THE CHILD WITNESS AND THE PRESUMPTION OF AUTHENTICITY AFTER *STATE V. MICHAELS*

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I. INTRODUCTION: DEVELOPING A MODEL OF THE CHILD WITNESS UNDER A PRESUMPTION OF AUTHENTICITY

The New Jersey Supreme Court, in the unanimous opinion of *State v. Michaels*,[1] recently announced a new rule of evidence providing for the exclusion of child witness testimony in criminal trials.[2] The evidentiary rule was promulgated in response to a child sexual abuse trial in which a young woman was convicted on April 15, 1988 of 115 counts of aggravated sexual assault, sexual assault, terroristic threats, and endangering the welfare of a minor.[3] Margaret Kelly Michaels, a preschool teacher at the Wee Care Day Nursery in Maplewood, New Jersey, was accused of performing sex acts on children, ages three to five,[4] and forcing them to perpetrate sex acts on her: for example, penetrating the children with forks, spoons, and knives, and forcing the children to lick peanut butter off her genitals.[5]

Apparently, the children's own accounts of abuse were dispositive in obtaining Michaels's conviction. During deliberations, the jury requested the replay of the audiotaped pretrial statements and videotaped trial testimony of the nineteen child victims who appeared in court.[6] At the time of their testimony, the Wee Care children were ages five to seven.[7] In the eyes of some, that conviction was tainted, because the accusations came "from the mouths of babes."[8] Thus, in the aftermath of the *Michaels* trial, the judiciary has become alarmed at child accusations and improper interviewing techniques. This parallels a growing concern in the media

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1 136 N.J. 299, 642 A.2d 1372 (1994) (Handler, J.).

2 This Article focuses on the application of the *Michaels* opinion to exclude the nonhearsay trial testimony of child witnesses. However, the taint hearing requirement also applies to proffered hearsay statements by child declarants. *Michaels*, 136 N.J. at 312, 642 A.2d at 1378-79. Evidentiary restrictions in the hearsay context are consistent with the principles underlying the adversarial system of litigation and might not comprise a special disadvantage for child witnesses. *See infra*, Part III. While it is precedented to erect barriers to the admission of hearsay evidence, the taint rule is an inappropriate type of barrier for reasons discussed throughout this Article. *But see* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 986 (1993) (proposing taint-type inquiry for all child hearsay).

3 *See Michaels*, 136 N.J. at 306, 642 A.2d at 1375.

4 Lisa Manshel, *Reporters for the Defense*, WASH. JOURNALISM REV., July/August 1991, at 16, 17.

5 *See id.* at 17.

6 LISA MANSHEL, NAP TIME: THE TRUE STORY OF SEXUAL ABUSE AT A SUBURBAN DAY-CARE CENTER 447-48 (1990).

7 Manshel, *supra* note 4, at 21.

8 *See id.* at 21 (criticizing inaccurate and inflammatory media coverage of the *Michaels* case).

about child sexual abuse accusations.[9]

On March 26, 1993, the Superior Court, Appellate Division, reversed Michaels's conviction on two grounds: First, the expert testimony introduced by the State had exceeded its permissible scope;[10] Second, the use of closed-circuit television testimony was improper.[11] In addition, the appellate division found that the pretrial interviews in *Michaels* were unduly suggestive and created a substantial risk of tainting the children's statements.[12] Accordingly, the court directed that, in future proceedings, proposed child witness testimony should be subject to a pretrial suppression hearing.[13]

The New Jersey Supreme Court granted limited certification to consider the lower court's proposal of a "taint hearing" requirement for child witnesses colorably exposed to suggestive interviewing.[14] With its opinion in *Michaels*, the supreme court has implemented the appellate division's proposal.[15] The Essex County Prosecutor's Office subsequently announced that it would not retry Kelly Michaels, although cautioning that the decision "should not be construed as any adverse reflection upon the veracity of the victim children or their parents."[16]

The new *Michaels* rule has a burden-shifting design by which the defendant triggers a taint hearing with a threshhold showing of "some evidence" that a child has been exposed to suggestive interviewing.[17] The rule places the ultimate burden on the State to prove by clear and convincing evidence that the child's statements retain sufficient indicia of reliability to outweigh suggestive pretrial influences.[18] If the State cannot persuade the judge that the child witness is sufficiently reliable despite having been exposed to sug-

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9 *See generally* THE BACKLASH: CHILD PROTECTION UNDER FIRE (John E.B. Myers ed., 1994).

10 State v. Michaels, 264 N.J. Super. 579, 593-605, 625 A.2d 489, 496-502 (App. Div. 1993), *aff'd*, 136 N.J. 299, 642 A.2d 1372 (1994).

11 *Id.* at 611-16, 625 A.2d at 505-08.

12 *Id.* at 620-35, 625 A.2d at 510-19.

13 *Id.*

14 State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993) (granting limited petition for certification).

15 "We thus concur in the determination of the Appellate Division . . . that to ensure defendant's right to a fair trial a pretrial taint hearing is essential to demonstrate the reliability of the resultant evidence." State v. Michaels, 136 N.J. 299, 320, 642 A.2d 1372, 1382 (1994).

16 Evelyn Nieves, *Prosecutors Drop Charges in Abuse Case from Mid-80's*, N.Y. TIMES, Dec. 3, 1994, at 25, 29.

17 *Michaels*, 136 N.J. at 320-21, 642 A.2d at 1383.

18 *Id.* at 321, 642 A.2d at 1383.

gestion, the judge must then hold the child's testimony inadmissible at trial.[19]

The exclusion of children as a class from the criminal justice system is not a new idea. Child witnesses have labored under a long history of negative stereotypes regarding their testimonial capacities.[20] At the turn of the century, children were viewed as "the most dangerous of all witnesses."[21] As a result, society at one time had erected "traditional formal barriers to the use of child testimony," including corroboration requirements, competency examinations, and cautionary jury instructions.[22]

The increasing incidence of child sexual abuse trials in the past several decades has sparked reexamination of the criminal justice system.[23] Up to one-third of all child sexual abuse victims are abused before the age of seven,[24] so that the courts have been forced to accommodate very young trial participants. The integration of preschool witnesses into the system presents two distinct problems: the special needs of young children and their pur-

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19 *See id.* The *Michaels* opinion leaves the door open for selective admission of portions of the proposed child testimony. The court states that "if it is determined by the trial court that a child's statements or testimony, *or some portion thereof,* do retain sufficient reliability for admission at trial, then it is for the jury." *Id.* at 323, 642 A.2d at 1384 (emphasis added).

20 *See generally* Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis,* 113 PSYCHOL. BULL. 403 (1993); Gail S. Goodman, *Children's Testimony in Historical Perspective,* 40 J. SOC. ISSUES 9 (1984). Progressive Era reforms on behalf of children were informed by a demonization based on "Freudian theory about the child who seethed with tensions and impulses, and lacked moral sensibility." Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights,* 9 HARV. WOMEN'S L.J. 1, 9 (1986).

21 Goodman, *supra* note 20, at 9.

22 Michael R. Leippe et al., *The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitnesses: A Survey, in* PERSPECTIVES ON CHILDREN'S TESTIMONY 100, 101 (S.J. Ceci et al. eds., 1989). The history of children's gradual permission to participate in the criminal justice system parallels the history of the "prosecutrix," the adult female accuser in a sex crime. The legal disabilities discussed within this Article track, as a general matter, the historical legal disabilities of adult women. *See* Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations,* 40 U. MIAMI L. REV. 167, 167 (1985); *cf.* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 72 (1992) ("The legal system is designed to protect men from the superior power of the state but not to protect women or children from the superior power of men.").

23 Only relatively recently have large numbers of children entered the system. Berliner, *supra* note 22, at 168. This observation could be due either to an increased incidence of child sexual abuse or to more reporting. L. Matthew Duggan III et al., *The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial, in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 71, 72.

24 Barbara W. Boat & Mark D. Everson, *The Use of Anatomical Dolls in Sexual Abuse Evaluations: Current Research and Practice, in* CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 47, 47 (Gail S. Goodman & Bette L. Bottoms eds., 1993) [hereinafter CHILD VICTIMS].

ported deficiencies as witnesses.[25] The pursuit of criminal convictions for sexual assaults on child victims is indispensable, necessitating that we confront these issues.[26]

In a first wave of child-centered reforms, protective measures were adopted to shield children from the full impact of trial conditions.[27] These compromises of the adversarial method of litigation were accepted because it is believed that children provide more accurate testimony under nonadversarial conditions.[28] Critics of such early child protective measures focused on the importance of getting the child in court and before the jury.[29]

The *Michaels* opinion marks a second wave of reform in which critics of child protection litigation are lobbying to remove child witnesses altogether from the criminal justice system. Despite the longstanding importance of maximizing the reliability of evidence, the taint hearing mechanism represents a radical departure from the evidentiary norm of admitting at trial all relevant nonhearsay testimony.[30] The justification for excluding child testimony is "child suggestibility"—the general theory that children can easily

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25 This Article focuses on very young, preschool-aged children. Psychological and legal arguments may change when the specific age in question changes.

26 *See* Meridith Felise Sopher, Note, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 641-42 (1994) (arguing that civil remedies for child sexual abuse are not as effective as criminal convictions).

27 *See generally* Mary Christine Hutton, *Child Sexual Abuse Cases: Reestablishing the Balance Within the Adversary System*, 20 U. MICH J.L. REF. 491 (1987). *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 857 (1990) (upholding the use of closed-circuit television testimony under the Confrontation Clause due to the state interest in protecting child witnesses).

28 *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1032 & n.5 (1988) (Blackmun, J., dissenting) (arguing to uphold a child shield law because confrontation may undermine the truth-seeking process with child witnesses); Gail S. Goodman & Vicki S. Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181, 204-05 (1985) (contending that children's testimony should be videotaped by one trained interviewer on behalf of all interested parties, thus avoiding the adversial method); *cf.* Hutton, *supra* note 27, at 494 n.16 (noting that for all witnesses the adversary process may disserve truth-seeking).

29 *See, e.g.*, Hutton, *supra* note 27, at 500 (criticizing the fact that, with the use of a hearsay witness or expert, "a buffer has been placed between the victim-witness and the fact finder"); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 815-16 & n.72 (1985) [hereinafter *Testimony of Child Victims*] (criticizing videotape statute under the Sixth Amendment for "hampering the jury's assessment of [the child's] credibility").

30 *See* John E.B. Myers, *New Era of Skepticism Regarding Children's Credibility*, 1 PSYCHOL., PUB. POL'Y & LAW 387, 396-98 (1995) (discussing *Michaels* from an historical perspective as a backlash phenomenon). Earlier courts had rejected taint arguments as a basis for excluding children's trial testimony. *See, e.g.*, Commonwealth v. Amirault, 535 N.E.2d 193, 202-03 (Mass. 1989); State v. Zamorsky, 159 N.J. Super. 273, 285, 387 A.2d 1227, 1232 (App. Div. 1978).

be led to make false accusations of or statements about sexual assault. Suggestibility is distinct from the question of whether children deliberately lie about sexual abuse, an issue which is not reached in *Michaels* or in this Article. Both this Article and the court's opinion assume a proposed child witness who has a present belief of having been sexually abused.

The dangers of suggestive influences are most often identified in the context of questionable interviewing techniques. Accordingly, the *Michaels* opinion focuses on damage to reliability due to State-conducted interviews with the children. The *Michaels* court condemns the State's investigators as having "utilized most, if not all, of the practices that are disfavored or condemned by experts."[31] The opinion itemizes numerous improper techniques that were used in pretrial interviews, which the court repeatedly refers to as "egregious,"[32] including "displayed [ ] frustration,"[33] "an obvious lack of impartiality,"[34] "failure to pursue any alternative hypothesis,"[35] "failure to challenge or probe seemingly outlandish statements,"[36] "leading questions that furnished information,"[37] "repeated, almost incessant, interrogation,"[38] "mild

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31 State v. Michaels, 136 N.J. 299, 313, 642 A.2d 1372, 1379 (1994); *cf.* MANSHEL, *supra* note 6, at 47-120. *But see* John E.B. Myers, *Taint Hearings For Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 911-26 (1994) (arguing that some of the improper interview techniques used in *Michaels* may at times be proper).

32 *Michaels*, 136 N.J. at 315, 324, 642 A.2d at 1380, 1384. Only 13 of the 34 transcripts of children's pretrial interviews submitted to the court by the defendant involved children who actually participated in the *Michaels* trial. Supplemental Brief for the State of New Jersey-Petitioner at 15, *State v. Michaels*, 134 N.J. 482, 634 A.2d 528 (1993) (No. 36,633).

33 *Michaels*, 136 N.J. at 314, 642 A.2d at 1379.

34 *Id.*

35 *Id.*, 642 A.2d at 1380.

36 *Id.*

37 *Id.* (expressly criticizing leading questions which provide answers).

The risk factor of leading questions is often discussed in overly simplified terms. "Leading questions" is not a unitary construct, and yet, an adult's interaction with a child may be called "suggestion" without reference to distinctions. More accurately, interviewing involves a range of question types that includes: "free recall," "specific questions," and "misleading questions." Jennifer Marie Batterman-Faunce & Gail S. Goodman, *Effects of Context on the Accuracy and Suggestibility of Child Witnesses*, *in* CHILD VICTIMS, *supra* note 24, at 301, 304-08. The category of misleading questions might be further broken down into specific forms of questions and word choice. For example:

> Mild suggestion, such as "Did Uncle Henry touch your penis?," would be less likely to lead to an inaccurate report than a strong suggestion, such as "I bet Uncle Henry touched your penis, isn't that right?," or "Let's pretend that Uncle Henry touched your penis. How would he have done it?"

Goodman & Helgeson, *supra* note 28, at 189.

The issue of proper interviewing of children is complex, because it is understood

threats, cajoling, and bribing,"[39] and "vilification" of the defendant.[40] Awareness of the importance of pretrial investigative events only deepens concerns about the suggestive interviewing of children.[41]

It is well-settled that all human beings—both adults and children—may make erroneous statements as a result of suggestive influences.[42] Most researchers agree that very young children are more suggestible than adults on average across all contexts.[43] Although children may be more suggestible than adults in some contexts, researchers have also demonstrated significant resistance to abuse-related suggestion among children.[44] The research on whether children are more suggestible than adults, however, has

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that very young children provide less "free recall," or unprompted information, than adults. *See, e.g.*, David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases, in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 184, 191. Therefore, although free recall provides very accurate reports, *see, e.g.*, Margaret-Ellen Pipe et al., *Cues, Props, and Context: Do They Facilitate Children's Event Reports?, in* CHILD VICTIMS, *supra* note 24, at 25, 25, child interviewers must advance to more direct questioning techniques. *See, e.g.*, Goodman & Helgeson, *supra* note 28, at 186.

38 *Michaels*, 136 N.J. at 315, 642 A.2d at 1380.

39 *Id.*

40 *Id.*

41 *See id.* at 318, 642 A.2d at 1381. "[T]oday's law enforcement machinery [. . . may] reduce the trial itself to a mere formality." United States v. Wade, 388 U.S. 218, 224 (1967) (holding that post-indictment lineup is a critical stage requiring the presence of counsel under the Sixth Amendment). *See also* John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 707-08 (1987) (arguing for judicial review of pretrial interviews, because "falsified memory [may have] been cemented in place as truth").

42 Overwhelming evidence indicates that, in an absolute sense, both children and adults are susceptible to error due to misleading questions. *See, e.g.*, Myers, *supra* note 31, at 916 & n.205. ("Psychologists have long documented suggestibility in adults.")

43 *See* Ceci & Bruck, *supra* note 20.

44 *See infra* note 54 (citing suggestibility studies). Additionally, some research suggests that child witnesses may be less likely to make certain kinds of reporting errors. For example, one article has noted that children may be less efficient at integrating suggested information into their reports. Elizabeth F. Loftus & Graham M. Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51, 55 (1984).

Furthermore, children may be less likely than adults to fill in memory gaps. Goodman & Helgeson, *supra* note 28, at 203. Thus, when children make reporting errors, they may tend to be errors of omission, not commission. *Id.* at 186; Gail S. Goodman et al., *Child Sexual and Physical Abuse: Children's Testimony, in* CHILDREN'S EYEWITNESS MEMORY, at 1, 17 (Stephen J. Ceci et al. eds., 1987). *But see* LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 61-62 (1994) (arguing that omissions are significant reporting errors which may also be inculpatory); Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of* State of New Jersey v. Michaels *Presented by Committee of Concerned Social Scientists*, 1 PSYCHOL., PUB. POL'Y & LAW 272, 273, 275-76 (1995) (arguing that some research shows that children do make errors of commission).

been widely criticized as inadequate.[45] It has been argued that our society both underestimates children and overestimates adults to the systematic disadvantage of children.[46]

The argument that children are suggestible is complex, involving controversial and still unclear questions of cognitive, developmental, and social psychology. The exact mechanism by which suggestion produces information errors is unknown.[47] Researchers fundamentally disagree over whether suggestion causes inaccuracy

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[45] *See, e.g.*, Maria S. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, *in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 53, 53 ("Recent studies, of which there are only a few, have failed to uncover any simple relationship between suggestibility and age. Nevertheless, the presumed suggestibility of children is one of the primary reasons children have historically been barred from testifying in court."); D. Stephen Lindsay & Marcia K. Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, *in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 92, 110 (noting "surprisingly little rigorous empirical evidence on the issue"); Loftus & Davies, *supra* note 44, at 62 ("Nearly all laboratory studies report that children are less efficient than adults in recalling events they have witnessed. . . . No clear developmental trend emerges, however, from recent studies on the effects of leading questions.").

Numerous child memory studies fail to use comparison groups of adult subjects, so that their usefulness in drawing conclusions about the relative suggestibility of children is doubtful. *See generally* research models reported in the following: CHILD VICTIMS, *supra* note 24; THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., 1991) [hereinafter CHILDREN'S RECOLLECTIONS]; CHILDREN'S EYEWITNESS MEMORY, *supra* note 44.

[46] *See* Carol B. Cole & Elizabeth F. Loftus, *The Memory of Children*, *in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 178, 180 ("More often, it is suggested that an adult misperceived or misremembered some detail or mistakenly identified the wrong perpetrator. When a child is involved, however, his or her entire story is sometimes considered suspect. . . .").

[47] Ceci & Bruck, *supra* note 20, at 412. Ceci and Bruck explain various theories on how suggestion operates:

> One view is that the original memory trace for the event was changed (overwritten) as a result of the suggestion. A second hypothesis is that the postevent suggestion interferes with recollection because it renders the original memory unretrievable but unchanged, as in the case of creating access competition. Whereas these first two hypotheses posit memory impairments . . . as the basis of suggestibility effects, a third hypothesis is that suggestibility effects reflect gap-filling strategies rather than a memorial distortion of the original event [ ]: subjects accept the misleading information because they have no memory for the original event. A fourth hypothesis is that suggestibility effects result from retrieval difficulties that reflect source monitoring difficulties. According to this view, the subject has simultaneous access to representations of the original event as well as to the erroneous suggestion but has difficulty distinguishing which one *was* the original event. . . . Finally, some researchers [ ] have posited that suggestibility effects arise out of social pressures: The subject accepts the misleading information to please the experimenter or because the experimenter is trusted.

Id. (citations omitted).

by distorting memory processes or instead by eliciting misstatements due to social and environmental influences.[48] Thus, one researcher has cautioned that suggestion errors may not be irretrievable in the sense that the child has a false, implanted memory:

> What is not clear is whether these subjects merely believe the information to be true because it was provided by a credible source, or whether they in fact now remember the misleading information as part of the original witnessed experience. It is entirely possible that some subjects believe the suggestion was part of the original event, even though they know full well they do not remember seeing it.[49]

Additionally, issues of miscommunication and misinterpretation can lead to the perception that a child has provided inaccurate information.[50]

In *Michaels*, the New Jersey Supreme Court adopts a memory error model of suggestibility, assuming that suggestive influences create a false memory in the child's mind: "[T]he child's recollection of actual events has been irremediably distorted."[51] Thus, when a child testifies that she has been abused, her statements may

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48 The bifurcation of suggestibility theory into memory and nonmemory models has been widely noted in the psychological literature as a central organizing debate. *See, e.g.*, Charles Brainerd & Peter A. Ornstein, *Children's Memory for Witnessed Events: The Developmental Backdrop, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 10, 15 (reporting "considerable debate" over whether misleading questions actually alter the initial memory trace); Stephen J. Ceci, *Some Overarching Issues in the Children's Suggestibility Debate, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 1, 7-8 (urging researchers to differentiate between memory trace alteration versus confabulation due to social or emotional pressures); Zaragoza, *supra* note 45, at 74 ("[D]istortions in the witness' testimony are not necessarily due to distortions in the witness' memory for the original event. . . . To the extent that memory is in fact distinct from testimony, it is important to distinguish between the suggestibility of memory and the suggestibility of testimony."). Ironically, many of the suggestive influences cited in the *Michaels* opinion are social factors that have been proposed as alternatives to memory factors in causing reporting errors.

49 Zaragoza, *supra* note 45, at 74.

50 For discussion of miscommunication issues, *see, e.g.*, ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (1994); Goodman & Helgeson, *supra* note 28, at 197-98. For discussion of misinterpretation issues, *see, e.g.*, Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 92, 99-102 (reporting studies which focus on children's interpretation of ambiguous events); Lindsay & Johnson, *supra* note 45, at 102 (noting that children might know the difference between fact and fantasy but "not know that it is pertinent" when questioned).

51 *Michaels*, 136 N.J. at 322, 642 A.2d at 1384. The opinion repeatedly characterizes children's memories as irremediably distorted. *See, e.g., id.* at 306-10, 315-16, 642 A.2d at 1375-77, 1380.

be based on false memories as opposed to authentic experience. In addition, the court posits an incurable, hardened form of memory distortion, in which the false memory allegedly hardens, or becomes frozen over time, in the individual's mind.[52] This is an extreme version among memory theories.[53]

Even if, as a general matter, suggestion can cause memory errors, it is unclear that a false memory specifically about sexual assault can be induced. It overstates the data to conclude that a preschool child can be led to make a false allegation of sexual abuse,[54] let alone be led to have a false memory that she has been assaulted. Some writers have argued that memory distortions

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[52] The *Michaels* court states:

> Further, the effects of suggestive pre-trial identification procedures, as with suggestive or coercive interview practices, are exceedingly difficult to overcome at trial. Witnesses in both situations are quite likely to be absolutely convinced of the accuracy of their recollection. Thus their credibility, understood as their obvious truth-telling demeanor, is unlikely to betray any inaccuracies or falsehoods in their statements.

Michaels, 136 N.J. at 319, 642 A.2d at 1382 (citation omitted).

[53] *See supra* note 47 (listing various suggestibility theories).

[54] In one study of five- and seven-year-old girls reported by Saywitz, et al., three out of 71 children made false reports of anal or vaginal touching during a medical examination with no genital component. Karen J. Saywitz et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. CONSULTING & CLINICAL PSYCHOL. 682, 686-87 (1991). The authors report:

> Of the children in the nongenital condition who made the three commission errors, two were unable to provide any detail. However, one child in the nongenital condition who said yes to the anal touch question described in further questioning that "it tickled" and "the doctor used a long stick."

