The student stated, in the presence of his mother and a nurse, "this is what my teacher does to me at nap time at school." *Id.* at 1374. Upon questioning by the nurse and his mother, the boy identified his teacher as Michaels and added that not only did she undress him and take his temperature daily, but also did the same to one of his classmates. The mother notified the New Jersey Division of Youth and Family Services, who, in turn, notified the Essex County Prosecutor's Office. *Id.* at 1375.

9. *Id.* at 1375; *see also* State v. Michaels, 625 A.2d 489 (N.J. Super. 1993), *aff'd*, 642 A.2d 1372 (1994): "Testing at the Federal Bureau of Investigation laboratories of a wooden spoon and piano benches for inculpatory evidence proved negative." 625 A.2d at 496. Also, the Appellant's Brief noted that "[n]ot only did Wee Care and church personnel suspect nothing, no physical or medical signs of abuse could substantiate the allegations. No parent, during the time that Ms. Michaels was at Wee Care, ever suspected something was amiss, nor did any report cuts, bruises, or other physical manifestations of abuse to a pediatrician. No parent during this period noticed any traces of peanut butter or jelly, or detected the odor of human waste, on a child . . . ." Brief for Appellant at 6, State v. Michaels, 625 A.2d 489 (N.J. Super. 1993), *aff'd.*, 642 A.2d 1372 (N.J. 1994) (No. 199-88T4).

10. *Michaels*, 642 A.2d at 1375.

touching to virtually incomprehensible heinous and bizarre acts."[11] Some children went so as far as to allege Michaels performed some of the acts in the presence of other adults. Some claimed they had told their parents as the events occurred.[12] Again, the investigation was the first news, to both the staff members and parents, of any such allegations of abuse. Nonetheless, the prosecutors were convinced they had obtained the evidence needed to convict Michaels. The trial jury was similarly convinced.[13]

On appeal to the Superior Court of New Jersey, Appellate Division, Michaels contended "the questioning of Wee Care Children was so suggestive and coercive that they were rendered incompetent to testify."[14] The Superior Court found not only the questioning of the children but also the entire interview surroundings displayed tactics strongly disfavored by child psychologists and other academicians.[15] The court reversed the conviction on other prejudicial errors,[16] but held that, if the state desired to retry the case, a pretrial factual hearing would be required to ascertain the effects of the improper interrogation techniques upon the reliability of the children's statements.[17] If the procedures used were found to compromise their reliability, then the statements would be inadmissible at trial.[18] The Supreme Court of New Jersey granted a motion by the state for reconsideration of this specific holding.

B. New Jersey Supreme Court Decision

In considering the necessity of a pretrial hearing, the Supreme Court of New Jersey focused exclusively on the conduct of the state's interviewers. More specifically, the court faced the issue of "whether the interview techniques employed by the State could have undermined the reliability of the children's statements and subsequent testimony, to the point that a hearing should be held to determine whether either form of evidence should be admitted at trial."[19] Having this sole issue presented for consideration, the court consulted the vast

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11. *Michaels*, 625 A.2d at 495-96. There were accounts of Michaels inserting eating utensils into rectums, penises, and vaginas of children. Some students said she played the piano while nude, and others accused her of defecating on the floor. There were also allegations of intercourse, fellatio, cunnilingus, and nude "pile-up games." *Id.*

12. *Id.* at 495-96.

13. Michaels was convicted at trial on 115 counts related to the sexual abuse of the children, including aggravated sexual assault, sexual assault, endangering the welfare of children, and terroristic threats. She was sentenced to forty-seven years in prison. *Michaels*, 642 A.2d at 1375.

14. *Michaels*, 625 A.2d at 493.

15. *Id.* at 510-16.

16. The Superior Court of New Jersey, Appellate Division, reversed Michaels' conviction on the following grounds: (1) certain expert testimony of a child psychologist was found inadmissible; and (2) certain in-chamber proceedings conducted by the trial judge removed the bench from the required level of impartiality. *See Michaels*, 625 A.2d at 496-502, 505-08.

17. *Id.* at 516-17.

18. *Id.* at 516.

19. State v. Michaels, 642 A.2d 1372, 1375 (N.J. 1994).

scholarly authority on the weaknesses of children as witnesses and the effects that disfavored interview techniques have on these witnesses.[20]

The court noted that child witnesses had not received excessive special attention in the past; that they are not, as a class, to be treated as inferior witnesses; that age, per se, is not determinative of the ability of a witness; and that children are able to give accurate accounts of sexual abuse in certain cases.[21] Despite this equal treatment, the court recognized that child sexual abuse cases are inherently suspect, unless special consideration is given to ensure the child witnesses are not unduly influenced by investigators.[22] This special consideration stems from the generally accepted notion that children's minds and psyches are not as fully-developed as adults'.[23] As a result, children are more easily influenced by authority figures, often leading to a reshaping of events in a child's mind from what he initially believed to be true. Because of such suggestibility,[24] the court noted several elements that indicate influenced statements from a child witness.[25] Among the more important factors listed were: lack of objectivity by the interviewer (bias against the accused); use of leading questions; lack of control of outside influences on the child; vilification or criticism of the accused; and use of repeated questions, bribes, threats, rewards, praise, and peer pressure. The court recognized the academic, judicial, and governmental authorities on the subject that disfavor these same techniques.[26] Thus, the court concluded a strict review of the *Michaels* interrogation procedures was necessary to ensure that the witnesses' recollections were not distorted into producing unreliable and inadmissible evidence.[27]

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20. *Id.* at 1379. The court consulted "academic, professional, and law enforcement" sources and cited its previous decisions to obtain the proper authority on the subject.

21. *Id.* at 1376.

22. *Id.* at 1376.

23. *See generally* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 Ariz. L. Rev. 927 (1993); Lucy S. McGough, Child Witnesses: Fragile Voices in the American Legal System (1994); Thomas L. Feher, *The Alleged Molestation Victim, the Rules of Evidence, and the Constitution: Should Children Really be Seen and Not Heard?*, 14 Am. J. Crim. L. 227 (1987); Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychol. Bull. 403 (1993); Julie A. Dale, *Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 Alb. L. Rev. 187 (1993).

24. Suggestibility is one's susceptibility to suggestion, which is defined as "presentation of an idea, especially indirectly, as through association of ideas, bringing before the mind for consideration, action, solution, or the like. It is in the nature of a hint or insinuation, and lacks the element of probability. Facts which merely suggest do not raise an inference of the existence of the fact suggested, and therefore a suggestion is much less than an inference or presumption." Black's Law Dictionary 1433 (6th ed. 1990).

25. *Michaels*, 642 A.2d at 1377 (citing Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 729-30, 730-31 (1991); John E. B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 Pac. L.J. 801, 885-89 (1987)).

26. *Michaels*, 642 A.2d at 1377-78.

27. *Id.* at 1378-79.

Turning to a factual analysis of the Wee Care interviews, the court found textbook examples of what the cited authorities had vehemently condemned. Indeed, the court previewed the prosecution's downfall early in its opinion when it stated that "[t]he interrogations undertaken in the course of this case utilized most, if not all, of the practices that are disfavored or condemned by experts, law enforcement authorities and government agencies."[28]

First, the court noted that the large majority of the incriminating statements made by the children were not the products of "spontaneous recollections" or "free recall," which are found by courts to be most reliable and accurate.[29] Further, none of the children provided any specific details, although the prosecutors repeatedly tried to elicit them.[30] A lack of interviewer objectivity was also found. The interviewing agents failed "to pursue any alternate hypothesis that might contradict an assumption of defendant's guilt," and failed "to challenge or probe seemingly outlandish statements made by the children."[31] The prosecutors also asked the children leading questions[32]—those "that contain a suggestion of what the answer should be."[33] A large majority of the children interviewed were asked questions phrased as if the sexual misconduct actually occurred, instead of questions designed to have the children describe events in their own words.[34] In addition, investigators had subjected the children to repeated and incessant questioning on the same subject, even after the children expressed their desire to end the interview or to not answer the specific question posed.[35] The record also included instances of threats, bribes, scolding, praise,

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28. *Id.* at 1379.

