STRETCHING THE BLANKET: LEGAL REFORMS AFFECTING CHILD WITNESSES

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ABSTRACT: The author presents an overview of the changes in the rules of evidence that now govern criminal prosecutions of child sexual abuse and civil proceedings. The United States Supreme Court has issued six decisions that profoundly affect the receipt of children's testimony and expert testimony assaying the reliability of children's reported experiences. These cases as well as the *Michaels* prosecution in New Jersey have been catalysts for reform, exposing the pretrial investigative processes as the critical determinant of the reliability of trial evidence from children. She concludes that the next frontier is the application of social science research to the shaping of legislative standards and administrative guidelines aimed at minimizing the contamination of children's testimony during the pretrial staging of litigation.

> [T]he law is like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia. Hell, the law is like the pants you bought last year for a growing boy, but it is always this year and the seams are popped and the shankbones to the breeze. The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different (Warren 1953, p. 145).

This special issue comes 15 years after the American rediscovery of child sexual abuse. In 1982, nationwide statistics for reported sexual assaults of children claimed 56,607 cases, an eye-catching 2,800% increase over the previous six

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years. (Highlights of Official Child Neglect 1982) That same year, the recently established ABA National Legal Resource Center for Child Advocacy and Protection outlined a legal reform agenda in its *Recommendations for Improving Legal Intervention in Interfamily Child Sexual Abuse Cases* (Bulkey 1985). Less than a year later, the mother of a two-and-one half year old boy reported to the police that she thought her child had been sexually molested by the staff of the nursery he attended, the McMartin Pre-School (*People v. Buckey* (1984), hereinafter the "*McMartin* case"). Suddenly the abstract statistics, graphs, projections and reform concepts became tangible, personified by real kids who became the poster children of the child sexual abuse reform movement. Ordinarily, law reform moves at glacial speed. Thus, the several revolutionary reforms that have occurred within only fifteen years are remarkable. Though the scent of legal change is still fresh, this article will review and analyze the major doctrinal shifts that have occurred for the purpose of illuminating the opportunities for collaborative work of social scientists and lawyers that lie ahead.

This article first addresses criminal prosecutions because all of the six recent United States Supreme Court pronouncements concerning child witnesses and most of the state statutory revisions were developed in the context of criminal prosecutions of child sexual abuse. Although a criminal prosecution can become the most sensationalized forum for the trial of allegations of child sexual abuse, these claims can also be litigated in civil cases, such as abuse and neglect proceedings in juvenile court, divorce and child custody proceedings, and actions for damages for sexual assault either against an alleged parent-perpetrator or a therapist for improperly planting the suggestion of sexual assault in a patient, the so-called "false memory" line of cases.

In the first section, we consider alterations of the courtroom environment, such as shielding a child from face-to-face sight of the accused while testifying (*Coy v. Iowa* (1988) and *Maryland v. Craig* (1990)). The next section discusses whether the traditional special showing of pre-testimonial "competency" for potential child witnesses should be eliminated or simply reshaped to respond to the known reliability risks. One United States Supreme Court case, *Kentucky v. Stincer* (1987), addressed this issue, and a subsequent state appellate court decision, *State v. Michaels* (NJ 1993 & 1994) more fully explored the heightened scrutiny deserved by purposeful forensic interviewing of an alleged child sexual abuse victim. The Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals* (1993) obliquely contributes to this discussion because it will permit a greater range of expert testimony on the reliability of children's reports of abuse. Addressed next is the proof needed before pretrial "hearsay" reports made by children to adults can be repeated by the adult witnesses. *Idaho v. Wright* (1990) and *White v. Illinois* (1992)) discussed the required burden of proof of reliability before an adult witness can testify about children's reports of abuse. *Tome v. United States* (1995) concerned the admissibility of a child's initial complaints of sexual abuse to rebut claims that the child was fabricating trial testimony. Although in *Tome* the Court was construing a provision of the Federal Rules of Evidence, most states have adopted a substantially similar if not identical provision.

The article then focusses upon the pretrial stages of a criminal prosecution, the critical stage to which all of the foregoing decisions have pointed. Most criminal cases are never tried due to prosecutors' perceptions of child victims' credibility or concerns about forensic contamination, behind the scene assessments that may be ill-informed. The next section sketches similar, even heightened decisionmaking concerns which arise as lawyers prepare civil litigation involving child sexual abuse allegations. The concluding section suggests a redirection of professional energy in rule formulation aimed at broader, systemic reform of the pretrial processes and the rules of evidence.

ALTERATIONS OF THE TRIAL ENVIRONMENT

Many of the eventual legal reforms clearly were evoked by the *McMartin* prosecution. The traditional American courtroom was designed for adults; its ambience is purposefully austere and intentionally intimidating, objectifying the metaphor that a trial is a rational decisionmaking process with judicial power to command obedience to any judgment. In the *McMartin* case, the courtroom was revealed as an inhospitable, stressful and counterproductive environment in which to interview children.

Many states including California thereafter authorized the deformalization of the courtroom when children were to appear as witnesses. Judges were permitted to discard their judicial robes of office when presiding over a trial involving child witnesses, children were permitted to testify out of the witness box, and specially trained Court Appointed Special Advocates were appointed to assist child victims throughout the course of an abuse case. If the prosecution could prove that the traditional courtroom conformation requiring testimony delivered by a child witness eye-to-eye to the alleged adult assailant would cause trauma to the child, a special screen or closed circuit television was authorized (McGough 1994, p. 11). As a Minnesota prosecutor commented, "We have to quit pretending that kids have to testify like adults" ("Children and the Courts" 1984).

The prosecutor's comment surfaces a central paradox of children as witnesses: Are children to be governed by special rules—given special concessions or special tolls—or are they properly subject to the general rules applicable to adult witnesses? Is it possible to treat children with the same respect accorded to adult witnesses and yet to favor them with additional special benefits unleavened by special burdens? This is a serious question for a society governed by a constitution that applies to all trial witnesses with no explicitly stated exceptions for children. As Mr. Justice Kennedy observed in *Tome v. United States* (1995):

> Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eye witness. But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." (p. 166).

