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**Expert Testimony on the Suggestibility of Children:  
Does it Fit?**

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## **Expert testimony on the suggestibility of children: Does it fit?**

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State v. Sloan was a criminal case of child sexual abuse. A.D., the six-year-old alleged victim, was dropped off on Friday by her mother at her grandmother's house, where the child's aunt Evelyn and defendant also resided. Two days later, on Sunday, the child's aunt Anita phoned the child's mother that something was wrong, and A.D. told her mother that the defendant sexually assaulted her the day before. The mother called the child abuse hot-line. On Thursday, five days after the alleged abuse, a social worker and police detective interviewed the child at her school. A.D. reported that her aunt Evelyn had allowed her to get into bed with the defendant and had then left the house. She stated that defendant had "placed her finger in her punkie," that she had touched his "wiener," and that defendant "had placed her on his wiener." Approximately three weeks later, the police detective re-interviewed the child, and she gave a similar report. The child testified at the trial, and her testimony was consistent with the testimony of her mother, the social worker, and the detective. The testimony of the child's Aunt Evelyn and grandmother (who both testified for the defense) as to the events subsequent to the alleged abuse was consistent with the child's.

The defendant was convicted, but the conviction was overturned on appeal. The Missouri Court of Appeals reversed the conviction on the grounds that the defendant should have been allowed to present the testimony of an expert witness that the social worker and the detective questioned the child in a manner that was "unreasonably suggestive" and "not probative of guilt" (State v. Sloan (Mo. Ct. App., 1995), p. 596). The expert would have testified that the use of such questions as "Where did he touch you" was inappropriately leading, that one should not use "repeats," which she defined as "questions that take the end of an answer and feed it back to the child in the beginning of the next question," "affirms," which are questions that indicate the child is "on the right track," or yes/no questions, because "you cannot judge the validity of the response" to questions that can be answered "yes" or "no" (p. 597).

Sloan reflects an apparent trend among American courts toward admitting defense expert testimony on the suggestibility of children (Myers, 1997). Yet the facts of the case are quite unlike the multi-victim ritual abuse day care cases that have caught the public's eye and inspired a rash of research on young children's suggestibility. The child reported abuse shortly after the alleged event. The first investigative interview occurred shortly thereafter. There was nothing bizarre about the child's allegations. There was no evidence of incessant interviews, repeated questions, or bad-mouthing of the defendant. The defendant was someone very familiar to the child. The interviewers did not tell the child that she was abused or that other children had been abused. The child was not asked to imagine abuse or to pretend that it had occurred; she was not even shown anatomically correct dolls. In short, the case was an unexceptional, routine sort of sexual abuse case that criminal attorneys see everyday. Nevertheless, an expert agreed to testify for the defense, and the conviction was overturned because the trial court did not allow her to testify.

Whether the courts ought to admit defense expert testimony on suggestibility raises issues regarding the psychology of children and the law of expert testimony. Many experts are anxious to communicate the recent findings on children's suggestibility to jurors in sexual abuse cases. However, some have raised concerns regarding the applicability of the research findings to typical cases of abuse (e.g. Garven & Wood, 1998; Holmgren, 1997; Lyon, 1999; Westcott, in press).

Moreover, researchers have shown that jurors often appear to fail to appreciate the inapplicability of expert testimony to the facts of the case (e.g. Kovera, Gresham, Borgida, Gray, & Regan, 1997). The courts are receptive to expert testimony, but cautious because of the risks that jurors may defer too much and lack the skills to critically appraise expert testimony. The rules regarding the admissibility of expert testimony, the relevance of evidence, and the exclusion of evidence that misleads the jury allow the courts to exercise some control.

In this chapter, I argue that there are good reasons to seriously limit or exclude such testimony in a large proportion of child sexual abuse cases. I argue that the most powerful argument is one of “fit”: defense attorneys are often too eager to offer testimony that does not fit the research findings or does not fit the facts of the case. Because jurors are sometimes impressed by experts qua experts, and may not detect the lack of fit between expert testimony and other evidence, expert testimony that does not fit should not be admitted.