29. *Id.* at 1379 (citing Idaho v. Wright, 497 U.S. 805, 826-27, 110 S. Ct. 3139, 3152 (1990); State v. Michaels, 625 A.2d 489, 515 (N.J. Super. 1993), *aff'd*, 642 A.2d 1372 (1994)).

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

31. *Id.* at 1379-80.

32. *Id.* at 1380.

33. John B. Myers, Legal Issues in Child Abuse and Neglect 55 (1992).

34. For example, consider the following excerpt given in the Appendix of the court's decision:

Investigator (I): Did she put the fork in your butt? Yes or no?

P.I. (child witness): I don't know, I forgot.

(I): You forgot? O.K. Did she do anything else to your bottom?

Michaels, 642 A.2d at 1388. Also, consider the following, from the Amicus Brief for the defense:

Q: Did you ever see Kelly have blood in her vagina?

A: This is blood.

Q: Kelly had blood in her vagina.

A: Yeah.

Q: She did? Did you ever get any of that blood on your penis?

A: No. Green blood.

Q: Did you ever see any of your friends get blood on their penis from her vagina?

A: Not green blood but red blood.

Brief for Appellant, *supra* note 9, at 7-8.

35. For example, consider the following excerpt:

Investigator (I): If what you tell me goes along with what they [other children] said, then I know they were all telling the truth. You know what I mean, jellybean.

B.M. (child witness): I want to leave.—Now!

rewards, and the use of peer pressure by the interviewers.[36] Finally, the

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(I): Did you ever go in the music room? The room with the big black piano?
B.M.: No.
(I): Did you ever see Kelly play Jingle Bells on the piano?
B.M.: No.
(I): How did she look when she was sitting at the piano?
B.M.: I never saw her play the piano.
(I): Did she look like this when she was sitting at the piano?
B.M.: No.

Michaels, 642 A.2d at 1391. Also, consider the following:

(I): What was it that she did to you?
P.I.: I hate you. I hate you.
(I): Oh, come on, if you just answer that you can go.
P.I.: I hate you.
(I): No you don't.
P.I.: Yes I do.
(I): You love me I can tell. Is that all she did to you, what did she do to your hiney?
(I2): What did she do to your hiney? Then you can go.
P.I.: I forgot.
(I2): Tell me what Kelly did to your hiney and then you can go. If you tell me what she did to your hiney we'll let you go.
P.I.: No.
(I): Please.
P.I.: O.K. O.K. O.K.
(I): Tell me now.
P.I.: O.K.
(I): What did Kelly do to your hiney?
P.I.: I'll try to remember.
(I): What did she put in your hiney?
P.I.: The fork.
(I): Did that hurt a lot? Did you bleed?
P.I.: Nope.

Id. at 1388.

36. *Id.* at 1380. Consider the following comments made by the interviewers:

(I): Don't be a baby. You're acting like a nursery school kid. Come here. Come here a second. B.M., come here. We're not finished yet. Sit down.
. . .
(I): Come on do you want to help us out? Do you want to help us keep her (Kelly) in jail?
. . .
(I): I'll let you hear your voice and let you play with the tape recorder. I need your help again, buddy. Come on.
P.I.: No.
. . .
(I): Just tell me—show me what happened with the wooden spoon. Let's go.
P.I.: I forgot.
(I): No you didn't. I'll tell you what, let's just go to the P.I. doll, we won't waste any time.
(I 2): Now listen you have to behave.
(I): Do you want me to tell him to behave?
(I 2): Are you going to be a good boy? Huh? You have to be good. Yes or no?

interviewing team engaged in "vilification"—criticism and condemnation—of

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P.I.: Yes.

. . .

(I): I talked to all of [the kids in your class] and they were telling me stuff Kelly was doing. Anyway I like talking to you older guys better because you're better to talk to, more like grownups than the little kids in the nursery school. So I'm asking you a favor—

. . .

(I): That's o.k. . . . Believe me she is not going to be coming out of jail. She's not going to be hurting you guys anymore. That's why I'm really proud of you, and E.N. and L.J. . . .

. . .

(I): I'd hate having to tell your friends that you didn't want to help them.

Id. at 1387-91. Also, consider the following excerpt from the Appellant's Brief:

(I): 8C (child witness), come on. Don't be so unfriendly. I thought we were buddies last time.

(8C): Nope, not any more. . .

(I): We have gotten a lot of other kids to help us since I last saw you.

(8C): No, I don't have to.

(I): Oh, come on. Did we tell you that Kelly is in jail?

(8C): Yes. My mother already told me.

(I): Did I tell you that this is the guy that arrested her? This is the guy that put her there. Did I tell you that? . . . Well, we can get out of here real quick if you just tell me what you told me last time, when we met the last time.

(8C): I forgot.

(I): No, you didn't. I know you didn't.

(8C): I did, I did!

(I): Naw, come on!

(8C): I forgot.

(I): . . . I thought we were friends last time.

(8C): I'm not your friend anymore!

(I): How come?

(8C): Because I hate you!

(I): You have no reason to hate me. We were buddies when you left.

(8C): I hate you now!

. . .

(I): Let's get done with this quick so we could go to Kings and get your popsicles. Sit down before you fall. Come on, just a couple of more minutes . . . Real quick, will you just tell me [or show me] what happened with the wooden spoon? Let's go.

(8C): I forgot.

(I): I'll tell you what, let's just go to the 8C doll. We won't waste any time.

(I2): Now listen, you have to behave.

(I): Do you want me to tell him to behave? Are you going to be a good boy. Huh? While you are here, did he [I2] show you his badge and his handcuffs? . . . Back to what happened to you with the wooden spoon. If you don't remember words, maybe you can show me.

(8C): I forgot what happened too.

(I): You remember. You told your mommy about everything: about the music room and the nap room and all that stuff. You want to help her stay in jail don't you? So she doesn't bother you anymore and so she doesn't tell you any more scary stories. . .

Brief for Appellant, *supra* note 9, at 86-87.

Michaels and failed to control the amount of outside influence presented to the children by their parents or classmates.[37]

Normally, remote and sporadic examples of the type of interview techniques as employed by the New Jersey prosecutors would not have invoked such a strict review. In *Michaels*, however, the New Jersey Supreme Court stated that "[t]he interviews of the children were highly improper and employed coercive and unduly suggestive methods. As a result, a substantial likelihood exists that the children's recollection of past events was both stimulated and materially influenced by that course of questioning."[38]

The court very briefly took notice of its judicial duty of ensuring that evidence admitted at trial is reliable, recognizing the due process rights of the defendant.[39] The court stated "[i]f crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk."[40] This suggestion is both logical and convincing. The Due Process Clause should preserve the guarantee of fundamental fairness to all defendants, regardless of the manner of evidence collection. The court in *Michaels*, however, did not expound further on its claim of possible due process implications in cases of improper interrogations of child witnesses. The reversal of Michaels' conviction was not on the basis of a due process violation, and thus the court created confusion as to whether a constitutional claim would in fact have been viable. Also, the court's dependence on a famous decision of the United States Supreme Court involving pretrial identifications, *Manson v. Brathwaite*,[41] was a bit unsettling. This reference to *Manson* was correct in citing a rule requiring reliability of testimony, but the court truncated its reasoning too soon. The court did not address the issue of how the *Manson* rule, which requires identification testimony to be reliable, can be applied to a non-identification problem as that of *Michaels*. Unlike the *Manson* decision, *Michaels* dealt with evidence of guilt or innocence, and not the mere identification of the accused. The court failed to provide sufficient justification for making the analogy, although it is reasonable. This analogy, however, can be supported.

After merely suggesting due process protections were at stake, the court then affirmed the appellate court's remedy of a pretrial reliability assessment, should the state decide to retry the case. The justification for such a hearing was found in prior New Jersey and United States Supreme Court decisions.[42] The court noted that when "police or prosecutorial conduct has thrown the integrity of the

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37. *Michaels*, 642 A.2d at 1380. Since the series of interviews occurred over several months, the children were free to discuss the questioning sessions with others.

38. *Id.* at 1380.

39. *Id.* at 1380.

40. *Id.* at 1380.

41. 432 U.S. 98, 97 S. Ct. 2243 (1977).