The only exceptional constitutional benefit so far extended to child witnesses by the Court is shielding from direct eye-to-eye contact with the accused. If the State provides sufficient justification due to the needs of a particular child, such a novel process does not violate the accused's right to Confrontation. Noting the State's compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, the Court held: "[A] State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court...if the State makes an adequate showing of necessity" (*Maryland v. Craig* (1990), 855, extending *Coy v. Iowa* (1988)) The principle apparently justifying this unique concession to a child witness was that shielding may enhance the reliability of the child's testimony, thus advancing the overarching truth-finding function embodied in the Due Process guarantees of our Constitution (McGough 1994, Pp. 165–167).

ALTERATION OF EVIDENTIARY RULES FOR IN-COURT TESTIMONY

If enhanced testimonial reliability is the touchstone for evaluating the constitutionality or wisdom of any procedural or evidentiary rule governing trial witnesses, then the paradox posed by child witnesses resolves. If the rule, though uniquely applicable only to child witnesses, is necessary to ensure the trustworthiness of their testimony then the rule will survive constitutional scrutiny and represents normative social policy.

The reliability of child witnesses dressed in Nikes and jeans was also pondered for children in sandals and togas. Children's reliability is but another ancient concern rediscovered in the latter twentieth century in the context of child sexual abuse cases. In the first Century A.D., Seneca the Elder posed for debate by his student rhetoricians the dilemma of whether a five-year old boy should be believed if, as an eyewitness to his father's murder, he offered identification of the perpetrator of the crime. Responding to the dilemma (and clearly inclined to disbelieve a child), Roman law absolutely disqualified children from giving testimony in any legal dispute involving a family member. Family interdependence was presumed to induce a child to decide or be induced to give perjurious testimony (McGough 1994, p. 87). The Romans intuited the malleability of children's testimony, a phenomenon it took science 2,000 years to prove.

The early English common law continued to disqualify all child witnesses when the parent was a party and others whose testimony might be suspect due to a bias presumptively inherent in relationship or pecuniary interest. (McGough 1994, p. 97). By the eighteenth century, age-based categories emerged, replacing the absolute ban. Children over the age of fourteen were presumptively competent and unless the defense overrode the presumption by proof, the older child took the oath and was treated like an adult witness. In contrast in cases involving younger children, the prosecutor bore the burden of proof in a preliminary hear-

ing to demonstrate that the child could understand the significance of an oath. (McGough 1989, pp. 560–61). This is the origin of the American special competency hearing that became a prerequisite for receiving the sworn testimony of any young potential child witness. However, young children who could not be formally qualified were permitted to give unsworn testimony although their testimony could not by itself justify a conviction; other corroborating evidence of guilt was necessary (Spencer & Flin 1990, pp. 44–45). In part, this dispensation led to the American requirement that young children's testimony be corroborated by other testimony or by circumstantial evidence. (A separate doctrinal strand required that the complaint of a victim of sexual abuse be corroborated. In this century although the overwhelming majority of states have rejected this requirement for adult complainants, some still retain it for "immature" sexual abuse victims (Gulbis 1996). Thus, compared to Roman law, the Anglo-American child witness rules can be viewed as an advance because they regarded children as potentially creditable, fully competent witnesses if an individualized demonstration of their capabilities could be made.

On the other hand, the competency demonstration rule can be and has been viewed by some critics as wrong-headed because it denigrates the cognitive and communicative abilities of children and subjects them to burdens not imposed upon adult witnesses. In the past fifteen years, there has been a clear trend toward repealing the corroboration requirement (Anderson 1996) and competency prerequisite for child witnesses, at least in child sexual abuse prosecutions (McGough 1994). The source of the competency reform, though often unacknowledged, was an extraordinary legal scholar, John Wigmore, who reshaped the form of twentieth century evidentiary rules and procedure, including those governing the receipt of children's evidence. In 1904, Wigmore wrote:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable....Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. (I Wigmore 1904, § 509, 640).

Seventy-five years later, Wigmore's position was incorporated into the Federal Rules of Evidence (1979) that are used as models for parallel state rules of evidence.

Though not apparent from this quoted text, Wigmore was the first of only a handful of legal scholars to believe that the findings of social scientists were highly relevant to the formation of legal rules. Of course, psychology was then in its infancy. Wigmore sifted through the research literature of what was then called "the psychology of testimony" from three languages before ruefully concluding

that the data appeared to have little scientific value for American adversarial trial processes (Wigmore 1909). Today Wigmore would undoubtedly react differently.

Wigmore justified the abandonment of the special competency showing only on the grounds of efficiency, not on any notion that children are inherently more credible or even as credible as adult witnesses. Lacking adequate scientific proof of unique reliability risks posed by child witnesses, Wigmore concluded that a preliminary, noncontextual demonstration of a child's cognitive capabilities was a waste of time. This is an often misunderstood aspect of the rejection of competency demonstrations for child witnesses. Historically, few witnesses have been disqualified by a competency procedure (Weihofen (1965), and thus, its abandonment for children is not a very significant change. Indeed, more recently, in her study of eight American cities, Gray found that virtually all of the children who underwent competency questioning were permitted to give testimony (1993, p. 155). The question is simply *when* the competency inquiry is to be accomplished: in a pretrial hearing through direct and cross-examination or by cross-examination after the child has presented his or her testimony?

Abrogation of the pretrial competency hearing for children rests on the assumptions that most children possess the ability to remember and an appreciation of the duty to testify truthfully about past experiences. These abstract and global assumptions have since been repeatedly validated by social scientists (Ceci & Bruck 1993). Furthermore, these assumptions are rebuttable if on cross-examination, the accused can demonstrate that the child actually lacks capacity for observation, for recollection, for understanding and responding to questions, or for appreciating the trial witness's obligations of candor and truthfulness (2 Wigmore 1979, § 506, 713). An accused defendant has a constitutional right to probe the veracity and memorial strengths of any accuser, old or young. As the Supreme Court held in yet another child witness case, *Kentucky v. Stincer* (1987), an accused must be afforded the right to conduct a full and complete inquiry regarding a witness's competency in order to effectuate the commands of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments.

As this passage reflects, Wigmore was quite ambivalent about the reliability of young children's accounts. He believed, however, that although some aspects of the testimony might be suspect as flights of fantasy, other parts could be accurate and more importantly, that the trier of fact, whether court or jury, could winnow the wheat from the chaff. The findings of modern empiricists have confirmed the first premise that remembering is not an all or nothing proposition. Children can retain memories of significant core events even though peripheral details have faded (Goodman, Aman & Hirschman 1987; Saywitz, Goodman, Nicholas & Moan 1989). In essence, the question for the factfinder is the child's credibility taking a holistic view of the child's demeanor and the coherence and consistency of the remembered account rather than a consideration of any demonstration of the child's general ability to remember. Wigmore's second premise, his faith in the ability of the judge or jury to differentiate accurate from inaccurate memories offered as testimony, has been less often studied and has yet to be validated (Cashmore & Bussey 1996). But accurate credibility assessment by the factfinder is an

enigma that haunts all legal systems and any attempted reconstruction of past human experience.

