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Where Has Michaels Taken Us: Assessing the Future of Taint Hearings

Julie A. Jablonski
Suffolk University Law School

WHERE HAS *MICHAELS* TAKEN US?: ASSESSING THE FUTURE OF TAINT HEARINGS

I. INTRODUCTION

Although society's disgust with the sexual abuse of children is not novel, beginning in 1960 and through the 1980s, lay and professional interest in protecting children from sexual abuse flourished.[1] As a result, prosecutions for child sexual abuse grew exponentially.[2] In their zeal to purge society of such evils, some investigators erred in their questioning and interviewing techniques of child-victims, utilizing excessively leading questions and suggestive investigative tactics.[3] Consequently, some child-witness's recollections of alleged instances of sexual abuse were "tainted," by either implanting memories in the children's minds that had not existed before, or distorting images that were formerly innocent.[4]

Within the confines of these overzealous times, a sexual abuse case against Margaret Kelly Michaels (hereinafter referred to as "Michaels") commenced.[5] Because of Michaels's conviction and subsequent appeals, the interviewing techniques involved in child sexual abuse litigation became suspect. As a result, in *State v. Michaels*,[6] the New Jersey Supreme Court announced a new evidentiary procedure which allows pre-trial hearings to assess a child-witness's reliability before testifying at trial.[7] By finding this, New Jersey became the first jurisdiction to extend "taint hearings" to a child's testimony in sexual abuse cases.

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[1] *See* John B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L.REV. 873, 878 (1994) (detailing legal, social and academic development regarding children and sexual abuse).

[2] *See id.* at 880 (finding the volume of litigation regarding child sexual abuse cases escalated during the 1980s).

[3] *Id.* One commentator notes that many legal and psychological specialists were unaware of the dangers their improper interviewing techniques posed to the defendants and their prosecutions. *Id.*

[4] Lisa Manshel, *The Child Witness and the Presumption of Authenticity After* State v. Michaels, 26 SETON HALL L.REV. 685, 693 & n.48 (1996) (indicating researchers have found sexual abuse memories can be implanted or misinterpreted in child-victims' minds).

[5] *See* State v. Michaels, 136 N.J. 299, 304, 642 A.2d 1372, 1374 (1994) (noting prosecution of Margaret Kelly Michaels began in 1985).

[6] 136 N.J. 299, 642 A.2d 1372.

[7] *See id.* at 315-16, 642 A.2d at 1380 (extending taint hearings to the testimony of child-witnesses in sexual abuse cases).

A taint hearing involves a pre-trial assessment of the reliability of an alleged child-victim's in-court statements as a predicate to the admissibility of the evidence at trial.[8] Despite a lack of precedent on the issue, the New Jersey Supreme Court justified extending pre-trial taint hearings to child sexual abuse cases to protect a defendant from a denial of due process by excluding tainted evidence and to protect the justice system's integrity.[9] Allowing a taint hearing in these cases provides defendants with a remedy when the child-accuser's testimony is based upon unreliable perceptions or memory which was created by suggestive investigative techniques.[10]

After New Jersey's articulation of this new evidentiary procedure, defendants in other jurisdictions urged their courts to follow the *Michaels* precedent and allow a pre-trial assessment of a child-witness's reliability before the youth can testify at a trial involving sexual abuse.[11] However, not all states agree with the New Jersey Supreme Court's ruling.[12] Nevertheless, as this article asserts, a trend is evolving advocating the proposition articulated in *Michaels* that taint hearings are appropriate in sexual abuse cases involving children. Part II of this article details the history and reasoning behind the *Michaels* decision. It explains the precedent for taint hearings as well as the prerequisites to trigger the pre-trial assessment. Part III of this paper examines how other courts since *Michaels* address its holding. This section asserts that despite the varied opinions of state courts, a trend toward allowing taint hearings is emerging.

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[8] *Id.* at 315-16, 642 A.2d at 1381.

[9] *Id.* at 316, 642 A.2d at 1381.

[10] State v. Michaels, 264 N.J. Super. 579, 632, 625 A.2d 489, 517 (1993), *rev'd* 136 N.J. 299, 642 A.2d 1372 (1994).

[11] *See e.g.*, Fischbach v. State, No. 245-1985, 1996 WL 145968, at *1 (Del. Supr. Mar. 15, 1996) (asserting trial court erred in failing to conduct taint hearing); Commonwealth v. Allen, 40 Mass. App. Ct. 458, 460, 665 N.E.2d 105, 107 (1996) (arguing for the adoption of the reasoning in *Michaels*); People v. Michael M., 162 Misc. 2d 803, 804, 618 N.Y.S.2d 171, 174 (1994) (requesting pre-trial hearing to suppress child's testimony as product of suggestive interviews).

[12] *See e.g.*, State v. Allen, No. 94-CA-005944, 1996 WL 48550, at *3 (Ohio App. Feb. 7, 1996) (refusing to follow *Michaels* because of lack of precedent on the issue in Ohio); State v. Smith, No. 95-CA-006070, 1996 WL 27908, at *4 (Ohio App. Jan. 24, 1996) (noting lack of precedent in Ohio giving authority to adopt *Michaels*); Frohne v. State, 928 S.W.2d 570, 575 (Tex. App. 1996) (declining to follow *Michaels* on evidentiary grounds).