Elsewhere, I have argued that recent research on children’s suggestibility is inapplicable to many cases of sexual abuse: the research uses suggestive techniques that are not the norm in routine investigative interviews, and fails to take account of factors--such as fear, loyalty, and embarrassment--that make false allegations of abuse less likely to occur (Lyon, 1999). Here, I will emphasize the legal implications of the research’s inapplicability when considering the admissibility of expert testimony on suggestibility. There are a number of potential legal objections to such testimony, although most are seriously limited. First, I will consider the traditional objection that expert testimony regarding suggestibility invades the province of the jury to assess witness’ credibility. Appellate courts have chipped away at the objection, and the resulting rules may actually encourage expert testimony that is less helpful and more misleading. Second, I will discuss the objection that expert testimony regarding suggestibility is not helpful to the jury because the testimony does not tell the jury anything that they don’t already know. Although this objection has some force, because lay people understand that young children are suggestible, it is limited by the fact that expert testimony can almost always be packaged in such a manner so as to transmit information of which the average juror is unaware. Finally, I will evaluate objections inspired by the Supreme Court’s interpretation of the prerequisites for the admissibility of expert testimony under the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals* (1993). Although most commentators interpreting *Daubert* have discussed its requirement that expert testimony qualify as scientific knowledge, I will emphasize its requirement that the expert’s testimony “fit” the facts of the case. Experts who misapply research or assert facts beyond what research supports should not be permitted to testify.

### **Invading the Province of the Jury to Assess Credibility**

The courts sometimes exclude expert testimony that touches on witness’ credibility on the grounds that it invades the province of the jury to assess witness’ accuracy and sincerity. For example, one Federal Court of Appeals recently upheld the exclusion of expert testimony on the failings of eyewitnesses in part upon the grounds that “the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical

function of the jury—determining the credibility of witnesses.” (United States v. Hall (7th Cir., 1999), p. 1107). State courts have rejected expert testimony in child sexual abuse cases on similar grounds (e.g. Commonwealth v. Ianello (Mass. 1987)).

This objection has come under increasing attack. The argument was long ago criticized by the renowned evidence scholar, John Henry Wigmore. Calling it a “mere bit of empty rhetoric,” Wigmore noted that the jury is always free to reject an expert’s opinion, and thus retains the right to assess the credibility of witnesses (Wigmore, 1904, p.18). Wigmore’s argument was endorsed by the California Supreme Court in *People v. McDonald* (1984), an influential opinion supporting the admissibility of expert testimony on the difficulties of adult eyewitness identification. In the federal courts, several Courts of Appeal have acknowledged an “increasing hospitality” toward testimony of experts on adult eyewitness identification (United States v. George (9<sup>th</sup> Cir. 1992, p. 1432); United States v. Harris (4<sup>th</sup> Cir. 1993); United States v. Brien (1<sup>st</sup> Cir. 1995).

Recently, the argument that expert testimony commenting on the credibility of witnesses invades the province of the jury was considered by the United States Supreme Court in assessing the constitutionality of an evidentiary rule that the results of polygraph tests are per se inadmissible (United States v. Scheffer, 1998). Although the majority opinion upheld the rule, only four of the justices agreed that a legitimate governmental interest supporting the rule was the fear that expert testimony would “diminish the jury’s role in making credibility determinations,” (p. 1266), whereas the other five (four concurring in the judgment and one dissenting) believed that such an argument “demeans and mistakes the role and competence of jurors in deciding the factual question of guilt or innocence” (id., p. 1269 (Kennedy, J., concurring)). A majority of the Supreme Court thus does not believe that concerns about expert testimony invading the province of the jury to make credibility judgments are legitimate.

Courts who wish to circumvent the rule that expert testimony on credibility invades the province of the jury have found ways to draw lines between permissible and impermissible expert opinion, and do so by examining the specificity of the expert testimony. Specific opinions invades the jury’s province, but generalities are admitted. The defense attorney presenting the expert testimony is then free to link the generalities to the case in argument.

In addition to allowing a large amount of expert testimony, this exception to the “province of the jury” objection creates line-drawing difficulties for the courts. As the Eighth Circuit has queried, “as the expert applies his or her general opinions to the case at hand, at what point does this more specific opinion testimony become an undisguised, impermissible comment on a child victim’s veracity?” (United States v. Rouse (8th Cir. 1997), p. 571). The difficulty of drawing such lines is illustrated by the expert’s opinions at issue in *Rouse*. The trial court would not allow the expert to express an opinion whether the child witness’ report was believable. This was an uncontroversial holding, and appears to be a general rule.