Even though the issue of children's competency may be accurately determined by a judge or jury, the issue of testimonial contamination due to interviewer suggestion is much more problematic (Lamb, Sternberg, & Esplin 1995). When there are significant risks that a critical piece of evidence is unreliable and that lay jurors may be swayed by it despite its inaccuracy, the law's traditional response is for the court to resolve the reliability issue in a special hearing outside the jury's presence (*Jackson v. Denno* (1964)). The prime example is a confession of criminal conduct by an accused. The original rationale for excluding a confession from jury consideration was that an involuntary confession was untrustworthy or probably untrue (*Brown v. Mississippi* (1936); Cf. *Watts v. Indiana*, 338 U.S. 143 (1949). Learning that the defendant has confessed his own guilt is a powerful inducement for a juror to enter a finding of guilt, overriding knowledge that the confession may have been extorted by physical or psychological coercion by law enforcement officers. In this instance, the constraining force of subsequent instructions to the jury to ignore the evidence are thought to be inadequate if the jurors have already heard the contaminated confession. Thus, the court must first rule that the State has demonstrated that a confession was voluntarily made by an accused (and hence is presumptively reliable) before the confession can be received in evidence and considered by the jury.

In *State v. Michaels* (NJ 1993 & 1994), the New Jersey appellate courts imposed a similar requirement for the resolution of substantial defense claims of suggestive pretrial interviewing of potential child witnesses. In *Michaels*, both trial and appellate experts documented serious flaws in the preparation of the prosecution's case: the use of leading questions, suggestive questions and props, the application of pressure on the child to acquiesce to some statement of events, interviewer bias, and the lack of exploration of alternative hypotheses during multiple pretrial interviews (Ceci & Bruck 1995). Relying on the authority of courts to refuse evidence if it is unreliable—here distorted by the interviewing process—defense counsel urged the courts to bar the child victims' trial testimony. (Federal Rules of Evidence, Rule 403 and similar state rules). The appellate courts agreed and directed the trial court to resolve the claims that the investigative interviews were so suggestively conducted that they "tainted" any possibility that the children could now accurately remember what, if anything, had happened to them at their day care center. The notion of "tainted" evidence derives from the "fruit of the poisonous tree" metaphor developed for the exclusion of evidence seized in violation of an accused's constitutional rights (*Wong Sun v. United States* (1963)). The Supreme Court has held that the Due Process guarantee is violated if a pretrial eyewitness identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons v. United States*, 390 U.S. 377 (1968)).

Michaels addresses far more troubling reliability concerns for children's testimony than niggling doubts about their memorial competency. By requiring a threshold showing that interviewer distortion is not a cause for alarm, the *Michaels*

process properly credits the known risks that have emerged from empirical research concerning the creation in the child of an altered "subjective reality" (Feher 1988, p. 233) or a false memory (Ceci & Bruck 1995; Loftus & Ketcham 1994). So long as research continues to demonstrate that the young child has a weakened ability to "source monitor"—to separate out his or her own remembered real experiences from imaginings or pseudo-facts contributed by others, including the interviewer—the lingering and perhaps irreversible effects of interviewer distortion will and should continue to be a matter of grave concern to our courts. *Michaels* is a most significant case, influential beyond New Jersey although no other state has yet to adopt the New Jersey court's precise approach (See, *e.g.*, *United States v. Rouse* (1996); *Commonwealth v. Allen* (1996); *Fuster v. State* (1995); *Steward v. State* (1995)). Already, *Michaels'* ripple effect is being felt in meetings of the Bar and Bench and it has been the subject of extensive commentary in both psychological and legal journals (Dugas 1996; Anderson 1996; *Psychology, Public Policy, and Law* 1995; Myers 1994).

Another national development that has shaped the trial of child sexual abuse cases is the Supreme Court's adoption of a new standard for trial courts' receipt of expert testimony. The decision in *Daubert v. Merrell Dow Pharmaceuticals* (1993) arose out of civil litigation involving the receipt of scientific evidence concerning the possibility that a prescription drug for morning sickness could cause birth defects. In *Daubert*, the Court rejected the "*Frye* restriction" that expert testimony asserting a scientific principle must demonstrate that the principle has "gained general acceptance in the particular field in which it belongs" (*Frye v. U.S.*, 1923, 1014). Instead, the extent of scientific consensus is to become only one of four factors to be used by the trial court in determining the trustworthiness of the expert's proposed testimony. The other factors to be weighed by the court are whether the theory or technique has been or can be tested and validated; whether supporting research findings have been published and subjected to peer review; and whether in the case of a particular technique there is a known potential rate of error. Although the Court was interpreting a federal rule of evidence governing federal trials and thus *Daubert* is not binding on state courts' construction of similar rules for state trials, it is persuasive authority that will influence parallel state court decisions.

The good news of *Daubert* is that future trial courts should predictably be more receptive to social science findings and empiricists as expert witnesses, such as those who provided commentary in the *Michaels* case and in the *McMartin* case. Historically legally trained judges have distrusted professionals in the "soft" sciences of psychiatry, psychology and social work (McCord 1987 pp. 27–28). Courts' skepticism may stem from a strong, if not exclusive, preference for experts from the physical sciences who can produce precise, quantifiable and measurable results (Imwinkelried 1981). The bad news is that under the more liberal test of *Daubert*, some ersatz experts may be permitted to give "diagnoses" of child sexual abuse based on very controversial methodologies, such as the Child Sexual Abuse Accommodation Syndrome or based on play with anatomically detailed dolls (McGough 1997). *Daubert* relies upon the trial judge to make the determination whether the probative value of an expert's testimony outweighs its potential for

distracting or misleading the jury. The Supreme Court also expressed confidence in the effectiveness of "vigorous cross-examination", rebuttal experts or documentary evidence, and careful jury instructions to expose any "shaky but admissible data", that is, an expert's overreaching conclusions or offer of pseudoscience (Cf. Kovera & Borgida 1997).