II. THE *MICHAELS* DECISIONS

A. Factual Background

In September 1984, Margaret Kelly Michaels began working as a teacher's aide at Wee Care, a nursery school enrolling approximately sixty children ages three to five.[13] In October of that year, Michaels was promoted to teacher and continued in that capacity for almost seven months.[14] During this time Wee Care received no complaints about Michaels's performance from staff, children or parents.[15]

As Michaels's employment was drawing to an end, however, a four-year old Wee Care child, M.P., was brought to his pediatrician to treat a rash.[16] During the examination, a nurse took M.P.'s temperature rectally at which time M.P. stated that his teacher, Michaels, had also done this to him at nap time.[17] The child provided additional instances and details of sexual abuse prompting his mother to notify the New Jersey Division of Youth and Family Services (DYFS).[18] DYFS notified the prosecutor's office of the allegations and an investigation ensued, beginning with interviews of only a small number of children and eventually expanding to all children who had contact with Michaels.[19]

These interviews revealed accounts of sexual abuse ranging from minor instances to bizarre and heinous sexual acts.[20] The prosecutor pro-

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[13] State v. Michaels, 136 N.J. 299, 304, 642 A.2d 1372, 1374 (1994).

[14] *Id.* In a letter dated April 15, 1985, Michaels gave Wee Care two weeks' notice that she intended to terminate her employment with them. *Michaels*, 264 N.J. Super. at 590, 625 A.2d at 495.

[15] *Michaels*, 136 N.J. at 303, 642 A.2d at 1374.

[16] *Id.* at 304, 642 A.2d at 1374.

[17] *Id.*

[18] State v. Michaels, 136 N.J. 299, 305, 642 A.2d 1372, 1374, 1375 (1994). M.P. commented additionally that Michaels undressed him and took his and another student's temperatures daily. *Id.* at 304, 642 A.2d at 1375. M.P. also stated that Michaels had "hurt" two other classmates. *Id.*

[19] *Id.* at 305, 642 A.2d at 1375. In total, there were twenty-six months of questioning. State v. Michaels, 264 N.J. Super. 579, 620, 625 A.2d 489, 510 (1993), *rev'd* 136 N.J. 299, 642 A.2d 1372 (1994).

[20] *Id.* at 592, 625 A.2d at 496. Some allegations made involved the insertion of utensils, light bulbs, and legos into genitalia. *Id.* The children described games where Michaels and the children were naked and licked peanut butter and/or jelly from various body parts. *Id.* Accounts of "intercourse" were relayed as well as one involving cakes made

ceeded to trial with a 163-count indictment involving aggravated sexual assault, sexual assault, endangering the welfare of children and making terroristic threats.[21] At the trial, a large portion of the state's evidence consisted of the testimony of the Wee Care children who at the time of trial ranged from ages five to seven.[22] After a nine month trial and twelve days of deliberation, the jury returned a guilty verdict on 115 counts, sentencing Michaels to forty-seven years imprisonment.[23]

B. The Appellate Division's Decision: Analogies to Pre-trial Eyewitness Identification and Hypnotically-Recalled Testimony

The trial court's decision was reversed and remanded after Michaels appealed to the Superior Court, Appellate Division, arguing a number of errors made in the lower court.[24] Among these was the assertion that reversal was required because the child-witnesses were made incompetent to testify by suggestive and coercive interview techniques.[25] On this issue,

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of "pee and poop." *Id.*

[21] *Michaels*, 136 N.J. at 305, 642 A.2d at 1375. There were three indictments brought against Michaels with a total of 235 counts. *Id.* Prior to trial many counts were dismissed and before going to the jury others received the same fate, therefore, by the time the jury began deliberations, 131 counts spanning the three indictments remained. *Id.* at 306, 642 A.2d at 1375.

[22] *Id.* at 305-06, 642 A.2d at 1375.

[23] State v. Michaels, 136 N.J. 299, 306, 642 A.2d 1372, 1375 (1994).

[24] State v. Michaels, 264 N.J. Super. 579, 587-88, 645, 625 A.2d 489, 494, 523 (1993), *rev'd* 136 N.J. 299, 642 A.2d 1372 (1994). Michaels asserted error on nine grounds: 1) she was denied due process by the trial court's refusal to allow her experts to examine the testifying children; 2) the use of closed circuit television testimony was improper; 3) Eileen Treacy's testimony (an expert witness for the prosecution) pertaining to Child Sexual Abuse Syndrome should not have been admitted because her methodology was unreliable and unscientific; 4) Treacy's testimony bolstering the children's credibility "invaded the province of the jury"; 5) her right to make a defense was violated by the court's refusal to allow expert testimony on the lack of any indication of deviancy or pathology; 6) the questioning of the children was so suggestive the children should not have been competent to testify; 7) the prosecution's closing statement's referral to Michaels as Hitler unfairly prejudiced the jury against her; 8) the lower court erred when it allowed the jury to review the children's closed circuit television testimony during their deliberations; 9) the use of massive hearsay evidence polluted the entire proceeding. *Id.* at 587-88, 625 A.2d at 493. Only the children's competence to testify because of suggestive interview techniques is relevant to the present discussion.