However, the line the trial court drew between admissible and inadmissible opinion was the subject of the appeal. The trial court allowed the expert to testify about practices of ‘suggestibility’

that produce unreliable child testimony and to opine that suggestive questioning can create false memories. These were sufficiently general to be unobjectionable. The trial court would not allow the expert to criticize the practices used by the interviewer in the particular case. The appellate court held that this was error (but expressed some uncertainty in doing so). Contrast this to an Eighth Circuit court case decided one year previously, *United States v. Kime* (8th Cir. 1996). In that case the appellate court upheld the exclusion of an expert opinion criticizing the manner in which an in-court identification was made on the grounds that it was too specific.

The state courts have had similar difficulty in deciding whether experts can specifically criticize the interviewing practices used in the individual case. Some say they can (*State v. Erickson* (Minn. Ct. App. 1990); *State v. Malarney* (Fla. Ct. App. 1993); *State v. Kirschbaum* (Wis. Ct. App. 1995)); some say they cannot (*State v. Steffes* (Mont. 1994); *Commonwealth v. Allen* (Mass. Ct. App. 1996)). A few appear to have avoided the specific/general distinction altogether by reasoning that the expert can testify as to the actions of the interviewer without thereby commenting on the credibility of the child (*State v. Sloan* (Mo. Ct. App. 1995); *Barlow v. State* (Ga. 1998)). For example, the court in *Sloan* explained that expert testimony that the interviewers used methods that “were unreasonably suggestive” was not “particularized testimony concerning the victim’s credibility” because “it is directed at the activities of the witness” (p. 596). This position is problematic, because the suggestibility of the interviewee largely determines the suggestiveness of the questions. Moreover, it creates an artificial distinction between external and internal sources of inaccuracy: expert’s could testify to outside influences on a witness but not on equally important endogenous factors that affect the perception, memory, and sincerity of the child witness.

The rule against commenting on a child’s credibility appears to have been all but swallowed by the exception in several cases in which the courts have allowed experts to testify to everything short of whether they believed the child. In *Schutz v. State* (1997), the Court of Criminal Appeals of Texas held that the expert’s testimony “that the complainant did not exhibit the traits of manipulation did not constitute a direct comment upon the truth of the complainant’s allegation” (p. 73). In *United States v. Cacy* (1995), the Court of Appeals for the Armed Forces held that an expert could testify that a child “did not appear rehearsed” but not that “she in fact believed the victim” (p. 218). The distinctions are very fine: one can testify whether the child has the traits or characteristics of an inaccurate witness, but not that she is, indeed, inaccurate. One can testify that the child’s story is not believable, but not whether one believes the child. Even these distinctions are hard to maintain in *Doe v. Johnson* (1995), a case in which the Seventh Circuit held that an expert’s testimony that “he believed that [the child’s] allegations were the product of parental suggestion” (p. 1563) was admissible because it was not an opinion “as to the [child’s] credibility” (*id.*).

Prosecutors who challenge testimony on the grounds that such distinctions are artificial must tread carefully lest they appear hypocritical, because the distinctions are largely the product of prosecutorial efforts to introduce expert testimony that children’s behavioral symptoms are proof that they were sexually abused. In order to overcome the objection that such testimony vouched for the credibility of the child witness, prosecutors argued that experts could properly testify as to the characteristics of sexually abused children in general, or to testify that a particular child’s behavior

was “consistent with sexual abuse,” without testifying that they in fact believed that the child had been sexually abused. In states where experts can go so far for the prosecution, defense attorneys can legitimately argue that their experts ought to be able to testify that a child’s behavior is consistent with a false allegation of sexual abuse.

The way in which prosecutors are hamstrung by their own distinctions is illustrated by *Commonwealth v. Allen* (Mass. Ct. App. 1996), a Massachusetts case in which the defendant was convicted of sexually abusing his 8-year-old daughter and 9-year-old son. Prior to *Allen*, the Supreme Court of Massachusetts had held that an expert for the prosecution may testify on the “general behavioral characteristics of sexually abused children,” but that a comparison of a particular child to those characteristics “impermissibly intrudes on the jury’s province to assess the credibility of the witness,” thus establishing the distinction between general and specific expert testimony (*Commonwealth v. Trowbridge* (Mass.1995), p. 420). Following the logic of *Trowbridge*, the trial court in *Allen* allowed the defense expert to testify “generally about proper and improper interview techniques,” to testify that children are more suggestible than adults, and to assert that the use of anatomically correct dolls “suggest to the complainant that the interviewer wants to hear about genitalia or sexual acts,” but did *not* allow the expert to “comment specifically on the questions employed in the videotape itself” (*Commonwealth v. Allen* (Mass. Ct. App. 1996), p.109).