Id. at 687. Previously, many researchers believed that young children were highly unlikely to make false reports of a sexual nature. *See, e.g.*, Goodman & Clarke-Stewart, *supra* note 50, at 102-04 (reporting original research suggesting that nonabused children are unlikely to make up details of child sexual abuse); Gail S. Goodman et al., *Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Eyewitness Testimony*, *in* KNOWING AND REMEMBERING IN YOUNG CHILDREN 249, 278 (R. Fivush & J.A. Hudson eds., 1990) ("It may be possible to obtain false reports if one relies on nods of the head by 3-year-olds, but we have so far never seen a 3-year-old provide any sexualized detail."); Gail S. Goodman et al., *Determinants of the Child Victim's Perceived Credibility*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 1, 5 (observing that young children are resistant to questions suggestive of abuse); Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 208, 219 ("[L]ittle research has been done to demonstrate that so-called improper interviewing techniques actually lead to false reports of sexual abuse."); *id.* at 216 ("[S]everal noted researchers and clinicians have recently criticized the increasing frequency of unsupported or exaggerated claims relating to false accusations of child sexual abuse."); Goodman et al., *supra* note 44, at 18 ("Interestingly, across the studies, children never made up false stories of abuse even when asked questions that might foster such reports."); Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 127 (1984) (noting that many children underreport, but

render a child witness's statements untestable.[55] However, the *Michaels* opinion fails to discuss the controversy within the professional literature over whether suggestion does in fact induce memory distortions.[56] Thus, the court's leap to the conclusion that interviewer suggestion may produce a false memory of sexual abuse is a weakness over-and-above other critiques offered in this Article.

Prior to the *Michaels* rule, New Jersey courts have been hospitable to child witnesses in sexual abuse trials.[57] Repeatedly, the courts have recognized "the demonstrated reliability of sex abuse complaints by child victims."[58] As a result, the New Jersey Supreme Court has noted approvingly that "[o]ther commentators agree that the liberal use of children's testimony at trial should be encouraged."[59] The *Michaels* court's hardened memory theory of suggestibility may undermine New Jersey's prior accommodations of child complainants.[60]

"exaggeration is rare"). *See also, infra* notes 288-91 and accompanying text (discussing ecological validity).

But see Ceci & Bruck, *supra* note 20 (suggesting that improper interviews may create false accusations); Max Steller, *Commentary: Rehabilitation of the Child Witness, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 106, 108 (arguing that the Saywitz et al. study, *supra*, produced one serious false allegation of sexual misconduct, which is a significant finding).

55 *See, e.g.*, Montoya, *supra* note 2, at 949 ("Children's suggestibility and memory distortion are factors that diminish the value of trial cross-examination as an impeachment tool."); 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. LAW 227, 250 (1988) ("Where a hypersuggestible witness undergoes a highly suggestive interviewing process, it is highly possible that a new memory will be created. . . . [M]eaningful cross-examination may not be achieved.").

56 Instead, the court writes that "a sufficient consensus exists within the academic, professional, and law enforcement communities [. . . that suggestion may] distort the child's recollection of events." *Michaels*, 136 N.J. at 312, 642 A.2d at 1379.

57 *See, e.g.*, N.J. STAT. ANN. § 2A:84A-32.4 (West 1994) (providing for closed-circuit television testimony of child witnesses); *id.* § 2A:84A-16.1 (providing for the use of "anatomically correct dolls, models or similar items" to assist children's testimony); N.J. EVID. R. 803(27) (providing for tender years hearsay exception for child victims of sexual offenses); State v. R.W., 104 N.J. 14, 514 A.2d 1287 (1986) (establishing "substantial need" test for court-ordered psychiatric evaluations of child witnesses); State in Interest of K.A.W., 104 N.J. 112, 515 A.2d 1217 (1986) (relaxing requirements that complaint specify date and time of offenses against children); State v. J.G., 261 N.J. Super. 409, 418, 619 A.2d 232, 237 (App. Div.) (extending statutory victim-counselor privilege to confidential communications with parent of sexually abused child), *certif. denied*, 133 N.J. 436, 627 A.2d 1142 (1993).

58 State v. D.R., 109 N.J. 348, 362, 537 A.2d 667, 674 (1988). *See also* R.S. v. Knighton, 125 N.J. 79, 92, 592 A.2d 1157, 1163 (1991); *cf. R.W.*, 104 N.J. at 29, 514 A.2d at 1295 (explaining that "[v]ictims of sex crimes are no less reliable as witnesses than other crime victims").

59 *D.R.*, 109 N.J. at 368, 537 A.2d at 677.

60 For example, in two cases, New Jersey courts treated as spontaneous the sexual abuse disclosures of two seven-year-olds after they had received sexual abuse educa-

It is important to understand that suggestive influences exist beyond the walls of interview rooms. All of human interaction manifests, for example, displayed frustration, lack of impartiality, single-mindedness, credulity, leading questions, threats or inducements, and stereotyping. The upshot of suggestibility theory is that the authenticity of all testimonial evidence must be questioned. Not surprisingly, then, those who accept the taint premise often argue that only physical evidence has probative value in child sexual abuse cases. The failure to explore these same concerns in the context of other types of crimes with other types of witnesses reveals that societal denial and stigmatization is influential in the proffer of taint arguments against children.

Johnson & Foley have discussed a study in which both adults and children were shown a photo of a subway scene depicting a man holding a razor in an aggressive posture.[61] Adults often reported that the man was black, whereas no child reported him to be black.[62] In fact, he was white.[63] Clearly, the appearance of no suggestion does not prove the absence of suggestive influences. The internal prejudices of eyewitnesses have the suggestive power to subvert the reliability of even "free recall" statements. It is artificially narrow to confine concerns about suggestibility to child witnesses in sexual abuse trials: "At this time, it remains unclear whether the imagination of children or the prejudice of adults is the more dangerous enemy of justice."[64]

Traditionally, the reliability of testimonial evidence is challenged through the impeachment of a witness's credibility. Although the issue of suggested testimony might be treated as an aspect of credibility, the *Michaels* court rejects that approach by removing the issue from the jury and by isolating tainted memory as an evidentiary problem distinct from credibility issues.[65] Therefore, the language of credibility usually used in discussing testimonial evidence is inadequate to evaluate the *Michaels* court's

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tion. *K.A.W.*, 104 N.J. at 114, 515 A.2d at 1218; State v. Ramos, 203 N.J. Super. 197, 496 A.2d 386 (Law. Div. 1985), *aff'd*, 226 N.J. Super. 339, 544 A.2d 408 (App. Div. 1988). It is possible after *Michaels* that these same disclosures would be held to be the tainted product of sexually suggestive materials.

61 Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. SOC. ISSUES 33, 46 (1984).

62 *Id.* at 46.

63 *Id.*

64 *Id.*

65 *Michaels*, 136 N.J. at 323, 642 A.2d at 1384 ("[T]he issue of a child-witness's credibility . . . remains strictly a matter for the jury."). The rejection of competency doctrine as a ground of decision is discussed *infra*, Part II.A.

reasoning, which removes the issue of taint from that discourse. Instead, the concept of authenticity provides alternative language which addresses more precisely the evidentiary concerns highlighted by the court.

This Article contends that all nonhearsay witnesses enjoy a pretrial "presumption of authenticity" within the constitutional and evidentiary structures of the adversary system.[66] Thus, a nonhearsay witness is generally not required to establish any quantum of authenticity of her inner experience in order to be permitted to testify. Ordinarily, the genuineness of a witness's testimony may not be attacked until trial. The taint rule established in *Michaels* permits a defendant to overcome a child witness's presumption of authenticity.

In a *Michaels* hearing, the defendant defeats a child's presumption of authenticity by presenting "some evidence" of suggestion. Once triggered, the State is required to prove to the judge by clear and convincing evidence that suggestive interviews did not have the effect of tainting the child.[67] By requiring the child to prove a negative—that the child's testimony has not been tainted—the effects test in fact requires proof of the authenticity of the child's inner sense of her own experience.

The pretrial presumption of authenticity as to adult testimony is strong and may be overcome only in closely circumscribed contexts. The most common way to overcome the presumption of authenticity with adult witnesses is in a *Wade*-type hearing, which determines the admission or suppression of certain eyewitness testimony. In the context of suggestive identification testimony, the *Wade*-type hearing is triggered by a showing that the identification "'procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[68] The *Michaels* hearing may be triggered by a lesser showing that the pretrial events "were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on defendant's guilt."[69] John Myers has recommended increasing the defendant's burden under *Michaels* to bring that standard more in line with the standard governing tainted adult evidence.[70]

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66 *See* discussion *infra*, Parts II and III.

67 *Michaels*, 136 N.J. at 321, 642 A.2d at 1383.

68 Myers, *supra* note 31, at 902 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

69 *Michaels*, 136 N.J. at 320, 642 A.2d at 1382-83.

70 Myers proposed the following formulation:

The *Michaels* rule seriously weakens the presumption of authenticity as to child testimony by permitting the presumption to be overcome more easily and as to a greater portion of the child's proffered testimony.[71] The New Jersey Supreme Court is legitimately concerned with the integrity of testimonial evidence, given the pervasiveness of suggestive influences affecting both child and adult witnesses. As in the case of suggestive identifications, it may be appropriate to permit the presumption of authenticity to be overcome regarding certain kinds of "tainted" evidence. However, the *Michaels* opinion responds to investigatory misconduct with child victims in a more vigorous way than in other types of investigations, establishing new safeguards in the artificially narrow context of child witnesses. In order to protect the interests of criminal defendants in a more evenhanded way, the court would need to extend the taint rule to all witnesses in all contexts or to strengthen the presumption as to child witnesses.

In the alternative, this Article proposes an irrebuttable pretrial presumption of authenticity as to nonhearsay, nonhypnotized witnesses offering central event testimony. Superficially, it appears that the exclusion of suggestive identification testimony supports the *Michaels* rule. However, that line of cases questions a witness's ability to give reliable testimony about a defendant's identity, not about the fact of a personally experienced event. In the identification cases, the presumption of authenticity has been overcome specifically in reference to testimony on the face-recognition of strangers. Under *Michaels*, the excluded evidence would include the child's testimony about the experience of being raped. The reasoning of the *Michaels* opinion does not justify permitting the pretrial presumption of authenticity to be overcome in the context of such central event testimony.[72] This Article proposes that no person should be barred from entering a courtroom to allege her sense of her own experience of a crime.

The taint premise is that a child's sense of her own experience is a forgery. Although testimonial evidence is usually considered distinct from documentary evidence, the *Michaels* premise suggests

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> A child's . . . trial testimony may be excluded . . . only if pretrial investigative interviews were so improperly and unnecessarily suggestive that they give rise to a very substantial likelihood of irreparably mistaken or false recollection of material facts that are central to the litigation.

Myers, *supra* note 31, at 903-04.

[71] *See* discussion *infra*, Parts II.B. and C. (discussing identification and hypnosis doctrine).

[72] *See* discussion *infra*, Part II.

a comparison to forged documents. The rule of evidence governing self-authenticating documents provides a practical model for an irrebuttable pretrial presumption of authenticity. That rule provides: "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required."[73] Obviously, the trier may ultimately reject the testimony of such a self-authenticating witness. Thus, the comment to the rule further states, "Despite authentication under this rule, the genuineness of a document may always be challenged."[74]

In a similar manner, any evidence of inauthenticity may be used at trial to challenge the genuineness of the human being's testimony or recollection. The presumption of authenticity could not be overcome in order to exclude the witness's testimony about the crime experience itself. However, the presumption would become rebuttable at trial as to the weight due the testimony.

This Article will demonstrate that, even accepting the questionable memory model of suggestibility adopted in *Michaels*, the New Jersey taint rule creates a new evidentiary barrier incompatible with legal doctrine. This can be seen in the *Michaels* court's struggle to find legal models by which to support its exclusion of relevant, in-court, nonhearsay testimony. The internal disarray of the legal reasoning in *Michaels* is caused by that opinion's repudiation of the presumption of authenticity as to child witnesses. This Article further argues that the rule established in *Michaels* creates bad law that is incompatible with public policy and that erects a barrier to justice that comports more with the history of negative stereotypes about child witnesses and less with concerns about the reliability of evidence.

Part II analyzes the *Michaels* opinion's internal reasoning. First, this Part considers the applicability of competency doctrine to the *Michaels* analysis, concluding that the taint rule effectively overrules state competency doctrine. Second, this Part considers the *Michaels* analogies to suggestive identification and hypnosis doctrine, concluding that the taint rule is distinguishable from those precedents because it allows the presumption of authenticity to be overcome more easily and across a wider range of topics. Part III examines the constitutional structure of the adversary system, arguing that implicit throughout is a strong presumption of authenticity which is consistent with an irrebuttable pretrial pre-

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[73] N.J. EVID. R. 902; FED. R. EVID. 902.

[74] N.J. EVID. R. 902 cmt. *See* FED. R. EVID. 902 advisory committee's note ("In no instance is the opposite party foreclosed from disputing authenticity.").

sumption of authenticity. Part IV sets forth extra-legal arguments against the *Michaels* rule, including arguments based on weaknesses in the social science research, slippery slope arguments, and public policy arguments. Part V concludes that child witnesses, as all witnesses, should enjoy a strong presumption of authenticity.

II. Arguments by Analogy to Justify Excluding the In-Court Testimony of Child Witnesses

The *Michaels* rule severely weakens the presumption of authenticity as to child witnesses. Unless the State succeeds in overcoming the defendant's pretrial rebuttal of the presumption with sufficient evidence of the child's internal authenticity, her testimony must be held inadmissible. The plainest interpretation of the new taint rule is that *Michaels* has overturned state competency doctrine, replacing the presumption of competency with a presumption of incompetency for child witnesses once the taint mechanism has been triggered. As will be seen in Section A., the opinion betrays considerable ambivalence about its own deep meaning regarding children's competency. However, the New Jersey Supreme Court resists this simple and forthright ground of decision. Declining to rest on competency doctrine, the court instead analogizes to other seemingly similar doctrines.

Briefly, the court adverts to an area of fundamental fairness under New Jersey law by which the court has, in the past, exercised its supervisory power to exclude certain manifestly unreliable evidence. In *Michaels*, the court explained:

> When faced with extraordinary situations in which police or prosecutorial conduct has thrown the integrity of the 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.[75]

All three cases cited are distinguishable, involving bad faith actions on the part of law enforcement personnel, some actions reaching the level of criminal conduct.[76] Indeed, the court itself concedes that the suggestive questioning by the investigators in *Michaels* did not reach the level of misconduct present in the three cited cases.[77]

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75 *Michaels*, 136 N.J. at 317, 642 A.2d at 1381.

76 *Id.* (citing State v. Gookins, 135 N.J. 42, 637 A.2d 1255 (1994) (falsified breathalizer reports); State v. Sugar, 84 N.J. 1, 417 A.2d 474 (1980) (electronic eavesdropping on defendant in conferences with lawyer); State v. Peterkin, 226 N.J. Super. 25, 543 A.2d 466 (App. Div.) (photo array destroyed and replacement fabricated to accompany police officer identification), *certif. denied*, 114 N.J. 295, 554 A.2d 850 (1988)).

77 *Id.* at 323, 642 A.2d at 1384 ("[W]e cannot conclude that the improper investi-

However, apparently the taint rule is authorized by this cluster of cases under a public policy rationale.[78]

The opinion moves to its two main arguments by analogy, selectively culling principles from the case law on suggestive identifications and hypnotically-induced testimony. The court attempts by these references to rationalize the exclusion of in-court testimony from otherwise "competent" child witnesses. Ultimately, as discussed in Sections B. and C., each of these analogies deeply disappoints the goals of the *Michaels* court.

A. *Competency Doctrine*

1. General Competency Doctrine

The most straightforward method for excluding in-court testimony would be to hold the proposed witness incompetent to testify under a new test of competency. *Michaels* reasons that, although she appears in court and describes her own experience, the witness is not "really" present, because her recollection has been tainted. These issues underlying the *Michaels* rule intuitively lend themselves to a competency analysis. However, the court does not invoke competency doctrine in *Michaels.*

The opinion vacillates between rejecting a conclusion about child witnesses' competency and concluding outright that children are particularly suspectible to improper interviewing tactics. On the one hand, the court writes:

> This Court has been especially vigilant in its insistence that children, as a class, are not to be viewed as inherently suspect witnesses.[79]

In the same paragraph the court then states:

> Nevertheless, our common experience tells us that children generate special concerns because of their vulnerability, immaturity, and impressionability.[80]

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gatory techniques were the result of conscious bad faith rather than a lack of training coupled with over-zealousness.").

78 Presumably, the court adverts to these distinguishable cases in order to establish an authority for its exercise of judicial power in *Michaels*, given that the opinion does not rest on constitutional, statutory, or evidence law authority. In *Sugar*, the court explained, "Fundamental fairness on occasion requires that a court prohibit conduct that does not transgress the Constitution." *Sugar*, 84 N.J. at 15, 417 A.2d at 481. *But see*, Myers, *supra* note 31, at 893 (stating that *Michaels* was decided under the Due Process Clause of the Fourteenth Amendment).

79 *Michaels*, 136 N.J. at 308, 642 A.2d at 1376.

80 *Id. See also id.* at 307-08, 642 A.2d at 1376 ("[T]he notion that a child is peculiarly susceptible to undue influence, while comporting with our intuition and common experience is in fact a hotly debated topic.").

Next, the court asserts:

> The broad question of whether children as a class are more or less susceptible to suggestion than adults is one that we need not definitively answer in order to resolve the central issue in this case.[81]

The *Michaels* opinion shifts tack so frequently that it becomes unclear whether the court is in fact denigrating the testimonial capacity of children as a class.

Modern courts have moved toward permitting juries to assess witness disabilities and have moved away from factors that had previously stigmatized and rendered a witness incompetent.[82] In 1918, the United States Supreme Court noted the overall trend:

> [T]he disposition of courts and of legislative bodies to remove disabilities from witnesses has continued . . . under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent.[83]

In reference to age disability, the Federal Rules of Evidence "abolish[ ] the presumption of incompetency and leave[ ] to the jury the task of determining the weight and credibility of the child's testimony."[84] Prior to *Michaels*, New Jersey had kept pace with the massive transformation in the rules of child competency throughout the country's state and federal courts. Under the New Jersey Rules of Evidence, as under the Federal Rules, all persons are presumed competent to testify at trial.[85] The New Jersey Supreme Court has held that this presumption of competency applies to children.[86]

In general, competency requirements merely test various testimonial capacities of a proposed witness.[87] Moreover, in adopting

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81 *Id.* at 308, 642 A.2d at 1376-77.

82 *See, e.g.*, Rosen v. United States, 245 U.S. 467, 471 (1918) (rejecting prior forgery conviction as proof of incompetency).

83 *Id.* at 471.

84 *Testimony of Child Victims*, *supra* note 29, at 819 n.89. Many states have adopted the federal presumption of competency regarding child witnesses. Bulkley, *supra* note 54, at 210-11 (noting that over half the states had adopted FED. R. EVID. 601).

85 N.J. EVID. R. 601; FED. R. EVID. 601.

86 State in Interest of R.R., 79 N.J. 97, 398 A.2d 76 (1979) (rejecting per se incompetency based on age).

87 *Testimony of Child Victims*, *supra* note 29. The author explains that:

> In most states the formula for determining competency includes four testimonial capacities: (1) recognition of the difference between truth

Federal Rule of Evidence 601, the Advisory Committee expressly repudiated the approach of using alleged "mental [in]capacity" to render a witness's testimony inadmissible. The Committee wrote:

> A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.[88]

This passage suggests that child suggestibility, which resembles a "mental incapacity," is a competency issue and, as such, should be rejected as grounds for incompetency.

New Jersey competency law likewise focuses on whether the witness has some expressive capacity:

> Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation.[89]

The New Jersey threshhold of expressive capacity has been interpreted as a minimal requirement:

> A person does not have to be entirely sound mentally in order to qualify as a witness. A certain minimal intelligence is required. He should have sufficient capacity to observe, recollect and communicate with respect to the matters about which he is called to testify, and to understand the nature and obligations of an oath.[90]

Even this minimal competency requirement may be waived.[91] In practice, the presumption of competency imposes only the most minimal requirements upon prospective witnesses, so that there has effectively been a nearly-irrebuttable presumption of competency.[92] Such a minimal standard comports with this Article's as-

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> and falsehood and of the duty to speak the truth, (2) the capacity to observe events accurately, (3) sufficient memory, and (4) communication skills.

Id. at 818 n.86.

88 FED. R. EVID. 601 advisory committee's note.

89 N.J. EVID. R. 601(a).

90 State v. Butler, 27 N.J. 560, 602, 143 A.2d 530, 554 (1958).

91 In adopting its tender years hearsay exception, New Jersey legislatively provided for a waiver of competency requirements for a child hearsay declarant in a sexual abuse case. N.J. EVID. R. 803(27).

92 Of course, it has been suggested that the presumption of competency is not as generous in practice as on paper:

> With more cases being reported involving children under eight years, however, this younger age group is more likely to be subjected to competency tests even in states that have abolished such requirements.

Bulkley, *supra* note 54, at 212.

sertion that a strong presumption of authenticity for nonhearsay witnesses is implicit throughout the rules defining the adversary system.

From the emphasis on a witness's "capacity" to testify flows the idea that competency does not require a pretrial finding of value in the proposed testimony itself. Consequently, the competency *voir dire* is not intended to determine the quality of the witness's actual testimony about the events in question. The memory requirement articulated under competency tests refers, not to actual memory of the litigated events, but rather to a basic capacity to remember.[93] Under New Jersey law, the further value of a witness's testimony is within the jury's purview as a question of credibility.[94] Accordingly, perhaps the *Michaels* court declines to ground its new rule in competency doctrine because, under New Jersey law, the children described therein as tainted would probably be held competent to testify.

In the leading case on the competency of child witnesses, *State*

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93 The Supreme Court of Minnesota has explained that, under its competency rules:

> [The question] whether the child has "the capacity to remember or to relate truthfully facts respecting which the child is examined." . . . does not mean that the court is to question the child on the details of possible testimony, but rather means that the court should determine in a general way whether the child remembers or can relate events truthfully. The jury will judge the child's credibility and decide the weight to assign the testimony.

State v. Lanam, 459 N.W.2d 656, 659-60 (Minn. 1990) (citation omitted) (affirming conviction of babysitter for sexual abuse of three-year-old girl), *cert. denied*, 498 U.S. 1033 (1991). The United States Supreme Court has similarly interpreted Kentucky's competency law: "Thus, questions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial." Kentucky v. Stincer, 482 U.S. 730, 741 (1986).

94 The New Jersey Appellate Division has written:

> "[W]here an infant is offered as a witness, the general purpose of the inquiry is to determine the capacity of the child to give evidence, *i.e.*, whether there is sufficient discernment and comprehension to invest the testimony with probative worth. . . . Capacity in this sense involves the ability to understand questions and to frame and express intelligent answers as well as a sense of moral responsibility, a consciousness of the duty to speak the truth."

State v. Zamorsky, 159 N.J. Super. 273, 279, 387 A.2d 1227, 1229 (App. Div. 1978) (quoting *State v. Grossmick*, 153 N.J. Super. 190, 379 A.2d 454 (App. Div. 1976), *aff'd o.b.* 75 N.J. 48, 379 A.2d 453 (1977)), *modified on other grounds*, 170 N.J. Super. 198, 406 A.2d 192 (App. Div. 1979).