[25] *Id.* at 588, 625 A.2d at 493. Note that suggestibility is distinct from deliberate lying by a child; suggestibility assumes the child witness has a present belief of having been

the appeals division agreed with Michaels, holding that at her new trial a "taint hearing" must be held to evaluate the reliability and subsequent admissibility of the children's testimony.[26]

While the appeals court recognized taint hearings as an extraordinary step, it also noted the practice is not unprecedented.[27] Specifically, the court justified its extension of the pre-trial hearing procedure by equating the facts before it with those involving hypnotically-recalled testimony and pre-trial eyewitness identifications.[28] In both of the latter situations, the court noted, the judiciary has not hesitated to implement the procedural protection of a pre-trial hearing to prevent corrupting a potential prosecution with tainted evidence.[29] By analogy, the court ruled that like cases

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abused. Manshel, *supra* note 5, at 690. In *Michaels*, the defense objected to numerous types of improper interview techniques. *Michaels*, 264 N.J. Super. at 621, 625 A.2d at 510. For example, the wording of the investigators' questions planted sexual knowledge and vocabulary in the children's minds that is not appropriate for children of their ages. *Id.* Peer pressure and threats were used to question uncooperative children. *Id.* One child was told her friends had already revealed to the investigators that certain things occurred. *Id.* These interviewing techniques are considered improper and violate due process. *See* Myers, *supra* note 2, at 909-11 (presenting examples of improper interview techniques).

[26] *Michaels*, 264 N.J. Super. at 631-32, 625 A.2d at 517. The appellate court held that "courts must provide a remedy where the record demonstrates that an accuser's testimony is found upon unreliable perceptions, or memory caused by improper investigative procedures if it results in a defendant's right to a fair trial being irretrievably lost. A factual hearing would be required for this purpose." *Id.*

[27] *Id.* The court noted that courts have used taint hearings to determine whether an in-court identification was tainted by any unduly suggestive identification procedures and whether hypnotically-recalled testimony is reliable. *Id.* at 630-31, 625 A.2d at 516-17 (citing *U.S. v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991) and *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981)). In *Stevens*, the court required a taint hearing to decide the reliability of an in-court identification based on possible impermissibly suggestive identification procedures. *Stevens*, 935 F.2d at 1388-92. In *Hurd*, the court found a taint hearing was required to assess the reliability and subsequent admissibility of hypnotically-recalled testimony. *Hurd*, 86 N.J. at 548, 432 A.2d at 97-98. The court found such testimony is inadmissible if the one conducting the hypnotic session uses suggestive techniques amounting to a constitutional due process violation. *Id.*

[28] *Michaels*, 264 N.J. Super. at 630-31, 625 A.2d at 516-17. The New York courts have also noted taint hearings should be allowed because child-witnesses are subject to the same type of suggestion as those who are under hypnosis and give pre-trial identifications. People v. Michael M., 162 Misc. 2d 803, 808, 618 N.Y.S.2d 171, 177 (1994).

[29] State v. Michaels, 264 N.J. Super. 579, 630-31, 625 A.2d 489, 516-17 (1993), *rev'd* 136 N.J. 299, 642 A.2d 1372 (1994); *see* State v. Michaels, 136 N.J. 299, 316, 642

involving hypnotically-recalled testimony or pre-trial eyewitness identifications, the facts in *Michaels* require a taint hearing to assess the reliability of the children's testimony to protect against an improper prosecution.[30]

When assessing the reliability and ultimate admissibility of a pre-trial eyewitness identification, a court should examine, under all the circumstances, whether the procedure used to obtain the identification was so ". . . suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[31] If the defendant raises an issue about the procedure used, a taint hearing will be held to determine the reliability and admissibility of the proffered testimony.[32] If the court finds the pre-trial identification procedure unduly suggestive, giving rise to a substantial likelihood of misidentification, the testimony is inadmissible at trial.[33] Similarly, the *Michaels* court held that if the defendant can make a showing of "some evidence" that the child's testimony is a result of suggestive and/or coercive interview techniques, the court must hold a pre-trial taint hearing to evaluate the reliability of the proposed in-court testimony.[34]

State precedent involving hypnotically-recalled testimony also served as a beacon to the *Michaels* court when it permitted taint hearings in child

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A.2d 1372, 1381 (1994) (noting that under certain factual scenarios, taint hearings are necessary to prevent injustice).

[30] *Michaels*, 264 N.J. Super. at 631-32, 625 A.2d at 517.