The facts of *Allen* raise the question why *any* expert testimony on the suggestibility of children was justified. In upholding the trial court’s exclusion of testimony specific to the case, the appellate court noted that the questions that the expert was prepared to criticize “were not particularly leading, nor were they coercive....[T]here was no vilification of the defendant, no incessant questioning, no references to statements made by the other complainant, and no use of threats, bribes, or cajoling” (p. 108). The trial court’s focus on distinguishing between specific and general testimony obscured an inquiry as to what general testimony would tell the jury.

In sum, the argument that expert testimony on credibility invades the province of the jury has been emaciated by distinctions between specific and general testimony, between the suggestiveness of the interviewer and the suggestibility of the interviewee, and between the believability of the child and the beliefs of the expert. Rather than serve as a means of ensuring that expert testimony is helpful to the jury, the presumptive admissibility of testimony couched in general terms may make it easier to introduce testimony that is of little relevance to a particular case. Yet even when such testimony does not match the facts of the case, jurors are likely to be influenced by the expert’s implicit opinion that the child should not be believed.

In states where the distinction between general and specific expert testimony on credibility has essentially disappeared, defense experts are now being given the same latitude. In *State v. Malarney* (1993), a Florida appellate court overturned a sexual abuse conviction on the grounds that the defendant should have been allowed to introduce expert testimony that “the techniques used in interviewing the alleged victim were unreasonably suggestive and that the victim’s ‘affect’ was inconsistent with sexual abuse” (pp. 740-741). The dissenting judge argued that the expert’s opinion invaded the province of the jury, but the force of his argument was limited by the fact that the Florida

Supreme Court had held that an interviewer could testify that she believed the child had been abused (*Glendening v. State* (Fla.1988)). Recognizing this problem, the dissenter suggested that “perhaps the supreme court should revisit the *Glendening* opinion” and assess whether expert testimony on the credibility of child witnesses satisfies the prerequisites for scientific expert testimony (*State v. Malarney* (Fla. Ct. App. 1993) p. 742 (Dimitrouleas, J., dissenting)). Once the “invading the province” argument is dispensed with, the courts may recognize the need to regulate expert testimony on credibility through other rules.

### **Telling the Jury What They Already Know**

In order to reach the jury, an expert must be prepared to tell the jury something they don’t already know. This requirement is derived from the rules regarding the admissibility of expert testimony and the exclusion of prejudicial evidence. In the federal courts, expert testimony is inadmissible unless it “will assist the trier of fact to understand the evidence or to determine a fact in issue” (Federal Rules of Evidence 702, 1999). As the Fourth Circuit has explained “[T]he court should consider whether the testimony is within the common knowledge of the jurors. This type of evidence, almost by definition, can be of no assistance to a jury” (*United States v. Harris* (4th Cir. 1993) p. 534). *Harris* and a number of other courts have upheld the exclusion of expert testimony on the accuracy of adult eyewitnesses on the basis that jurors are already generally aware of the dangers of misidentification (*United States v. Larkin* (7th Cir. 1992); *United States v. Daniels* (7th Cir. 1995); *United States v. Shay* (1st Cir. 1995); *United States v. Kime* (8th Cir. 1996)). Most state courts follow a similar rule for admitting expert testimony, and many state appellate courts have similarly upheld the exclusion of expert testimony on eyewitness identification (*State v. Long* (N.J. 1990); *People v. Gibbs* (N.Y. 1990); *Utley v. State* (Ark. 1992)).

Another basis for excluding expert testimony that fails to teach the jurors what they don’t already know is that it will mislead or confuse the jury, or that it is simply a waste of time (Federal Rules of Evidence 403, 1999). As the helpfulness of the expert decreases, the potential to mislead the jury looms large. Jurors may read between the platitudes and infer that the expert is testifying on behalf of the defense because she believes the eyewitness is mistaken. Indeed, this is precisely what a good defense attorney offering an expert on behalf of her client hopes will happen. Therefore, the Seventh Circuit has held that a trial court’s decision to bar expert testimony on adult eyewitness identification on the grounds that the jury was already generally aware of the dangers of misidentification was justified under *either* 702 (assisting the jury) or 403 (misleading the jury) (*United States v. Curry* (7th Cir. 1992) p. 1051).