In *Zamorsky*, the appellate division held that it was error to instruct a jury that the competency *voir dire* of a child witness was intended to establish "'whether the child will tell her version truthfully.'" *Id.* at 281, 387 A.2d at 1230. Instead, *voir dire* was intended to demonstrate that she understood her duty. Her actual truthfulness at trial was a credibility question reserved to the trier. *Id.* at 281-82, 387 A.2d at 1230.

in Interest of R.R., the New Jersey Supreme Court held that the use of leading questions at trial does not, on appeal, retract a child witness's competency to testify:

> The extent to which [leading] questions are employed bears upon the weight which should be attributed to the infant's testimony by the trier of fact. It is not ordinarily, however, relevant to a determination of whether the infant is competent to testify at all.[95]

Certainly, the use of leading questions at trial is in many ways distinguishable from the use of pretrial leading questions. Nevertheless, the *R.R.* holding indicates that any susceptibility of a child witness to give false statements under leading questions may be a credibility issue reserved to the jury.

More importantly, the *R.R.* court abandoned the traditional evidentiary requirement that an infant "possess[ ] an independent recollection of the events which have transpired" in order to be found competent.[96] The court wrote:

> [N.J.R.E. 601] makes the competence of a witness dependent merely upon his ability to "express" himself. The Rule thus abandons the criterion of "independent recollection" as a condition to testifying. Instead, questions concerning the child's re-

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[95] State in Interest of R.R., 79 N.J. 97, 115, 398 A.2d 76, 84 (1979) (upholding competency on appeal despite leading questions in trial examination). The Minnesota Supreme Court has adopted a similar rule: "A competency hearing is not a credibility hearing. . . . Whether a child is easily led goes more to credibility than to competency. Even adults at trial become inconsistent upon cross-examination." *Lanam*, 459 N.W.2d at 660. Relatedly, the New Jersey Supreme Court has explained:

> In a sense every question is "leading." If interrogation did not lead, a trial would get nowhere. . . . A question must invite the witness's attention to something. No formula can be stated with confidence that it will embrace all situations. But it may be said that ordinarily a question is not improperly leading unless it suggests what the answer should be or contains facts which in the circumstances can and should originate with the witness.

State v. Abbott, 36 N.J. 63, 78-79, 174 A.2d 881, 889 (1961). *See also* Rider v. Lynch, 42 N.J. 465, 471, 201 A.2d 561, 564 (1964) (holding that specific questions at trial were "not offensively leading. At most, they call attention to a topic or subject about which testimony is desired").

[96] *R.R.*, 79 N.J. at 115-16, 398 A.2d at 84-85. The Wyoming Supreme Court has rejected the argument that it was error to permit a child victim to testify on the grounds that "the victim had discussed the events with so many adults that independent recall no longer could be assured." Stephens v. State, 774 P.2d 60, 69 (Wyo. 1989) (reversing on other grounds conviction of father for sexual abuse of son). The court concluded that the competency hearing adequately determined the admissibility of the child's testimony. *Id. But see* Christiansen, *supra* note 41, at 715-18 (arguing that extrinsic evidence of pretrial procedures should be required to determine a child witness's ability for "independent recollection," reasoning that traditional competency hearings are inadequate to ensure reliability).

> call are now relevant only insofar as they bear upon the weight which the factfinder places upon testimony that has in fact been given.[97]

The repudiation of the "independent recollection" test is directly relevant to the *Michaels* facts. *R.R.* can stand for the proposition that a witness can be excluded from trial if she lacks the capacity to remember, but not if her actual memories are "dependent" on some taint.[98]

2. De Facto Competency Implications Within the *Michaels* Burden-Shifting Mechanism

The *Michaels* rule imposes substantial barriers to the admission of the in-court testimony of child witnesses. The New Jersey Supreme Court tries but fails to avoid a competency reading of its holding in *Michaels*. The opinion neither overrules nor distinguishes *R.R.*, but merely ignores that seemingly applicable precedent. As will be shown, the workings of the taint mechanism place children's competency in issue and reveal the rhetorical devices used in the opinion to mask that implication.

A *Michaels* hearing employs a burden-shifting mechanism for the pretrial evaluation of the admissibility of child witness testi-

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97 *R.R.*, 79 N.J. at 116, 398 A.2d at 85. In following *R.R.*, the appellate division has explained the irrelevance of the quality of memory to the evidentiary competency requirement:

> The child, however, was capable of expressing himself; he was merely incapable of remembering any of the games he played with Fat Boy [the defendant]. [Competency], however, focuses on the witness' expression, not his memory. Memory, or lack thereof, bears only upon the weight that the trier of fact should attribute to the testimony.

State v. Davis, 229 N.J. Super. 66, 78, 550 A.2d 1241, 1246 (App. Div. 1988) (citing *R.R.*, 79 N.J. at 116, 398 A.2d at 85) (upholding the admission of testimony from four- and five-year-old male victims of sexual assault).

98 Other states have concluded that the suggestiveness of pretrial interviews is not relevant to the admissibility of child testimony, but rather is a credibility issue for the trier. For example, in *Amirault*, the Supreme Judicial Court of Massachusetts rejected the argument that the testimony of child victims had been "tainted by, or [was] the product of, improper interviews." Commonwealth v. Amirault, 535 N.E.2d 193, 202 (Mass. 1989). The court wrote:

> There is ample evidence in this case that the children were interviewed by multiple persons—parents, social workers, attorneys, therapists, police officers, and other investigators. Despite the defendant's argument to the contrary, we think the judge was warranted in concluding that the children's ability to relate, recall, and recount their experiences independently was not so seriously undermined that their testimony should have been excluded. . . . "Whether a witness testifies truthfully or according to some fictional script is for the jury to decide."

Id. at 202-203 (quotation omitted).

mony. The defendant's burden is minimal and fairly incidental to the actual purpose of the rule. The defendant must "make a showing of 'some evidence' that the victim's statements were the product of suggestive or coercive interview techniques"[99] in order to trigger the requirement of a pretrial taint hearing. An illustrative list of evidence the defendant may adduce almost exclusively mentions attributes of the investigatory interviews themselves:

> 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—constitute 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.[100]

In the defendant's burden, no inquiry is made into the witness's capacities or cognitive traits. The initial trigger merely involves an inquiry into the circumstances and techniques of the investigation.

In contrast, the second burden, which is carried by the State, focuses on the qualities of the child witness. After the defendant triggers the hearing:

> [T]he burden shall shift to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence. Hence, the ultimate determination to be made is whether, despite the presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interviews, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques.[101]

As the burden changes over from the defendant to the State, so the nature of the factual inquiry changes. In order to meet its burden, "[t]he State may attempt to demonstrate that the investigatory procedures employed in a case *did not have the effect of tainting an individual child's recollection* of an event."[102] The causation/effects test burden indicates that the State must affirmatively prove the child

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99 *Michaels*, 136 N.J. at 320, 642 A.2d at 1383.

100 *Id.* at 321, 642 A.2d at 1383. The "absence of spontaneous recall" refers to a lack of "free recall" questions by the interviewers.

101 *Id.* (citation omitted).

102 *Id.* (emphasis added).

to be sufficiently mentally competent (still authentic). This reading works an inversion of the law and establishes a presumption of incompetency once the defendant has met her minimal burden.

Two methods of proof are permitted by the court. First, the State may present expert witnesses on the "suggestive capacity"[103] of the investigatory interviews. Presumably then, the State may offer clear and convincing evidence refuting the defendant's showing that the interviews had the capacity to taint. This method does not seem to implicate the question of competency, but rather, once again, as with the defendant's burden, only considers the nature of the questioning. However, the burden of persuasion in a taint hearing rests fully with the State, so that it would be risky indeed for the State to rely solely on a refutation of the proofs offered by the defendant.

Most likely, the second suggested method of proof will provide the State's main avenue for discharging its own burden. The opinion adds that "[t]he State is also entitled to demonstrate the reliability of the child's statements or testimony by proffering *independent indicia of reliability*."[104] The "independent indicia" language looks a lot like the "independent recollection" showing expressly repudiated in *R.R.* under the rubric of competency.[105] It would seem that a substantively identical requirement has been resurrected under a new name, either "reliability" or freedom from "taint."

The *Michaels* court nonetheless insists that its opinion "need not" determine the quality of children as witnesses:

> Our inquiry is much more focused. The issue we must determine is 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 recollections of actual events and thus compromise the reliability of the children's statements and testimony based on their recollections.[106]

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[103] *Id.* The taint hearing is subject to New Jersey Evidence Rule 104, the "preliminary questions" rule, under which the judge is not required to conform to the rules of evidence. *Id.* at 320, 642 A.2d at 1382-83. Therefore, expert testimony might not be subject to the admissibility requirements imposed at trial. Yet, the quality of expert testimony on child suggestibility has been disputed. *Compare* MANSHEL, *supra* note 6, at 341-63 (reporting the suggestibility testimony of Dr. Ralph Underwager in the *Michaels* trial) *with* Underwager v. Salter, 22 F.3d 730, 736 (7th Cir. 1994) (affirming summary judgment for defendants in defamation suit brought by Underwager, despite the fact that defendants had concluded plaintiff is "a hired gun who makes a living by deceiving judges about the state of medical knowledge").

[104] *Michaels*, 136 N.J. at 322, 642 A.2d at 1383 (emphasis added).

[105] *See supra* note 97 and accompanying text (quoting *State in Interest of R.R.*).

[106] *Michaels*, 136 N.J. at 308-09, 642 A.2d at 1377.

The implicit distinction between the taint determination and a competency determination appears then to be that the witnesses themselves are not being held unreliable, but instead, only their testimony is being held unreliable.

The court must push this distinction—that the capacity of interviews is being tested, as opposed to the capacity of children—because the capacity of children cannot be at issue without requiring the court to reconsider well-established competency doctrine. Therefore, the opinion repeatedly insists that in the pretrial hearing only the capacities of the interviews are being litigated. For example:

> It bears repeating that the focus of the pretrial hearing is on *the coercive and suggesting propensity* of the investigative questioning of each child and whether that questioning, examined in light of all relevant circumstances, gives rise to the substantial likelihood that the child's recollection of actual events has been irremediably distorted and the statements and the testimony concerning those events are unreliable.[107]

> [At trial, e]xperts may thus be called to aid the jury by explaining *the coercive or suggestive propensities* of the interviewing techniques employed, but not of course, to offer opinions as to the issue of a child-witness's credibility, which remains strictly a matter for the jury.[108]

However, the nature of an interview is inextricable from the nature of an interviewee. Interview questions operate on a person whose mental attributes are necessarily called into question. The reasoning of the opinion itself demonstrates this very enmeshment: Its catalogue of suggestive interview techniques is interwoven with references to children's special "susceptibility" to taint.[109] Clearly then, the capacities of child witnesses are at issue in *Michaels*.

Perhaps a semantical argument can be made that an excluded child has not been found "incompetent," because the defendant who prevailed merely proved that the interviews created a substantial risk of taint. However, it necessarily must also be true that the State has failed to rebut the presumption of taint. Most likely, either the State did not prove that the child had an independent ability to resist suggestion or the State did not prove that the child's memories were actually free from the mental effects of sug-

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107 *Id.* at 322, 642 A.2d at 1383-84 (emphasis added).

108 *Id.* at 323, 642 A.2d at 1384 (emphasis added).

109 The court writes: "Woven into our consideration of this case is the question of a child's susceptibility to influence through coercive or suggestive questioning." *Id.* at 307, 642 A.2d at 1376.

gestion. Thus, both the taint inquiry and its potential result of exclusion amount to a de facto competency test.

The court's evasion of the competency clash is made easier by the fact that the opinion dedicates most of its language to discussing the defendant's burden.[110] The opinion heavily discusses the defendant's burden of showing "some evidence" of suggestive interviewing, possibly because it highlights the law enforcement conduct which so outraged the court. In opposition, the opinion gives minimal treatment to explicating the State's central burden.[111] This split, a natural bifurcation of the opinion along the lines of the burden-shifting mechanism, helps draw attention away from the State's burden, which is where the competency-related requirements are introduced.

In fact, the *Michaels* court itself seems aware that the notion that the presumption of competency remains undisturbed is confined to consideration of the defendant's burden. The opinion states:

> Consonant with the presumption that child victims are to be presumed no more or less reliable than any other class of witnesses, the initial burden to trigger a pretrial taint hearing is on the defendant.[112]

The opinion fails to note that *only* the defendant's burden is consonant with a presumption of competency. The State's much more significant and crucial burden collides with competency doctrine.

The opinion's direct holding regarding the *Michaels* case itself is that the defendant has met her initial burden of triggering the taint hearing.[113] Therefore, with a veneer of literal accuracy, the

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110 In defining the defendant's burden, the opinion lists different interview techniques which may provide "some evidence" of suggestive capacity. *Id.* at 321, 642 A.2d at 1383. These factors are explicated at length earlier in the opinion. *See id.* at 309-15, 642 A.2d at 1377-80.

111 In defining the State's burden, the opinion does not set forth a list of factors which may prove the reliability of the children's testimony. *Id.* at 321-22, 642 A.2d at 1383; *cf. id.* at 317-18, 642 A.2d at 1381 (describing reliability factors relevant to the admissibility of children's out-of-court statements to support an analogy between hearsay and tainted in-court testimony).

112 *Id.* at 320, 642 A.2d at 1383.

113 *Id.* at 324, 642 A.2d at 1384-85. The court states:

> In conclusion, we find that the interrogations that occurred in this case were improper and there is a substantial likelihood that the evidence derived from them is unreliable. We therefore hold that in the event the State seeks to re-prosecute this defendant, a pretrial hearing must be held in which the State must prove by clear and convincing evidence that the statements and testimony elicited by the improper interview techniques nonetheless retains [sic] a sufficient degree of reliability to warrant admission at trial.

court is able to state: "The broad question of whether children as a class are more or less susceptible to suggestion than adults is one that we need not definitively answer in order to resolve the central issue in this case."[114] This misleading assertion is only true in the limited context of the opinion's direct ruling in the *Michaels* litigation. However, the New Jersey Supreme Court has delivered not only a ruling, but also a rule.

The children-only nature of the taint rule finally defeats the premise of not having altered competency doctrine. The thesis that preschool children are more suggestible than adults is highly contextual and thus controversial regarding false statements about sexual abuse.[115] Yet, without adequately exploring the professional controversy or justifying its exclusivity,[116] the New Jersey Supreme Court erects a class-based rule only against child witnesses. Ironically, the opinion itself recognizes that a class-based generalization about child witnesses' mental abilities would constitute a revision of the competency doctrine. Mindful of that possible reading of its opinion, the court insists:

> This Court has been especially vigilant in its insistence that children, as a class, are not to be viewed as inherently suspect witnesses. We have specifically held that age *per se* cannot render a witness incompetent.[117]

Despite this declaration, the *Michaels* opinion has indeed endorsed the view that child witnesses are inherently suspect as a class. Age per se may not render a child incompetent, but it does render every child subject to an authentication requirement to which adults are not subject.

Only the thin veil of the defendant's minimal "some evidence" burden hangs between a child witness and a loss of the presumption of authenticity. By weakening the presumption as to child witnesses, *Michaels* at the same time contravenes competency doctrine that had previously been in harmony with a strong presumption of authenticity. The common sense import of the court's opinion in *Michaels* is that it impliedly overrules *R.R.* and reinstates a presump-

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Id.

114 *Id.* at 308, 642 A.2d at 1376-77.

115 *See supra* note 54 (reporting studies related to suggestibility and sexual abuse allegations); *infra* notes 288-91 (discussing ecological validity).

116 *Michaels*, 136 N.J. at 307, 642 A.2d at 1376 (noting that, despite "a variety of views and conclusions," there exists "a consistent and recurrent concern" over children's susceptibility to suggestion).

117 *Id.* at 308, 642 A.2d at 1376 (citing State in Interest of R.R., 79 N.J. 97, 398 A.2d 76 (1979)).

tion that child witnesses who are colorably tainted are incompetent.

B. Eyewitness Identification Doctrine

At first glance, the problem of suggestion in pretrial interviews with children seems directly analogous to the problem of suggestion in pretrial identification procedures. Both contexts present a danger of producing inaccurate in-court testimony. The strength of the analogy to identification doctrine is that, like *Michaels*, it targets suggestion under normal cognitive conditions. Moreover, the presumption of authenticity may be overcome by pretrial challenges to impermissibly suggestive identifications.

The United States Supreme Court has recognized a constitutional dimension to suggestive law enforcement procedures under the Fourteenth Amendment. The criminal defendant has a protected interest in the reliability of in-court identifications that requires special procedural safeguards against pretrial suggestion.[118] As a result, in-court identification testimony must be excluded under the Due Process Clause if the prior out-of-court identification procedure was impermissibly suggestive, unless the "totality of the circumstances" under a factor analysis test can outweigh the suggestion and avoid "a very substantial likelihood of irreparable misidentification."[119] Thus, in the finite context of suggestive identifications, the Supreme Court has held that the structural safe-

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118 The admissibility of out-of-court identifications is also circumscribed by constitutional rules. However, these are not on-point with the aspect of the *Michaels* rule, discussed herein, which addresses the admissibility of in-court testimony. Because the constitutional requirements for the admission of suggestive in-court and out-of-court identifications have converged, the doctrinal distinction is not important here.

In *Manson v. Braithwaite*, the majority concluded that *Biggers* had synthesized both the pretrial and in-court identification tests for suggestive identification procedures under the Fourteenth Amendment. Manson v. Brathwaite, 432 U.S. 98, 106-07 n.9 (1977). Therefore, the reliability factors articulated in Neil v. Biggers, 409 U.S. 188 (1972), discussed extensively *infra*, apply equally to dissipating the taint of suggestibility for both out-of-court and in-court identification evidence. The *Brathwaite* majority rejected Justice Marshall's dissent view that the treatment of out-of-court and in-court identifications under the Fourteenth Amendment should be bifurcated. *Brathwaite*, 432 U.S. at 106-07 n.9. Marshall had interpreted precedent to require the per se exclusion of unnecessarily suggestive pretrial identifications, but to permit the dissipation of taint from in-court identifications through independent source proofs of reliability. *Id.* at 122-23 (Marshall, J., dissenting).

119 Simmons v. United States, 390 U.S. 377, 384 (1968) (expressly extending the Due Process right to in-court identifications); Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (recognizing independent Fourteenth Amendment Due Process right against identifications which are "unnecessarily suggestive and conducive to irreparable mistaken identification").

guards inherent in the adversary system may be inadequate to preserve the reliability of in-court testimony.

The issue of suggestive identifications has a superficial similarity to the issue of suggestive child interviews. The constitutional law addressing suggestive identifications is centrally concerned with the effect of suggestion on reliability. The United States Supreme Court has explained that "reliability is the linchpin in determining the admissibility of identification testimony."[120] The Supreme Court has also identified the problem of possible memory hardening due to pretrial identifications.[121] The *Michaels* court shares these concerns about unreliability and memory hardening due to suggestive interviews.[122] Therefore, that court analogizes to Due Process Clause cases, drawing a comparison between suggestive pretrial identifications and suggestive pretrial questioning.[123] However, the subject matter of identification testimony differs from proposed testimony providing descriptions of events in a child sexual abuse case.

In the taint hearing context, the New Jersey Supreme Court addresses suggestively-influenced event testimony: whether a child may testify that she believes she experienced a rape. By contrast, the identification cases have been concerned with the suggestively influenced face recognition of strangers.[124] New Jersey identification cases share this narrow focus.[125] In psycholegal literature, sug-

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120 *Brathwaite*, 432 U.S. at 114.

121 *See, e.g.*, United States v. Wade, 388 U.S. 218, 229 (1966) (stating 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"); *id.* at 240 (stating that "the [pretrial] lineup is most often used . . . to crystallize the witnesses' identification of the defendant for future reference").

122 *Michaels*, 136 N.J. at 319, 642 A.2d at 1382.

123 *Id.* at 318-19, 642 A.2d at 1381. The *Michaels* opinion also cites *Wade*, the landmark case establishing a right to counsel in post-indictment lineups. *Id.* at 318, 642 A.2d at 1381 (citing United States v. Wade, 388 U.S. 218, 230 (1966)). However, the *Michaels* opinion does not follow the Sixth Amendment cases to require the presence of defense counsel at pretrial interviews of children, nor does it even suggest counsel's presence as one possible method for the State to safeguard a witness's reliability.

124 The United States Supreme Court has attributed the special reliability concern to the stranger recognition context:

> [*Wade*, *Gilbert*, and *Stovall* reflect] the Court's concern with the problems of eyewitness identification. Usually, the witness must testify about an encounter with *a total stranger* under circumstances of emergency or emotional stress. The witness' recollection of the *stranger* can be distorted easily.

Manson v. Brathwaite, 432 U.S. 98, 111-12 (1976) (emphases added). *See also* United States v. Wade, 388 U.S. 218, 228 (1966) (quoting THE CASE OF SACCO AND VANZETTI 30 (1927)) ("The identification of strangers is proverbially untrustworthy.").

125 "[T]he classic situations [are those] in which eyewitnesses glimpse a defendant

gestion in the event-related questioning of children is routinely treated separately from suggestion in identification procedures.[126]

The exceptions to the exclusionary rule in identification doctrine clarify the distinction between face recognition and central event testimony. Under the United States Constitution, the potential taint of suggestion may be cured if the witness can demonstrate the reliability of the offered identification. The relevant factors were definitively articulated in *Neil v. Biggers*:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[127]

In addition, the circumstantial factors stated in suggestive identification cases have been identified as an "independent source" test of reliability.[128] Therefore, if identification law tests of reliability

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at the crime scene and later make an identification at a lineup." State v. Long, 119 N.J. 439, 495, 575 A.2d 435, 462 (1990).

126 Children's accuracy in reporting the central detail of events is better than that for peripheral detail. *See, e.g.*, Helen R. Dent, *Experimental Studies of Interviewing Child Witnesses, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 138, 142 (concluding that descriptive information may be more vulnerable to suggestion error than event information); Cole & Loftus, *supra* note 46, at 199 ("[T]here is little evidence that [preschoolers] are more suggestible than adults with respect to the central aspects of an event."); Gary B. Melton & Ross A. Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child-Witness Research, in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 209, 213 (noting that child suggestibility studies of misleading questions tend to focus on peripheral details, but even young children are resistant to central detail suggestion).

See also Cole & Loftus, *supra* note 46, at 199-205 (treating face recognition memory independently from event memory suggestibility); David F. Ross et al., *Age Stereotypes, Communication Modality, and Mock Jurors' Perceptions of the Child Witness, in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 37, 53 (setting apart "face-recognition" memory abilities); Jean Montoya, *On Truth and Shielding in Child Abuse Trials*, 43 HASTINGS L.J. 1259, 1298-99 (1992) (arguing that the Confrontation Clause implications of child shield laws differ if the identity of the perpetrator is at issue).

127 Neil v. Biggers, 409 U.S. 188, 199-200 (1972). *See* State v. Madison, 109 N.J. 223, 239-40, 536 A.2d 254, 262 (1988); State v. Clausell, 121 N.J. 298, 325-26, 580 A.2d 221, 234 (1990) (restating the test).

128 New Jersey has acknowledged that these reliability factors are an independent source test. *Madison*, 109 N.J. at 245, 536 A.2d at 265. In addition, *Wade* adopts an "independent source" test to cure the taint of in-court identifications due to pretrial identifications without the presence of counsel. *Wade*, 388 U.S. at 241-42. These "independent source" factors are similar to the *Biggers* "totality of the circumstances" factors:

> [F]or example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description

control under *Michaels*, the State will have met its burden if it can prove that the child witness has an independent source for her testimony.

As a general matter, the nature of events in a child sexual abuse case should satisfy an independent source test for the reliability of trial testimony. In most child sexual abuse cases, the victim knows the accused,[129] is personally involved in traumatic events, and has had more than a fleeting interaction with the defendant.[130] The alleged event itself and/or the child's admitted exposure to the defendant should usually comprise a colorable independent source.[131] For example, in *Michaels*, the children's extensive opportunity to observe would seem to outweigh the suggestion in pretrial interviews under an independent source analysis.