[31] Stovall v. Denno, 388 U.S. 293, 301-302 (1967); *see* People v. Blackman, 488 N.Y.S.2d 395, 396, 110 A.2d 596, 597-98 (1985). In *Blackman*, the court found that a pre-trial hearing must be held to determine the appropriateness of admitting an identification into evidence. *Blackman*, 488 N.Y.S.2d at 396, 110 A.2d at 597-98. The court held that these hearings are "designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police." *Id.*

[32] *See* Mason v. Brathwaite, 432 U.S. 98, 114 (1977). In *Mason*, the defendant claimed a pre-trial identification procedure was unduly prejudicial so as to fatally taint his conviction. *Id.* The court did not agree but stated that, "[r]eliability is the linchpin in determining the admissibility of identification testimony." *Id.*

[33] *See* Simmons v. U.S., 390 U.S. 377, 384 (1968) (finding suggestive pre-trial identification inadmissible); *Stovall*, 388 U.S. at 301-02 (recognizing independent Fourteenth Amendment due process right against identifications which are "unnecessarily suggestive and conducive to irreparably mistaken identification"); *see also*, Manshel, *supra* note 5, at 712 (noting due process requires such testimony excluded).

[34] State v. Michaels, 136 N.J. 299, 320, 642 A.2d 1372, 1383 (1994); *cf. U.S. v. Geiss*, 30 M.J. 678, 681 (1990) (declining to apply eyewitness rationale to child sex abuse cases).

sexual abuse cases.[35] The New Jersey Supreme Court has found the suggestive effect of hypnosis raises questions about the reliability of the proffered testimony.[36] An individual under hypnosis is extremely vulnerable to suggestion, loses critical judgment, and has a tendency to confuse memories evoked under hypnosis with those recalled prior to the hypnotic state.[37] Consequently, taint hearings are required to assess the reliability and hence the admissibility of hypnotically-induced recall.[38] The *Michaels* court followed this reasoning when determining a taint hearing was required in the child sexual abuse case before it.[39]

C. The New Jersey Supreme Court's Decision: Establishing Standards and Prerequisites for Taint Hearings

The state sought the New Jersey Supreme Court's review of the appellate division's ruling.[40] The court denied the petition to review on all counts except the count involving the adoption of a pre-trial hearing to assess the reliability of the alleged child-victims' testimony.[41] On that issue, the court upheld the appellate division's holding requiring a taint hearing.[42]

The court reiterated the appeals court's rationale for implementing such a procedure. It noted that child witnesses are extremely susceptible to suggestion by adult authority figures because of their "vulnerability, imma-

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[35] *Michaels*, 136 N.J. at 319, 642 A.2d at 1383; *see* State v. Hurd, 86 N.J. 525, 548, 432 A.2d 86, 97-98 (1981) (ruling taint hearing necessary when using hypnotically-recalled testimony).

[36] *See Hurd*, 86 N.J. at 546-47, 432 A.2d at 97 (observing potential error and consequent risk of injustice hypnotically-recalled testimony can cause).

[37] *Id.* at 539-40, 432 A.2d at 93-94.

[38] *Id.* at 542, 432 A.2d at 95. The *Hurd* court noted the "traditional procedural safeguards such as cross-examination and an opportunity to observe a witness's demeanor are not sufficient" to protect the defendant against improper evidence. *Id.*

[39] State v. Michaels, 136 N.J. 299, 320, 642 A.2d 1372, 1382 (1994).

[40] *Id.* at 303, 642 A.2d at 1374. The court phrased the determinative issue as follows: "whether the interview techniques used by the state in this case were so coercive or suggestive that they had a capacity to distort substantially the children's recollection of actual events and this compromised the reliability of the children's statements and testimony based on their recollections." *Id.* at 308-09, 642 A.2d at 1377.

[41] *Id.*

[42] *Id.* at 324, 642 A.2d at 1385.

turity, and impressionability."[43] As such, a child's responses can be shaped by a suggestive interviewer and recollections of actual events can be distorted.[44] Therefore, interviews with children possibly involved in sexual abuse must be conducted free of suggestion and coercion to ensure a child-witness's recollections and subsequent testimony are a result of his or her own recall.[45] The court reasoned that, to ensure the reliability of a child's memory and the absence of improper interview procedures, a taint hearing is an appropriate technique.[46]

To trigger such a hearing, the defendant must first present "some evidence" that the child's testimony is a result of improper investigative procedures.[47] If the court finds that the defendant meets this threshold stan-

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[43] *Id.* at 308, 642 A.2d at 1376; *see* Idaho v. Wright, 497 U.S. 805, 812-13 (1990) (recognizing susceptibility of child-witnesses to suggestion). Most researchers agree that on average very young children are more easily influenced by suggestion than adults. Manshel, *supra* note 5, at 691.

[44] State v. Michaels, 136 N.J. 299, 309, 642 A. 2d 1372, 1377 (1994). The *Michaels* court adopts a "memory error" model of suggestibility, assuming false memories are created in the child's mind by the suggestive influence of the interviewer. Manshel, *supra* note 5, at 693.