Some state appellate courts have upheld exclusion of expert testimony on children’s suggestibility on the grounds that jurors already believe that young children are suggestible (*State v. James* (Conn. 1989), *State v. Swan* (Wash. 1990), *State v. Ellis* (Me. 1996)). Ironically, expert testimony that is framed in generalities so as to avoid the challenge that it invades the province of the jury is especially susceptible to the claim that the expert is not telling the jury anything new. For example, in *State v. Ellis* the proffered expert was prepared to inform the jury that “young children are more susceptible to suggestions than older children or adults, that children will sometimes give

an answer they think is expected, and that leading questions increase the possibility of suggestion” (p. 753). The Supreme Court of Maine upheld exclusion of the testimony on the grounds that it is common knowledge.

If experts can identify a misconception common among lay people regarding credibility, their testimony is more likely to be admitted. Courts that have approved the admissibility of expert testimony on adult eyewitness identification have emphasized the extent to which some research findings regarding eyewitness accuracy “contradict the expectations of the average juror” (*People v. McDonald* (Cal. 1984), p. 721; see also *United States v. Smith* (6th Cir. 1984), p. 1106 [expert testimony helpful because it would “question common-sense evaluation”]). For example, in allowing Professor Michael Leippe to testify regarding the potential errors of adult eyewitnesses, the district court in *United States v. Norwood* (D.N.J. 1996) emphasized that the research findings ran counter to what jurors usually believe: Leippe discussed studies finding that the presence of weapons reduces eyewitness accuracy (rather than increases it), extreme stress impairs memory (rather than enhances it), and increased confidence does not increase accuracy (contrary to jurors’ heavy reliance on confidence as a measure of veracity).<sup>1</sup>

In contrast to experts in adult eyewitness cases, experts in children’s suggestibility have rarely if ever argued that jurors harbor misconceptions about children’s reliability. Indeed, there is little evidence that jurors fail to recognize the greater suggestibility of younger children.<sup>2</sup> Experimental psychologists often attack “myths” regarding children’s suggestibility (e.g. *State v. Sloan* (Mo. Ct. App. 1995)), but these are beliefs about children espoused by social workers and clinical psychologists, who are themselves challenging common-sensical skepticism of young children’s reports. Some experts have emphasized that highly suggestive and repeated questioning can create false reports that may fool a lay jury. But the admissibility question is not whether convincing false narratives can be created, but whether jurors’ believe they cannot be. If jurors are aware of the possibility of a false story that rings true, this is often as much as an expert can offer. The argument that expert testimony on children’s suggestibility is not helpful to the jury thus has some force; indeed, it appears to have greater empirical support than a similar argument against expert testimony on inaccuracies in adult eyewitnesses.

However, there are a number of reasons why the argument that jurors already understand the suggestibility of children will not stop courts predisposed to admitting expert testimony from doing so. First, the courts’ assertions regarding what jurors know about children are rarely if ever backed up by empirical research. This makes it easy for courts favoring the admissibility of such testimony to simply assert that jurors do not already know what suggestibility experts have to offer (*State v. Sloan* (Mo.Ct. App. 1996), *State v. Gersin* (Ohio 1996), *State v. Kirschbaum* (Wis. Ct. App. 1995)).

Second, expert testimony is more or less obvious depending on the way in which it is characterized. Expert testimony sounds less obvious when it is couched in terms of commentary on professional standards of interviewing rather than lay beliefs about suggestibility. In *State v. Gersin* (1996), an Ohio supreme court case in which the court upheld the admissibility of expert testimony

on children's suggestibility, the majority asserted that "most jurors lack the knowledge of accepted practices in interviewing child victims" (p. 494) whereas the dissent argued that "specialized knowledge" was unnecessary "to identify when an interview might have been overly suggestive" (p. 498). Recall that attacks on the interviewer rather than the credibility of the witness also appear less invasive of the jurors' province. Expert testimony that criticizes interviewers rather than the interviewees thus moves from the jury's province to the experts'.

Experts in jurisdictions where specific discussion of the particular case is forbidden may find it more difficult to avoid discussing the obvious generalities, but could frame their discussion as a description of specific research rather than a summary of general conclusions. Jurors may understand that younger children are more suggestible than older children but be unable to predict the outcome of specific studies examining age effects.