Kelly Michaels did not claim error on appeal regarding the reliability of the children's identification of her as the accused.[132] She was known to the child witnesses as a teacher at their day-care center. Some of the children were in the defendant's classroom, others were supervised by her at nap time, and late-day children were supervised by her after school.[133] By comparison, the New Jersey Supreme Court has upheld the in-court identification testimony of eyewitnesses who had the opportunity to observe and mentally record the defendant's image during a four-minute armed robbery.[134] By this standard, the Wee Care children had

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> and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241.

129 Duggan et al., *supra* note 23, at 74; Goodman & Helgeson, *supra* note 28, at 191.

130 *See* State in Interest of K.A.W., 104 N.J. 112, 123, 515 A.2d 1217, 1223 (1986) (acknowledging the frequency of contact between some victims and perpetrators); *cf. Biggers*, 409 U.S. at 201 (concluding that rape victim "had an unusual opportunity to observe and identify her assailant"); *Wade*, 388 U.S. at 229 ("[T]he dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial.").

131 *See* Goodman & Helgeson, *supra* note 28, at 191 (stating that in most child sexual assault cases, "the child has many opportunities to see the person, increasing the likelihood of a correct identification").

132 *See* State v. Michaels, 264 N.J. Super. 579, 587-88, 625 A.2d 489, 493 (App. Div. 1993).

133 MANSHEL, *supra* note 6, at 91-92.

134 State v. Ford, 79 N.J. 136, 398 A.2d 95 (1979). In *Ford*, the New Jersey Supreme Court adopted the position of the dissent in the appellate division. *See* State v. Ford, 165 N.J. Super. 249, 253, 398 A.2d 101, 103 (App. Div. 1978) (Michels, J., dissenting). Another out-of-court identification has been held sufficiently reliable, in the totality

vast amounts of time in which to record reliable memories. Furthermore, those child witnesses did not purport to be bystanders to third-party action, but instead had personal fixity on the alleged events.[135] Thus, the defects due to the taint of suggestion may be cured under the very identification doctrine cited in *Michaels*, so that the independent source test of reliability is likely to swallow the taint hearing rule.

In fact, Justice White has protested the application of identification hurdles to a witness who has transactional information about a known perpetrator:

> It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present.[136]

This passage flags the vast difference between risks of error in face recognition and in event testimony. Even more explicitly, the United States Supreme Court has approvingly cited Judge Friendly to conclude that a rape victim's testimony has exceptional reliability.[137] Thus, according to the teachings of the identification cases themselves, tainted testimony should be more easily redeemed when the witness has a relationship with a known perpetrator or when the criminal event holds personal significance for the witness. These legal factors roughly approximate some of the contextual features that increase eyewitness reliability as understood in the psychological literature.[138]

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of the circumstances, because the gunman/defendant was in the store for three minutes and standing at most three feet from the witness in bright light. State v. Santoro, 229 N.J. Super. 501, 505, 552 A.2d 184, 186 (App. Div. 1988).

135 One Wee Care witness told his mother, "Tears still come out of my eyes sometimes because I feel so bad because Kelly [the defendant] was my best friend." MANSHEL, *supra* note 6, at 143. He also volunteered the following: "You know, Mommy, I peed on my friends." *Id.* at 166.

136 United States v. Wade, 388 U.S. 218, 251 (1966) (White, J., concurring in part, dissenting in part) (criticizing the per se exclusion of post-indictment identifications when defense counsel is not present).

137 "[The witness] was no casual observor, but rather the victim of [rape,] one of the most personally humiliating of crimes." Neil v. Biggers, 409 U.S. 188, 200 (1972) (citing United States ex rel. Phipps v. Follette, 428 F.2d 912, 915-16 (2d Cir.) (maintaining that the witness "was a prospective victim of an assault, not a mere bystander"), *cert. denied*, 400 U.S. 908 (1970).

138 *See infra*, notes 288-91 and accompanying text (discussing ecological validity).

It is unclear under *Michaels* whether the State may cure taint with proofs of an independent source for a child's testimony. The *Michaels* opinion does advert to an independent source test:

> The State is also entitled to demonstrate the reliability of the child's statements or testimony by proffering independent indicia of reliability. *See Ford, supra*, 79 N.J. at 137, 398 A.2d 95 (inquiring, "whether there are sufficient indicia of reliability to outweigh the 'corrupting effect of the suggestive identification itself.'") (quoting *Manson, supra*, 432 U.S. at 114 [ ]).[139]

In *Manson*, cited in the above-quoted passage, the test to cure pretrial suggestion is described as identical to an independent source test.[140] This would suggest that an independent source for a child's testimony will dissipate taint. However, the *Michaels* opinion also adverts to the hearsay test of reliability, under which only the circumstances of the statement itself may be considered.[141]

The *Michaels* court models the identification cases, adopting a burden-shifting evidentiary rule which parallels the constitutional identification rules. However, the court then dismissively rejects that law's distinction between face recognition and event testimony:

> 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.[142]

In one facile sentence, the opinion tranforms the major flaw in its reliance on identification cases into a supposed strength. Therefore, it appears unlikely that the *Michaels* court intends an independent source test which would credit the salience of the alleged occurrence as a cure of taint.

The *Michaels* vision of children is fundamentally incompatible with an independent source analysis. The *Michaels* court repeatedly states that pretrial suggestion may irremediably distort a

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139 *Michaels*, 136 N.J. at 322, 642 A.2d at 1383.

140 "[T]he same factors are evaluated in applying both the Court's totality test and the *Wade-Simmons* independent-source inquiry." Manson v. Braithwaite, 432 U.S. 98, 127 (1977) (Marshall, J., dissenting).

141 *See, e.g., Michaels*, 136 N.J. at 318, 642 A.2d at 1381 (citing Idaho v. Wright, 497 U.S. 805, 820 (1990)).

142 *Id.* at 320, 642 A.2d at 1382 (emphasis added). *But cf. State v. Madison*:

> While "it is well known that eyewitness evidence is inherently suspect and that suggestive procedures may prejudicially affect the ultimate identification," it is equally well recognized that in criminal actions an eyewitness's identification may be the most crucial evidence.

State v. Madison, 109 N.J. 223, 232, 536 A.2d 254, 258 (1988) (quoting W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, §7.4 at 320 (1985)).

child's recollection. This language reflects a computer virus understanding of suggestion,[143] one which implies that the virus of suggestion irrevocably destroys any accurate information that may previously have been stored. Under this view, the fact that a child might be able to point to a prior and independent *source* for the information is irrelevant, because the accurate *information itself* is now presumed gone. Thus, the inappropriateness of an analogy between identification and child sexual abuse testimony resurfaces in application of that doctrine's own tests of reliability within the *Michaels* premise.

C. *Hypnosis Doctrine*

The second major analogy offered by the New Jersey Supreme Court to justify its special barrier to the in-court testimony of children is to state hypnosis doctrine.[144] Currently, jurisdictions have widely varying rules on the admissibility of hypnotically-affected testimony. The evidentiary rules range in strictness from per se admissibility to per se inadmissibility.[145] Under state evidentiary principles, New Jersey allows the conditional admissibility of hypnotically-affected testimony.[146]

Intuitively, the suggestive effect of hypnotic interviews seems to parallel the asserted suggestive effect of traditional interviews.[147] Both raise concerns about the effect of pretrial suggestion on relia-

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143 *Cf. Michaels*, 136 N.J. at 315-16, 642 A.2d at 1380 (asking "whether those clearly improper interrogations so infected the ability of the children to recall").

144 *Id.* at 319-20, 642 A.2d at 1382.

145 The four typical approaches to hypnotically-affected testimony are: (1) unconditional admissibility; (2) conditional admissibility; (3) per se inadmissibility; and (4) case-by-case undue prejudice analysis such as under Federal Rule of Evidence 403. Stevan D. Mitchell, Note, *The Admissibility of Posthypnotic Testimony: Constitutional Considerations and the Defendant's Right to Testify*—Rock v. Arkansas, *107 S. Ct. 2704 (1987)*, 16 FLA. ST. U.L. REV. 185, 186, 194-205 (1988).

146 In *Hurd*, New Jersey adopted a conditional admissibility rule for hypnotically-induced testimony. State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 91 (1981). The court held that, in general, properly conducted hypnosis satisfies the *Frye* general acceptance standard for scientific testimony. *Id.* at 536-38, 432 A.2d at 90-91 (expanding *Frye* from physical tests such as radar, polygraph, or voiceprints) (citing Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923)). Modifying *Frye*, the court then held that the admission of specific testimony would require a case-by-case inquiry into whether "the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy." *Id.* at 538, 432 A.2d at 92. *See* State v. L.K., 244 N.J. Super. 261, 270, 582 A.2d 297, 301 (App. Div. 1990) (discussing *Hurd*'s rejection of a per se rule).

147 *See* Loftus & Davies, *supra* note 44, at 64-65 (analogizing children's interview statements to hypnotically-induced statements).

bility which may require the exclusion of in-court testimony. In the hypnosis context:

> The [New Jersey] Supreme Court recognized in *Hurd* that the traditional procedural safeguards such as cross-examination and an opportunity to observe a witness's demeanor are not sufficient to determine the reliability and hence the admissibility of hypnotically-induced recall.[148]

To the extent that verbal interviews present "some evidence" that suggestive techniques were employed, the analogy to hypnosis appears warranted. The hypnosis analogy seems even more on point with *Michaels* than the identification analogy: Hypnosis doctrine establishes a precedent for excluding not only identification but also central event testimony of an alleged crime victim. As such, both hypnosis and taint rules permit a defendant to overcome the presumption of authenticity as to all testimony from a given witness, due to underlying fears that the witness's in-court appearance will be illusory.

At first glance, the analogy to hypnosis doctrine seems to eliminate the major flaw in the identification analogy. However, to some extent the facts of *Hurd* reintroduce the problematic distinction between identification and event testimony. In *Hurd*, a stabbing victim was hypnotized in order to recover the identity of her attacker.[149] While *Hurd* established rules about hypnosis in all its uses,[150] it is likely that the special concerns about the reliability of facial identification strongly influenced the court's conclusions about the possible dangers of hypnosis. Therefore, the repeated importance of identification evidence in the hypnosis doctrine mitigates in a general way against the appropriateness of the analogy with children's event testimony.

The surface similarity between hypnotic and traditional interviews dissolves upon closer scrutiny. The most obvious way that hypnosis might differ from verbal questioning is that hypnosis is considered a scientific method.[151] However, New Jersey cases since *Hurd* have treated other types of pretrial questioning by expert wit-

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148 *L.K.*, 244 N.J. Super. at 270, 582 A.2d at 301 (holding that the conditional admissibility of hypnotically-induced testimony applies to criminal defense expert who proposed multiple personality disorder/insanity defense to the alleged murder of sexually abusive father and of aunt).

149 *Hurd*, 86 N.J. at 530-31, 432 A.2d at 89, (remembering that she was stabbed by her husband).

150 *Id.* at 547-48, 432 A.2d at 98 (treating the question of suggestive identification testimony as a distinct legal challenge).

151 *L.K.*, 244 N.J. Super. at 273, 582 A.2d at 303 (stating that the "salutary purpose of requiring evidence to be reliable is to prevent the trier of fact from being misled by

nesses as scientific methods.[152] Therefore, precedent exists to treat suggestive pretrial questioning under the doctrine governing scientific methods. Each of those precedents considered the admissibility of expert testimony in light of pretrial questioning techniques, whereas *Michaels* contemplates the admissibility of the alleged victim's fact testimony.[153] However, *Hurd* applied the *Frye* test for scientific evidence to lay testimony. Therefore, in combination, the cases support analogizing the taint rule governing the trial testimony of child lay witnesses to hypnosis doctrine.[154]

A stronger basis for distinguishing hypnosis from taint doctrine is found in the reasoning of *Hurd* itself. *Hurd* lists the following features of hypnotic interviews which justify special reliability safeguards, each of which involves the deliberate hypnotic alteration of a subject's cognitive state: (1) the fact that "a person undergoing hypnosis is extremely vulnerable to suggestions";[155] (2) "the

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unsound scientific methods"); *Hurd*, 86 N.J. at 536-37, 432 A.2d at 90-92 (applying the *Frye* test to hypnosis as a "scientific procedure").

152 Since *Hurd*, verbal questioning has been treated as a scientific procedure subject to reliability safeguards. For example, in *Pitts*, the New Jersey Supreme Court applied the test for scientific evidence to sodium amytal interviews. State v. Pitts, 116 N.J. 580, 621-35, 562 A.2d 1320, 1343-51 (1989) (affirming capital murder convictions). Sodium amytal is "an intravenously-administered barbiturate" intended to elicit statements. *Id.* at 621, 562 A.2d at 1343. The court affirmed the exclusion of expert testimony as to the criminal defendant's state of mind, due to the fact that the opinion was based on sodium amytal interviews that the court held to be scientifically unreliable to determine "truth." *Id.* at 629-31, 562 A.2d at 1347-48.

In *Wilkerson*, the appellate division applied the scientific evidence test to art therapy. Wilkerson v. Pearson, 210 N.J. Super. 333, 509 A.2d 818 (Ch. Div. 1985) (deciding evidentiary issue in motion to terminate supervised visitation with allegedly incestuous father). The court held that art therapy is a scientifically reliable basis for expert testimony. *Id.* at 338, 509 A.2d at 821. Art therapy does not involve altering the mental state of the interviewee via drugs or hypnosis, yet reliability testing of scientific evidence was held to apply.

Both of these early holdings can be distinguished from *Michaels* on the ground that both involved methods intended to recover a lost memory. *Pitts*, 116 N.J. at 652-53, 562 A.2d at 1360-61 (Handler, J., dissenting) (noting that sodium amytal helps patients "reliv[e] repressed events," "'get to' memories" and "overcome psychological blocking of traumatic events"); *Wilkerson*, 210 N.J. Super. at 337, 509 A.2d at 820 (maintaining that art therapy "can be a bridge between the conscious and the unconscious"). By contrast, in the *Michaels* context, the courts consider the admissibility of testimony about contemporaneous memories. *See infra*, notes 166-77 and accompanying text (distinguishing the issue of recovered memory).

153 Neither the *Pitts* nor *Wilkerson* court discussed possible taint of the interviewee's own testimony due to either the sodium amytal or the art therapy sessions. Having not addressed the issue, neither case stands as authority for a concern about suggestive questioning and possible "taint" of the interviewee.

154 *But see infra*, notes 166-77 (distinguishing the issue of recovered memory).

155 *Hurd*, 86 N.J. at 539, 432 A.2d at 93.

loss of critical judgment" compared to "a waking person";[156] and (3) "the tendency to confound memories evoked under hypnosis with prior recall."[157] The opinions make clear that each of these special concerns is dependent on either the altered consciousness of hypnosis or deliberate post-hypnotic suggestion.[158] Yet, in *Michaels*, the child witness is neither hypnotized nor subjected to deliberate posthypnotic suggestion.[159]

A further weakness in the hypnosis analogy is rooted in the *Michaels* court's evasion of the question of children's competency as witnesses. The hypnosis doctrine only permits the exclusion of testimony if the hypnotic session in the particular case would make the witness less reliable than a nonhypnotized witness. A super-reliability requirement is expressly rejected:

> [H]ypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate.[160]

The derivative testimony remains admissible, as long as the hypnosis has induced memory that is "comparable in accuracy to normal human memory."[161] Thus, if the court were committed to following *Hurd* without imposing a super-reliability requirement, it would impose a taint hearing requirement on all pretrial interviews in which "some evidence" of suggestion exists, without discriminating by age. Even if child witnesses were found to be less reliable in general, the court would impose a taint hearing requirement on all populations similarly susceptible to taint.

Additionally, *Michaels* does not address the specific methods by which the reliability of hypnotically-refreshed testimony may be preserved.[162] In particular, the following is recommended:

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156 *Id.* ("A person under hypnosis is more willing to speculate and will respond to questions with a confidence he would not have as a waking person.").

157 *Id.* at 540, 432 A.2d at 93 (referring to instructions while under hypnosis to integrate recovered memories with waking memories).

158 *See id.* at 534-40, 432 A.2d at 90-93; State v. L.K., 244 N.J. Super. 261, 273, 582 A.2d 297, 303 (App. Div. 1990).

159 In *Michaels*, the court did not attempt to align State interviewers with hypnotists. The opinion does not describe them as mesmerizing or relaxing the children and leading them toward dissociation. Hypnosis is not even mentioned as a possibly suggestive factor if used during an interview with a child.

160 *Hurd*, 86 N.J. at 538, 432 A.2d at 92.

161 *Id.* at 543, 432 A.2d at 95.

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> In addition to requiring that either a psychiatrist or psychologist experienced in the use of hypnosis who is independent of the prosecutor and the defense conduct the examination, the following safeguards were established:

> *[B]efore* inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. The hypnotist should carefully avoid influencing the description by asking structured questions or adding new details.[163]

The hypnosis safeguards in part attempt to establish a pre-interview memory baseline, presumably to determine whether recovered memories are in fact implants. However, the requirement of a baseline interview reintroduces concerns that even verbal questioning might taint testimony.[164] Therefore, the importation of the hypnosis safeguards to the child interview context would at most redress peripheral problems addressed by the *Hurd* test. It would leave untouched the central premise that the very act of questioning itself may cause irremediable taint.[165]

All of these doctrinal incompatibilities seem small by comparison to the more fundamental clash in psychological premises. The key difference between hypnosis and traditional interviewing is that the stated purpose of hypnosis is to recover a presently nonexistent memory. The language in *Hurd* repeatedly acknowledges that hypnosis involves the recovery of lost memories. For example:

> The purpose of using hypnosis is not to obtain truth, as a poly-

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> 1. Information given to the hypnotist by either side must be recorded,
> 2. The session must be recorded, preferably on videotape,
> 3. Only the hypnotist and the subject should be present during any phase of the session,
> 4. A detailed description of the facts as the subject remembers them must be recorded by the hypnotist before inducing hypnosis,
> 5. All contacts between the hypnotist and the subject must be recorded, and
> 6. The party who wishes to introduce hypnotically-induced memory must give reasonable notice [and discovery.]

L.K., 244 N.J. Super. at 271, 582 A.2d at 302 (citing *Hurd*, 86 N.J. at 543-47, 432 A.2d at 89-90).

The reliability of prehypnosis information may also be preserved by the use of similar safeguards. *Id.* at 278, 582 A.2d at 306. Alternatively, prehypnosis information may be admitted under an "independent verification" test. *Id. See also* State v. Dreher, 251 N.J. Super. 300, 312-13, 598 A.2d 216, 222 (App. Div. 1991) (explicitly analogizing "independent verification" of prehypnosis memories to an "independent source" test), *certif. denied*, 127 N.J. 564, 606 A.2d 374 (1992). This latter method of preserving pre-interview child testimony would subvert the *Michaels* rule for reasons that track the analysis of the "independent source" test under the identification case law.

163 *Hurd*, 86 N.J. at 546, 432 A.2d at 96.

164 "Any question has the potential to be suggestive to a child." Raskin & Yuille, *supra* note 37, at 192. *See also supra*, notes 95, 107-09 and accompanying text.

165 Furthermore, in the *Michaels* context, there is no admitted amnesia, so that the entire project of establishing a pre-recovery baseline is misconceived. *See infra*, notes 166-77 (distinguishing the issue of recovered memory).

> graph or "truth serum" is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness.[166]

The basic terminology throughout the hypnosis cases—"hypnotically-refreshed" and "hypnotically-induced"—clearly signifies a focus on recovered memories.

Currently, the issue of "recovered memory" is highly controversial within the memory research field. The recovered memory discourse applies to adults who claim to have recovered, either through therapy or traumatic epiphany, memories of childhood abuse.[167] The recovered memory critique alleges that adults who recover memories of childhood abuse that were previously absent in fact have false memory. The recovered memory critique finds fault with interviewing methods, but specifically as operative on memories repressed over long periods of time. Some detractors argue that there is no such thing as recovered repressed memory.[168] Other critics question the very existence of repression.[169] A more moderate claim is that, even if a recovered memory holds some truth, it will be difficult to root out partial distortions due to the degradation of other evidence over time. Criticism of recovered memory is based largely on anecdotal accounts of recovery and/or witness recantation.[170]

On the other side of the debate, professionals argue that repression is an acknowledged coping mechanism for the trauma of

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166 *Hurd*, 86 N.J. at 537, 432 A.2d at 92. *See also* State v. Long, 119 N.J. 439, 490-92, 575 A.2d 435, 460-61 (1990) (reporting hypnosis of eyewitness to recover time of crime); *Hurd*, 86 N.J. at 538, 543, 432 A.2d at 92, 95 ("restoring" memory); *id.* at 547, 432 A.2d at 96 ("reviving" memory); *L.K.*, 244 N.J. Super. at 270, 582 A.2d at 301 ("restoring" memory).

167 *See* Borawick v. Shay, 68 F.3d 597 (2d Cir. 1995) (affirming summary judgment for defendants based on the exclusion of the adult plaintiff's hypnotically-recovered memories of childhood sexual abuse).

168 *See generally* ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1994).

169 *See, e.g.*, Ronald J. Allen & Joseph S. Miller, *The Expert as Educator: Enhancing the Rationality of Verdicts in Child Sex Abuse Prosecutions*, 1 PSYCHOL., PUB. POL'Y & LAW 323, 336 (1995) (noting without citation "the consistent failure of psychologists and neuroscientists to find empirical evidence of the mechanism of repression"). *But see infra* note 172 (citing Linda Williams's study).

170 *See, e.g.*, LOFTUS & KETCHAM, *supra* note 168. Some individuals have repudiated their prior claims of having recovered memories of abuse. For example, in one New Jersey case, a 34-year-old plaintiff dropped his civil suit against a cardinal when he decided that he could not be sure if the memories of child sexual abuse he had recovered under hypnosis were accurate. Linda Bean, *Suits Depend on the Persistence of Memory*, N.J.L.J., Mar. 21, 1994, at 36. The ability of such individuals to recant their accusations weakens the claim that irretrievable memory distortion has occurred.

child sexual abuse,[171] setting the stage for those memories to be recovered later in life.[172] For example, Judith Herman argues that child sexual abuse survivors offer "disguised presentation" as adults, so that many adult psychiatric diagnoses, including borderline personality, somaticization, and multiple personality disorders, may in fact originate in childhood trauma.[173] Herman specifically identifies hypnosis with recovered memory, concluding that an adult's difficulty in retrieving traumatic childhood memories makes hypnosis a valuable tool of recovery.[174] Clearly then, the New Jersey Supreme Court's reliance on *Hurd* incorporates an embedded recovered memory premise.

By contrast, the suggestibility critique is typically leveled against child-aged accusers bringing current charges of abuse. It centers on the assumption that a child can easily be led through suggestive questioning to accuse a defendant of sexual abuse. *Michaels* is a paradigmatic suggestibility critique, but of the extreme hardened memory variety. The child suggestibility argument as formulated in *Michaels* would be harder to sell as an attack on an adult victim's timely accusations. It would require critics to argue that an adult can be led to make false statements *which she then comes to experience as true.* It would be much more difficult to convince the media-watching public or a jury that suggestive interviewing by a police officer can cause an adult to believe he or she has been raped, say, eleven months ago. We might accept that the witness succumbed to social pressures to make false accusatory statements. But we would be much less likely to accept that he or she actually came to remember falsely that a rape had occurred.