ALTERATION OF THE "HEARSAY" RULES

Media portrayal of the American trial implies that invariably the witnesses to some disputed event are all rounded up and summoned to present their recollected accounts in one continuous dramatization presented live before a judge or jury. Certainly that presentation is true to the degree that there is a strong preference for live testimony given under oath and tested by adversarial cross-examination. However, more than a layperson might believe, out of court statements, "hearsay", made by some event witness often are received in evidence and can be the pivotal point upon which a judgment hinges. "Hearsay" is defined as "...a statement, other than one made by the declarant while testifying the trial or hearing, offered in evidence to prove the truth of matter asserted" (Rule 801, Federal Rules of Evidence). The Supreme Court chose two criminal cases involving child witnesses as the opportunity for elaborating upon the constitutionally permitted use of hearsay evidence.

White v. Illinois (1992) was a classic prosecution for aggravated sexual assault of a four-year-old girl by her mother's former boyfriend. The State twice attempted to call the child as a trial witness, but on each occasion she experienced "emotional difficulty on being brought into the courtroom and ... departed without testifying" (p. 739). In lieu of the child's testimony from the witness stand, the prosecutor sought to admit five hearsay statements the child had made to adults. The State relied on the "excited utterance" heresay exception to admit the child's statements to her babysitter, her mother, and the investigating officer. For her statements to the emergency room nurse and doctor, the State relied on the "medical diagnosis or treatment" exception.

In *White*, a unanimous Supreme Court announced that the exclusive test for determining the admissibility of hearsay is its reliability based on legal categories of presumptive reliability developed over the course of the last three hundred years. Defense counsel had urged the Court to adopt a more stringent test for children's hearsay, by requiring a special demonstration that the legal assumptions about the reliability of adult's hearsay held true for children's hearsay. The Court rejected this claim, implicitly holding that there were no special risks for the class of children who report experiences in social contexts. Both the "excited utterance" and "medical diagnosis or treatment" exceptions to the general ban on hearsay are "firmly rooted" or long recognized types of permitted hearsay. Each rests on an *a priori* assessment that such a statement was made under circumstances that pro-

vide guarantees of reliability equivalent to trial testimony given under oath and subject to cross-examination. In *White*, the Court observed:

> We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant [child] later testifying in court....And as we have also noted, a statement that qualified for admission under a "firmly rooted" hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability (p. 860 [Citations omitted]).

The hearsay exceptions rest on roughhewn, highly questionable legal assumptions about human behavior. For example, reliability is inferred for "excited utterances" based on the assumption that when one is sufficiently startled to make a spontaneous statement, she or he is unlikely to have either the time or the presence of mind to fabricate. Further, the close occurrence of event and statement mitigates against any probable memory-fade. Similarly, reliability is inferred for statements made to health care personnel based on the assumption that no one seeking a diagnosis or treatment of a medical condition is likely to lie or to mislead someone who can provide help. For these categories of "firmly rooted", that is, long recognized hearsay, reliability is presumed by the rules of evidence (McGough 1994).

Rather oddly, unlike the reliability of pretrial lineups which has been exhaustively studied, empiricists have never systematically tested the behavioral assumptions about reliability that underlie the hearsay exceptions for adult witnesses, much less have they sought validate the extension of those assumptions to child witnesses. There simply are no data exploring this double assumption (Hutchins & Slesinger 1928c; Goldman 1990). After *White*, many cases of child sexual assault arising in both criminal and civil proceedings will continue to be tried on children's pretrial reports, and the children will not even be produced as witnesses at trial. None of the traditionally recognized hearsay exceptions focuses on the potential distortion inherent in the interaction between the declarant and whoever repeats the account as the witness who appears at trial. When a child is the declarant, the nature of the child's relationship with the confidant and the context in which the child's statement was made are crucial to an assessment of the risk of suggestibility (Ricci, Beal & Dekle 1996). The adult may be highly motivated to misinterpret, exaggerate or even fabricate the child's alleged statement (Turtle & Wells 1987).

In *Idaho v. Wright* (1990), the trial court admitted hearsay statements elicited by a pediatrician who had evaluated a five-year-old girl's complaint that she had been sexually assaulted by her stepfather on the day before. For reasons never explained in the court records, the State did not seek to have these statements admitted under the "firmly rooted" exception for medical treatment or diagnosis. (Of course, we can infer that the prosecutor feared rebuttal that the pediatrician was primarily acting in his capacity as a forensic investigator rather than as a physician from whom treatment was sought). Nevertheless, the doctor's hearsay report of the child's statements was not legally presumed reliable, leaving the bur-

den of proof of reliability on the State. The *Wright* case illustrates the distortions that can occur in investigative interviews that are not skillfully and carefully conducted and cast doubt on the reliability assumptions that underlie the "medical treatment or diagnosis" exception in the case of child patients.

The Idaho Supreme Court reversed the trial court decision to admit the doctor's repetition of the child's statements finding that the State had failed to prove that the statements possessed "particularized guarantees of trustworthiness" (*Ohio v. Roberts* 1980, p. 66). The Court noted several possible sources of contamination of the child's statements. The doctor may have been predisposed to "find" an accusation of sexual abuse because the child had been referred to him for evaluation of possible sexual abuse and he was informed that similar allegations had been made by an older sibling. More troubling is the doctor's remembered account of the exchange: rather than asking the child open-ended questions, he asked very pointed, leading questions. Indeed, the child's critical accusation occurred only in response rather than in a free narrative. As the doctor testified, "When I asked her 'Does daddy touch you with his pee-pee'?, she did admit to that. When I asked, 'Do you touch his pee-pee, she did not have any response" (pp. 810–811).

The United States Supreme Court agreed that under a totality of the circumstances test, the State had not carried its burden of proving that the child's hearsay was particularly trustworthy, noting the "suggestive manner" in which the interview was conducted. Furthermore, when considering the issue of hearsay reliability, the Court held that a trial court must focus exclusively on the circumstances of the exchange between the child and the adult reporter; other extrinsic evidence of sexual abuse cannot be used to bootstrap a finding that the child's alleged accusation must therefore have been truthfully made and accurately reported. Thus, the trial court had improperly considered physical evidence of injury to the child's vagina, the step-father's opportunity to commit the offense, and the older sibling's similar accusation of sexual abuse by the step-father in determining that the child's statements to the pediatrician were intrinsically reliable. According to the Court, "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial" (*Idaho v. Wright*, p. 822). Physical evidence, opportunity, patterns of conduct and other evidence may be sufficient to support a verdict of guilt, but they are irrelevant to the determination of the admissibility of other evidence such as a child's hearsay accusation.