Third, it is unclear just how much (or how many) jurors must understand in order for an expert's testimony to be characterized as unhelpful. The Advisory Committee notes to the Federal Rules of Evidence regarding the rule of admissibility for expert testimony suggests that expert testimony is unhelpful only if the "untrained layman" could determine the issue "to the best degree" without the help of the expert. Certainly the average suggestibility expert can tell jurors *something* they didn't fully understand. In *People v. McDonald* (1984), the California Supreme Court case that looked favorably on expert testimony on eyewitness identification, the court approved discussion of facts that "may be known only to some jurors, or may be imperfectly understood by many, or may to contrary to the intuitive beliefs of most" (p. 720). Certainly there are *some* jurors who harbor misconceptions about child witnesses.

Prosecutors opposing expert testimony on suggestibility are unlikely to push too hard on the issue of what jurors already know, lest their own experts be barred from testifying. Expert testimony regarding the behavioral consequences of sexual abuse has been criticized on the grounds that jurors already understand that sexual abuse has negative behavioral consequences (*People v. Dunkle* (Pa. 1992)). Rehabilitative expert testimony, which rebuts defense arguments that factors such as delays in reporting prove allegations false, has been criticized on similar grounds (Mason, 1995). Although there is some empirical support that jurors have misconceptions about sexual abuse (Morison and Greene, 1992), as experts qualify their statements in order to accurately characterize the available research (Lyon, in press, a), their testimony sounds more like the average jurors' understanding. That is, when an expert conservatively states that "many" (rather than "most") victims delay, her testimony comes close to merely affirming what a lay person might intuit about sexual abuse. A stringent standard for qualifying as expert testimony that tells the jury something they don't already know would thus place greater limitations on experts offered by both defense and prosecution.

### **Scientific Testimony**

In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the United States Supreme Court held that in order for scientific expert testimony to be admissible under the Federal Rules of Evidence, the theory or technique upon which the expert's testimony is based must be both reliable and relevant.

In order to be “reliable” (scientists would prefer the term “valid”) the expert’s testimony must be grounded in the methods and procedures of science. Specifically, the court should consider whether the expert’s theory or technique can (or has been) tested, whether it has been subjected to peer review and publication, its rate of error, and its general acceptance within the relevant scientific community. Under the Frye standard (*Frye v. United States*, 1923), which had been adopted by most federal courts prior to Daubert, a court would simply consider the last of the Daubert factors—the “general acceptance” of the theory or technique—in deciding whether to admit scientific expert testimony. Daubert requires judges to defer less to expert’s professional peers and act more like “amateur scientists” in evaluating the admissibility of expert testimony (*Daubert v. Merrell Dow Pharmaceuticals* (1993), p. 600 (Rehnquist, C.J., dissenting)).

Although there was language in Daubert suggesting the Court believed it was liberalizing the admissibility of expert testimony, and a number of commentators echoed this belief, the opinion does not seem to have had this effect. Theoretically, the opinion opened the door to testimony that was not yet generally accepted by the scientific community. For example, an expert might testify to a theory that had been published but was not a consensus view among scientists. In practice, however, the opinion has enabled the courts to take a closer look at proffered expert testimony, and with a longer list of factors, any of which can lead to exclusion of the expert’s testimony. The Supreme Court’s opinion in *General Electric Co. v. Joiner* (1998) illustrates such an approach. The trial court had excluded the experts’ testimony after considering the applicability of the studies upon which the experts relied to the facts of the particular case. The Court of Appeals rejected the trial court’s approach, holding that the court should not “make independent scientific judgments on the basis of individual studies” (*Joiner v. General Electric* (11th Cir. 1996), p. 532). The Supreme Court held that the appellate court was not sufficiently deferential to the trial court’s judgment, and approved the trial court’s study by study analysis.

On its face, testimony on suggestibility would appear to be based on reliable scientific knowledge. Kovera and Borgida (1998) have argued that “expert evidence on child witness memory probably would be admissible under Daubert” because “the psychological research on this topic is reliable: it is grounded in scientific methods, has been subjected to peer review, and is generally accepted by the relevant scientific community” (p. 189). Suggestibility research is conducted by extremely well-respected developmental psychologists, has been published in the highest quality peer-reviewed psychological journals, and summarized in several influential books published by the American Psychological Association (Ceci & Bruck, 1995; Poole and Lamb, 1998). On the other hand, Holmgren (1997) has argued that because of difficulties with generalizing the research to actual cases, error rates are unknown, there are no standards for how the research should be conducted, and the relevance of the research is not generally accepted.