[45] *Michaels*, 136 N.J. at 309, 311, 642 A.2d at 1377, 1378. Suggestiveness alone does not violate the Due Process Clause. *See* Myers, *supra* note 2, at 906 (noting all interviews have some suggestion present). A proper interview should begin by building a rapport with a child, treating her as a child, not as a young adult. *Id.* at 907. Interviewers should use praise moderately and not only when the child provides an answer the interviewer "wants" to hear. *Id.* at 907-08. Open-ended questions that invite narrative responses are favored over highly leading questions such as "[h]e touched your pee pee, didn't he?" *Id.* at 908, 910. The interviewer must remain neutral and independent of the investigation. *Michaels*, 136 N.J. at 309, 642 A.2d at 1377. Incessantly repeating questions is another improper technique. *Id.* at 310, 642 A.2d at 1377. If the child gives a negative response and the interviewer asks the questions again, the child, thinking her first answer was incorrect, is likely to make an affirmative answer the second time. *Id.* In addition, the interviewer should refrain from vilifying the defendant, thereby placing the interviewer's bias onto the child. *Id.*; *see* Myers, *supra* note 2, at 910 (detailing procedures interviewers should not use when questioning children).

[46] *Michaels*, 136 N.J. at 315-16, 642 A.2d at 1380.

[47] *Id.* at 320, 642 A.2d at 1383. The court should consider all relevant factors when determining if this threshold burden is met, including the circumstances of the questions, the manner and form of the interrogatories, the person to whom the statements were made, the physical and mental conditions of the victim, the use of inducements, threats, or bribes, and whether or not the statements were inherently believable. Andres Winerman, *The Use and Misuse of Anatomically Correct Dolls in Child Sexual Abuse Evaluations: Uncovering Fact*

dard, the court will hold a pre-trial taint hearing to decide if ". . . the investigatory interviews and interrogatories were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on the defendant's guilt."[48]

In *Michaels*, the New Jersey Supreme Court held that Michaels produced "some evidence" that the investigative procedures used were highly improper.[49] As such, if retried, a hearing must be held to determine if the techniques were so suggestive and coercive as to taint the children's testimony concerning Michaels's alleged sexual abuse of them.[50] At this hearing the state has the burden of proving through clear and convincing evidence that the proffered testimony is reliable despite some suggestive or coercive interview procedures.[51] If the state does not meet its burden, such evidence is deemed unreliable and therefore is not admissible at trial.[52]

III. ANALYSIS: TREND TOWARD EXPANSION AFTER *MICHAELS*

Since *Michaels*, many defendants urged their jurisdictions to adopt the taint hearing procedures promulgated in that decision.[53] Texas, Ohio, New York, Delaware, Massachusetts and the military courts have all been pre-

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. . . *Or Fantasy?*, 16 WOMEN'S RTS. L. REP. 347, 358 (1995).

[48] *Michaels*, 136 N.J. at 320, 642 A.2d at 1383.

[49] State v. Michaels, 136 N.J. 299, 313, 315, 642 A.2d 1372, 1379, 1380 (1994).

[50] *Id.* at 315-16, 642 A.2d at 1380. As of the publication of this article, the state has not elected to retry the case.

[51] *Id.* at 321, 642 A.2d at 1383. The state must prove that when the court considers the totality of the circumstances surrounding the interview, the testimony still retains a "degree of reliability sufficient to outweigh the effects of the improper interview techniques." *Id.* To meet its burden, the state may choose to call experts to testify to the lack of suggestive effects the interview may have had or offer independent testimony indicating the reliability of the child's testimony. *Id.* In response, the defendant may offer expert testimony attesting to the suggestiveness present in the interrogations. *Id.* The focus of the hearing is the questioning techniques utilized, not the child witness herself. *Id.* at 322, 642 A.2d at 1383-84. In pursuit of this goal, it is very unlikely that the child must be present at or testify at the hearing itself. Stephen J. Ceci, Maggie Bruck & Robert Rosenthal, *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues: A Reply to Commentators*, 1 PSYCHOL. PUB. POL'Y & L 494, 512 (1995).

[52] *Michaels*, 136 N.J. at 316, 642 A.2d at 1380. The court notes that if such evidence were allowed, the defendant's right of due process would be violated. *Id.*

[53] *See supra* notes 11 and 12 and accompanying text (listing courts that have addressed taint hearings in sexual abuse cases after *Michaels*).

sented with the issue.[54] Upon examination of the decisions handed down by these courts, there appears to be a developing trend towards allowing taint hearings despite some jurisdictions' denial of the hearing's propriety.

New York and Delaware have specifically adopted taint hearings through case law.[55] The most recent New York courts used the identical arguments proffered in *Michaels* to conclude that taint hearings in child sexual abuse cases were warranted in certain circumstances.[56] In addition

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[54] *Id.*; *see* U.S. v. Geiss, 30 M.J. 678, 681 (1990) (addressing whether to adopt taint hearings in child sexual abuse cases).