In *Tome v. United States* (1995), the Court considered a slightly different use of a child's out-of-court statements. In a prosecution for incest, the accused father claimed that his four-year-old daughter's testimony was motivated by the underlying divorce and custody suit between her parents and her mother's desire to gain custody. He challenged the child's testimonial assertions of sexual assault based on "recent fabrication or improper influence or motive" (Fed. Rule Evid. 801(d)(1)(B)). The State offered seven out-of-court statements that the child had made to her babysitter, her mother, a social worker and three pediatricians to prove the consistency of her allegations of her father's sexual assault and in an attempt to rebut the claims of fabrication. Furthermore, if admitted under this

exception, the statements can be relied upon for their truthfulness by the judge or jury. A consistent statement by a witness that *predates* the motive directly rebuts the charge that the testimony was contrived by a motive to lie. Here, the evidentiary problem was that these statements did not begin until *after* the end of the child's summer visitation with her mother and arguably after the motivation to fabricate arose and hence, they did not address the father's claim. The Court narrowly construed the rule of evidence, holding that these statements were improperly admitted because the prosecutor had not first demonstrated that they occurred before any motivation to lie occurred.

Unless the defense attacks the credibility of a witness, ordinarily prior consistent statements made by a testifying witness are inadmissible. Prosecutors thus eagerly await such a challenge in order to "rehabilitate the witness" and can then introduce out-of-court statements that rebut the charge and more importantly, produce a spill-over effect of reinforcing the truthfulness of the witness's in-court account (McGough 1994). Aware of this strategy, the Court observed:

> If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from [any] recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that [the child's] testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount [the child's] detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether [the child] had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive (p. 165).

In holding the evidence of children to the same standards generally applicable to witnesses, *Tome* may be read as a retrenchment from some of the broad, sweeping language of the Court's child-shielding decision in *Maryland v. Craig* (1990).

In sum, of the important child witness jurisprudence decided within the past fifteen years, the New Jersey Supreme Court decision in *Michaels* and the United States Supreme Court's hearsay decisions in *White, Wright* and to a lesser degree, *Tome,* are by far the most significant. All three cases arose from disputed evidentiary issues at trial, but collectively they properly redirect attention to the importance of the world outside of the courtroom, to the trial-staging preparations and even earlier to the pretrial investigative process. What happens in this pretrial dawn more seriously determines the resolution of an allegation of sexual abuse than anything that occurs in the trial itself.

ALTERATION OF CRIMINAL PRETRIAL PROCEDURES

In her 1993 study of eight American jurisdictions, Gray found that legal rule changes in the criminal trial processes had accomplished little real change for child witnesses in the workaday world and that prosecutors were proceeding in much the same ways as before. That is not a surprising finding when trial observation becomes the primary methodology because access to pretrial case files is frustrated or completely denied (Gray 1993). The authorization of closed-circuit television or screening devices to shield a child witness from viewing the accused, begun by *Coy v. Iowa* and achieved by *Maryland v. Craig*, will predictably be infrequently employed. Most trial courts are woefully underbudgeted and technologically challenged. The State's burden of demonstrating necessity for the shield is considerable, and more importantly, *White*'s approval of the use of "firmly rooted" hearsay exceptions for children provides a less onerous alternative for a prosecutor: a reluctant child witness who has made qualifying statements out of court may not need to testify at all at trial.

Similarly, the expanded qualification of trial experts authorized by *Daubert* merely confirms what was already the norm for most cases involving child witnesses. In the garden variety, low-visibility child sexual abuse prosecution, the trial expert is a social worker with a clinical practice. In her study of reported decisions, Mason found that in child sexual abuse prosecutions using expert witnesses, over one-third (34%) were social workers (1997). Only in the most highly publicized cases do empiricists appear in court to present complete "social framework" or global testimony about the reliability risks of children's memories, such as that offered by the array of experts in the *McMartin, Michaels* or the Little Rascals Day Care Center case in North Carolina (*State v. Kelly*, pp. 1991–1992).

Most criminal prosecutions, including child sexual abuse charges, never go to trial. The power in the criminal justice system is lodged in the prosecutor who assesses the strength of the State's evidence, including an evaluation of the credibility of key witnesses, and consequently decides what crime(s) to charge and what offer is to be made to the defense in exchange for a guilty plea. In felony prosecutions for serious offenses, only seven percent are contested by trial; in the remainder, there is a guilty plea. Nearly half of the trial convictions are the products of a bench trial (no jury). The percentage of convictions by guilty plea (and by bench trial) are even higher in state misdemeanor cases (Alschuler & Deiss 1994, p. 921, ns. 278–280). Guilty pleas are appealing to the risk-adverse, a group that unfortunately includes not only those who are truly guilty but also those who cannot afford to underwrite the costs of trial or perhaps especially in sexual abuse cases, to endure the notoriety of a contested trial (*Innocence Betrayed* 1991, 1997).

As has often been observed, in the typical child sexual abuse cases the only eyewitness is the child. Absent some volunteered statement by the child which fits a hearsay exception, the key evidence is testimony by a police officer or social caseworker who conducted an investigative interview with the child. A busy prosecutor may well lack the time or inclination personally to conduct an interview with the child and will instead rely upon witness statements taken by

investigators or paralegals. The prosecutor may further assume that the interview performance represents the child's optimal capability as a witness. Scheduling a re-interview of an unresponsive or equivocal child witness is a possibility, but it is an option fraught with difficulties. Predictably opposing counsel will claim that the new interview caused the child to succumb to pressure to come up with fabricated, albeit more convincing "facts". Additional evaluative interviews also can impose substantial stress upon the child and his or her family.