Accordingly, the adult false memory critique is usually made narrowly, against those adults who claim to have recovered memories (as opposed to uninterrupted memories) of sexual crimes committed against them during childhood. Quite possibly, the greater acceptibility of this argument is due in part to bootstrapping on stereotyped fears about children's cognition. As such, the critique of recovered memory is built upon a buried intuition

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171 *See* Am. Psychiatric Ass'n Bd. of Trustees, *Statement on Memories of Sexual Abuse*, Dec. 12, 1993, at 2.

172 *See* Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167, 1174 (1994) (reporting data which "indicate[s] that having no recall of child sexual abuse is a common occurrence for adult women with documented histories of such abuse").

173 HERMAN, *supra* note 22, at 123-25.

174 Judith Lewis Herman, *Crime and Memory*, 23 BULL. AM. PSYCHOL. LAW 5, 8-9 (1995).

about child suggestibility, the child's presumed errors simply emerging belatedly in an adult's words.

An intellectually honest concern about the effects of suggestion on authenticity would not be confined to allegations about abuse that took place in childhood. The fact that the suggestibility argument has not been extended to adult victims of contemporaneous sex crimes is an odd omission, particularly given that the whole subject of child suggestibility research is an outgrowth of previous work on adult suggestibility.[175] Furthermore, both the hypnosis and identification doctrines have been developed in the context of adult witness testimony. However, when seen as a strategic omission, it becomes understandable.

The recovery and suggestibility issues have been imprecisely conflated within *Michaels*. Hypnosis is a tool specifically intended to facilitate the recovery of repressed memory. By citing hypnosis doctrine, the New Jersey Supreme Court pursues a recovered memory rationale to justify erecting a barrier to testimony about nonrecovered/nonrepressed memories of abuse. Certainly, one might argue, consistent with the *Michaels* premise, that contemporaneous suggestion causes memory errors, not merely statement errors.[176] Therefore, like recovered memory, suggestion involves a danger of false memory regardless of whether that error was caused today or twenty years ago. However, this blurring of the two issues assumes that there is a significant similarity between child suggestion and recovered repressed memory without acknowledging that this is an unexamined assumption that overreaches the social science data.

More importantly, by conflating these issues in *Michaels*, the court fails to identify another crucial distinction between recovered repressed memory (and hypnosis) on the one hand, and suggestive questioning on the other hand. That is the differential presumption of authenticity recognized in each context. Even if a similarity could be established between child witnesses and adults with repressed memory, the *Michaels* court treats child witnesses as even less authentic than such adults.

In the recovered memory or hypnosis context, the hypnotized witness admits that she cannot self-authenticate her hypnotically-

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175 *See* Michael E. Lamb et al., *Making Children Into Competent Witnesses: Reactions to the Amicus Brief* In re Michaels, 1 PSYCHOL., PUB. POL'Y & LAW 438, 445 (1995) (citing ELIZABETH F. LOFTUS, EYEWITNESS MEMORY (1979)).

176 *Cf. supra* notes 47-56 and accompanying text (discussing various models of suggestibility).

refreshed testimony. The interviewee knows and agrees that, prior to the recovery, there were no memories. She herself reports lack of memory and concedes that the hypnotic interview did, in fact, "induce" the memory. Therefore, the imposition of safeguards against hypnotically-distorted testimony does not contradict the proposed irrebuttable pretrial presumption of authenticity which models the rule for self-authenticating documents.

Conversely, in the *Michaels* context, the charge of induced memory is external, leveled by the court, the defendant, or defense experts.[177] Child witnesses who are subjected to suggestive interviewing techniques do not present the special context of having lost a memory that they seek to recover. They are the same as many other individuals routinely questioned by law enforcement agents: possibly reluctant, withholding, or non-conversational witnesses who simply do not provide information in a "free recall" flood.

Furthermore, under the taint rule, a crime victim will have little control over the fate of her proposed testimony. Unlike a witness who chooses to undergo hypnosis, a nonhypnotized witness will not be able to safeguard herself against allegedly suggestive influences cognizable under *Michaels*. She will not be able to take the clear and simple precaution of refusing to undergo hypnosis. By breaching the line between hypnotized and nonhypnotized states—concluding that certain nonhypnotized witnesses may also be especially vulnerable to suggestion[178]—the court has opened the door wider to third-party corruption of proposed crime victim testimony.

The hypnosis analogy is conceptually misconceived. The mismatch between doctrines suggests that the contemporaneous testimony of nonhypnotized children will be more reliable than that of hypnotized adults. Nevertheless, *Michaels* weakens the presumption of authenticity as to child witnesses beyond that which remains in force under the hypnosis doctrine. Even adults who have overcome amnesia or repressed memory are accorded a stronger presumption of authenticity than the contemporaneously complaining witnesses under *Michaels*. Furthermore, the hypnosis safeguards do not violate a proposed irrebuttable pretrial presump-

177 *See infra* note 233 and accompanying text (distinguishing internal and external charges of memory loss in the hearsay/nonhearsay context).

178 The rationale for hypnosis safeguards is that hypnotized witnesses are especially vulnerable to suggestion. *See* State v. Fertig, A-19, 1996 N.J. LEXIS 1, at *23 (N.J. Jan. 4, 1996) (noting that "people who have been hypnotized are vulnerable to intentional or inadvertent suggestions").

tion of authenticity, because hypnotized witnesses do not claim to be self-authentic. Consequently, the expansive exclusionary rule established by the New Jersey Supreme Court in *Michaels* is not justified by analogy to hypnosis law.

D. *Conclusion: The* Michaels *Court's Arguments by Analogy Do Not Justify Excluding the In-Court Testimony of Child Witnesses*

The New Jersey Supreme Court's analogies to tainted in-court identifications and hypnotically-induced in-court testimony are important because they present two examples of precedent in which relevant, nonhearsay evidence may be removed from the adversary system. More significantly, each cited doctrine permits a defendant to overcome the presumption of authenticity as to an in-court witness. However, identification and hypnosis cases reason from concerns about hardened memory errors to pretrial tests of reliability. Therefore, in order to rely on these doctrines, *Michaels* must depend upon its assumption that suggestion creates hardened false memories of sexual abuse.[179]

In fact, as shown herein, these narrow and idiosyncratic doctrines are distinguishable on several bases. In various ways, both identification and hypnosis doctrine preserve a strong presumption of authenticity, despite some narrow range in which the witness may be held to be inauthentic. The identification case law does not provide authority for the proposition that suggestive pretrial influences can pervasively taint an entire witness, so that she may be barred completely from trial participation. The hypnosis case law, while providing authority for the exclusion of a whole human being from trial, is premised on the witness's own prior acknowledgment of the absence of memory and recovery of memory under an altered cognitive state. Accordingly, the *Michaels* rule comports less with precedent and more with stereotypical fears about the deficiencies of child witnesses.

III. The Constitutional Structure of the Adversary System: The Problem of the "Illusory" Witness

As shown in Part II, the internal reasoning of the *Michaels* opinion does not adequately support the taint rule. This Part considers the issue of child suggestibility more generally, in the context of the structures of the adversary system. The constitutional

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[179] *See supra* notes 47-56 and accompanying text (discussing various models of suggestibility).

backdrop supports the argument that a strong presumption of authenticity is accorded to nonhearsay trial witnesses. Furthermore, the structures of adversarial resolution are consistent with the proposed irrebuttable pretrial presumption of authenticity for nonhearsay, nonhypnotized witnesses.

A. *Out-of-Court Statements and the Confrontation Clause*

In *Michaels*, the New Jersey Supreme Court has erected a barrier to the in-court testimony of child witnesses.[180] The principle of reliability infuses the rules of evidence and criminal law in general.[181] Thus, both the adversary system of adjudication[182] and the jury system[183] have been construed as structural safeguards intended to maximize the reliability of evidence. These safeguards have generally been considered adequate to test the reliability of in-court testimonial evidence.

The classic exception in which a preliminary showing of reliability may be required is regarding out-of-court statements offered in court to prove the truth of the matter asserted.[184] These statements have been excluded under hearsay rules,[185] subject to specific hearsay exceptions which are circumscribed by constitutionally required limitations.[186] By contrast to out-of-court

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180 This Article uses the term "in-court" to refer to in-court nonhearsay testimony, and the term "out-of-court" to refer to hearsay statements.

181 *See, e.g.*, Christiansen, *supra* note 41, at 707 n.10 (citing In re Winship, 397 U.S. 358, 368-75 (Harlan, J., concurring)) (noting that concern with reliability is the basis of beyond a reasonable doubt criminal conviction standard) (citing FED. R. EVID. 602 advisory committee note which observes that the personal knowledge requirement reflects "'pervasive manifestation' of the common law insistence" on the most reliable information).

182 *See* Maryland v. Craig, 497 U.S. 836, 857 (1990) ("[This holding] ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation."). *But see* Montoya, *supra* note 126, at 1270 & n.59 (criticizing *Maryland v. Craig* for essentializing the Confrontation Clause to a functional analysis of reliability).

183 Watkins v. Sowders, 449 U.S. 341, 347 (1981) (explaining that a jury's very task within the adversary system is to assess the reliability of evidence).

184 "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J. EVID. R. 801(c); FED. R. EVID. 801(c).

185 "Hearsay is not admissible except as provided by these rules or by other law." N.J. EVID. R. 802. *See* FED. R. EVID. 802.

186 The United States Supreme Court has established a general, two-prong test under the Confrontation Clause of the Sixth Amendment to determine the admissibility of out-of-court statements by a non-appearing declarant. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (upholding the admissibility of an unavailable adult declarant's prior testimony). First, the Confrontation Clause imposes a necessity requirement, so that the declarant must be unavailable for cross-examination. *Id.* The unavailability

statements admitted under exceptions to the hearsay rule, in-court testimony is generally not subject to pre-admission reliability requirements.[187] The premise is that the adversarial process at trial will reveal any latent unreliability or weakness in the testimony.

Prior to the *Michaels* ruling, most commentators who proposed screening child statements for suggestion did so in the limited context of precluding unreliable out-of-court statements, not in-court nonhearsay testimony.[188] In stark contrast, *Michaels* excludes the nonhearsay, in-court testimony of witnesses subject to cross-exami-

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requirement has since been narrowed, so that it does not apply to every proffered hearsay statement. United States v. Inadi, 475 U.S. 387, 392 (1986). Second, the statements must present "indicia of reliability." *Roberts*, 448 U.S. at 66. This requirement is satisfied by all statements admissible under a traditional, "firmly rooted hearsay exception." *Id.* Hearsay admitted under the residual hearsay exception, or other exceptions not "firmly rooted," require "a showing of particularized guarantees of trustworthiness." *Id.*

In the alternative, when the hearsay declarant does appear at trial, *Roberts* does not control:

> [N]one of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial. The concern of most of our cases has been focused on precisely the opposite situation—situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him at trial. . . . [W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.

California v. Green, 399 U.S. 149, 161-62 (1970). *But cf.* United States v. Inadi, 475 U.S. 387, 394-96 (1986) (suggesting that live testimony may be a weaker substitute for some hearsay).

187 *But cf. supra*, Part II (discussing hypnosis and identification rules).

188 For example, one author has proposed tightening the rules for child hearsay with a statutory variation on the hearsay exception for the former testimony of an unavailable child declarant. Montoya, *supra* note 2, at 968-77. The Montoya proposal permits the defendant to require a videotaped pretrial deposition that is timely, thus ensuring the defendant meaningful cross-examination. *Id.* at 969. In order to admit the videotape at trial without the declarant present, any unavailability requirement would be considered waived. *Id.* at 971-72. In addition, the offering party would be required to demonstrate that the child's statements are free of adult suggestion. *Id.* at 973. *See also* Hutton, *supra* note 27, at 538 & n.236 (proposing that a court-appointed expert evaluate "intervenors" with multiple investigatory functions and determine whether intervenor testimony about a child's out-of-court statements should be excluded).

However, at least one author has proposed excluding in-court child testimony tainted by suggestion. Feher, *supra* note 55. Feher proposes the exclusion of in-court child testimony due to suggestion under either Federal Rule of Evidence 403 (undue prejudice), Federal Rule of Evidence 601 (incompetency), or Federal Rule of Evidence 602 (lack of personal knowledge). *Id.* at 245-49. Alternatively, Feher proposes exclusion under the Confrontation Clause, which he states requires "effective" cross-examination, *id.* at 250, or under the Due Process Clause requirements of fundamental fairness and sufficiency of evidence. *Id.* at 250-52.

nation. The New Jersey Supreme Court acknowledges in *Michaels* that "assessing reliability as a predicate to the admission of in-court testimony is a somewhat extraordinary step."[189]

On the precise issue of child suggestibility, New Jersey has also gone far beyond the United States Supreme Court, which has considered child suggestion in the context of out-of-court statements. In *Idaho v. Wright*, the Supreme Court considered the admissibility of out-of-court statements of an unavailable child declarant in a sexual abuse trial.[190] *Wright* considered whether the hearsay evidence, admitted under the state's residual hearsay exception, satisfied the *Roberts* requirement of "particularized guarantees of trustworthiness."[191] The Supreme Court concluded that the suggestiveness of the questioning of the two-and-a-half-year-old declarant rendered the child's statements too unreliable to pass constitutional muster.[192] On those facts, the Court recognized the danger of unreliability posed by the suggestive questioning of children.

Wright initially led some to believe that a special constitutional jurisprudence for child witnesses was under development. On facts involving an adult declarant, the Supreme Court had held in *Roberts* that no showing of "particularized guarantees" is required when a firmly-rooted hearsay exception is invoked.[193] *Wright* then raised the possibility that *Roberts* would be differentially applied to child declarants. However, that expectation was disappointed in *White v. Illinois*.[194] In *White*, the United States Supreme Court upheld the admission of a child's out-of-court statements about sexual abuse under firmly-rooted hearsay exceptions, without inquiry into particularized guarantees of trustworthiness.[195]

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189 *Michaels*, 136 N.J. at 316, 642 A.2d at 1381.

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

191 *Id.* at 815-27; Ohio v. Roberts, 448 U.S. 56, 66 (1980).

192 *Wright*, 497 U.S. at 826-27. The doctor who questioned the child testified to the following:

> "I started out with basically, 'Hi, how are you,' you know, 'What did you have for breakfast this morning?' Essentially a few minutes of just sort of chitchat. . . . She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, 'Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?'"

Id. at 810.

193 *Roberts*, 448 U.S. at 66.

194 White v. Illinois, 502 U.S. 346 (1992).

195 *Id.* at 354-56 (rejecting unavailability requirement and upholding admission of

White indicates that the Constitution does not impose special requirements on the admissibility of out-of-court statements by child declarants.[196] *A fortiori*, the Constitution cannot currently be said to impose special requirements on the admissibility of in-court statements by child declarants. The New Jersey Supreme Court's decision in *Michaels* takes the concerns about child suggestibility narrowly considered by the United States Supreme Court in *Wright* and dilates those concerns into a global distrust of any child statement, whether made out-of-court without any structural safeguards of reliability or made in court under conditions of adversarial testing. Notwithstanding the New Jersey Supreme Court's citation to constitutional hearsay doctrine,[197] the *Michaels* rule is in fact a departure from the constitutional policies.

The *Michaels* court reasons that, in the context of child witnesses, the special reliability testing required of out-of-court statements should apply equally to in-court statements:

> The considerations that are germane to the assessment of the reliability of in-court testimony parallel those that inform the determination of the reliability of out-of-court statements.[198]

Accordingly, the *Michaels* opinion cites state cases in which New Jersey courts have acknowledged a danger of coercive questioning with child witnesses in the context of admitting out-of-court statements.[199] Each involved the admissibility of out-of-court statements, either under the exception for the admission of fresh complaint testimony in sexual assault cases[200] or under the tender

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four-year-old's out-of-court statements under spontaneous declaration and medical examination exceptions).

196 One writer has attacked the *White* opinion for failing to impose a requirement of particularized guarantees of trustworthiness on all out-of-court statements by child declarants, even when they fall within a firmly rooted hearsay exception. Montoya, *supra* note 2, at 980-84. Montoya argues that the suggestibility of child witnesses and the tendency of courts to stretch traditional hearsay exceptions for child declarants mandate across-the-board proofs of "trustworthiness" under both the rules of evidence and the Confrontation Clause. *Id.* Montoya notes that in *Wright*, if Idaho had used the firmly rooted hearsay exception for medical diagnosis instead of the not-firmly-rooted residual exception, then under the command of *White*, there would have been no constitutional defect in having admitted the child hearsay, despite the suggestive questioning. *Id.* at 982-83.

197 *See Michaels*, 136 N.J. at 312-13, 642 A.2d at 1378-79.

198 *Id.* at 318, 642 A.2d at 1381-82.

199 *Id.* at 312, 317-18, 642 A.2d at 1378, 1381.

200 The doctrine of fresh complaint admits the fact of an out-of-court report of a sexual assault in order to rebut the inference that, if such a crime had "really" happened, the victim would have reported it immediately. State v. J.S., 222 N.J. Super. 247, 257, 536 A.2d 769, 774 (App. Div.), *certif. denied*, 111 N.J. 589, 546 A.2d 513 (1988). The fresh complaint doctrine requires the out-of-court statement to be tested

years hearsay exception.[201]

The *Michaels* opinion thus collapses both the out-of-court and in-court statements of child declarants into one kind of evidence. The court justifies the leap from out-of-court to in-court admissibility hurdles by reasoning that "anticipated in-court testimony . . . may be derived from the out-of-court statements and antecedent interrogations."[202] In so doing, the *Michaels* court holds child witnesses to a higher standard even than that for hearsay declarants who appear at trial.[203]

B. In-Court Testimony and the Confrontation Clause

The Confrontation Clause of the Sixth Amendment generally protects against the admission of out-of-court statements that have not been subjected to the equivalent of in-court, adversarial protections. However, in-court testimony must also be tested against the Clause.[204] When a witness appears in court, the Sixth Amendment

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for possible coercion. *See, e.g.*, State v. Bethune, 121 N.J. 137, 149, 578 A.2d 364, 370 (1990) ("Questioning of young children may be a necessary component of unearthing sexual abuse. As long as the questioning is noncoercive, evidence of the complaint is admissible."); State v. Hill, 121 N.J. 150, 167, 578 A.2d 370, 379 (1990) (noting that "non-coercive question[ing]" to elicit fresh complaint is sufficiently voluntary, but "pointed, inquisitive, coercive interrogation" is not); *J.S.*, 222 N.J. Super. at 253, 536 A.2d at 772 (maintaining that "the victim's statement must at least be self-motivated and not extracted by interrogation").

201 The courts first construed the newly-created tender years hearsay exception in State v. M.Z., 241 N.J. Super. 444, 575 A.2d 82 (Law Div. 1990) (considering out-of-court statements of three-year-old victim of sexual assault). The court upheld the admissibility of certain statements as trustworthy, given their spontaneity. *Id.* at 450-51, 575 A.2d at 85-86. It held inadmissible other statements to an investigator and the grand jury which lacked spontaneity, could not be separated from suggestion, and, alternatively, lacked "a clinically sound environment." *Id.* at 451-52, 575 A.2d at 86.

In subsequent cases, New Jersey courts have continued to treat the coerciveness of questioning as an aspect of hearsay trustworthiness. *See* State v. Donegan, 265 N.J. Super. 180, 187, 625 A.2d 1147, 1150-51 (App. Div. 1993) (upholding under *Idaho v. Wright* the admission of videotaped tender years hearsay of a six-year-old who testified at trial, noting the following indicia of trustworthiness: "basically unrehearsed," displayed the "language of childhood," involved "events of which she could have known only through direct experience," the child's "demeanor was at all times at least consistent with the thesis of believability," and the interviewer never suggested answers or displayed partisanship); State v. J.G., 261 N.J. Super. 409, 421, 619 A.2d 232, 238 (App. Div. 1993) (holding that tender years hearsay was trustworthy, noting that "each [child] provided detailed descriptions of sexual acts without prompting"); State v. R.M., 245 N.J. Super. 504, 512, 586 A.2d 290, 294 (App. Div. 1991) ("[In *Bethune*, t]he Court identified 'coerciveness' as a primary characteristic of untrustworthy circumstances surrounding the taking of infant statements.").

202 *Michaels*, 136 N.J. at 318, 642 A.2d at 1381.

203 *See supra* note 186 (quoting *California v. Green*).

204 *See* Maryland v. Craig, 497 U.S. 836, 846 (1990). In discussing in-court testimony, this Section assumes that the witness's appearance is unaided by child protec-

has been interpreted simply to require that the defendant have an adequate "opportunity" to cross-examine.[205] It has recently been the dissenting position that a defendant is constitutionally entitled to meaningful or effective cross-examination.[206] Thus, memory defects of a trial witness which may hamper cross-examination have not been considered to be of constitutional moment.[207]

In general, courts have equated the physical presence of a witness with his availability for cross-examination: "Ordinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions."[208] Yet, despite the literal opportunity to cross-examine, some have argued that even an in-court witness may be somehow absent from the trial confrontation.

For example, in *United States v. Owens*, the Supreme Court upheld the admission of an out-of-court identification of a testifying crime victim who could no longer remember the basis for that identification.[209] Justice Brennan argued in dissent that the witness did not "really" testify at trial due to his memory loss:

> [R]espondent's sole accuser was the John Foster who, on May 5, 1982, identified respondent as his attacker. *This John Foster, however, did not testify at respondent's trial:* the profound memory loss he suffered during the approximately 18 months following his identification prevented him from affirming, explaining, or elaborating upon his out-of-court statements just as surely and completely as his assertion of a testimonial privilege, or his death, would have.[210]

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tive measures. Therefore, other Confrontation Clause values—such as oath, demeanor, and literal confrontation—are not at issue.

205 *See, e.g.*, United States v. Owens, 484 U.S. 554, 557, 560 (1988) (stating that "successful cross-examination is not the constitutional guarantee"); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (stating that "[g]enerally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish").

206 *Owens*, 484 U.S. at 567-69 & n.1 (Brennan, J., dissenting); Kentucky v. Stincer, 482 U.S. 730, 738 n.9 (1987) (Blackmun, J., personal footnote) (arguing that confrontation is not merely a "trial right," but a substantive right to effective cross-examination); Pennsylvania v. Ritchie, 480 U.S. 39, 66-72 (1987) (Brennan, J., dissenting) (same).

207 "This Court has never held that a Confrontation Clause violation can be founded upon a witness' loss of memory." *Owens*, 484 U.S. at 557.

208 *Id.* at 561 (construing Federal Rule of Evidence 801(d)(1)(C)).

209 *Id.* at 564.

210 *Id.* at 566 (Brennan, J., dissenting) (emphasis added). Justice Brennan further argued that the adversary system is incapable of discovering truth in the face of a witness with profound memory loss. He wrote:

> [H]ere cross-examination, the "greatest legal engine ever invented for

Justice Brennan offered an illusory witness argument[211] in the context of the admissibility of hearsay statements requiring that the declarant be subject to cross-examination.[212] However, the idea of the "illusory witness" can equally be applied to in-court witnesses.[213]

The witness whose in-court statements are considered illusory is the equivalent of an organic tape recorder which simply plays back out-of-court statements. Her present beliefs about an experience of crime are seen as possible forgeries due to taint. Therefore, although a child may take the stand at trial, that person has been irrevocably severed from her own experiential reality. Confrontation literally cannot take place because, allegedly, the authentic child was destroyed outside the courtroom during the pretrial interview.