42. *Michaels*, 642 A.2d at 1381 (citing *Manson*, 432 U.S. at 114, 97 S. Ct. at 2253; Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964); State v. Gookins, 637 A.2d 1255 (N.J. 1994); State v. Hurd, 432 A.2d 86, 95 (N.J. 1981); State v. Sugas, 417 A.2d 474 (N.J. 1980)).

judicial process into question, we have not hesitated to use the procedural protection of a pretrial hearing to cleanse a potential prosecution from the corrupting effects of tainted evidence."[43] The court again referenced the *Manson*-line of decisions to show the similarities between suggestive identification procedures and pretrial investigatory interviews, but again did not base its holding on due process implications. The court cited *United States v. Wade*,[44] reasoning that both pretrial identifications and investigatory interviews are critical stages of a prosecution because they are "riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[45] Because of the overlapping dangers presented, the court validated the requirement of the pretrial hearing, just as in suggestive identification prosecutions. Indeed, the court found the *Michaels* case to be even more deserving of a reliability assessment.[46]

Assuming the state chose to re-prosecute Michaels, the court stressed a need to consider all relevant facts to determine reliability.[47] The court identified several specific factors, especially with regard to children, which had a bearing on this determination.[48] The specific test to be applied if such a hearing arose was outlined by the court: "whether the pretrial events, the investigatory interviews and interrogations, were so suggestive that they give rise to a substantial likelihood of irreparable mistaken or false recollection of material facts bearing on defendant's guilt."[49]

The court recognized that generally "the initial burden to trigger a pretrial taint hearing is on the defendant,"[50] meaning "[t]he defendant must make a showing of 'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques."[51] In a particularly strong

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

44. 388 U.S. 218, 87 S. Ct. 1926 (1967) (holding that a post-indictment lineup, in which the accused was to be identified, was a "critical stage" of the prosecution).

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

46. *Id.* at 1382. The court stated: "We are confronted in this case with pretrial events relating not to the identification of an offender but, perhaps more crucially, to the occurrence of the offense itself." *Id.*

47. *Id.* at 1381.

48. *Id.* at 1381. The factors listed are:

> (1) the person to whom the child made the statement; (2) whether the statement was made under conditions likely to elicit truthfulness; (3) whether the child's recitation exhibits unusual or above-age-level familiarity with sex or sexual functions; (4) post-event and post-recitation distress; (5) any physical evidence of abuse; and (6) any congruity between a defendant's confession or statement.

Id. at 1381 (citing State v. D.R., 537 A.2d 667 (N.J. 1988)). Other factors listed are: "(1) the age of the victim; (2) circumstances of the questioning; (3) the victim's relationship with the interrogator; and (4) the type of questions asked." *Id.* at 1381 (citing State v. Hill, 578 A.2d 370, 379 (N.J. 1990)).

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

50. *Id.* at 1383.

51. *Id.* at 1383 (citing Watkins v. Sowders, 449 U.S. 341, 350, 101 S. Ct. 654, 659-60 (1981)).

condemnation of the prosecution's tactics, however, the court found Michaels had met this burden of triggering the need for the hearing.[52] Assuming the state would go forth with the prosecution, and thus assuming such a hearing would be held, Michaels would have a second threshold to overcome. Once at the hearing, Michaels would be required to established "sufficient evidence of unreliability," and then the burden of redeeming the evidence would shift to the state. The state was given a strict burden, "to prove the reliability of the proffered statements and testimony by clear and convincing evidence."[53] By choosing a clear and convincing standard, the court provided a threshold sufficient to "safeguard the fairness of a defendant's trial without making legitimate prosecution of child sexual abuse impossible."[54]

Finally, the court held that, even if some evidence is found to be reliable on retrial, the duty will then be on the jury to weigh its probative value and credibility. But, because of the intense disapproval of the prosecution's case, this instruction may have, in effect, been a rule solely for future cases. Indeed, almost seven months after the decision, the prosecution in *Michaels* announced that it would not go forward in pursuit of a retrial.

Overall, the decision in *Michaels* provides persuasive authority for other courts to extend due process protection to alleged child sexual and physical abusers, although the Due Process Clause was not the specific source of remedy. The thorough summary of the evidentiary problems involved with respect to child witnesses is very beneficial. The remainder of this comment will discuss

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52. [The] threshold standard has been met with respect to the investigatory interviews and interrogations that occurred in this case. Without limiting the grounds that could serve to trigger a taint hearing, we note that the kind of practices used here—the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions—constitutes more than sufficient evidence to support a finding that the interrogations created a substantial risk that the statements and anticipated testimony are unreliable, and therefore justify a taint hearing.

Michaels, 642 A.2d at 1383.

53. *Id.* at 1383. Because the lack of reliability was already expounded on by the New Jersey Supreme Court, Michaels' duty of shifting the burden to the state at the hearing would have been slight at best. Then the state would be required to show that the evidence possessed independent features of reliability strong enough to "outweigh the effects of the improper interview techniques." *Id.* at 1383.

54. However, considering the forceful language used, the court may have effectively rendered a legitimate prosecution impossible. Consider the court's language:

Our decision today should make clear that the investigatory techniques employed by the prosecution in this case are unacceptable and that prudent prosecutors and investigatory agencies will modify their investigatory practices to avoid those kinds of errors and to conform to those standards that are now accepted by the professional and law enforcement communities.

Id. at 1384. Also, the court stated that "[g]iven the egregious prosecutorial abuses evidenced in this record, the challenge that the State faces is formidable." *Id.* at 1385.

the general concerns with child witnesses in criminal prosecutions and the constitutional due process implications raised by the *Michaels* decision.

III. PRE-*MICHAELS* AUTHORITY ON THE RELEVANT ISSUES

A. Problems with Child Witnesses

The alarming statistics of child sexual abuse incidents have caused great social and political concern.[55] Because of an active media frenzy, state legislatures have moved quickly to increase penalties for such crimes.[56] At first glance, this increasing recognition and concern appears beneficial in that authorities now strive to reduce the frequency of the crime. However, as one commentator recently noted, "an overly emotional response to child sexual abuse compromises efforts to respond to this serious and widespread social problem."[57] The overzealous attempts to curb sexual offenses on children suffer from three significant problems, as it relates to this discussion:

> First, because children are developmentally immature, their allegations of sexual abuse are of limited reliability. Second, most professionals who interview children employ improper interview techniques that often lead to false allegations of sexual abuse. . . . And finally, a considerable proportion of the professionals working in the child abuse field are biased or corrupt.[58]

The suggestibility of children's memories has been a topic of much concern among child psychologists and legal experts,[59] who believe that, due to their credulousness, children may be easily manipulated to give responses not truly intended. With this in mind, various interview techniques have been developed to ensure more reliable testimony from children.

Attention has been drawn also to the various interview techniques either approved or disapproved as ways of eliciting information from child witnesses. Again, experts and courts have recognized those techniques that should be

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55. *See The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806 (1985) [hereinafter Harvard]. This authority asserts that one in five female and one in eleven male children are sexually abused. *Id.* at 806 (citing David Finkelhor, Sexually Victimized Children 53 (1979)).

56. Harvard, *supra* note 55, at 806.

57. John B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 Mich. L. Rev. 1709 (1990).

58. *Id.* at 1711 (citing Hollinda Wakefield & Ralph Underwager, Accusations of Sexual Abuse (1988)).