Surprisingly, there is little case law supporting the scientific reliability of suggestibility testimony. The Washington Supreme Court held that a suggestibility expert’s opinion was not supported by the scientific community (*State v. Swan*, 1990). However, social scientists since the turn of the century have generally agreed that young children are suggestible (Ceci and Bruck, 1993), and a 1979 survey of 16 psychological experts who had published research on eyewitness reliability

found that when asked, “If a young child (about 8 years) is questioned by police or in court, which statement best reflects your view of the type of replies the child might give?” only one of the experts responded that the child was likely to respond accurately, and 13 of the 16 believed that the child was “likely to reply the way” she thought “the questioner wants” (Yarmey & Jones, 1979) (the other two believed the child would say “I don’t know”). More recently, in at least two high-profile child sexual abuse cases, dozens of leading researchers in developmental and cognitive psychology have signed onto summaries of the suggestibility research designed to inform the courts of the danger that coercive interviewing may elicit false allegations of abuse (Committee of Concerned Social Scientists, Bruck & Ceci, 1995; Scientists for the Accurate Communication of Data, 1998).

The Supreme Court of Maine rejected a suggestibility expert’s testimony on the grounds that there was a lack of “valid empirical research establishing a causal relationship...between particular techniques...and inaccuracies in reporting” (State v. Gordius (1988), p. 8). But Gordius was decided in 1988, and as the Scientists for the Accurate Communication of Data (SACD) informed the Supreme Court of Massachusetts in 1998, “[i]t was only at the beginning of the 1990s that researchers in the field of children’s suggestibility began to systematically examine the effects of interview bias, repeated questions, repeated interviews, stereotype induction, anatomically detailed dolls, peer pressure, and selective reinforcement on the accuracy of young children’s reports” (SACD, 1999, p. 6). According to this group of experts, the long-standing consensus among research psychologists is now being supported by systematic research.

The Eighth Circuit Court’s original opinion in *United States v. Rouse* (1996) has been cited as supporting the admissibility of suggestibility testimony (Bruck, Ceci, & Hembrooke, 1998; Kovera & Borgida, 1998). However, the opinion is a mixed blessing for defendants. The original opinion referred to the general acceptability of research by Ceci, Bruck, and others, but was vacated and a rehearing was held. On rehearing, the appellate court upheld the trial court’s ruling that the testifying expert (Dr. Ralph Underwager) “should not embellish his own research and opinions by telling the jury about the research and writing of other psychologists because these works have not produced a consistent body of scientific knowledge” (*United States v. Rouse* (8<sup>th</sup> Cir. 1997), p. 571). What is unclear is why the court would allow an expert to discuss any research at all if there was no “consistent body of scientific knowledge.” One could speculate that the trial court did not perceive the expert’s description of his own findings as “scientific,” and therefore believed them exempt from Daubert. Such an approach has now been rejected by the Court, which recently held that no expert testimony is categorically exempt from Daubert’s requirements (*Kumho Tire Co., Ltd. v. Carmichael*, 1999). It is therefore unlikely that Rouse’s holding will facilitate the admissibility of expert testimony on suggestibility.

Despite the lack of case support thus far, a future finding that suggestibility research qualifies as scientific knowledge seems likely, if only because courts in general are exhibiting an increased receptivity to expert testimony on children’s suggestibility. Courts that have held such testimony ought to be admitted have simply not considered whether it meets the requirement of scientific expert testimony. When they do, it will not be difficult for them to justify a finding that much of the testimony is based on scientific knowledge. This is currently the case with expert testimony on adult

eyewitnesses. Courts that admit such testimony can emphasize the fact that the expert was able to “determine that each study scrupulously adhered to scientifically valid methodologies, was capable of replication and objective measurement, and was subjected to discriminating peer review prior to publication” (United States v. Norwood (D.N.J. 1996), p. 1136). In some cases, prosecutors have simply conceded that eyewitness research is scientific knowledge (United States v. Hall (7th Cir. 1999). Although I agree with Holmgren (1997) that the generalizability of the research to actual abuse cases subjects it to criticism, I do not believe that courts will disqualify it as “scientific knowledge” on this basis. As I argue below, I believe problems in generalizability will limit the admissibility of expert testimony on other grounds.