Consequently, based solely on viewing a videotape or the interviewer's notes or interviewing the child's interviewer, the prosecutor may well conclude that the extraction of the child's account is so rife with suggestive questioning that evidence of the child's statements will not be admissible under either *Wright* or *Michaels*. The prosecutor might decide to minimize the risk of loss by offering an extremely generous sentence in exchange for a guilty plea or in the extreme to dismiss all charges. The prosecution of the defendants in the Little Rascals Daycare ultimately demonstrated the use of both options (*State v. Kelley* 1995); *Innocence Betrayed* (1991, 1997). If the prosecutor concludes that the interviewer has been merely inept, accomplishing a benign but very vague and sketchy free recall account from the child, the case may also wash out of the system. The prosecutor may decide that the child would be a poor witness because he or she appeared unconvincing in the early interview. Although the empirical literature does not often talk about this consequence, in trials the issue is not whether a child can give accurate, reliable evidence but whether this particular child will be perceived by the fact-finder as offering complete and accurate evidence.

We do not know with any precision how many American sexual abuse prosecutions involving children as principal witnesses are jettisoned based on the poor quality of the initial interview—that is, never pursued to formal charges or dismissed before trial. In Gray's Florida site sample, over 38% of the cases presented to the prosecutor did not proceed to a formal filing of charges (1993, p. 94). In a recent comprehensive study of child abuse cases in Great Britain, the slippage rate was found to be substantial. Of 14,912 videotaped child witness interviews conducted by police investigators over an 18 month period, only 3,652 (24%) were submitted to prosecutors for charging review; of that number, only 1199 (33%) went to trial (Davies, Wilson, Mitchell, & Milsom 1995, p. 17, iii). In a sample of 40 cases, only 18% failed to go to trial due to a guilty plea from the defendant. One out of every three interviews prompted a prosecutorial decision to avoid trial, either because the interview was deemed to have "no evidential value" (30%) or would be "inadmissible in court" (3%) (Davies, Wilson, Mitchell, & Milsom 1995, p. 23).

Although the British and American trial processes are not identical, there is no procedural distinction that would suggest that American prosecutors are any more eager to try flawed cases or that American forensic interviewers are more sophisticated. Indeed, we now have good reason to suspect from reported legal decisions (McGough 1995) and empirical research (Warren, Woodall, Hunt, & Perry 1996), that American interviewers have yet to adapt their practice to scientifically proved methods for enhancing a child's accuracy

and completeness of recall. Furthermore, we know that flawed questioning techniques are greater sources of distortion than any underlying deficits in children's cognitive capabilities (Ceci & Bruck 1993; Aldridge 1992). In view of all the casualties of poor interviewing—prosecutions lost, cases dismissed, fractured families and communities, irreparably scarred victims and defendants—reforming the investigative interview process becomes the most critical needed reform. And, as it turns out, the same reform path emerges from a review of civil litigation involving allegations of child sexual abuse.

CIVIL LITIGATION AND CHILD SEXUAL ABUSE ALLEGATIONS

Although child sexual abuse by nonrelated adults is typically processed as a criminal case, allegations of intrafamily child sexual abuse can follow any of three paths. Such charges can be investigated by the police as a criminal case of incest with a prosecution of the adult perpetrator; they can be investigated by the public department of social services as an intrafamily child abuse or protection case, with an action in juvenile court for the removal of the child from an environment of potentially continued abuse; or the child's caretaker may attempt to use the complaint as a basis for a private civil action against the family member. Theoretically there is no reason why all three remedies might not be pursued. Occasionally all begin simultaneously, although eventually the legal representatives will decide priority of resolution. Communities have only recently begun to attempt a coordinated, nonduplicative approach by involving both law enforcement and social services personnel in the investigation and choice of appropriate remedy (Doris, Mazur, & Thomas 1995). Throughout the country there are now more than 150 Child Advocacy Centers using a multidisciplinary approach (Pence & Wilson 1994).

Given the reality of overburdened prosecutors and child welfare caseworkers, if the child's caretaker has played no significant role in the alleged sexual abuse and prefers to pursue private remedies against the other family member, these public officials may well acquiesce, declining or deferring any state intervention (*e.g., Kahre v. Kahre* (1995). In this sense *Tome v. United States* (1995) is an exceptional case. The parents were divorced in 1988, and the father was named primary physical custodian in a joint custody judgment. The following year, the mother unsuccessfully petitioned the trial court for a change of custody. After visitation during the next summer with her mother, the child had complained of her father's sexual abuse while in his custody. Rather than bringing a new change of custody action, the mother contacted State authorities. A social worker investigated the complaint, but for reasons not clear from the record, the State elected to prosecute the father for felony sexual abuse rather than to file a protective services case in juvenile court (*e.g., In re Gina D.* (1994)).

The primary evidentiary contrasts between the criminal justice system and the civil justice system lie in the burden of proof and the burden of persuasion, as the

outcomes in the O.J. Simpson case so vividly demonstrate. In a criminal trial, the State's burden of proof is beyond a reasonable doubt and at least in serious felony cases, a jury verdict must be unanimous. In a civil trial, the State or private plaintiff's burden is much lower, by a preponderance of the evidence, and only a majority of any jury must concur in the judgment. The Due Process Clause of the Constitution controls the conduct of both civil and criminal trials and ensures that any trial or hearing process must comply with notions of "fundamental fairness" (*Matthews v. Eldridge* (1976)). Under prevailing analyses, ensuring the reliability of evidence is certainly the paramount intention underlying Due Process. As a result, the previously discussed Supreme Court decisions in *Daubert, White* and *Wright* would clearly govern the resolution of any civil dispute involving an alleged child victim of sexual abuse. Arguably, relying on the New Jersey decision in *Michaels*, a civil court could refuse to hear evidence of a child's accusation found to be irreparably tainted by suggestion, but that is an unlikely result. Unconstrained by the specific constitutional guarantees governing criminal trials, most civil courts would permit evidence of the accusation but discount its reliability accordingly, based on cross-examination and rebuttal evidence from defense experts.

In the 1970s and 1980s, heightened awareness of incest bred an increasing number of privately initiated custody and visitation disputes with a sexual abuse component. Many professionals agree that the dynamics of suspicious or hostile divorcing parents make wrongful accusations more likely (Yates & Musty 1988; *Newsom v. Newsom* (Miss. 1990); *Tome v. United States* (1995)). The most famous early case involved the refusal by Dr. Elizabeth Morgan to permit her ex-husband to have any contact with their two-year-old daughter. When the court rejected her claim and ordered visitation, in defiance, she hid the child in New Zealand for three years and was jailed in contempt of the court (*Morgan v. Foretich* (4th Cir. 1988). For a concerned parent, the stakes in a custody dispute are enormous, a species of a loss of personal liberty carrying the destructive equivalent of incarceration. If sexual abuse is alleged, pending the resolution of such a serious threat to the child's safety the court may temporarily prevent the accused parent from having any unsupervised visitation with the child. But the temporariness of the order depends upon the business of the court; some final judgments of custody are not achieved for several years. If the abuse is proved, in many states, the parent can permanently lose all right to contact with the child except under State supervision (See, e.g. LA. R.S. §9:341 (1997)).