59. *See* Younts, *supra* note 25; Montoya, *supra* note 23; Feher, *supra* note 23; The Suggestibility of Children's Recollections (John Doris ed., 1991).

avoided to obtain reliable evidence from child witnesses.[60] Such improprieties associated with child interviews were abundant in the *Michaels* investigation.[61]

A third problem, especially in light of the *Michaels* decision, is interviewer prejudice. Studies have shown that incidents of inaccurate reports are most likely to occur when "the interviewer harbor[s] preconceived notions about what had happened."[62] This prejudice is most obvious when the interviewer fails to suggest any explanations other than the accused's guilt, as in *Michaels*. Because of the above mentioned flaws in the judicial framework of child sexual abuse prosecutions, state legislatures and governmental agencies have started to develop solutions toward producing more reliable evidence.[63]

B. Analysis of Modern Due Process Protections

In pertinent part, the Fourteenth Amendment of the United States Constitution mandates that no State shall "deprive any person of life, liberty, or property, without due process of law." In the context of a criminal defendant, the United States Supreme Court has held "criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[64] The majority of the United States Supreme Court's due process discussions in criminal prosecutions have focused on police procedures used to identify a suspect or to extract confessions from accused individuals. A common problem in suspect identification techniques has been the suggestive lineup, often used at police stations. For example, a black individual picked from a lineup comprised of one black and the rest whites would be outrageously suggestive. Generally, courts have held a state may not

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60. For excellent commentaries, see Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181 (1985); James Selkin & Peter G.W. Schouten, The Child Sexual Abuse Case in the Courtroom: A Source Book (James Selkin ed., 1987); Younts, *supra* note 25; Dale, *supra* note 23. The factors most likely to result in unreliable answers are: the presence of police officers, the use of excess leading questions and repeated questions, the use of peer pressure, the use of promises, threats, praise or criticisms, and the failure to control outside influences.

61. *See* State v. Michaels, 642 A.2d 1372, 1379-80 (N.J. 1994).

62. Goodman & Helgeson, *supra* note 60, at 195.

63. One step taken by legislatures to protect defendants from unreliable child testimony is the hearsay statute. For example, see State v. Townsend, 635 So. 2d 949, 953 (Fla. 1994) (stating a hearsay statute is one "enacted to enable trustworthy and reliable statements not covered under any other hearsay exception"). Another protection is the pretrial reliability assessment. For example, the Criteria-Based Content Analysis test provides a means to "evaluate the validity of the child's statement by analyzing its content" before trial. Dale, *supra* note 23, at 200. Finally, various governmental and psychological agencies have given guidelines for interviewers to use to obtain valuable information. For example, see National Institute of Justice, *New Approach to Interviewing Children: A Test of Its Effectiveness*, May (1992).

64. California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984).

"rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction."[65]

The scope of the Due Process Clause in criminal prosecutions, however, is not restricted to identification of accused individuals. The protections run much deeper. Fundamentally, the clause guarantees a defendant the right to a fair trial. To maintain a claim of a due process violation, a defendant must prove some form of wrongful government conduct. More specifically, the United States Supreme Court has recently recognized "the settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause."[66] If the defendant makes a sufficient showing of impropriety, the Due Process Clause of the Fourteenth Amendment then imposes upon courts the duty to examine "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[67] In the context of criminal prosecutions, the Supreme Court has employed the Due Process Clause in two general areas: traditionally, in guaranteeing defendants a fundamentally fair trial; and more specifically, in requiring confession and identification evidence to meet certain standards of reliability.

1. Fairness

Perhaps the seminal case with respect to traditional criminal due process is *Rochin v. California*.[68] In *Rochin*, the Court explained that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[69] Asserting that some police procedures "offend the community's sense of fair play and decency,"[70] the Court enunciated the "shock the conscience test"[71] and overturned a drug conviction based on evidence obtained through pumping the defendant's stomach against his will.

Twenty-five years later, the Court limited *Rochin* and the judiciary's discretion in finding due process violations:[72] "[J]udges are not free, in

65. Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1966).

66. Colorado v. Connelly, 479 U.S. 157, 165, 107 S. Ct. 515, 521 (1986). This case involved not an identification but a confession, which was claimed to be involuntary. In an opinion by Chief Justice Rehnquist, the Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id.* at 167, 107 S. Ct. at 522.

67. Malinski v. New York, 324 U.S. 401, 416-17, 65 S. Ct. 781, 789 (1945).

68. 342 U.S. 165, 72 S. Ct. 205 (1952).

69. *Id.* at 169, 72 S. Ct. at 208 (citing Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 332 (1934)).

70. *Rochin*, 342 U.S. at 173, 72 S. Ct. at 210.

71. *Id.* at 172, 72 S. Ct. at 209.

72. United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044 (1977).

defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'"[73] Rather, courts are limited to applying due process to situations in which the procedures violate the *community's* sense of fairness in judicial procedures.[74]

Additionally, the Supreme Court has extended due process to protect defendants from overbearing governmental influence. In *Chambers v. Florida*,[75] the Court asserted that the Due Process Clause "was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."[76] The Court concluded: "[t]he fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power."[77] Recently, the Supreme Court has confirmed the idea that due process in criminal prosecutions still exists to guarantee fairness in proceedings against the accused at any stage, from arrest to investigation and trial.[78]

2. Reliability

As mentioned above, the Supreme Court has included identifications and confessions among those stages of a prosecution deserving of due process protections. More specifically, the Court's decisions have culminated in a requirement of reliability of the evidence that these prosecutorial devices produce. Focus, therefore, has been on the factual surroundings of the procedures at hand to ensure no improprieties existed, resulting in the wrong person on trial. Because of the similarities of identification procedures to child witness interviews,[79] an analysis of the identification and confession decisions is proper at this point.

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73. *Id.* at 790, 97 S. Ct. at 2049 (citing *Rochin*, 342 U.S. 165, 170, 72 S. Ct. 205, 209).

74. *Lovasco*, 431 U.S. at 790, 97 S. Ct. at 2049.

75. 309 U.S. 227, 60 S. Ct. 472 (1940).

76. *Id.* at 236, 60 S. Ct. at 477. The Court expressed disapproval of "[t]yrannical governments [that] had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak." *Id.*

77. *Id.* at 236-37, 60 S. Ct. at 477.

78. *See supra* note 64 and accompanying text.

79. Consider the analogies given by the Supreme Court of New Jersey: "The law governing the admissibility of eyewitness identification testimony provides a helpful perspective in addressing the concerns at issue here. . . . Like the investigatory interview in a child sexual-abuse case, a pretrial identification procedure can be a critical moment in the course of a criminal prosecution." State v. Michaels, 642 A.2d 1372, 1382 (N.J. 1994) (citing United States v. Wade, 388 U.S. 218, 230, 87 S. Ct. 1926, 1932 (1967)). The court further noted that "the effects of an initially suggestive identification, like those of a coercive or suggestive interrogation, are likely to remain corrosive over time; that is, 'once the witness has picked out the accused . . . he is not likely to go back on his word later.'" *Michaels*, 642 A.2d at 1382 (citing *Wade*, 388 U.S. at 229, 87 S. Ct. at 1933).

The United States Supreme Court extended due process protections to defendants identified in suggestive lineups in the landmark decision of *Stovall v. Denno*.[80] The Court cited due process as a "recognized ground of attack" in suggestive identification cases, due to the risk of "irreparable mistaken identification."[81] The next major decision was *Neil v. Biggers*,[82] in which the Court reaffirmed *Stovall*'s due process implications and protections and laid out guidelines for use in evaluating the likelihood of misidentification resulting from suggestive confrontation procedures.[83]

The most significant decision concerning the Due Process Clause in identification proceedings, however, was the 1977 case of *Manson v. Brathwaite*.[84] Using the reasoning in *Stovall* and the factors in *Biggers*, the Court provided the current rule on admissibility of tainted identifications. The Court concluded "reliability is the linchpin in determining the admissibility of identification testimony."[85] Using the *Biggers* factors to determine reliability and weighing the result against "the corrupting effect of the suggestive identification itself,"[86] the Court upheld the conviction against a due process challenge. The Court's analysis suggests that, regardless of the suggestive nature of the identification techniques used, courts may admit identification evidence if it is found to be reliable.

Many state and lower federal court decisions have applied and interpreted the United States Supreme Court's identification due process decisions.[87] The underlying theme in these decisions is a strong reluctance to overturn convictions by sustaining due process challenges.[88] An argument exists that the Supreme Court's decisions, culminating in *Manson*, have steadily decreased a defendant's

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80. 388 U.S. 293, 87 S. Ct. 1967 (1967).

81. *Id.* at 302, 87 S. Ct. at 1972.

82. 409 U.S. 188, 93 S. Ct. 375 (1972).

83. The factors listed in *Biggers* include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at 199, 93 S. Ct. at 382.