Few opinions of the United States Supreme Court address memory loss and the adequacy of confrontation, and only one of those cases addresses in-court testimony such as in *Michaels*. The one indication in a United States Supreme Court opinion that memory loss might affect the admissibility of in-court statements under the Constitution appears in *Delaware v. Fensterer*.[214] In *Fensterer*, an expert witness testified at trial to his present opinion, but he was unable to remember the basis for that opinion.[215] The Court upheld the in-court testimony, reasoning that the Sixth Amendment only requires that the defendant have an opportunity to cross-examine.[216]

> the discovery of truth," [ ] stood as helpless as current medical technology before Foster's profound memory loss. In concluding that respondent's Sixth Amendment rights were satisfied by Foster's mere presence in the courtroom, the Court reduces the right of confrontation to a hollow formalism.

Id. at 572 (Brennan, J., dissenting). Justice Brennan's argument was impliedly rejected by the majority, which held that there had been no constitutional violation. *Id.* at 561.

211 Justice Brennan referred to the "hypothetical witness." *Owens*, 484 U.S. at 570 (Brennan, J., dissenting).

212 *Id.* at 561.

213 *Cf.* Mitchell, *supra* note 145. Mitchell argues that memory distortion due to hypnosis may render a witness not the same person who initially had some experience. *Id.* at 189-90. The author suggests that, because "the witness is made highly resistant to cross-examination," the Confrontation Clause may be implicated. *Id.* at 189. However, he concedes that United States v. Owens, 484 U.S. 554 (1988), stands against this constitutional argument in holding that even complete loss of memory does not deprive the defendant of the "opportunity" to cross-examine. *Id.* at 190-91.

214 Delaware v. Fensterer, 474 U.S. 15 (1985).

215 *Id.* at 16-17.

216 *Id.* at 21-22.

Arguably, the expert's in-court statements were merely the reiteration of testimony actually arising out-of-court. Given his total inability to identify the source of his "present" opinion, the expert might have been treated as an illusory in-court witness. In treating the witness's trial statements as contemporaneous, the Court declined to adopt a model of the in-court witness with memory loss as "not really present." In rejecting an illusory witness test under the Confrontation Clause, the opinion states:

> [I]t does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that the opinion is as unreliable as his memory.[217]

Thus, under the guidance of *Fensterer*, the in-court testimony of witnesses unable to disentangle suggested information from experienced information should be admissible under the Confrontation Clause.

Given that the New Jersey Supreme Court invokes hearsay doctrine as applicable to the alleged taint of in-court testimony, it is notable that the constitutional cases on memory loss and out-of-court statements also fail to support the *Michaels* rule. The United States Supreme Court has twice directly addressed memory loss in reference to the constitutionality of admitting out-of-court statements.

In *California v. Green*, the prior testimony of a minor witness was used to convict the defendant of selling marijuana to a minor.[218] Despite the memory loss at trial of the minor, an available declarant, the Court upheld the admission of the prior testimony.[219] The Court left open the possibility that the admission of out-of-court statements of an available declarant might violate the Confrontation Clause if the declarant's inability to recall "so affected [the] right to cross-examine."[220] Of course, the suggestion of possible constitutional problems due to memory loss was con-

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217 *Id.* at 19.

218 California v. Green, 399 U.S. 149, 151-53 (1970).

219 *Id.* at 153-64. The Court explained the facts:

> [Declarant] claimed at trial that he could not remember the events that occurred after respondent telephoned him and hence failed to give any current version of the more important events described in his earlier [out-of-court] statement.

Id. at 168.

220 *Id.* at 168-69 & n.18. The open door was also noted in *Fensterer*:

> We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-exami-

fined to the admissibility of certain hearsay statements.[221]

The hint in *Green* that some type of memory loss might develop into a constitutional barrier to out-of-court statements has not been realized. Subsequently, in *United States v. Owens*, the Supreme Court upheld the admission of an out-of-court identification, despite the declarant's inability at trial to remember the basis for that out-of-court belief.[222] The witness, a correctional counselor at a federal prison, had been "brutally beaten with a metal pipe" so that his skull was fractured, and, by the time of trial, he could no longer remember the basis for his contemporaneous identification of the defendant.[223] The Supreme Court held that the defendant had an unrestricted opportunity to cross-examine, thus satisfying the Confrontation Clause.[224] In addition, the Supreme Court expressly declined to treat the witness as a nonappearing declarant, despite his memory loss.[225] Thus, the Court held that the declarant's hearsay testimony about his own past belief did not have to show "particularized guarantees of trustworthiness" for hearsay under *Ohio v. Roberts*.[226]

In *Owens*, the Court acknowledged that the question left open in *Green* was squarely presented: whether the admission of out-of-court hearsay statements by a declarant unable to remember the basis for that past belief violates the Confrontation Clause.[227] The

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> nation that admission of the witness' direct testimony violates the Confrontation Clause.

Fensterer, 474 U.S. at 20.

221 The United States Supreme Court subsequently explained that *Green* had left open the possibility of Confrontation Clause concerns due to memory loss only in relation to hearsay testimony itself not arising in an in-court proceeding:

> As *Green*'s framing of that question indicates, the issue only arises where a "prior statement," not itself subjected to cross-examination and the other safeguards of testimony at trial, is admitted as substantive evidence.

Fensterer, 474 U.S. at 21. *See also Owens*, 484 U.S. at 558.

222 *Owens*, 484 U.S. at 556, 559-60.

223 *Id.* at 556 ("[The victim/witness] testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with [an FBI agent]. On cross-examination, he admitted that he could not remember seeing his assailant.").

224 *Id.* at 559-60; *cf.* United States v. Grooms, 978 F.2d 425, 428 (8th Cir. 1992) (following *Owens* in affirming admission of child testimony in child sexual abuse trial).

225 *Owens*, 484 U.S. at 560, 563-64.

226 *Id.* at 560. Because *Michaels* considers cross-examination of a child ineffective to cure taint, the in-court testimony of a "tainted" child witness would appear to be most like hearsay testimony of a nonappearing declarant. However, this portion of the *Owens* holding indicates that the in-court tainted child witness should be considered to be an appearing witness.

227 *Id.* at 559.

Court held that it did not.[228] Thus, the Court closed the opening left in *Green* regarding memory loss about out-of-court hearsay statements. *A fortiori*, the door regarding in-court nonhearsay statements must also be seen as closed, given the more timely and adversarial testing of in-court statements. With the closing of the *Green* door, the illusory witness barrier can no longer be considered constitutionally compelled.

The *Michaels* opinion does not mention any of these three United States Supreme Court cases addressing the adversarial testing of memory-impaired witnesses. Given the New Jersey Supreme Court's stated concern with issues of fundamental fairness to the defendant as informed by constitutional values, the cases discussed herein would seem to have been within the ambit of the court's wide-ranging search for precedent.[229]

The illusory witness concept as used by the New Jersey Supreme Court far exceeds the scope contemplated by the discussion in the constitutional cases. If child witnesses are understood to be in-court witnesses subject to memory problems, then their statements are constitutionally admissible under *Fensterer*, which upheld the admission of in-court opinion testimony by a memory-impaired expert. Alternatively, if child witnesses are understood to be illusory and not "really" present in court, then their statements are constitutionally admissible under *Green* and *Owens*, which upheld the admission of prior testimony and an out-of-court identification respectively. Any question of whether higher requirements might be imposed on the memory-deficient testimony of child, as opposed to adult, witnesses seems to have been settled in the negative by *Wright* and *White*.[230]

Even Justice Brennan, whose dissent in *Owens* provides the foothold of United States Supreme Court interest in the illusory witness concept, would seem to reject expanding the idea to the *Michaels* context. In *Owens*, Justice Brennan used a present belief/past belief line to distinguish *Fensterer* (expert witness's memory loss about basis of present belief) from *Owens* (identification wit-

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228 *Id.* at 559-60.

229 The *Michaels* opinion invokes constitutional rhetoric drawn from many bodies of law. *See, e.g., Michaels*, 136 N.J. at 316, 642 A.2d at 1380 (reasoning that the reliability of evidence "implicates principles of constitutional due process"); *id.* (reasoning that "[c]ompetent and reliable evidence remains at the foundation of a fair trial"); *id.* (arguing that "due process interests are at risk"); *id.* at 318, 642 A.2d at 1382 (citing constitutional right to counsel doctrine); *id.* at 318-19, 642 A.2d at 1382 (citing suggestive identification doctrine under the Due Process Clause); *id.* at 320, 642 A.2d at 1382 (explaining taint rule as necessary "to ensure defendant's right to a fair trial").

230 *See supra* notes 190-96 and accompanying text.

ness's memory loss about basis of past belief). He argued that the memory loss of the expert in *Fensterer* was "self impeaching," whereas the memory loss in *Owens* was not.[231] A child witness under *Michaels* allegedly cannot remember the basis for a present belief testified to in court. Therefore, even under Justice Brennan's reasoning, the in-court testimony of such a tainted witness would satisfy the Confrontation Clause, because her loss of memory regarding her present testimony would be self-impeaching.

Alternatively, even if child witnesses are not considered to be self-impeaching because they do not acknowledge memory loss, the *Michaels* context is distinguishable on another basis. In each of the three constitutional cases discussed, the witness himself testified to having memory loss.[232] Conversely, the New Jersey application of the concept turns on third parties alleging that the witness is illusory. The claim of memory distortion is not made from inside, but rather from outside the witness.[233] This fully comports with the *Michaels* premise that children who are suggestively interviewed are not merely unreliable, but indeed are not self-authenticating. While superficially aligned with prior discourse about the reliability of evidence, the New Jersey Supreme Court in fact imposes a novel and onerous burden on child witnesses.

C. *Being in Court: The Adversary System and the Testing of Evidence*

The notion of single-minded adversaries engaging in regulated courtroom combat has been attacked as "a phenomenon in search of justification."[234] This Article does not endorse the adversarial method of testing evidence as a means to "find" "the" "truth." Rather, it questions the New Jersey Supreme Court's special squeamishness about child participants, indulged by that court in the extreme manner of permitting children's total exclusion from in-court testimony.

The adversarial mechanism confronts disorganized human subjectivity, hoping to distill an organized, objective truth. The

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231 United States v. Owens, 484 U.S. 554, 569-70 (1988) (Brennan, J., dissenting).

232 Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985); California v. Green, 399 U.S. 149, 152 (1970); United States v. Owens, 484 U.S. 554, 556 (1988).

233 *See supra* note 177 and accompanying text (distinguishing internal and external charges of memory loss in the hypnosis context).

234 Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 319 (1988). *But see* United States v. Cronic, 466 U.S. 648, 655 (1984) (quoting Herring v. New York, 422 U.S. 853, 862 (1975) ("'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'")).

trial system is fleshed out in the four duties of a witness under the Confrontation Clause of the Sixth Amendment: physical presence, taking an oath, presenting demeanor to the trier, and undergoing cross-examination.[235] Each of these elements of confrontation provides the trier with opportunities to observe a witness under psychological conditions that are expected to provide culturally relevant clues to accuracy.[236] Pretrial hurdles to the admission of testimonial evidence, especially hurdles like the *Michaels* hearing which purports to blanch out of the trial certain types of psychological data, are fundamentally in tension with the structure itself.

To have bite, the argument that suggestibility errors are beyond the reach of adversarial testing must be predicated upon a memory model of suggestibility. Mere misstatements or statement errors caused by suggestive influences would be correctible within the adversarial framework.[237] Thus, the *Michaels* court's reasoning

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235 Maryland v. Craig, 497 U.S. 836, 846 (1990).

236 *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (stating that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back'"); Mattox v. United States, 156 U.S. 237, 242-43 (1895) (explaining the purpose of confrontation as providing the defendant "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge . . . his demeanor upon the stand").

The following excerpt also illustrates the psychological nature of the adversary system:

> [Research shows that] jurors tend to have difficulty estimating the accuracy of adult witness as well. One possible explanation for these findings is that there are no quick and easy markers or "traits" that distinguish accurate from inaccurate witnesses. . . . Because no memorial traits can be observed across all contexts to differentiate accurate from inaccurate witnesses, jurors use markers such as witness confidence, facial expressions, and memory for irrelevant details to make judgments about witness accuracy. Unfortunately many of these markers, such as witness confidence, have been shown to be unrelated to accuracy.

Ross et al., *supra* note 126, at 53 (citation omitted).

237 *See* Thomas D. Lyon, *False Allegations and False Denials in Child Sexual Abuse*, 1 PSYCHOL., PUB. POL'Y & LAW 429, 435 (1995). Without any defect in memory to create an invisible, cognitive barrier, the child witness—like any other witness—can be questioned to accuracy. The United States Supreme Court has noted the ability of adversarial confrontation to expose socially-induced errors:

> [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.

Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (striking per se child shield law under the Confrontation Clause, notwithstanding defendant's opportunity to cross-examine). *See also* Montoya, *supra* note 126, at 1298 n.188 (arguing that "intimidation may induce truthfulness"); *Testimony of Child Victims*, *supra* note 29, at 807 & n.12 (observing that child witnesses are easily confused on cross-examination); *id.* at 815 & n.67 (not-

is deeply dependent on the controverted premise of suggestion-induced memory hardening.[238] However, even the idea of hardened memory error does not justify selectively removing child testimony from the adversary system.

1. Adversarial Testing

Cross-examination is the main tool by which in-court testimony is challenged.[239] Admittedly, the value of cross-examination will vary greatly, depending on the nature of the testimony. In *Rock v. Arkansas*, the United States Supreme Court conceded that "memory hardening" due to prior hypnosis "mak[es] effective cross-examination more difficult."[240] However, the Supreme Court ultimately concluded that "[c]ross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies."[241]

Indeed, the adversary system has always been considered capable of testing memory-impaired testimony:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.[242]

Prior to *Michaels*, the New Jersey Supreme Court likewise considered memory problems to be suitable for adversarial testing, writing:

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ing that child witnesses are often intimidated into silence by the coerciveness of trial testimony).

238 *See supra* notes 47-56 and accompanying text.

239 California v. Green, 399 U.S. 149, 158 (1970) (describing cross-examination as the "'greatest legal engine ever invented for the discovery of truth'") (citation omitted); State v. Silva, 131 N.J. 438, 444, 621 A.2d 17, 20 (1993).

240 Rock v. Arkansas, 483 U.S. 44, 60 (1987). *See also* Manson v. Brathwaite, 432 U.S. 98, 130 (1977) (Marshall, J., dissenting) (stating that "the witness' degree of certainty in making the identification—is worthless as an indicator that [she] is correct") (footnote omitted).

241 *Rock*, 483 U.S. at 61 (holding that the per se exclusion of the defendant's hypnotically-refreshed testimony violated her right to present a defense under the Fourteenth, Fifth, and Sixth Amendments). The Court explained:

> [The State] has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events.

Id. at 61.

242 Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985). The fear of suggestion is simply a repackaging of "the inherent shortcomings of eyewitness testimony." United States v. Wade, 388 U.S. 218, 253 n.3, 254 (1966) (White, J., concurring in part, dissenting in part). Just as poor visibility is relevant to impeach an eyewitness, poor interviewing is relevant to impeach a witness, although both witnesses may firmly believe in the accuracy of their testimony.

> The fallibility of human memory poses a fundamental challenge to our system of justice. . . . Nevertheless, it is an inescapable fact of life that must be understood and accommodated. Rather than require historical accuracy as a condition for admitting eyewitness testimony, we depend on the adversary system to inform the jury of the inherent weaknesses of the evidence.[243]

Some research has hinted that a witness's answers to questions may differ, depending on whether the information is original or is the result of implantation during misleading interviews.[244] This suggests that an inaccurate witness may present indications, woven through her otherwise firm testimony, that her memory is false.[245]

In addition, a witness testifying to false memories may lack the breadth of knowledge about an alleged crime which an authentic witness would have. When pressed for details, she may waver in her testimony or manifest memory problems, self-impeaching her own

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243 State v. Hurd, 86 N.J. 525, 542-43, 432 A.2d 86, 95 (1981) (citations omitted). In another New Jersey case, the appellate division has directly addressed the problem of hardened memory in the context of repeated interviews during preparation for trial. The court reasoned: "The memory-hardening process is an intrinsic part of a witness's preparation for trial," and held that memory hardening does not in itself disqualify the witness from testifying. State v. Dreher, 251 N.J. Super. 300, 310, 598 A.2d 216, 221 (App. Div. 1991), *certif. denied*, 127 N.J. 564, 606 A.2d 374 (1992). However, the court then somewhat confusingly added, "so long as [the evidence] has not been falsified." *Id.*

244 Lindsay & Johnson, *supra* note 45. Lindsay and Johnson reported that:

> [S]ubjects' descriptions of items suggested in the misleading postevent information *systematically differed* from their descriptions of items that were actually in the original source: the former were longer and included more verbal hedges, more references to cognitive operations, and fewer references to sensory and contextual details than the latter.

Id. at 113 (emphasis added).

245 The trial demeanor of a complaining witness is a manipulable indicator. On the one hand, visible trauma may suggest actual victimization, or it may suggest that the trial process itself is traumatizing. On the other hand, flat affect may suggest actual victimization, or it may suggest that no crime occurred.

In *Michaels*, the appellate division described the trial testimony as follows:

> We have had the opportunity to review the videotapes of the children's testimony in their entirety as presented to the jury. . . . *[T]he children manifested virtually no reticence or emotion when speaking of the defendant or the alleged acts of abuse.* Further, the children [had been] subjected to repeated, intense investigative [pretrial] interviews without untoward consequences being reported. . . . *[T]heir testimony appeared well prepared, rote and detached.*

State v. Michaels, 264 N.J. Super. 579, 614, 625 A.2d 489, 507 (App. Div. 1993) (emphases added). *But see* MANSHEL, *supra* note 6, at 179-303 (describing behavioral indications of trauma visible during trial appearances of child witnesses). In addition, the court's statement that the children suffered no "untoward consequences" following disclosure is puzzling. It belies the extensive and severe acting out during the chaotic disclosure period, as reported at trial by adult witnesses to the children's behavior. *Id.* at 77-156. Of course, the significance of such observations can be disputed.

testimony.[246] For just this reason, attorneys often contrive to cause an adverse witness to claim memory loss.[247]

Furthermore, defense counsel can cross-examine on and direct summation to the evidence of taint that might otherwise be used to exclude a child witness from trial.[248] Attorneys can point directly to the pretrial use of leading questions and suggestion to discredit the in-court witness.[249]

Moreover, opposing counsel may use her own leading or suggestive questions to test the witness beyond the four corners of her own testimony. The use of leading questions is not reserved for the pretrial interviewing of child witnesses. In fact, coercive and leading questions are staples of the trial questioning of all witnesses.[250] At trial, attorneys routinely wield leading questions for the purpose of pressuring a witness to become confused, change her testimony, or even to misremember.

Suggestibility theory itself suggests that a lawyer may be able to lead a child witness to statements advantageous to the defendant. The centrality of leading questions to cross-examination reveals an implicit understanding that all witnesses are vulnerable to suggestion. The most extreme version of suggestibility theory posits that a post-event suggestion can overwrite the memory trace for the ac-

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246 *See, e.g.*, United States v. Owens, 484 U.S. 554, 559 (1988) (concluding that memory loss can be tested by "the very fact that [the witness] has a bad memory"); Delaware v. Fensterer, 474 U.S. 15, 19 (1985) (concluding that the memory-impaired witness "invites the jury to find that his [testimony] is as unreliable as his memory").

247 In rejecting memory loss as a basis for inadmissibility, the United States Supreme Court has reasoned in part that it could in fact benefit opposing counsel:

> [L]imitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination . . . no longer exists. But that effect is not produced by the witness' assertion of memory loss—which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement.

Owens, 484 U.S. at 561-62. *See also* Commonwealth v. Amirault, 535 N.E.2d 193, 202 (Mass. 1989) (stating that "[t]he defendant could have used, and did use, the child's memory lapse and unresponsiveness to impeach her credibility") (footnotes omitted).

248 A child whose statements and/or testimony are ruled admissible despite the *Michaels* hearing may still be neutralized by evidence of prior suggestion. *Michaels*, 136 N.J. at 323, 642 A.2d at 1384. *Cf.* State v. Falcetano, 107 N.J. Super. 383, 388, 258 A.2d 395, 397-98 (Law Div. 1969) (holding that a competent witness may still be impeached before the jury with evidence of flaws in her competency).

249 *Cf.* Manson v. Brathwaite, 432 U.S. 98, 112 n.12 (1977) ("Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence.").

250 *See Roberts*, 448 U.S. at 70-71 ("His presentation was replete with leading questions, the principal tool and hallmark of cross-examination.") (footnote omitted). *See also* N.J. EVID. R. 611; FED. R. EVID. 611(c).

tual event.[251] The overwriting hypothesis would suggest that a defense attorney could use high-pressure questioning at trial to write over the State's tainting script to create new memories exonerating the defendant. Admittedly, defense lawyers do not have long periods of time in which to influence child witnesses. Nevertheless, memory researchers have not explained why the efficacy of suggestion should cease upon termination of the State's interviews.

Ultimately, the adversary system does not require that any single witness be breakable in her self-contained version of the facts. Just as a lying witness may not crack, a misremembering witness may not crack. The trial itself is intended to make the determination of evidentiary reliability by puzzling over indivisible, potentially unreliable, and conflicting bits of information.[252] This premise can be seen in the concept of credibility, which indicates that unbreakable, inaccurate testimony is expected within the adversary system. It can also be seen in the terminology, "weighing process," used in reference to a fact-finder's deliberations. Through this lens, we can again glimpse the presumption of authenticity built into the adversarial structures.[253]

It is generally agreed that all human memory is subject to distortion, even without exposure to identifiable suggestion.[254] The *Michaels* court seizes on the suggestive influences manifested in a documented interview because they are identifiable. However, suggestive influences are everywhere. Arguably, defendants who are entitled to taint hearings, because they can present "some evi-

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251 *See* Lindsay & Johnson, *supra* note 45, at 110 (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979)).

252 "One witness's perceptions may differ radically from another's—*each believing his account is the truth.* Cross-examination points out the discrepancies and gives the fact finder the opportunity to evaluate which version more closely approximates reality." Hutton, *supra* note 27, at 495 (footnote omitted) (emphasis added).

253 In another context, the Supreme Court has noticed:

> "[T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."

United States v. Ceccolini, 435 U.S. 268, 277 (1978) (quoting Smith v. United States, 324 F.2d 879, 881-82 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964)). The Court concluded that "the exclusionary rule [under the Fourth Amendment] should be invoked with much greater reluctance" with live witnesses. *Id.* at 280.

254 *See, e.g.*, Robyn Fivush, *Developmental Perspectives on Autobiographical Recall, in* CHILD VICTIMS, *supra* note 24, at 1, 2 (noting "widespread acceptance that memory is at least partly reconstructive"); Goodman & Helgeson, *supra* note 28, at 184 (maintaining that "[m]emory, regardless of a person's age, is not entirely accurate"); State v. Hurd, 86 N.J. 525, 541, 432 A.2d 86, 95 (1981).

dence" of suggestive interviewing, are in a better position to present a defense than if it outwardly appeared that no suggestion had occurred.