Sexual abuse allegations can also form the basis for a civil action for damages against the abusing parent brought by the child's representative during the child's minority or directly by the child when she or he reaches the age of majority. In 1983, an adult daughter sued her father for damages resulting from forced oral sex and sexual assault that had occurred more than a decade earlier. A majority of the Washington Supreme Court held that the suit was barred by the state's statute of limitations, a law that requires that a civil action be initiated within some specified period of time after the occurrence of the wrongdoing (*Tyson v. Tyson* (1996). Thereafter, as a direct consequence, Washington and over half of the other states have lengthened the statute of limitations, typically from two to six years, by delaying its onset until after a child victim reaches the age of majority or until "dis-

covery" of the injury (Murray 1995). Thus even long-buried "recovered memories" of childhood sexual assault can now be brought not only for mental suffering stemming from incest but also for assaults by unrelated adults—nuns, priests, school teachers, choir masters, scout leaders, and their employers (Klass 1996; Loftus & Ketcham 1994; Murray 1995, collecting cases).

In the 1990s, another spate of litigation occurred as the alleged perpetrators of sexual abuse began suing counselors and therapists for professional malpractice on the theory that they had improperly induced a patient's belief in the reality of recovered or repressed memories (Klass 1996; Ernsdorff & Loftus 1993). In 1994, the Philadelphia-based False Memory Syndrome Foundation claimed that their records disclosed over 11,000 cases of false accusations of sexual abuse (Murray 1995, n. 12, p. 479).

Like criminal prosecutions, critical decisionmaking about civil cases begins long before trial, and many cases are abandoned based upon counsel's assessment of the record of the child's initial complaint or interview. The assessments made by the public social services department counsel are identical to those made by a prosecutor as previously outlined, and the slippage rate is again, considerable. As a typical example, during fiscal year 1996, in Louisiana slightly less than one-third (31.3%) of the 27,930 child official reports of abuse/neglect were "validated" after investigation by the State protective services staff and proceeded further to trial (LA CH.C. Art. 616).

In privately conducted litigation, the calculus is significantly different. There may have been no previously arranged interview of the child at the point the child's caretaker retains counsel. Evaluations, including an interview by some clinician with the child, and depositions have to be arranged. In view of the typical delay before any formal interview, counsel can anticipate a defense challenge based on the child's memory loss or confusion. Furthermore, the hired evaluators may be equally or more partisan than the experts who conduct interviews in the publicly financed child sexual abuse investigation. A new cottage industry of "validators", clinicians who claim an ability to discern the truthfulness of a child through interviewing, has been spawned. *Daubert* will permit the use of testimony from some experts who have developed theories or conclusions contrary to the mainstream of empirical research. Furthermore, many lawyers may be reluctant to schedule an interview of the child by anyone else (and incur the attendant cost) without first conducting their own interview of the child. Thus, in private civil litigation, the opportunities for contaminating the child's independent memory equal or even exceed those typical of the criminal prosecution.

Unlike a publicly financed cause, each party to private litigation must advance the court costs and counsel fees which can be considerable. It is not at all atypical for a contested custody case with expert witnesses to cost in excess of $25,000. If the civil suit seeks damages, counsel for the plaintiff may agree to advance the court costs and accept the case on a contingent fee basis whereby the lawyer will assume the risk, recovering fees only if the plaintiff wins a money judgment. In a Washington case decided in 1994, a daughter sued her father on a theory of recovered memory of sexual assault and was awarded $600,000 in damages (Klass 1996). In 1993, a seminarian initially sued the late Cardinal Joseph Bernardin,

another priest and the Catholic Church seeking $10 million in damages although he later recanted and dismissed the action before his own death (Klass 1996). In 1995, a Minnesota jury awarded a patient $2.5 million in damages from her psychiatrist on a false memory implantation claim (False Memories to Cost $2.5 Million 1995).

The scent of a large verdict may well induce some attorneys to risk a contingent fee contract, especially where the alleged perpetrator is covered by malpractice or in some instances, a homeowner's policy of insurance. Without question, the potential for a large verdict drives pretrial settlement negotiations and like the similar cost containment of a guilty plea, some uninsured defendants will settle rather than go to trial. Insurance companies are especially cost-sensitive and on their own authority may decide to settle a claim against an insured so long as the settlement is within policy limits. Negotiation for settlement is more art than science, and unless counsel for all parties have acquired a sophisticated knowledge of the reliability risks inherent in investigative interviews with child victims of sexual abuse, its artfulness goes unchecked.

CONCLUSIONS AND PROJECTIONS

Any retrospective of legal developments must include a discussion of the reported decisions of the United States Supreme Court and of state courts of last resort although they only broadly and indirectly constrain future litigation involving similar issues. The Supreme Court's rulings on children's testimony and hearsay statements clearly identify evidentiary reliability as the critical concern of Due Process, but the Court's opinions rarely cite empirical research as relevant, much less determinative of reliability analyses. (Cf. the dissenting opinion of Justice Blackmun in *Coy v. Iowa* (1988, 1026 -1035) In *Idaho v. Wright* (1990), the Court did acknowledge that the "suggestive manner" in which the investigative interview was conducted made the hearsay evidence untrustworthy and hence, violated the accused's constitutional rights. Since the Supreme Court's jurisdiction over state court judgments involves only review for constitutional error, its discussions of constitutional reliability are more narrowly focussed than evidentiary reliability and establish only minimum standards. Consequently, the real work of fashioning reliability criteria for the admissibility of children's evidence is left to the states which have primary responsibility for developing the rules of trial court evidence and procedure.