84. 432 U.S. 98, 97 S. Ct. 2243 (1977). In this case, an undercover police officer purchased heroin from a seller and then gave a description of the seller to another officer. The second officer later left a single photo of the defendant in the office of the undercover officer. This photograph was to be used to allow the undercover officer (the witness) to identify the seller of the heroin. Defendant challenged the identification as being overly suggestive since the officer had only his picture from which to choose his suspect.

85. *Id.* at 114, 97 S. Ct. at 2253.

86. *Id.* at 114, 97 S. Ct. at 2253.

87. For example, *see* Harris v. Wyrick, 644 F.2d 710 (8th Cir. 1981); State v. Hurd, 432 A.2d 86 (N.J. 1981).

88. *E.g.*, *Harris*, 644 F.2d at 710; United States *ex rel.* Kirby v. Sturges, 510 F.2d 397 (7th Cir.), *cert. denied*, 421 U.S. 1016, 95 S. Ct. 2424 (1975); Stanley v. Cox, 486 F.2d 48 (4th Cir.), *cert. denied*, 416 U.S. 958, 94 S. Ct. 1975 (1973); Bryant v. Commonwealth, 393 S.E.2d 216 (Va. App. 1990).

due process protections in criminal prosecutions.[89] The *Manson* rule tends to admit nearly all evidence. With "reliability" being the only requirement, courts have been able to look to any corroborating evidence.[90] If evidence is found to be reliable, then the suggestive procedure by which it was gathered becomes irrelevant. This lesser standard of protection has allowed courts "to focus less on the fairness of the pretrial procedures and more on the reliability of the outcomes of those procedures."[91] One commentator has noted the current state of due process in criminal identification cases: "[t]he lower courts have applied the *Stovall-Manson* rule in a manner that routinely permits identifications secured by all but the most outrageous procedures."[92]

IV. DUE PROCESS IMPLICATIONS RAISED BY *MICHAELS*

A. Analysis of the New Jersey Supreme Court Opinion

The *Michaels* court's discussion of the defendant's due process rights did not go far enough with its reasoning. The New Jersey Supreme Court gave the defendant the benefits of a successful due process challenge without expressly

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89. For example, *see* David E. Paseltiner, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 Hofstra L. Rev. 583 (1987); Steven P. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria*, 11 U. Balt. L. Rev. 53 (1981).

90. A distinction must be drawn between corroborating evidence used to sustain a conviction and corroborating evidence used to sustain a finding that a piece of testimony is reliable. A state may introduce other evidence to sustain a conviction based on a suggestive identification. This is the idea behind the harmless error and independent source doctrines. However, the Supreme Court in Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139 (1990), held that corroborating evidence may not be introduced to sustain a finding of reliability of a hearsay statement. Such a statement "must present inherent indicia of reliability before it may be admitted into evidence. Corroborative evidence may not be considered in a trial court's initial determination of whether certain hearsay is reliable." McGough, *supra* note 23, at 147. Thus, while other evidence may be introduced to corroborate a conviction based *in part* on a suggestive identification, it may not be used to help sustain the reliability of an out-of-court statement itself. In essence, the corroborating evidence must be enough to render the substance of the statement reliable despite the suggestive procedure used.

91. Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 261-62 (1991). *See also* Stanley v. Cox, 486 F.2d 48, 52 (4th Cir. 1973) ("Due process does not require that every pretrial identification of a witness must be conducted under laboratory conditions of an approved lineup.") (citing United States v. Davis, 407 F.2d 846, 847 (4th Cir. 1969)).

92. Louis M. Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L.J. 315, 328 n.43 (1984). See also Foster v. California, 394 U.S. 440, 89 S. Ct. 1127 (1969) for the only Supreme Court decision to reverse a conviction based on the suggestiveness of a lineup. In *Foster*, the defendant was initially placed in a lineup with considerably shorter men and, after no positive identification by the victim, was placed in a one-on-one confrontation with the victim. The victim then only made a tentative identification. It was not until a new lineup after the one-on-one confrontation in which the defendant was identified more definitely.

holding the clause to be applicable. The court recognized its duty "to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence."[93] This concern alone, according to the court, implicated constitutional due process. The lack of explanation, however, decreases the strength of this reasoning.

The court did cite *Manson* as support for its position, but erroneously interpreted its holding, stating, "[r]eliability is the linchpin in determining admissibility *of evidence*."[94] While this assertion is a logical extension of the *Manson* standard, it is not a part of the actual holding. This omission may have been inadvertent, or the court may have tried to avoid a constitutional quandary. Whatever the cause for error, the *Stovall-Manson* protections have been expressly extended only to identification questions. *Michaels*, however, is not an identification decision; it dealt instead with substantive evidence of guilt or innocence. Thus, the New Jersey court's reliance on *Manson*, without further clarification, is not an entirely satisfactory explanation for its holding.

B. Extending Due Process Protections to the Michaels*-Type Defendant*

The Due Process Clause should be extended to cases of suggestive or coercive pretrial interviews of witnesses. This should be accomplished by the government interviewers complying with the constitutional notions of fundamental fairness. Procedures should be instituted to minimize the possibility of a person being wrongfully accused and thus denied a truly fair trial. As the *Michaels* court explained, the *Manson* "reliability" rationale should apply. Regardless of the suggestiveness of the interviews, evidence derived should be admitted if it is found to be reliable, because reliable evidence can result in a fair trial under the *Manson* due process rationale, and because of the similarities between an identification procedure and a pretrial interview.

A concern underlying this due process extension, however, is the countervailing interest of the criminal justice system and society in convicting the guilty. Defendants should not escape an otherwise legitimate prosecution because of a small mistake on the state's part. As the United States Supreme Court noted in *Stone v. Powell*,[95] "[w]hile courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[96] The need to preserve highly relevant evidence can be satisfied through a balancing test, as delineated in *Stone*:

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93. State v. Michaels, 642 A.2d 1372, 1380 (N.J. 1994).

94. *Id.* at 1380 (emphasis added). The actual words of the United States Supreme Court were: "reliability is the linchpin in determining admissibility of *identification testimony*." Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977) (emphasis added).

95. 428 U.S. 465, 96 S. Ct. 3037 (1976).

96. *Id.* at 485, 96 S. Ct. at 3048.

> The same pragmatic analysis of the exclusionary rule's usefulness in a particular context was evident in Walder v. United States, . . . where the Court permitted the Government to use unlawfully seized evidence to impeach the credibility of a defendant who had testified broadly in his own defense. The Court held, in effect, that the interests safeguarded by the exclusionary rule in that context were outweighed by the need to prevent perjury and to assure the integrity of the trial process. The judgment in *Walder* revealed most clearly that the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of competing policies.[97]

The same balancing test surrounding the exclusionary rule is applicable in accusations of child sexual abuse. In extending the due process guarantees to cases involving suggestive pretrial interviews of child witnesses, the same two general categories of the Supreme Court decisions must be considered, namely fundamental fairness and reliability.

1. Fairness

As in all criminal proceedings, the due process safety net protects a defendant like Kelly Michaels throughout her trial. Just as in identification cases, the Due Process Clause should also extend to pretrial procedures. Since due process is used to ensure fairness to the accused in identification or confession cases, it should also require fairness in the methods used to obtain evidence from alleged victims of child abuse. There is judicial support for extending the Due Process Clause to this stage of a criminal proceeding. The United States Supreme Court in *Miller v. Fenton*[98] stated that "tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness."[99] The Court further noted "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment."[100]

A due process fairness question clearly arises in the context of suggestive interview techniques. Regardless of one's personal position on the degree of tolerance for police impropriety, it is certain that improperly conducted child interviews can result in unfairness to the accused individual. In applying the

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97. *Stone*, 428 U.S. at 488, 96 S. Ct. at 3049 (citing Walder v. United States, 347 U.S. 62, 74 S. Ct. 354 (1954)).

98. 474 U.S. 104, 106 S. Ct. 445 (1985).

99. *Id.* at 110, 106 S. Ct. at 449.