Finally, juries have routinely handled evidence specifically involving issues of suggestion.[255] In fact, the *Michaels* opinion expressly notes that, should the child survive the taint hearing and be permitted to testify, the jury retains the obligation to weigh the credibility and value of that evidence.[256] Therefore, the court does not preclude juries from considering issues of taint. In fact, the New Jersey Supreme Court has upheld the exclusion of expert testimony on the reliability of eyewitness identification in favor of jury resolution: "[The eyewitness's] testimony was amply tested on cross-examination, and defendant failed to demonstrate that the subject matter (problems of eyewitness identification) was 'beyond the ken of the average juror.'"[257]

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255 There is a growing psycho-legal research literature examining jurors' perceptions of child witnesses, their ability to detect accuracy, and their willingness to convict. *See generally* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22. The research on juror perception suggests several important points: (1) Both adult witnesses and child witnesses are difficult to assess; (2) witness accuracy is contextually unique; and (3) the validity of the adversary system is inextricably linked to the ability of jurors to determine witness accuracy. *See* Ross et al., *supra* note 126, at 53. *Cf.* Melton & Thompson, *supra* note 126, at 225 ("Our major point, though, is that the emphasis on [child] competency is misplaced. Given the strong evidence already present that children usually can handle testimony when faced with age-appropriate demands, attention should turn where, as a matter of legal policy, it probably should have been initially: jurors' ability to draw proper inferences from children's testimony.").

256 *Michaels*, 136 N.J. at 323, 642 A.2d at 1384. The court explains:

> Finally, if it is determined by the trial court that a child's statements or testimony, or some portion thereof, do retain sufficient reliability for admission at trial, then it is for the jury to determine the probative worth and to assign the weight to be given to such statements or testimony as part of their assessment of credibility. . . . [T]he issue of a child-witness's credibility [ ] remains strictly a matter for the jury.

Id. Cf. Manson v. Brathwaite, 432 U.S. 98, 112, 116 (1977) (rejecting per se exclusion of in-court identifications due to impermissibly suggestive pretrial identifications); *Hurd*, 86 N.J. at 541, 432 A.2d at 94 (rejecting per se exclusion of hypnotically-induced testimony).

257 State v. Long, 119 N.J. 439, 495, 575 A.2d 435, 463 (1990) (reasoning that expert testimony on the unreliability of eyewitness identification was not helpful to the jury) (quotation omitted). Similarly, Justice Black has written:

> [T]he jury must be allowed to decide for itself whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob it of the responsibility to perform the precise function the Founders most wanted it to perform. And certainly a Constitution written to preserve this indispensable, unerodible core of our system for trying criminal cases would not have included, hidden among its provisions, a slumbering sleeper granting the judges license to destroy trial by jury in whole or in part.

In the *Michaels* trial, the defense aggressively presented its suggestibility theory to the jury.[258] The *Michaels* defense team attempted to prove at trial the very aspects of inauthenticity that the court notes in its opinion. Consistent with traditional adversarial methods, the memory issues were litigated for impeachment of the children's credibility. Also consistent with adversarial methods, the jury delivered an independent verdict and rejected the suggestibility defense.[259]

Sexual assault prosecutions may labor under a lack of inculpatory evidence, so that the jury's credibility determinations will become dispositive.[260] Such a showdown between conflicting witnesses may be an uncomfortable basis for a criminal conviction in the context of a child witness opposing an adult defendant. Vague but entrenched distrust of children perhaps puts pressure on courts to find ways to avoid ever reaching the credibility confrontation at trial. The *Michaels* taint hearing requirement fits this description by skewing the criminal justice system toward nonprosecution of child sexual abuse.

2. Corroborative Evidence

Even accepting the *Michaels* assumption that suggestion causes permanent distortions of memory itself, child testimony can still be examined in light of other trial evidence to help determine whether such a memory distortion has occurred:

> [It is an] unsound assumption that cross-examination serves merely to test the reliability of a witness's testimony in light of the circumstances under which it is given. Cross-examination, however, also tests the consistency of that testimony with other known facts.[261]

Foster v. California, 394 U.S. 440, 447 (1969) (Black, J., dissenting).

258 MANSHEL, *supra* note 6, at 175-442. In closing arguments, a defense attorney referred to the State's investigators as "the magic people" for their ability to suggest information to the children. *Id.* at 433-34.

259 *Id.* at 443-63.

260 *See, e.g.*, State v. Bicanich, 132 N.J. Super. 393, 395, 334 A.2d 42, 43 (App. Div 1973) (per curiam), *aff'd*, 66 N.J. 557, 334 A.2d 17 (1975). The court stated:

> As to one [count], it was the victim's word as to what occurred against defendant's denial of the happening. As to the other, there was some minimal corroboration by another nine year old girl but it was not compellingly persuasive. Credibility in cases such as this is ofttimes the most critical issue.

Id.

261 *The Testimony of Child Victims*, *supra* note 29, at 822 (advocating for corroboration requirement rather than circumstantial guarantees of trustworthiness for the admissibility of out-of-court statements by an unavailable child declarant).

Thus, the point of cross-examination may in part be "revealing inconsistencies" between testimony and other evidence.[262] The most likely method to test whether hardened false testimony fits with the other evidence is to examine corroboration.[263]

It is unclear whether the State is permitted to use corroborating evidence to meet its burden in a *Michaels* hearing. On the one hand, the court might import constitutional hearsay doctrine and require a showing that the child's statements are reliable solely based upon "the circumstances in which the statement was made."[264] On the other hand, the *Michaels* opinion describes the taint inquiry as an examination of "the totality of the circumstances *surrounding* the interviews,"[265] arguably a broader formulation. Furthermore, the court has already imported constitutional identification doctrine in *Michaels*, permitting the State to offer proofs of "independent indicia of reliability."[266] The latter method of proof suggests that, to some degree, the State may be permitted to introduce facts beyond the circumstances of the interviews themselves.

In *Michaels*, many of the children presented one or more of the following types of corroboration: physical evidence,[267] pre-interview sexual acting out or statements,[268] and inculpatory state-

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262 Rock v. Arkansas, 483 U.S. 44, 61 (1987).

263 *Cf.* Idaho v. Wright, 497 U.S. 805, 827-35 (1990) (Kennedy, J., dissenting).

264 *Id.* at 820-23 (holding that corroborating evidence cannot satisfy the Constitution when "particularized guarantees of trustworthiness" are required); State v. J.G., 261 N.J. Super. 409, 421-22, 619 A.2d 232, 238 (App. Div. 1993) (following *Wright*). The first method of proof available to the State in a taint hearing comports with a no-corroboration rule. *Michaels*, 136 N.J. at 321, 642 A.2d at 1383 (holding that the State may offer proofs refuting the suggestiveness of the interviews themselves).

265 *Michaels*, 136 N.J. at 321, 642 A.2d at 1383 (emphasis added).

266 *Id.* at 322, 642 A.2d at 1383.

267 The New Jersey Supreme Court dismissively concludes that there was only "limited physical evidence" in the *Michaels* case, *Michaels*, 136 N.J. at 306, 642 A.2d at 1375, having already observed that the "bulk of the State's evidence consisted of the testimony of the children." *Id.* at 305, 642 A.2d at 1375. *But see*, Manshel, *supra* note 4, at 17. That article reports that in the *Michaels* case:

> The list of physical evidence found on a number of children included three girls with virtually no hymens; an anal rash; two black eyes; numerous shin bruises; four children with unusual circular bruises on the small of the back (the children said [defendant Kelly] Michaels had pounded them with the handle of a wooden spoon); scratch marks; genital redness; and complaints of anal and genital soreness. The defense, of course, disputed the significance of such evidence.

Id. at 20. *Cf. infra*, note 324 and accompanying text (recognizing the rarity of physical evidence in child sexual abuse cases).

268 *See, e.g.*, Supplemental Brief of the State of New Jersey-Petitioner at 11 n.5, State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993) (No. 36,633) (describing a child victim's sexual acting out prior to the State's investigation).

ments by the defendant herself.[269] Most significantly, in a multiple victim case such as *Michaels*, the child witnesses corroborate one another. Arguably, each type of corroboration is probative of the question of taint.

Additionally, postinterview sexual behavior and statements might also be used as corroboration.[270] Numerous behavioral symptoms have been associated with the experience of traumatic events in general, and sexual assaults in particular. Evidence of traumatic impact on a child can be admitted by third-party fact witnesses who observed a child's out-of-court behaviors. Even assuming that suggestion can cause false memories of abuse, it has not been well-researched or established that suggestive interviews can induce the identical traumatic impact which is played out in children's emotions and behaviors.[271]

The concurrence among the nineteen child witnesses who ultimately testified at the *Michaels* trial would provide, if admissible, overwhelming corroboration in satisfaction of the State's burden.[272] Both existing state law and child research reject the idea of universal taint due to suggestibility. The New Jersey Supreme Court has previously recognized the improbability of even three eyewitnesses all succumbing to suggestive identification techniques.[273] Similarly, not one study of child suggestibility has re-

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269 *See, e.g.*, Petition for Certification on Behalf of the State of New Jersey at 4, State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993) (No. 36,633) (describing party admissions to jail guards); MANSHEL, *supra* note 6, at 323-31.

270 MANSHEL, *supra* note 6, *passim*.

271 For example, trauma survivors may wish to have died and make suicide attempts. HERMAN, *supra* note 22, at 49-50. In the *Michaels* case, one preschool boy presented repeated suicidal thoughts and drank drain cleaner. MANSHEL, *supra* note 6, at 165. *But see* David Marxsen et al., *The Complexities of Eliciting and Assessing Children's Statements*, 1 PSYCHOL., PUB. POL'Y & LAW 450, 473-74 (1995) (speculating that an investigation might cause symptoms similar to Post-Traumatic Stress Disorder).

272 Nineteen child witnesses testified at the *Michaels* trial. Manshel, *supra* note 4, at 18-19. Moreover, one child who testified at trial and corroborated the testimony of other children did not participate in the State's pretrial investigation during which the improper interviews occurred. MANSHEL, *supra* note 6, at 259-69. In addition, seven of the children initially disclosed to individuals who were not law enforcement personnel. *See* Reply Letter-Brief for the State of New Jersey on Petition for Certification at 2, State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993) (No. 36,633).

273 State v. Ford, 79 N.J. 136, 398 A.2d 95 (1979) (upholding admissibility of identifications). The New Jersey Supreme Court adopted the dissenting position in the appellate division. The dissent in that case stated:

> [Photo identifications were made] moments after the crime before memories would reasonably be expected to fade. . . . I do not believe that the mere showing of the photographs to eyewitnesses under such circumstances would sway them sufficiently to misidentify an innocent person. Certainly all three could not be that suggestible.

ported that 100% of the child subjects were misled into making false statements.[274] Consequently, the court's concerns about the reliability of child statements do not justify excluding corroboration among multiple victims from the taint hearing.

D. *Conclusion: The* Michaels *Taint Rule is Incompatible with the Structures of Adversarial Resolution*

The background premise of the adversary system is that relevant, nonhearsay testimony should be admitted into evidence. The witness with memory loss—whether a nonhearsay witness or an appearing declarant subject to cross-examination—has not been excluded based on alleged inauthenticity of memory. Therefore, an irrebuttable pretrial presumption of authenticity for nonhearsay, nonhypnotized witnesses, as proposed in this Article, is compatible with the current structures of adversarial resolution.

The *Michaels* court's awareness of the dangers of memory loss exposes the underlying flaw in the confrontation premise. Suggestive influences—leading questions, personal prejudice, emotional pressures, social pressures—exist everywhere. The very notion of adversarial confrontation appears designed to overcome the suggestive or distorting influences that are inherent in human existence. In questioning the efficacy of confrontation with nonhearsay child witnesses, the New Jersey Supreme Court has called into question the viability of the adversary system itself.

IV. EXTRA-LEGAL ARGUMENTS AGAINST THE *MICHAELS* TAINT RULE

A. *Arguments Against the* Michaels *Rule Based on Weaknesses in the Social Science Research*

The field of child eyewitness research is nascent in that, prior to 1980, not a single study existed that examined suggestibility in preschool-aged children.[275] Accordingly, there is currently widespread disagreement among researchers about the most basic

State v. Ford, 165 N.J. Super. 249, 256, 398 A.2d 101, 104 (1978) (Michels, J., dissenting).

274 For studies with some of the highest rates of reporting errors, see Michelle D. Leichtman & Stephen J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers' Reports*, 31 DEVEL'L PSYCHOL. 568 (1995); Stephen J. Lepore & Barbara Sesco, *Distorting Children's Reports and Interpretations of Events Through Suggestion*, 79 J. APPLIED PSYCHOL. 108 (1994); Debra A. Poole & D. Stephen Lindsay, *Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events*, 60 J. EXPERIMENTAL CHILD PSYCHOL. 129 (1995).

275 Ceci & Bruck, *supra* note 20, at 409.

premises reported in individual studies.[276] The psychological premise of the *Michaels* opinion is that suggestive influences can cause children to develop hardened false memories. As discussed throughout, this premise is highly controversial and overly simplistic as presented in *Michaels*. Two researchers have pointed out that judges often launder their own moral judgments through scientism:

> Judicial policy makers use psychological research much like a drunk uses a lamppost—more for support than for illumination. [Courts have] the tendency to select studies that support their own prior position.[277]

Whether or not the New Jersey Supreme Court correctly applied the research, its reliance upon social science research in itself overindulges that body of work. The value of the research is marred by several significant problems. First, some of the reported studies use small sample sizes.[278] Relatedly, there is much variance among individual children as to their susceptibility or resistance to suggestion. The suggestibility research does not provide "personological marker[s]" to predict which individual child will remain accurate or make errors.[279] Instead, the research focuses on which questioning conditions are likely to produce reporting errors.[280] In order to minimize damage to principles of individualism in justice, the data would be better used to improve out-of-court interviewing methods, rather than to create a class-based presumption about authenticity of memory. The courts would thereby avoid barring access to the justice system to individual children who are not lucky enough to encounter a highly skilled interviewer.[281]

Second, allegations of sexual crimes against children arise in

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276 *See supra* notes 44-50, 54, and accompanying text.

277 John W. Turtle & Gary L. Wells, *Setting the Stage for Psychological Research on the Child Eyewitness, in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 230, 244. *Cf.* Karen J. Saywitz, *Children's Testimony: Age-Related Patterns of Memory Errors, in* CHILDREN'S EYEWITNESS MEMORY, *supra* note 44, at 36, 36 (finding that "[e]mpirical findings from the field of developmental psychology cannot offer sufficiently reliable and valid conclusions on which to base legal recommendations concerning age limits for competence"); Montoya, *supra* note 126, at 1287-91 (criticizing social science research).

278 See generally research models reported in: CHILD VICTIMS, *supra* note 24; CHILDREN'S RECOLLECTIONS, *supra* note 45; PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22; CHILDREN'S EYEWITNESS MEMORY, *supra* note 44.

279 David Dunning, *Research on Children's Eyewitness Testimony: Perspectives on Its Past and Future, in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 22, at 230, 242.

280 *Id.*

281 The shortage of well-trained investigators has been documented. *See, e.g.*, John Doris et al., *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci (1993/1995)*, 1 PSYCHOL., PUB. POL'Y & LAW 479 (1995). *Cf.* State v. R.M., 245

numerous contexts, such as incest cases, institutional abuse cases, divorce cases, single victim cases, and multiple victim cases. Arguably, the research as applied to the facts of the *Michaels* case does not warrant instituting an across-the-board rule for child witnesses in every kind of case.[282]

Third, the psychological research is inherently limited by the current research paradigm. Indeed, the literature reflects a small group of researchers who modify one another's research models, review one another's literature, draw inferences from one another's research, and generally reinforce one another's conclusions through self-references within the group.[283] The net value of this body of research is therefore overstated by the mere abundance of similar conclusions about the capacities of child witnesses. A more measured use of this literature would be for purposes of impeachment. Consistent with an irrebuttable pretrial presumption of authenticity, data on child suggestibility could be introduced at trial to attack the genuineness of the child's statements, either through cross-examination of adults who influenced the child or through expert testimony.

Furthermore, the professional community which produces child suggestibility studies appears to be consumed with its own internal political struggles. For example, the amicus brief submitted to the New Jersey Supreme Court in *Michaels* by a "Committee of Concerned Social Scientists"[284] has come under attack as having misrepresented the state of the research.[285] In addition, a new

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N.J. Super. 504, 516-17, 586 A.2d 290, 296 (App. Div. 1991) (rejecting interviewer's lack of expertise as dispositive of trustworthiness of tender years hearsay).

282 *See* Lyon, *supra* note 237, at 432-34 (noting numerous aspects of *Michaels* that are not representative of most child sexual abuse cases). More generally, the taint rule will have variable impact on mass abuse cases as opposed to single victim cases. If corroborating evidence is admissible in taint hearings, then mass abuse cases will have the advantage of self-reinforcement over smaller cases. Conversely, if corroborating evidence is not admissible, then the premise of contamination inherent in the taint model will render mass abuse cases much less likely to survive a taint hearing. Whether or not corroboration is admissible, mass abuse prosecutions will be significantly more costly to pursue, given the greater scope and duration of the taint hearing.

283 *See supra* note 278.

284 Bruck & Ceci, *supra* note 44.

285 For example, Thomas D. Lyon criticizes the amicus brief for failing to acknowledge the debate over whether suggestion causes destruction of the original memory or merely induces false statements. Lyon, *supra* note 237, at 435-36. In addition, Lyon notes that the authors' exclusive focus on the risk of false accusations, without mentioning the risk of false denials and resistance to suggestion, results in an overstatement of the dangers of leading questions. *Id.* at 430-32. He criticizes the authors for failing to distinguish "between suggestive questioning and leading questioning," in-

publication by two authors of the amicus brief[286] has sparked an outcry due to alleged factual distortions, omissions, and mischaracterizations.[287] As a result, these publications are of questionable authoritativeness.

Fourth, the research which purports to assess children's suggestibility must be evaluated in light of whether it has "ecological validity." Ecological validity refers to the salience of research conditions to the applied legal context and the multiplicity of contextual factors which can improve accuracy and generate resistance to suggestion. For example, children's memory has been shown to be especially resistant to suggestion regarding: the central details or main actions of events; personally significant events; and events in which the child is a participant instead of a bystander.[288] The eco-

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stead drawing global conclusions based on narrowly-designed, highly suggestive research models. *Id.* at 434-35. John E.B. Myers more generally criticizes the authors of the amicus brief, noting that the authoritativeness of their seminal work on child suggestibility, Ceci & Bruck, *supra* note 20, is marred by lack of objectivity, insufficient support for its conclusions, and factual distortions of the material. Myers, *supra* note 30, at 392-96. *But see* Stephen J. Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues: A Reply to Commentators*, 1 PSYCHOL., PUB. POL'Y & LAW 494 (1995).

286 STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (American Psychological Association 1995).

287 *See, e.g.*, Letter from Eileen C. Treacy, Ph.D., to Raymond D. Fowler, Ph.D., President, American Pyschological Association (Aug. 28, 1995) (on file with author) (stating that JEOPARDY IN THE COURTROOM is "filled with a significant number of factual errors and omissions" misrepresenting her work in the *Michaels* case); Letter from Katherine Fernandez Rundle, Florida State Attorney, to Scott Barash, Outside Counsel, American Psychological Association (Aug. 18, 1995) (on file with author) (stating that inaccuracies in JEOPARDY IN THE COURTROOM regarding the Country Walk abuse case "have created a work of quasi-fiction"); Letter from Barbara Snow, Former Clinical Director and Founder of the Intermountain Sexual Abuse Treatment Center, to Gary R. VandenBos, Ph.D., American Psychological Association Books (July 27, 1995) (on file with author) (detailing mischaracterizations of her research that are "blatantly in error"). *See also* Letter from Charles A. Wilson, M.S.S.W., Executive Director, The National Children's Advocacy Center, to Raymond D. Fowler, Ph.D., Chief Executive Officer, American Psychological Association (Aug. 24, 1995) (on file with author) (complaining that marketing materials inaccurately portray JEOPARDY IN THE COURTROOM as "state of the art," when in fact "many respected professionals are apparently very concerned about the accuracy of the facts presented, or the biased interpretation of events presented as objective fact").

288 Goodman et al., *supra* note 54. In addition, children's accuracy in reporting information about live events may be better than that for slides, stories, or films, which are usually tested in the research. For example:

> The difficulty in generalizing from research studies is exacerbated by the methodology researchers prefer. Typically, a researcher claims to have investigated children's eyewitness abilities by showing the child an event in a slide sequence[ ], a film[ ] or a video tape[ ]. Although children's memories for recorded events may be of interest to makers of television commercials and educators who use visual media, the rele-

logical features of the experience of child sexual abuse provide the standard against which research models should be measured. Accordingly, even a study claiming to create in a child false memories of getting a finger caught in a mousetrap may lack sufficient ecological validity to conclude that an interviewer can likewise create in a child false memories of having been raped.

To the extent that a given research model fails to establish ecological validity by comparison to the forensic context at issue, its results cannot legitimately be generalized to that legal context, much as a given legal opinion may be narrowed to its facts so that it cannot stand as authority in subsequent cases.[289] The ecological validity of child memory studies regarding the ability of researchers to implant false information about child sexual abuse has been limited due to ethical boundaries. Thus, it is well-settled that the psychological research purporting to confirm children's disabilities has largely failed to achieve minimal ecological validity.[290] These failures of methodology are so important because they systematically understate the reliability of child witness statements in the very context in which their testimony may be especially reliable.[291]

> vance of this work to the eyewitness abilities of children remains to be demonstrated. There is little to suggest that a child's or an adult's memory for a recently seen movie is an indicator of capacity to report a sexual assault or robbery in which they were victimized.

Raskin & Yuille, *supra* note 37, at 189. *See* Goodman et al., *supra* note 44, at 4 (most published studies of both adult and child eyewitnesses are not live-event designs).

289 Two researchers have dismissed the ecological validity critique as "rigid situationalism." Elizabeth F. Loftus & Stephen J. Ceci, *Commentary: Research Findings—What Do They Mean?, in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 129, 133.

290 The research has generally not studied child accuracy regarding traumatic events in which the child was personally involved and about the central details of those events. A few studies involved staged live events; however, they examined child accuracy regarding peripheral details, not central details. *See* Ceci, *supra* note 48, at 3-6 (acknowledging the ecological validity problem in generalizing clinical research to the child sexual abuse context); Goodman et al., *supra* note 54, at 18 ("Psychologists have a nagging tendency to study the testimony of bystander witnesses to fairly brief, neutral events. . . . Because children are particularly likely to testify as victim/witnesses, this focus is of limited value."); Goodman & Clarke-Stewart, *supra* note 50, at 92 (stating that "ecologically valid and scientifically sound" research on child sexual abuse testimony is "virtually nonexistent"). Thus, Fivush has argued that discrepancies in research findings on suggestibility which find more errors than in her own research may be explained by methodological differences relating to ecological validity. Fivush, *supra* note 254, at 20.

But see Bruck & Ceci, *supra* note 44, at 273, 296 (arguing that ecological validity has been achieved in studies of "salient and personally-experienced events that involve [children's] own bodies," but reporting studies which arguably lack ecological validity to the sexual abuse context).

291 Goodman et al., *supra* note 54, at 250.

B. *Slippery Slope Arguments Against the* Michaels *Rule*

The invisible presence of human suggestibility is a ghost in the adversary machine. Previously, the presumption of authenticity had given way to suggestibility in the narrow scope of identification testimony or in the unique cognitive context of hypnotically-refreshed testimony. Now, in *Michaels*, the New Jersey Supreme Court has announced that it sees the ghost beyond those narrow contexts, and this acknowledgement threatens to expose weakness throughout the jury system. Although the court restricts its holding to suggestively influenced child witnesses, the *Michaels* opinion establishes a precedent which lends itself to radical expansion. To the extent that suggestion may present a substantial risk to the reliability of all testimony, any witness could be subject to a taint rule.