As Gray's work indicates (1993), assessing the extent of the trickle-down effect of appellate court decisions on subsequent case decisionmaking is a very difficult task. Prosecutors, judges, perhaps all lawyers tend to be conservative. Gray's observations about prosecutors is particularly apt:

> Requesting certain of these procedural innovations [for the trials of child sexual abuse cases] may require the advance preparation of appropriate motions and supporting memoranda and/or affidavits. Prosecutors may not have the time

> or assistance from aides or law clerks to prepare these documents. Furthermore, the controversial nature of many of these techniques increases the risk for appeals and reversals of convictions, making them less attractive to the prosecutor. Prosecutors may overestimate the difficulty of getting such procedures accepted by judges in their courtrooms. Or the problem may be lack of knowledge and experience....
>
> [Consequently, m]any prosecutors claim that the most effective way to prosecute the cases is the conservative way—no new rules, no "bells and whistles," just convincing testimony by the child, on the stand in the courtroom, possibly bolstered by an expert witness (1993, p. 139).

Radical change in trial processes should not be expected over night, but it will gradually occur. Indeed, in view of the heightened public and professional awareness of the reliability risks inherent in a pretrial interview fueled by the *Wright* and *Michaels* decisions, a conservative approach to the use of any accusations obtained by an interviewer may well be warranted.

During the last fifteen years, social scientists have made significant forays into the legal territory of reliability, by designing research having clearer applicability to trial issues, by testifying about those data before trial courts and by brief-writing for appellate courts. In several widely publicized cases, particularly the *Michaels* case, such testimony properly redirected the court's attention to the pretrial processes and ultimately produced a reversal of the conviction. Unfortunately, most litigants lack the means to attract the testimony of eminent empiricists. Accordingly, in an effort to reduce the economic barriers created by the costs of expert witnesses, some scholars have proposed that experts on child development should be appointed by the court to assist in its evaluation of children's evidence (Myers et al. 1989) or have suggested the creation of an "Amicus Institute" that would provide nonpartisan, not-for-profit opinions and analyses for courts (Ceci & Bruck 1995).

The inherent limitation on the power of these reform proposals is that they are directed toward the resolution of fact-specific issues in pending litigation. Only the grossest sorts of investigatory error invite trial suppression or appellate reversal. Court rulings in specific cases necessarily involve a *post hoc* determination of reliability of the child's account. The focus is upon diagnosis of error rather than writing a prescription for a cure. Consequently, although celebrated trial and appellate victories are important catalysts in any law reform movement, shaping a public climate for change necessary for achieving permanent systemic conversion requires a different investment of professional energy.

Social scientists should become more involved in seeking legislative and administrative policy change. Melton has suggested that researchers should invest in preparing summaries of current research findings for consumers, obtaining the confidence of networks of opinion leaders, and watching for opportunities for influencing relevant judicial cases or legislative bills. While that activity will undoubtedly provide important groundwork for building interprofessional bridges, scientists should also consider a more proactive stance of initiating legislative proposals with accompanying commentary. Like my colleagues in other

jurisdictions, as the Chair of one state's law reform commission for juvenile court proceedings, I would welcome such informed suggestions for improving the laws.

The waves of statutory reform of the 1980s that altered the competency and corroboration rules and the creation of special sexual abuse hearsay exceptions dramatically illustrates the possibility of legislative change of even ancient rules (McGough 1994). But much refinement of those statutes remains to be accomplished. The criteria for assessing the reliability of children's hearsay varies from state to state and the typical list is both overinclusive and underinclusive and fails to reflect the known empirical risks. Many of these statutes are hopelessly vague, and thus it is little wonder courts, prosecutors and counsel fail to rely on them. Models for hearsay rule reform already exist and can be revised as necessary to meet the idiosyncrasies of any state's requirements for legislation or for judicial evidentiary rulemaking (Anderson 1996; McGough 1994; Bulkley 1985). The only missing connection is the collaboration of both social scientists and lawyers in formulating normative legislative reforms that reflect the best of current knowledge.

The appeal of legislation is that it applies prospectively to future practices and procedures; it can be developed without the attendant pressure of fixed litigation deadlines; and it can present a comprehensive approach to the resolution of some forensic issue. Every state legislature has some mechanism for the study and preparation of proposals on significant social issues, whether a standing law reform commission or special task forces created by legislative resolution. Establishing the relevant criteria for the assessment of reliability of hearsay statements made by children is a good example of potential legislative reform.

Improving the knowledge of front-line professionals can be achieved most efficiently by reforming administrative policies. All public agencies exercise a form of legislative power by issuing administrative policies, regulations or guidelines for their staffs (Doris, Mazur, & Thomas 1995). The forensic interviewing of children is a prime example of a significant social issue that should be targeted for administrative law reform. Through litigation we can never improve pretrial processes and avoid potential distortion of children's accounts unless we can implement preventive rather than remedial procedures. In the overwhelming majority of sexual abuse cases, the critical evidence is the reliability of the child's pretrial statements, and we now know how to minimize the inaccuracy and contamination of the investigative interview. Empirical research has identified the risk points of interviewing a child, and a broad consensus has emerged from scientific literature about the precautions that should be taken to ensure a reliable account. The books and articles written about child witness interviewing can now fill a small room. Indeed, the essential features of the child sexual abuse interview have achieved "convergent validity". (Davies et al. 1996) The recent willingness of some empiricists to write interviewing protocols and to participate in interviewer training may be the most significant venture for the real world reform of the American legal system's treatment of child witnesses.

Becoming more involved in the legislative and administrative law reform arenas is often dirty work involving unruly variables and encounters with bureaucratic barriers, professional turf-guarding, and an occasional Neantherthal. Sometimes it entails compromise and forced choices between half-loaves or none at all. Pre-

cisely because legislation or administrative protocols produce such a powerful, generally applicable remedy may explain why many professionals shrink from that activity, preferring the more limited and less risky influence of the lawsuit. (After all, perhaps the definitive research can be produced that will make all ambiguities and quandaries disappear in assessing the reliability of children's accusations? Then we can write the complete list of criteria for the admissibility of children's hearsay and draft the perfect set of interviewing protocols).

Perfection in the crafting of any law is illusory as Robert Penn Warren had Willie Stark remind us. The law is inevitably "too short and too tight for growing humankind" (and growing science). The state of knowledge about the complexity and interaction of the testimonial reliability of children has exponentially advanced and changed over the past decade. But inevitably, there will be new, relevant empirical findings that will have to be incorporated as we go along to improve any set of protocols and rules of evidence we now can write. Even so, continuing to pretend that the law fits what we now know about the reliability risks of children's testimony in sexual abuse cases doesn't seem to be a sensible alternative. We can work together to improve the pretrial processes and that should be the interprofessional reform agenda for the new millennium.

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