100. *Id.* at 109, 106 S. Ct. at 449.

fairness notions to the *Michaels* case, the prerequisite of "some sort of 'state action'"[101] is clearly satisfied.[102]

The next question to be asked is what degree of wrongful acts by the state's agents should lead to a dismissal or reversal of a prosecution? The United States Supreme Court answered this question in *Stroble v. California*:

> When this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise.[103]

Even though the acts of the interviewers in *Michaels* would not rise to the level of being "illegal," they did result in the defendant being deprived of a fair trial. Minor uses of leading questions, for example, may not deprive a defendant of a fair trial. But in Michaels' case, the degree of suggestive interviews and the interviewers' clear impartiality bore very heavily on her fair trial rights—the wrongful acts gave the state practically all of its evidence. Therefore, under *Stroble*, all of the pretrial interview techniques used on the Wee Care children would be relevant in a court's resolution of a due process challenge by Michaels.

Next, considering the New Jersey investigators' techniques in light of traditional Supreme Court due process doctrine, a court would probably find a violation of the Due Process Clause. Although no clear definition exists of "the community's sense of fair play and decency" under *Rochin*,[104] or the "canons of decency and fairness which express the notions of justice" under *Malinski v. New York*,[105] Michaels' situation should easily "shock the conscience,"[106] especially considering the public outrage over child sexual abuse. Many people in positions dealing with children—teachers, counselors, doctors, and the like—would readily admit the fear of being wrongfully accused, as was apparently the case with Kelly Michaels. Of course, a determination of fairness will vary according to the specific facts. In a case as extreme as *Michaels*, however, how could it be found fair? How can such procedures possibly comport with the Due Process Clause requirements? Considering the plethora of authority available on interviewing techniques for child witnesses, blatant disregard of such techniques should be heavily disfavored.

What should a court do when there is adequate evidence to convict the accused, besides the tainted interview evidence, yet the defendant claims a

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101. Colorado v. Connelly, 479 U.S. 157, 165, 107 S. Ct. 515, 521 (1986).

102. In *Michaels*, the interviewing detectives, as agents of the state, and their degree of involvement would supply the "necessary predicate" of state action. *Connelly*, 479 U.S. at 167, 107 S. Ct. at 522.

103. Stroble v. California, 343 U.S. 181, 197, 72 S. Ct. 599, 607 (1952).

104. 342 U.S. 165, 173, 72 S. Ct. 205, 210 (1952).

105. 324 U.S. 401, 417, 65 S. Ct. 781, 789 (1945).

106. *Rochin*, 342 U.S. at 172, 72 S. Ct. at 209.

violation of due process rights because of that taint? Should a guilty criminal have his case dismissed because of slight improper acts of the state's agents? The vagueness of the "fairness" standard may suggest to courts that the defendant's right to a fair trial has been fundamentally infected. This situation would require an analysis similar to the *Manson*-line of decisions.[107]

2. Reliability

If the analogy can be properly made, then the argument is simple: if the evidence derived from the witnesses, in this case the children, is deemed to be *reliable*, then it should be admitted into trial despite the improper techniques used to obtain it. This standard should be used only in cases where the state impropriety is slight and the corroborating evidence substantial. In cases of egregious disregard by the state agents, the fairness rationale should govern and taint the whole prosecution. To determine admissibility, a balancing process would be required. In close cases, the state's interest in prosecuting abusers could outweigh any unfairness employed by the state, and the otherwise reliable statements would become available.

The *Michaels* court's rationale that reliability *should* be the "linchpin" in determining the admissibility of statements elicited from child witnesses should be accepted. An analogy of a *Michaels*-type case to the reasoning of the United States Supreme Court in its identification decisions is a proper beginning. This rule of reliability in identification cases protects a defendant from the specific risk of a misidentification. This risk can easily be analogized to that of a wrongful accusation or wrongful conviction. The introduction of substantive evidence of guilt, achieved through faulty interrogations from witnesses, threatens the fairness of the trial as much or more than an improper identification procedure.[108] Thus, by excluding suggestive interview evidence if unreliable, the same goal sought by the *Stovall-Manson* rationale would be achieved.

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107. Recall that the *Manson* rule allows evidence from a suggestive identification procedure to be admitted into evidence, notwithstanding the suggestiveness, if the evidence is reliable. It is important to remember that reliability is required by *Manson* in an attempt to assure a fair trial, because fairness is the underlying principle of the Due Process Clause in criminal proceedings. Indeed, even the Manson Court noted that "[f]airness of the trial is threatened by suggestive confrontation evidence . . . ." Manson v. Brathwaite, 432 U.S. 98, 111, 97 S. Ct. 2243, 2251 (1977). Fairness of the trial is even more threatened by admitting suggestive evidence relating to substantive guilt or innocence. By using the Manson analogy in cases in which it would do injustice to the state to dismiss the prosecution, the same goal of providing a fair trial would be achieved in situations similar to that in Michaels.

108. Note the Michaels court's reasoning: "We are confronted in this case with pretrial events relating not to the identification of an offender but, *perhaps more crucially, to the occurrence of the offense itself.* Those events—investigatory interviews—are fraught with the elements of untoward suggestiveness and the danger of unreliable evidentiary results." State v. Michaels, 642 A.2d 1372, 1382 (N.J. 1994) (emphasis added).

Furthermore, the pretrial identification of an accused and the pretrial investigatory interviews of child witnesses can both produce effects that tend to taint the whole course of the prosecution. It has been noted that "the interviewing process is also a learning process and can actually change what exists in the child's memory. Once such a change takes place, it is virtually irreversible."[109] Similarly, the United States Supreme Court stated, relating to identification procedures, "[m]oreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on.'"[110] Thus, in both identification and pretrial interview cases, the memories of the witnesses subjected to the improper procedures may be fatally tainted. An extension of due process protections to the interview stage of the prosecution would reduce this threat, as the protection has done in identification cases.

Extending the protection would also serve the common goal, mentioned in *Biggers*, of "deter[ring] the police from using a less reliable procedure where a more reliable one may be available."[111] Threatened with possible exclusion of their main evidence, prosecutors will, at least, attempt to obtain more credible testimony. This is especially true with a *Michaels*-type case in which children are the only witnesses, and little or no corroborating evidence exists.

Another analogy from the *Manson* family of decisions relates to the *Biggers* factors, and how they can be modified to a situation like *Michaels*.[112] The factors, modified only slightly, could be as follows:

(1) the opportunity of the child to actually witness the events;
(2) the child's degree of attention;
(3) the accuracy of the child's prior description of the events;
(4) the level of certainty exhibited by the child; and
(5) the length of time between the crime and the interview.

Each modified factor would have to be viewed in light of the special considerations due child witnesses. When taken in light of "all relevant circumstances"[113] and weighed against the "corrupting effect"[114] of the suggestive interview itself, these factors could provide an adequate test for reliability.

Several lower federal and state court decisions also present justifications for extending due process protections by requiring reliability of pretrial interview evidence. For example, the United States Court of Appeals for the Second

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109. Feher, *supra* note 23, at 232-33.

110. United States v. Wade, 388 U.S. 218, 229, 875 S. Ct. 1926, 1933 (1967) (alteration in original) (citing Williams & Hammelmann, *Identification Parades, Part I*, 1963 Crim. L. Rev. 479, 482 (1963)).

111. Neil v. Biggers, 409 U.S. 188, 199, 93 S. Ct. 375, 382 (1972).

112. *See supra* note 83.

113. State v. Michaels, 642 A.2d 1372, 1381 (N.J. 1994). Other extremely valuable factors for courts to consider were cited by the Michaels court. *See supra* note 48.

114. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977).

Circuit expounded on the police deterrence goal in *Solomon v. Smith*.[115] The court noted the right to due process "must encompass not only the right to avoid improper police methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain."[116] Logically then, due process should also prevent transforming a slight or nonexistent belief in a child's mind into one that the child really believes to be true.

In *Smith v. Coiner*,[117] the Fourth Circuit sustained a due process challenge upon finding "the police were so certain that they had the real culprit that they in effect had determined to make no further investigation."[118] The *Michaels* prosecutors acted in much the same way. Michaels was stigmatized from the outset of the investigation as *the* culprit—no other possible defendants were questioned. This narrow-minded approach was prevalent in the interviews and led to the influenced nature of the children's responses. This interviewer bias is another factor to be considered in the admissibility analysis.