Even if the *Michaels* rule were limited to those witnesses especially susceptible to suggestion, it could not logically be limited to children.[292] Other groups "susceptible" to suggestion could be included. Those groups most vulnerable to crime, such as the elderly or mentally retarded, would make easy targets for an authentication requirement. The hypnosis cases suggest an expansion of the taint approach from actual hypnosis procedures to relaxation and dissociative states which might then be made subject to the *Michaels* rule.[293]

Also, it is worth remembering that only recently every female was considered susceptible to incest and rape fantasies under the scientifically accepted teachings of Freud.[294] In keeping with its own internal logic, a *Michaels* line of cases might someday require taint hearings for "hysterical" women.

In addition, it is unclear whether the taint hearing motion is available to parties involved in other types of proceedings to oppose child witnesses. Certainly, the *Michaels* opinion discusses at length the importance of fairness and reliability in a criminal trial. However, the opinion does not expressly limit the taint rule to

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292 *Cf.* Montoya, *supra* note 126, at 1295 & n.183 (fearing slippery slope relaxation of the Sixth Amendment to extend child witness shield laws to developmentally disabled, mentally disabled, elderly, handicapped, and special needs witnesses).

293 In *L.K.*, the State argued that hypnosis safeguards should apply to the defendant's testimony, because her expert "had relaxed the defendant who then went into a dissociative trance-like state. This is a form of hypnosis." State v. L.K., 244 N.J. Super. 261, 267, 582 A.2d 297, 300 (1990). Because the defendant conceded the applicability of hypnosis law, the court did not reach this question. *Id.* at 268, 582 A.2d at 300. Judith Herman has concluded that dissociation is a survival skill developed during traumatic experience. HERMAN, *supra* note 22, at 87-90, 101-03.

294 *See generally* JEFFREY MOUSSAIEFF MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1992).

child witnesses in a criminal case. In fact, child witnesses are called upon to testify in other kinds of cases, including divorce, spousal abuse, custody, delinquency, and tort actions.[295]

Civil suits involving allegations of child sexual abuse present the same substantive issues as those in a criminal sexual abuse trial. Thus, it is not readily apparent that the court's concerns about child suggestibility will be confined to the criminal proceeding context. Additionally, it is unclear that the taint requirement will be restricted to cases involving sexual crimes. The court does not explain why the danger of suggestively implanted allegations does not apply equally to other kinds of crime.

Furthermore, it is necessary to know the age group under discussion in order to determine whether there is a fit between the taint requirement and the psychological research cited in the opinion as supporting the rule. Although the child witnesses at issue in *Michaels* were preschoolers ranging from age five to seven,[296] the opinion does not define "child" under the taint rule, so that it remains unclear which witnesses will be subject to the new mechanism. Without providing some specific age limit, judges and prosecutors will be flying blind, perhaps needlessly deterring unaffected prosecutions due to the prospect of an arduous and expensive *Michaels* hearing. Conversely, if the taint rule applies to children of all ages, then the rule overreaches the significance of the research, which presents scattershot findings by age.

It is also unclear whose actions can be cited to trigger a taint hearing. In a recent opinion, the New Jersey Supreme Court held that the *Hurd* guidelines for hypnotically-refreshed testimony apply "even if the State played no role in [the] hypnosis."[297] In another case, New Jersey has extended to private actors the rule barring suggestive identifications, relying upon a basic fairness rationale.[298] Similarly, the full spirit of the suggestibility argument and the policy concerns vindicated by the *Michaels* court suggest that the taint rule will not be limited to state action.

Michaels might reasonably be read to apply only when taint is introduced by a State actor in a State-conducted pretrial interview. Indeed, the opinion itself states, "The focus of this case is on the manner in which the State conducted its investigatory interviews of

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295 *Cf.* Montoya, *supra* note 2, at 939 ("Moreover, there is no reason to limit our concern for child witnesses and the pretrial process to cases of child sexual abuse.").

296 *See supra* note 7.

297 State v. Fertig, A-19, 1996 N.J. LEXIS 1, at *18 (N.J. Jan. 4, 1996).

298 State v. McCord, 259 N.J. Super. 217, 224, 611 A.2d 1160, 1164 (Law Div. 1992) (granting suppression hearing on suggestive private-party pretrial identification).

the children."[299] However, if this language is meant to restrict the cognizable suggestive influences to State action, it becomes clouded by subsequent discussion. Specifically, the court notes that one of the factors which may render child interviews unreliable is "a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers."[300]

The academic literature has noted the potential of parents to act as an independently suggestive influence:

> To what extent, if any, are parents or guardians more powerful agents of testimony distortion through the use of misleading questions?[301]

The centrality of parents to their children's disclosure of and healing from incidents of abuse is also well-documented.[302] While *Michaels* does not overtly hold that "some evidence" of parental suggestion will satisfy the defendant's burden, the court's dismissal of parent testimony in that case suggests future extension of the rule so that parental suggestion may trigger a taint hearing. In *Michaels*, the court observes:

> The record is replete with instances in which children were asked blatantly leading questions that furnished information the children themselves had not mentioned.[303]

The court correctly faults the State for its use of blatant leads. However, it fails to mention that both investigators and parents testified at trial that some of the suggestive interview questions were based on information previously disclosed by the child to the parent.[304] This omission suggests an undisclosed assumption, either that both parents and investigators perjured themselves at trial or that the parents' own actions prior to the State's interview had already tainted the children's allegations.

The court also indicates that the children's interactions with each other may be considered taint in satisfaction of the defendant's burden.[305] The children in the *Michaels* case interacted with

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299 *Michaels*, 136 N.J. at 306, 642 A.2d at 1375.

300 *Id.* at 309, 642 A.2d at 1377.

301 Turtle & Wells, *supra* note 277, at 238. *See also* Bruck & Ceci, *supra* note 44, at 281 ("It is also possible that some of the allegations [in *Michaels*] . . . reflect suggestions implanted from earlier conversations with parents.").

302 *See* Goodman & Helgeson, *supra* note 28. at 196 (noting that, although parents must be instructed not to be suggestive, children will report events spontaneously to parents which may not come out as readily during interviews).

303 *Michaels*, 136 N.J. at 314, 642 A.2d at 1377.

304 *See* Supplemental Brief for the State of New Jersey-Petitioner at 16, State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993).

305 *Michaels*, 136 N.J. at 315, 642 A.2d at 1380 ("[N]o effort was made to avoid

one another following the disclosures about sexual abuse.[306] The net effect of those encounters on the children's authenticity is unknowable. However, the jury in the case heard extensive argument about "contamination and contagion"[307] and convicted the defendant. Perhaps overriding in the jurors' minds was the fact that some of the children's encounters involved not verbal exchanges about the defendant, but rather spontaneous sexual acting out in the mode later testified to as typical of the defendant's scenarios of abuse.[308]

If contacts with other children in the case are recognized as possible taint, then several results may follow. First, multiple victim abuse cases will become more difficult to prosecute in direct proportion to the number of victims. Second, children who are friends may be discouraged from interacting, perhaps when they particularly need consistency in friendship and routine during the chaos of disclosure. Third, siblings will almost de facto be considered tainted due to their exposure to one another. Thus, the slippery slope dangers inherent in the *Michaels* rule are extensive.

C. *Public Policy Arguments Against the* Michaels *Rule*

Several other public policy considerations weigh against erecting a special barrier to exclude allegedly memory-distorted child testimony. First, the taint hearing rule in *Michaels* was adopted, at least in part, to deter interviewers from using unreliable methods of questioning.[309] The deterrence of improper investigative tech-

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outside information that could influence and affect the recollection of the children. . . . [T]he children were in contact with each other and, more likely than not, exchanged information about the alleged abuses.").

306 *See* MANSHEL, *supra* note 6, at 77-79 (describing joint interview with two boys); *id.* at 111-13 (describing five group therapy sessions "to address the underlying psychological issues," not the allegations). *But see id.* at 167 (reporting that one girl refused to see a boy who felt guilty about having hurt her).

307 *See, e.g.*, MANSHEL, *supra* note 6, at 374 (describing testimony of defense expert Dr. Elissa Benedek); *id.* at 236-37 (describing one child's testimony that she thought two Wee Care friends told her that Michaels did "something bad").

308 *See* Supplemental Brief for the State of New Jersey-Petitioner at 17-18, State v. Michaels, 134 N.J. 482, 634 A.2d 528 (1993).

309 The court emphasizes:

> Our decision today should make clear that . . . prudent prosecutors and investigatory agencies will modify their investigatory practices. . . . Therefore, we conclude that the need to deter prosecutorial misbehavior will be adequately fulfilled by the clear and convincing-evidence standard.

Michaels, 136 N.J. at 323, 642 A.2d at 1384. *But cf.* United States v. Ash, 413 U.S. 300, 317 (1973) (noting that the Sixth Amendment right to counsel does not extend to prosecutors' pretrial interviews with witnesses).

niques is an important public policy consideration. Nevertheless, the steep barrier erected to child testimony in the *Michaels* opinion is not a warranted means of improving the quality of child interviews.

It has already been widely agreed that interview techniques have needed improvement along the lines noted in the *Michaels* opinion. Anachronistically, the New Jersey Supreme Court cites to interview protocols which did not exist in 1985 when the *Michaels* investigation was conducted.[310] However, John Myers has concluded that, since the *Michaels* investigation, poor interviewing techniques are less frequently used during investigations.[311]

Also, innovative interview methods have been under development which work to increase the accuracy of children's reports.[312] Accordingly, some self-correction appears to have already occurred. Additionally, pretrial identifications and hypnotic interviews provide clear-cut opportunities for law enforcement to reject a suggestive procedure, whereas verbal interviews are less mechanistic. In fact, John Myers argues that child interview protocols must permit interviewer flexibility. He proposes that courts should extend to child interviewers the same latitude to use suggestive procedures in an emergency that is extended to police in pretrial identifications.[313]

Furthermore, the *Michaels* rule might also deter unrecorded child interviews.[314] In *Michaels*, thirty-nine interviews with thirty-four children were taped, but taping did not begin until after most initial interviews had already been conducted.[315] It has been argued that, without a record of the initial State interview, a child's subsequent statements cannot be considered reliable.[316] Every defense lawyer understands that contemporaneous records are criti-

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310 *Michaels*, 136 N.J. at 311-12, 642 A.2d at 1378.

311 Myers, *supra* note 31, at 897-901. Nevertheless, due to the continuing need to use direct questions with child witnesses, the taint rule probably will not become obsolete. *See supra* note 37.

312 *See, e.g.*, R. Edward Geiselman et al., *Effects of Cognitive Questioning Techniques on Children's Recall Performance, in* CHILD VICTIMS, *supra* note 24, at 71-93; Karen J. Saywitz & Lynn Snyder, *Improving Children's Testimony with Preparation, in* CHILD VICTIMS, *supra* note 24, at 117-146; John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases, in* CHILD VICTIMS, *supra* note 24, at 95-115. The effectiveness of improved questioning techniques to elicit accurate information further undercuts the memory model of suggestibility upon which the *Michaels* court relied.

313 Myers, *supra* note 31, at 925.

314 *See Michaels*, 136 N.J. at 321, 642 A.2d at 1383 (noting the State's "failure to videotape or otherwise document the initial interview sessions").

315 *Id.* at 313-14 & n.1, 642 A.2d at 1379 & n.1.

316 *See, e.g.*, Bruck & Ceci, *supra* note 44, at 272, 307-08.

cal to impeach false testimony and exonerate innocent defendants. Clearly, it is imperative that the courts encourage law enforcement investigators to create and maintain timely records of witness contacts.[317] Nevertheless, the courts have admitted adult testimony despite the fact that initial documents have not been preserved.[318]

The intuition of suggestibility theory is that even timely records of initial interviews with witnesses will not adequately inform the defense about possible sources of taint. Thus, even if a recording existed of the State's initial interview, pre-interview suggestive influences would continue to subvert reliability. Due to the pervasiveness of suggestive influences, it is false to argue that the defect in pretrial child interviews is simply the lack of an audiotaped or videotaped record. In addition, if a rule of deterrence is warranted to minimize tainted crime victim testimony, it will be warranted for any interviews which present "some evidence" of suggestion, and not just interviews of child witnesses in sexual abuse cases.[319]

Second, the excision of child memory issues from the adversary system could make child sexual abuse nearly impossible to prosecute. It is beyond well-settled that often the only witness to a sexual assault on a child is that child. The United States Supreme Court has written that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[320] Thus, officials are extremely reluctant to initiate child sexual abuse prosecutions with children

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317 *Cf.* Montoya, *supra* note 2, at 969 (proposing pretrial depositions of children based on the controverted premise that child memory fades faster than adult memory); Goodman & Helgeson, *supra* note 28, at 193 (noting that memory is strongest at the time of the first interview).

318 *See, e.g.*, State v. Zenquis, 251 N.J. Super. 358, 369-70, 598 A.2d 245, 248 (App. Div. 1991) (holding defendant was not unduly prejudiced by police officer's failure to preserve notes), *aff'd*, 131 N.J. 84, 618 A.2d 335 (1993); State v. Peterkin, 226 N.J. Super. 25, 44-45, 543 A.2d 466, 476 (App. Div.) (remanding for hearing to determine whether police officer had an independent source for his identification testimony, despite the officer's failure to preserve the pretrial photo array and attempt to fabricate a dummy array), *certif. denied*, 114 N.J. 295, 554 A.2d 850 (1988). *Cf.* Idaho v. Wright, 497 U.S. 805, 818-19 (1990) (rejecting per se unreliability of out-of-court statements due to failure to record pretrial interview).

319 *See supra* notes 292-308 and accompanying text (discussing slippery slope problems).

320 Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1986). New Jersey courts have repeatedly acknowledged that the victim is often the only witness to child abuse. *See, e.g.*, State v. D.R., 109 N.J. 348, 358-59, 537 A.2d 667, 672 (1988); State v. R.W., 104 N.J. 14, 16, 514 A.2d 1287, 1289 (1986) (concluding that "as is often the case, the verdict hinges on the testimony of the child").

as young as those in *Michaels*.[321]

New Jersey has expressly acknowledged the barriers to child sexual abuse prosecutions[322] and, as a result, has even relaxed one of its own evidentiary standards.[323] Because physical evidence is rare in cases of child sexual abuse,[324] barriers to the admission of children's own accusations will impede the prosecution of most cases. Without the "tainted" complaining witness, many cases will have to be dropped outright.

Third, the memory theory of suggestibility has been applied in an artificially narrow way, unwilling to accept its own slippery premise. The movement to discredit children due to vulnerability to suggestion only considers the influence of adults other than the abuser. The perpetrator of child sexual abuse has been left out of the attemped calculus of children's authenticity. Yet, the crime of child abuse typically involves acts repeated over time,[325] giving the perpetrator leisure to exploit any suggestibility of the child.[326]

Children live their lives in an experienced context of inequality, and crimes against children deepen their education in their own unequal condition:

> Child sexual abuse occurs in part because of the inequalities between child and adult in size, knowledge, and power. The legal system should not perpetuate these same inequalities by failing

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321 *See, e.g.*, Gail S. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, 40 J. SOC. ISSUES 157, 157-58 (1984) (relating anecdotal account of case dropped by prosecutor); Gail S. Goodman, *The Child Witness: An Introduction*, 40 J. SOC. ISSUES 1, 6 (1984) (reporting that prosecutors often drop child sexual abuse cases or refrain from calling the child witness); Leippe et al., *supra* note 22, at 101 (acknowledging informal barriers to prosecution). *Cf.* State v. D.R., 109 N.J. 348, 360, 537 A.2d 667, 672 (1988) (noting that often incest victims recant).

But see Bulkley, *supra* note 54, at 209 (arguing that child sexual abuse is now seen as more "prosecutable").

322 *D.R.*, 109 N.J. at 361-63, 537 A.2d at 673.

323 N.J. EVID. R. 803(c)(27) ("[N]o child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness [under the competency rule].").

324 *See, e.g.*, Hutton, *supra*, note 27, at 506-07 ("The facts of child sexual abuse cases often do not fit the pattern of traditional crimes, so many investigative methods are ineffective. Physical evidence may have disappeared; the crime scene may yield nothing of importance, making a search warrant unnecessary; and the surveillance of suspects is irrelevant if the child knows the identity of the perpetrator."); John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases*, *in* CHILD VICTIMS, *supra* note 24, at 95, 95 (noting that physical evidence is rare in child sexual abuse cases).

325 *See* Berliner & Barbieri, *supra* note 54, at 129.

326 *Cf.* Berliner, *supra* note 22, at 167-68 (explaining that evidentiary problems in child sexual abuse cases are due to the difference in type of criminal conduct, which in these cases involves persuasion and trickery).

to take such differences into account.[327]

Arguably, a child witness may have hardened true memories arising out of an actual experience of sexual abuse. In such a case, the greater suggestibility of children might serve to imprint them more successfully with unshakable and accurate memories. Suggestibility proponents fail to take their own theory far enough, in this instance far enough back along the timeline of a life. The result is that suggestibility theory is used to recognize discrediting influences on children, but not the opposite.

When children reach the courtroom, the ability of perpetrators to make children accept suggestions is used to discredit them. For example, perpetrators may mask sexual abuse as a game that will sound nonsensical if disclosed to an uninvolved adult. The *Michaels* children made numerous statements that seemed preposterous to adults.[328] If children can be barred from speaking their sense of their own experience of abuse due to interview taint, it is possible that the only suggestive influence that will win legal deference is that of the perpetrator who successfully implants discrediting information in the child's mind.

The power of the perpetrator should stand as a reminder that suggestion—however we define it—swims through every moment in a person's life. The courts should not isolate the suggestive influences of law enforcement interviews as "the problem." In reframing suggestibility as an ongoing learning process, which may begin with a malevolent adult, we can appreciate suggestive influence as human experience. Furthermore, leading questions may suggest either inaccurate or accurate information. Therefore, the authenticity of children's memories cannot be determined merely by noting their suggestibility.

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327 Berliner & Barbieri, *supra* note 54, at 136.

328 *See generally* MANSHEL, *supra* note 6, at 7-174. The facts of *Amirault* further illustrate the problem:

> Some of the children described the abuse as being perpetrated by a bad clown. The bad clown made the children taste ice cream from his penis and made them touch his penis. One child described the incidents in terms of playing an elephant game at school, licking ice cream from the trunk of a pink elephant.

Commonwealth v. Amirault, 535 N.E.2d 193, 196 (Mass. 1989). The children in *Amirault* said they were threatened that if they told, their parents or family would be killed or cut up in pieces; One child said he saw a bird, squirrel, and dog killed, another said her wrist was cut and blood came out, and some children said that a robot had threatened them. *Id.* at 197. The opinion gravely notes, "Teachers testified that they never saw the defendant dressed as a clown, never saw a robot at the school." *Id.*

V. CONCLUSION: THE CHILD WITNESS AS SELF-AUTHENTICATING

A presumption of human authenticity is pervasive throughout the constitutional and evidentiary structures. In tension with this presumption, the *Michaels* court creates a far-reaching exclusionary rule which reintroduces archaic stereotypes about children as "the most dangerous of all witnesses."[329] The court's interest in the nascent field of child suggestibility research is legitimate, but its assertion of a public policy interest in reliability is not justifiable under the current research. The likely outcome of the court's decision will be the impetuous closing of the courtroom doors to many child victims of sexual crimes. In addition, the rule itself stigmatizes with the imprimatur of the state's highest court a class of citizens that is especially vulnerable to crime.

As shown in this Article, the *Michaels* procedure cannot be characterized as a mere test of the reliability of child testimony. Quite differently, *Michaels* permits a defendant to overcome the presumption of authenticity of a child witness. Moreover, compared to precedent, *Michaels* makes it extremely easy to defeat the presumption across an unusually expansive range of testimony. Furthermore, the child witness under *Michaels* confronts a theory of inauthenticity that is less refutable and less avoidable than the theories of suggestibility presented in the identification and hypnosis doctrines. When suggestive influences are believed to permanently alter central event memory, the interview subject will be unable to prove her authenticity.[330]

In a dissent from an identification case, Justice Black wrote:

> How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses?[331]

Justice Black's insight reflects the difficulties of proving the source of a finite piece of information—a face recognition. The impossibility of adducing sufficient evidence to prove the source of event

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329 *See supra*, note 21 and accompanying text.

330 *See* Maria S. Zaragoza, *Preschool Children's Susceptibility to Memory Impairment*, *in* CHILDREN'S RECOLLECTIONS, *supra* note 45, at 27, 36 (questioning how one can prove the negative—that children are *not* susceptible to memory impairment).

331 United States v. Wade, 388 U.S. 218, 248 (1966) (Black, J., dissenting).

memory, all memory, may become insurmountable. Thus, the viability of the *Michaels* taint rule is weakened by the very memory theory of suggestibility which purports to justify it.

Finally, the inauthenticity approach to child witnesses is profoundly disrespectful. The refusal to listen is its own affront to children's dignity, independently of whether children are less mature or less authentic than adult witnesses.[332] For an excluded child witness who believes she has experienced sexual assault, the taint determination must somehow be integrated into her sense of herself. The risk of testifying and being disbelieved by a jury that acquits is a risk shared by all complaining witnesses upon entrance into the adversarial arena. The harm of not being allowed to speak about a core experience without extrinsic proof that one is an authentic person is reserved for child witnesses. The very importance of secrecy to the nonreporting of child sexual abuse should also caution against instituting a rule that silences children.[333]

At a minimum, the child witness should be accorded a pretrial presumption of authenticity as strong as the presumption enjoyed by other similarly situated witnesses. The New Jersey Supreme Court should not single out one class of suggestible witnesses while turning a blind eye to others. If the court intends to safeguard

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332 *See* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 84 (1994) ("[O]ur jurisprudence . . . allows us to deny children their personhood as children. We provide in the law for hearings of adult rights and utilitarian state interests, but refuse to hear children's experiences and perspectives."); *id.* at 87 ("By legally disabling immature children from voicing their perspectives, we deny that a child's perspective bears legal significance. . . . When children voice a childhood perspective, when they remain manifestly different from us, however, we do not heed them at all.").

Another author has proposed the following inquiry to "orient" judges in their rulings: "[J]udges must ask whether the challenged state action affronts the minor's imputed apperception of inherent human worthiness." Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1325 (1988). *See id.* at 1299 (arguing for "the superordinance of human dignity" as a constitutional value).

333 Secrecy is considered a precondition to the occurrence of sexual abuse under the Child Sexual Abuse Accommodation Syndrome. Hutton, *supra* note 27, at 517 n.125 (citing Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181 (1983)). Hutton writes:

> Dr. Summit explains that child sexual abuse accommodation syndrome includes five categories: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. Categories (1) and (2) are preconditions to the occurrence of sexual abuse.

Id. See also State v. Bethune, 121 N.J. 137, 143, 578 A.2d 364, 367 (1990) (noting the vulnerability of children to cajoled or coerced secrecy).

more vigorously against the dangers of pretrial suggestion, it should do so in a coherent and comprehensive manner.

In the alternative, the court should treat nonhearsay, nonhypnotized witnesses offering central event testimony as self-authenticating evidence with an irrebuttable pretrial presumption of authenticity. In so doing, the court would simply acknowledge boundaries beyond which a defendant cannot overcome the presumption of authenticity. The recognition of an irrebuttable presumption would preserve balance within the adversary system. Neither party would be automatically entitled to prevail, but both would be entitled to participate. The defendant's opportunity to cross-examine would stand in balance against the alleged crime victim's opportunity to testify. The child witness should be recognized as self-authenticating, because, like all other complaining witnesses, her sense of her own experience officially seals her authenticity.