[55] *See* Fischbach v. State, No. 245-1985, 1996 WL 145968, at *2 (Del. Supr. Mar. 15, 1996) (adopting taint hearings); People v. Michael M., 162 Misc. 2d 803, 810, 618 N.Y.S.2d 171, 178 (1994) (agreeing with *Michaels* decision).

[56] *Michael M.*, 162 Misc. 2d at 803-10, 618 N.Y.S.2d at 171-74. The *Michael M.* court reasoned that taint hearings in child sexual abuse cases are allowed; the court employed the same reasoning that permits taint hearings in cases involving eyewitness identification and hypnotically-enhanced testimony. *Id.* at 808, 618 N.Y.S.2d at 176. In addition, the court cited various psychological studies indicating that a child-witness's testimony can be shaped by suggestive interviewing techniques. *Id.* at 808-09, 618 N.Y.S.2d at 177. Finally, the court noted various state and federal decisions that recognized a child's susceptibility. *Id.* at 808-810, 618 N.Y.S.2d at 177. *See* Idaho v. Wright, 497 U.S. 805, 813 (1990) (noting children are susceptible to suggestion and can be misleAd by leading questions); People v. Diefenderfer, 784 P.2d 741, 748 (Colo. 1989) (considering child-witness's age in reliability analysis); State v. Erickson, 454 N.W.2d 624, 627 (Minn. Ct. App. 1990) (citing study stating that unwanted children are vulnerable to "malicious suggestion"); People v. Hudy, 73 N.Y.2d 40, 57, 535 N.E.2d 250, 270 (1988) (stating that child-witnesses are impressionable); People v. Alvarez, 159 Misc. 2d 963, 964, 607 N.Y.S.2d 573, 573-74 (N.Y. Sup. Ct. 1993) (citing *Hudy*, 73 N.Y.2d 40, 535 N.E.2d 250); State v. Hadfield, 788 P.2d 506, 508 (Utah 1990) (examining suggestive techniques used to manipulate child-witness's testimony). The *Michael M.* court's finding specifically overruled existing New York precedent disallowing such hearings. *See Alvarez*, 159 Misc. 2d at 965, 607 N.Y.S.2d at 574 (refusing to extend taint hearings in sexual abuse cases involving child-victims). In *Alvarez*, the defendant, indicted on multiple charges involving sodomy, sexual abuse, and endangering the welfare of a child, requested a pre-trial hearing to assess the extent to which suggestive questioning tainted the child-witness's testimony. *Id.* at 963, 607 N.Y.S.2d at 573. The court refused to allow a taint hearing in this case based on the lack of authority on the matter, as well as concern for the children's well-being during the additional proceeding. *Id.* at 965, 607 N.Y.S.2d at 574. In overturning this holding, the court in *Michael M.* first stated that a lack of precedent on a matter does not prevent a court from acting. *Michael M.*, 162 Misc. 2d at 810, 618 N.Y.S.2d at 178. Second, the court tempered the argument concerning the children's well being by stating that not all children would be required to take part in such hearings. *Id.* Such a hearing

to adopting the rationale behind the *Michaels* decision, the New York courts adopted the procedures and parameters of the hearing established in that case.[57] In contrast, Delaware courts adopted the premise of taint hearings, but refused to follow the formal procedures articulated in *Michaels*.[58] Nevertheless, the Delaware court recognized the need for an assessment of a child-witness's reliability due to possible impermissibly suggestive questioning techniques.[59]

Those jurisdictions choosing to dismiss the propriety of taint hearings in child sexual abuse cases have either failed to explain their reasoning or offered weak reasoning.[60] The Ohio courts refused to adopt the taint

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would only be held after a showing that the interview techniques were unduly suggestive. *Id.* The court concluded that a defendant's right to a fair trial must supersede a child's inconvenience once the defendant establishes the use of suggestive techniques. *Id.*

[57] *Id.* at 812, 618 N.Y.S.2d at 179. For a defendant to be granted such a hearing, he or she must make a showing of suggestiveness in the interview techniques. *Id.* Once established, the prosecution, because of its control of the information regarding the child-witness's initial interview, will have to establish by clear and convincing evidence that the child's testimony is not tainted. *Id.* The court noted that such an assessment does not require the child's presence, but rather notes and tapes of interviews, expert testimony, and testimony of those present at the questioning are admissible. *Id.*

[58] *See Fischbach*, 1996 WL 145968, at *2 (declining to adopt formal procedures for taint hearings outlined in *Michaels*). In *Fischbach*, the defendant, convicted of unlawful sexual penetration, argued the trial court erred by failing to suppress the child-victim's videotaped statement. *Id.* at *1. The defendant asserted that improper interview techniques tainted the child's testimony, therefore a taint hearing should have occurred to prove the reliability of the child's accusations. *Id.* at *2. At the taint hearing, the defendant argued, the state would have the burden of establishing the child's reliability. *Id.* The court found that a child's testimony could be impermissibly suggestive; however, a formal taint hearing, such as the one articulated in *Michaels*, would not be adopted by the Delaware courts. *Id.* Instead, the court announced that it is up to the trial court to determine, considering the totality of the circumstances, whether the child's testimony is reliable. *Id.*