Lower courts have also focused more on the actual suggestiveness employed and less on the stage of the proceeding.[119] Prosecutorial conduct is becoming a major concern,[120] regardless of the stage of the prosecution. This suggests due process protections are being extended beyond the courtroom to all pretrial activities.

The "risk of misidentification" analogy is also given support in state court decisions. In *People v. Caruso*,[121] the Supreme Court of California sustained a due process challenge to identification testimony derived from "circumstances which *could only have suggested* . . . that defendant was the man to be charged with the offense."[122] When interview procedures like those in *Michaels* are used, the interviewers suggest to the children that the defendant is in fact guilty and that they should respond accordingly. The tainted statements of the witnesses are "essential to [the] defendant's conviction," so their admission would constitute "prejudicial error."[123] Thus, a likelihood of wrongful accusation or conviction relates well to the "irreparable mistaken identification" rationale.[124]

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115. 645 F.2d 1179 (2d Cir. 1981).

116. *Id.* at 1185.

117. 473 F.2d 877 (4th Cir.), *cert. denied*, 414 U.S. 1115, 94 S. Ct. 848 (1973).

118. *Id.* at 881.

119. For example, *see* Sanchell v. Parratt, 530 F.2d 286 (8th Cir. 1976): "The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor . . . ." *Id.* at 292 (citing Patrick M. Wall, Eye-Witness Identification in Criminal Cases 26 (1971)).

120. *See infra* note 155.

121. 436 P.2d 336 (Cal. 1968).

122. *Id.* at 339 (emphasis added).

123. *Id.* at 341 n.2.

124. Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967).

Besides analogizing to fit the reliability rule within pretrial interviews of children, specific support of the idea exists in judicial opinions and other written authority. Two judges, although in dissent, recently argued strongly for extending the reliability due process requirement to pretrial interviews. In *State v. Bullock*,[125] Justice Stewart of the Supreme Court of Utah attempted to convince his colleagues of the fundamental unfairness and unreliability present because of admitted testimony from suggestive interviews of the child witness. Judge Stewart wrote:

> The majority does not even address [the] point; but if it has merit, as I believe it has, then this trial was in fact fatally infected with fundamental unfairness and cannot stand constitutionally . . . .
>
> [S]ince [the social worker/interviewer's] techniques are so *highly unreliable and may have induced false testimony*, this Court should declare such techniques inappropriate and testimony elicited by them inadmissible . . . . Once testimony is tainted, it is unlikely that the taint can be excised, and convictions may have to be reversed that would not have to be if the testimony were not tainted.[126]

More directly on point is the dissent in *United States v. Spotted War Bonnet*,[127] a decision that also involved questionable child interviews. Chief Judge Lay, of the Eighth Circuit Court of Appeals, noted that "[a] serious deprivation of the accused's right to due process has occurred in this case. The defendant has been sentenced to prison for fifteen years on the most *unreliable, suggestive, and manipulated evidence* contained in any record that I have ever reviewed."[128] The judge made a direct analogy to identification cases: "In this sense, this case is analogous to the scores of cases in which law enforcement personnel have been found as a matter of law to have used improper suggestive and manipulative techniques in order to attain sought-after identification."[129]

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125. 791 P.2d 155 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S. Ct. 3270 (1990). The interviewer in this case admitted that her "intervention with children is not from a neutral position," but rather as "a child's advocate." *Id.* at 156. The interviews she had with the children were not recorded and were therefore attacked for an inability to challenge their objectivity. The defendant presented expert witnesses, one of whom attacked the interviewer's techniques of "ignoring the child's response until the child learned to give the answer she expected and of rewarding answers that she liked by making such comments as 'good boy.'" *Id.* at 157.

126. *Id.* at 162 (emphasis added).

127. 882 F.2d 1360 (8th Cir. 1989), *cert. granted*, 497 U.S. 1021, 110 S. Ct. 3267 (1990), *aff'd on other grounds*, 933 F.2d 1471 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1187 (1992).

128. *Id.* at 1364 (emphasis added). The interviewers in this case were accused, among other things, of influencing the answers of the alleged child victims by telling them that they would be placed in a foster home if they failed to accuse their father of sexual abuse. *Id.* at 1366.

129. *Id.* at 1366. Chief Judge Lay also noted that "[o]nce it is demonstrated that an unnecessarily suggestive confrontation has been used, testimony about that confrontation 'must be excluded and the government then assumes the burden of proof by clear and convincing evidence that the witness' in-court identification was not tainted by the suggestive confrontation.'" *Id.* at 1364

Thus, current judicial recognition exists that due process should extend to cases involving child interviews.

At least one legal expert has recognized that this argument should be adopted.[130] Thomas C. Feher stated, "securing a criminal conviction through testimony that is tainted by suggestion violates the due process clause of the United States Constitution,"[131] although without an analogy to identification cases. He also found no significant decisions directly on point, and thus analogy to other prosecutorial conduct was necessary.[132] Feher analogized to *Wade*[133] and stated "[d]ue process requires that the State not convict a defendant upon evidence which is the product of suggestion."[134] Although he conceded a lack of judicial authority, Feher's analysis is very convincing:

> Child witnesses are highly susceptible to suggestion and often undergo severely suggestive interviews. It is hard to imagine that the testimony of such a person could ever bear enough indicia of reliability as to not violate due process.
>
> *Further, there seems to be no basis for limiting the use of these standards to cases where the witness' testimony consists of an identification. Wade* and its progeny have provided guidance for the admissibility determination to other types of testimony, and their logical congruence to the situation at hand is too compelling to be ignored.[135]

Considering the above, the due process protections provided by *Manson* and its predecessors, relating to the requirement of reliable identification evidence, could be equally applied to a *Michaels*-type situation. If the testimony obtained from child witnesses retains a level of credibility that it is deemed reliable, then it should be admitted despite the suggestive interview techniques. This position would be beneficial to those accused of child sex crimes in that proper interview techniques would be demanded to maintain fairness. With the availability of written material on proper interview techniques for child witnesses, the state has guidance on how to avoid a due process challenge. Continued use of improper techniques should suggest to courts that the information derived is tainted and thus inadmissible. Finally, courts should keep in mind the countervailing interests of the criminal justice system and factor the interests of society in general into the due process consideration.[136]

(citing Sanchell v. Parratt, 530 F.2d 286, 293 (8th Cir. 1976)).

130. Feher, *supra* note 23.

131. *Id.* at 249.

132. *Id.* at 249-50 n.160.

133. United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967).

134. Feher, *supra* note 23, at 251.

135. *Id.* at 251 (emphasis added).

136. *See* Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781 (1945), for a good balancing determination: "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting

C. *Arguments Against the Extension of the* Manson *Reliability Rule*

There are arguments that opponents of the above-mentioned *Manson* reliability proposition may present. If any of them are accepted, and the proposition thus denied, then the fundamental fairness rationale will still govern, but without a pretrial reliability assessment. First, no express language exists from Supreme Court decisions that warrants such an extension; the due process reliability standard has been exclusively used with identifications. The response to this contention is the analogies explained above. True, the Supreme Court has not provided specific precedent, but its decisions provide ample justification for the transition. Courts are free to employ their analytical reasoning skills to decide *res nova* issues according to previous decisions.

Second, courts have been traditionally reluctant to sustain due process challenges. Challenges have been decided in defendants' favor only in the most egregious situations. Again, this policy should continue. All the proposed extension would do is to provide a defendant in a proceeding involving child witnesses with a last chance protection, exactly as courts have provided in the past.

Third, some may argue that, because of the nature of the child's mind, stronger tactics are necessary to elicit testimony at all. Thus states should not be as threatened with exclusion as if adults were the witnesses. This argument is faulty. It is true that some stronger tactics are needed on children to pierce through the initial fear and uneasiness that children experience in pressure situations and to reach their actual memory of the events; but, because of the guidelines now provided to properly interview children, the interrogation techniques are not required to be flagrant in order to access valuable and reliable testimony. Therefore, as Mr. Feher argues,[137] it seems that no compelling reasons exist for not extending due process to the interview stage of a *Michaels* situation.

Colorado v. Connelly,[138] however, presents a problem by supporting the theory that reliability of the evidence is not the focus for a due process claim. *Connelly* suggested that reliability has no place in a due process analysis. The defendant in *Connelly* claimed his distorted mental state affected the voluntariness of his confession. In deferring to the evidentiary rules of the trial forum, Chief Justice Rehnquist noted:

> Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite

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convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Id.* at 418, 65 S. Ct. 789-90. *See also* United States v. Janis, 428 U.S. 433, 96 S. Ct. 3021 (1976): "Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *Id.* at 448-49, 96 S. Ct. 3029.

137. Feher, *supra* note 23, at 251.

138. 479 U.S. 157, 107 S. Ct. 515 (1986).

> divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, . . . and not by the Due Process Clause of the Fourteenth Amendment.[139]

Thus, by refusing to decide on the reliability of the confession evidence, the Court may have precluded a *Manson* test for child interview evidence. An evidentiary due process challenge would then be governed by the rules of the trial court and not by the United States Constitution. This would leave a defendant with only a "fundamental unfairness" constitutional challenge, as *Connelly* still recognized.[140] On the other hand, the specific language that Rehnquist used could limit the decision to defendant confessions. Identifications and interrogation techniques have nothing to do with the mental state of the defendant, as does a confession. They instead involve procedures employed by state agents, evidence from which *is* susceptible to determinations of reliability. This suggests that reliability could be the standard in cases of pretrial child interviews, despite the effects of *Connelly*.

D. Harmless Error and Independent Source

In the event that due process arguments would be considered in a case like *Michaels*, counterclaims of the state would undoubtedly arise to oppose the assertion of a Fourteenth Amendment violation. This would occur regardless of which option is chosen to extend the protection: requiring fundamental fairness throughout or requiring reliability of the child interview statements. The more prominent of such claims would be harmless error[141] and independent source.

Almost thirty years ago, the Supreme Court announced the harmless error standard.[142] The Court stated "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they

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139. *Id.* at 166-67, 107 S. Ct. at 521-22.

140. "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence, whether true or false." *Id.* at 167, 107 S. Ct. at 522 (citing Lisenba v. California, 314 U.S. 219, 236, 62 S. Ct. 280, 290 (1941)).

141. The main United States Supreme Court decision interpreting the harmless doctrine is Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967), which noted that "the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" *Id.* at 22, 87 S. Ct. at 827 (citing 28 U.S.C. § 2111 (1964)).

142. *Chapman*, 386 U.S. at 18, 87 S. Ct. at 824. In this case the Court held that there was *not* a harmless error when the state's prosecutor commented on the defendant's failure to testify as being inferences of their guilt, and when the trial court charged the jury that "it could draw adverse inferences from petitioners' failure to testify." *Id.* at 19, 87 S. Ct. at 825.

may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[143] The Court also established a test for determining harmless errors: whether the court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt."[144]

A defendant in the position of Kelly Michaels would not be subject to such a rule, especially considering other language by the United States Supreme Court: "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless."[145] If the defendant can show that "there is a reasonable possibility that the evidence complained of might have contributed to the conviction," then the harmless error claim must be denied.[146] The evidence complained of in *Michaels* was almost exclusively what led to her conviction, so a harmless error challenge would fail. But, in many other cases in which the state has sufficiently strong corroborating evidence to support its case, the argument may have merit. For example, in a case involving plenty of physical evidence or medical testimony of abuse effects shown on the alleged victims, some degree of police impropriety could reasonably be overlooked.

Closely related to the harmless error doctrine is the idea of independent source[147]—applicable when the prosecution can show that the conviction was based on totally unrelated and untainted evidence. The underlying idea of the independent source rule is "the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively."[148]

In the typical case involving a pretrial identification, the accused must first demonstrate that the identification was tainted by suggestiveness. The burden then shifts to the state to show an "independent source" for the identification. Using the *Biggers* factors, the state usually focuses on the witness' opportunity to view the accused at the crime scene. If the state can convince the trier of fact that the identification at the scene was independent and untainted, then the suggestive and tainted identification under police surveillance will be disregarded. This analysis is consistent with the famous United States Supreme Court exclusionary rule decision of *Wong Sun v. United States*,[149] which asks "whether, granting establishment of the primary illegality, the evidence to which

143. *Id.* at 22, 87 S. Ct. at 827.

144. *Id.* at 24, 87 S. Ct. at 828.

145. *Id.* at 23-24, 87 S. Ct. at 828.

146. Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963).

147. The two main independent source decisions are United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967) and Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967).

148. Nardonne v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 268 (1939) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 183 (1920)).

149. 371 U.S. 471, 83 S. Ct. 407 (1963).

instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[150]

In the *Michaels* context, because of the lack of any other evidence, the independent source would have to be the child's independent memory of the alleged events. That is, evidence employed to charge and convict the defendant must be shown to derive from an independent and untainted source. The *Wong Sun* test would have to be met for the evidence not to be subjected to the exclusionary rule. Prosecutors, however, would face a formidable challenge to show an independent source. Studies show that once a child's memory is implanted with ideas different from his original ones, the taint is irreparable.[151] Thus, prosecutors dealing with suggestive child interviews would normally not have the advantage of this exception to the exclusionary rule.

V. CONCLUSION

Constitutional due process protections should extend beyond pretrial identifications to protect defendants from testimony derived from unfair pretrial interviews and interrogatories. This is especially true if the interviewee is a child, as shown by the outlandish miscarriage of justice displayed by the New Jersey prosecution team in *Michaels*.

The underlying principle of the argument to allow a due process claim is best described by the Supreme Court's language in *Chambers v. Mississippi*:[152] "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[153] Fairness to the accused should govern the interviews of alleged child victims of sexual abuse. Indeed, even in *Manson*, the Court noted, "[t]he standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment."[154] Courts should recognize that suggestive and coercive pretrial interviews are subject to a due process "fairness" claim, and exclude this evidence, especially in cases of obvious and egregious prosecutorial abuses.[155]

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150. *Id.* at 488, 83 S. Ct. at 417 (citing John MacArthur Maguire, Evidence of Guilt 221 (1959)).

151. *See* McGough, *supra* note 23, at 73, 204-05; Montoya, *supra* note 23, at 936-37; Feher, *supra* note 23, at 230-33.

152. 410 U.S. 284, 93 S. Ct. 1038 (1973).

153. *Id.* at 294, 93 S. Ct. at 1045.

154. Manson v. Brathwaite, 432 U.S. 98, 113, 97 S. Ct. 2243, 2252 (1977).

155. There are examples of State court decisions in which due process was held to be violated as a result of prosecutorial misconduct other than suggestive identifications. For example, *see* State v. Leadingham, 438 S.E.2d 825 (W. Va. 1993). Due process was held to be violated when police and prosecutors used an undercover informant to penetrate a psychiatric institution in order to elicit incriminating statements from a State court defendant undergoing a court-ordered psychiatric evaluation. The court held that "when the State's action in obtaining incriminating evidence against a defendant is overzealous or outrageous and infringes upon a defendant's constitutional rights under the Fourteenth Amendment . . ., due process and fundamental fairness preclude the State from using

Where slight impropriety exists and sufficient evidence from other sources is available to substantiate the allegations, the reliability standard from *Manson* may be used. This standard would satisfy the interests of the state in prosecuting criminals despite improprieties that do not impinge upon the truth-finding function of trials. These solutions are reasonable, considering not only the need to stop child sexual abuse, but also the need to avoid untrue or exaggerated allegations.[156] The Due Process Clause offers the most cogent reason to address this problem, because "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[157]

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such evidence against the defendant." *Id.* at 834. Also, the Supreme Court of Nevada in State v. Babayan, 787 P.2d 805 (Nev. 1990), agreed with the trial court that "portions of the prosecution's presentations before the grand jury were deficient and denied respondent Babayan due process of law . . . ." *Id.* at 818. However, the court dismissed the case without prejudice, thus allowing a retrial.

156. Additionally, there is no basis for limiting this protection to cases involving child witnesses. That is, prosecutors should be required to act with the same fairness when interviewing adult witnesses. However, because adults do not have the same fragile and suggestive mentality as children, the argument would be more difficult to make.

157. Spano v. New York, 360 U.S. 315, 320-21, 79 S. Ct. 1202, 1206 (1959).