[59] *Id.* The court held that "[i]f a witness's statement is obtained by use of impermissible interviewing techniques, as alleged here, the trial court must determine whether the statement is reliable after considering the totality of the circumstances." *Id.*

[60] *See* U.S. v. Geiss, 30 M.J. 678, 681 (1990) (holding taint hearings unnecessary under MIL. R. EVID. 601); State v. Allen, No. 94-CA-005944, 1996 WL 48550, at *3 (Ohio. App. Feb. 7, 1996) (refusing to adopt taint hearings because of lack of Ohio precedent); State v. Smith, No. 95-CA-006070, 1996 WL 27908, at *4 (Ohio App. Jan. 24, 1996) (finding no current requirement for a taint hearing in child abuse cases); Frohne v. State, 928 S.W.2d 570, 575 (Tex. App. 1996) (finding taint hearings disallowed under TEX. R. EVID. 602).

hearing procedure because no precedent exists in that jurisdiction requiring the courts to conduct a pre-trial assessment of a child-witness's potential contamination.[61] Those courts conduct no further inquiry into the necessity or legal appropriateness of taint hearings in child sexual abuse cases.[62]

The Texas and military courts, which also decline to adopt taint hearings, base their refusal on general evidence arguments.[63] Neither jurisdiction addresses or examines the myriad of psychological studies that attest to a child's suggestibility, nor do they specifically refute the detailed arguments expounded in *Michaels*.[64] Instead, both summarily dismiss the

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[61] *See supra* note 60 and accompanying text (explaining why Ohio courts refuse to adopt *Michaels* decision). In *Allen*, the court declined to hold a pre-trial hearing even if a child-witness is "potentially contaminated" by suggestive interview techniques, reasoning that no Ohio appellate court has adopted the taint hearing procedure. *Allen*, 1996 WL 48550, at *3. In *Smith*, the court noted that "[t]here currently is no requirement in Ohio that a taint hearing be held in cases of alleged child abuse." *Smith*, 1996 WL 27908, at *4. This "lack of precedent" argument was expressly denounced in the New York courts. People v. Michael M., 162 Misc. 2d 803, 810, 618 N.Y.S.2d 171, 178 (1994). In *Michael M.*, the court noted that a lack of specific authority on a matter does not prevent a court from taking action, especially where the issue pertains to the reliability of evidence at trial. *Id.*

[62] *See Allen*, 1996 WL 48550 at *3 (limiting analysis to "lack of precedent" argument); *Smith* 1996 WL 27908, at *4 (offering no further arguments besides "no precedent" on this issue).

[63] *See Geiss*, 30 M.J. at 681; *Frohne*, 928 S.W.2d at 575 (asserting Texas Rules of Evidence allow any witness with personal knowledge to testify). In *Geiss*, the court cited Military Rule of Evidence 601 which notes that "every person is competent to be a witness. . . ." *Geiss*, 30 M.J. at 681. The court found that child-witnesses are presumably able to testify at trial and any questions regarding suggestive and coercive interview tactics are questions of credibility. *Id.* As such, cross examination, expert testimony, corroborating or contradictory evidence and cautionary jury instructions serve as adequate safeguards to a defendant's rights and as a means to test the child-witness's credibility. *Id.* Therefore, a taint hearing is not required. *Id.*

In *Frohne*, the court announced that the *Michaels* opinion cannot be reconciled with Texas Rule of Evidence 602, which states that any witness with personal knowledge may testify. *Frohne*, 928 S.W.2d at 575. Therefore, a child-witness who is the alleged victim in a sexual abuse case is competent to testify because he or she has personal knowledge of the incident in question. *Id.* As such, a taint hearing is not required. *Id.*

[64] *See Geiss*, 30 M.J. at 681 (addressing taint hearing solely in context of evidence rules); *Frohne*, 928 S.W.2d at 575 (limiting discussion to Texas Rules of Evidence analysis).

taint hearing process without fully examining the issue on its merits or explaining specific problems they found with the *Michaels* holding.[65]

Some courts that decline to follow *Michaels* justify their refusal to agree with the arguments proffered in *Michaels*, yet proceed to distinguish the facts before them from those in *Michaels*.[66] These courts do not attack the legal and psychological foundations behind *Michaels* but rather distin-

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[65] *See supra*, note 64 and accompanying text (noting that *Frohne* contains limited discussion of taint hearing issue). In *Frohne*, the court also noted that since *Michaels* was non-binding authority from another jurisdiction, the court would not address it. Frohne v. State, 926 S.W.2d 570, 575 (Tex. App. 1996). However, defendants asked both the New York and Delaware courts to follow *Michaels* despite its non-binding status. *See* Fischbach v. State, No. 245-1985, 1996 WL 145968, at *1 (Del. Supr. Mar. 15, 1996); *Michael M.*, 162 Misc. 2d at 810. Both jurisdictions were persuaded by each defendants' arguments and adopted the premise, if not the actual procedure, of taint hearings articulated in *Michaels*. *Fischbach*, 1996 WL 145968, at *2; *Michael M.*, 162 Misc. 2d at 808-10.

[66] *See* U.S. v. Kibler, 43 M.J. 725, 728 (1995) (distinguishing factual situation in the case at bar from *Michaels*); State v. Smith, No. 95-CA-006070, 1996 WL 27908, at *4 (Ohio App. Jan. 24, 1996) (finding no taint hearing allowed because defendant never moved for hearing prior to trial). In *Smith*, the court declined to implement a taint hearing requirement in Ohio, basing its decision on the lack of precedent. *Smith*, 1996 WL 27908, at *4. The court then continued by stating that even if Ohio had adopted such a procedure, its use would be inappropriate in the case before it because the defendant never moved for a taint hearing prior to trial, a requirement established in *Michaels*. *Id.*

In *Kibler*, the court determined a taint hearing was inappropriate, basing its decisions on the doctrine of waiver. *Kibler*, 43 M.J. at 727. The court noted that since the defendant failed to raise a motion or objection concerning the child-witness's reliability at trial, under the Rules for Courts-Martial 801(g) and 905(e), the defendant waived such issues on appeal. *Id.* Nevertheless, after asserting this position in three short paragraphs, the court proceeded in ten paragraphs of dicta to distinguish the facts before it from those presented in *Michaels*. *Id.* at 727-29.

The *Kibler* court found three factual deficiencies in the case before it which distinguished it from *Michaels* making a taint hearing inappropriate, assuming *arguendo*, that the doctrine of waiver did not apply. *Id.* at 727. The *Kibler* court declined to follow *Michaels* for three reasons. *Id.* at 728. First, the court found that the government's case did not consist primarily of the alleged child-victim's testimony unlike the situation in *Michaels*. *Id.* Second, in *Kibler*, the prosecution's case against the defendant in the present case did not hinge solely on the findings of the social workers and law enforcement officials, as was the case in *Michaels*. *Id.* Finally, unlike the *Michaels* facts, the government in *Kibler* presented ample medical, physical, and behavioral evidence to support the children's allegations. *Id.* Because of these differences, the court noted it would have declined to allow a taint hearing in the case. *Id.*

guish the factual circumstances.[67] By doing so, they weaken their argument that the *Michaels* holding is inappropriate.[68]

Finally, the jurisdictions declining to adopt the *Michaels* procedure are not following their own precedent.[69] In *U.S. v. Geiss*,[70] the military courts declined to adopt taint hearings, basing its decision on the fact that Military Rule of Evidence 601 contains a presumption that a witness is competent to testify at trial.[71] Any problems concerning suggestive interview techniques could adequately be addressed through cross-examination, expert witnesses and similar trial tactics.[72] Five years later, the question again crossed the military court's bench; this time the court made no mention of the *Geiss* decision nor that court's specific refusal to adopt taint hearings.[73] Implementation of the procedure in this later case was declined on other grounds; nevertheless, the court proceeded to discuss the impropriety of taint hearings in the case before it, centering its discussion not on the precedent articulated in *Geiss*, but rather on factual dissimilarities with *Michaels*.[74]

III. CONCLUSION

As a result of the *Michaels* decision, a new evidentiary procedure has emerged regarding children's testimony in sexual abuse cases. While

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[67] *See supra*, note 66 and accompanying text (detailing decisions that refuse to adopt taint hearings yet distinguish facts before it from *Michaels*).

[68] *Id.* Massachusetts courts have also been presented with the *Michaels* argument that taint hearings are appropriate in certain circumstances. Commonwealth v. Allen, 40 Mass. App. Ct. 458, 460-62, 665 N.E.2d 105, 107 (1996). In *Allen*, the court declined to specifically address the propriety of taint hearings in child sexual abuse cases, leaving that decision for another day. *Id.* at 462. Nevertheless, the court proceeded to engage in a factual analysis of the case before it and those facts present in *Michaels*, finding that the present defendant did not present any evidence of suggestibility. *Id.* at 462-64. Without meeting the threshold requirement of suggestibility, the court said, the defendant will never be entitled to a taint hearing. *Id.* at 464 The court found that since this requirement was not met, the question of the propriety of taint hearings would be left for another day. *Id.*

[69] *See Kibler*, 43 M.J. at 727-29 (refusing to adopt taint hearings, basing its argument on facts not precedent.)

[70] 30 M.J. 678 (1990).

[71] *Id.* at 678.

[72] *Id.*

[73] *See supra*, note 66 and accompanying text (explaining *Kibler* holding)

[74] *Id.*

those jurisdictions who have been urged to adopt the *Michaels* holding have varied opinions on the matter, a trend toward allowing such hearings is developing. Certain jurisdictions have specifically adopted taint hearings. Those jurisdictions that decline to do so ground their arguments in weak reasoning, fail to follow precedent, and publish counter-argumentative dicta. As a result, examining the decisions promulgated by the various courts presented with the taint hearing issue indicates that jurisdictions that have yet to address the propriety of taint hearings, may soon be proponents of them.

Julie A. Jablonski