Even if the courts will inevitably hold that suggestibility research is scientific knowledge, this does not make the Daubert analysis superfluous. First, Daubert provides a foundational prerequisite for the admissibility of expert testimony on subjects that have been the subject of scientific research. Experts who seek to testify on children’s suggestibility must provide a scientific basis for their testimony before they will be allowed to take the stand. As Ceci and Bruck (1995) note, ethical experts should be cognizant of the relevant research in their area of expertise. Ignorance of the research will be a basis for exclusion.

Details of the research, rather than summary conclusions, are a necessary prerequisite to admissibility. The research itself must be described in sufficient detail for the court to do more than blindly defer to the expert’s credentials. In United States v. Kime (1996), the Eighth Circuit held that a review of eyewitness research, which supported its conclusions with summary citations to the original research, said “nothing whatsoever to the district judge attempting to assess the credibility of the research underlying [the expert’s] opinions” (p. 883). Other courts have similarly barred eyewitness experts from testifying when they could not detail the methodology of the research underlying their assertions (United States v. Brien (1st Cir. 1995); United States v. Downing (E.D. Penn. 1985)).

Research details are essential for a court to perform the next steps in the Daubert analysis. The court will determine whether the research constitutes scientific knowledge *and* whether the research provides a sufficient foundation for the expert’s conclusions. Suggestibility research certainly has all the trappings of scientific knowledge, as noted above. The latter question, however, is important insofar as testifying experts may over claim the results of research, either because of their own predilections, or in order to reach a conclusion favorable to the party for whom they are testifying. As social scientists recognize, there are two kinds of validity: internal and external. A study may be scientifically sound on its own terms, and thus be internally valid, but be inapplicable to a particular situation or individuals, and thus be externally invalid as applied.

In Joiner, the studies upon which the experts relied for their conclusions were clearly scientific--they were published peer-reviewed articles utilizing well-respected methods. However, the trial court barred the experts’ from testifying--both as to the research they cited and the conclusions they reached--because it felt that their conclusions could not be extrapolated from the research they offered. Because Daubert had warned that the courts are expected to analyze scientific

experts' methodology and not their conclusions, the Eleventh Circuit criticized the trial courts' willingness to second guess the conclusions drawn by the proffered experts. However, the Supreme Court noted that "conclusions and methodology are not entirely distinct from one another" (*General Electric Co. v. Joiner* (1997), p. 519). Sometimes, the method by which an expert reaches her conclusions is invalid. As the Supreme Court explained: "[t]rained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion offered" (*id.*). Without using the term "external validity," the Court recognized that prudent extrapolation is an aspect of appropriate scientific methodology.

Perhaps experts could evade findings that their extrapolations were unscientific if they simply refrained from extrapolating from the research to the particular case. They could offer to discuss the research, and let the jury draw its own conclusions. Such an approach has been advocated by some experts for other reasons. It allows experts to avoid the presumptive inadmissibility of specific commentary on credibility (the first objection discussed in this chapter). It allows experts to participate in cases with which they are relatively unfamiliar, enabling them to remain objective (and certainly increases the appearance that they are not taking sides). Finally, it acknowledges the difficulty that in order to draw conclusions, the expert must inject her own standards of proof. For example, the conclusion that a child's statements are "unreliable" relies on a subjective judgment regarding the likelihood that a statement must be true in order to be judged as true.

The expert who avoids excessive extrapolation, however, may run afoul of the second prong of the Daubert standard. In addition to qualifying as scientific knowledge, the information offered by the expert must assist the jury. And although "assisting the jury" has long been recognized as a prerequisite to admitting expert testimony, the opinion in Daubert helped to elaborate on the helpfulness inquiry in a useful fashion. Daubert described the assistance standard in terms of "fit": whether the proffered expert testimony "is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute" (*Daubert v. Merrell Dow Pharmaceuticals* (1993), pp. 2795-2796). If the research the expert describes cannot be appropriately applied by the jury to the particular case, the expert's testimony fails to "fit" and should be excluded.<sup>3</sup> The external validity problem thus persists even if the expert refrains from drawing conclusions; it simply changes from a scientific reliability problem to a "fit" or relevance problem. If the expert draws an inappropriate conclusion from the research, the testimony is excluded as unscientific. If the expert's testimony would lead the jury to draw an inappropriate conclusion, the testimony is excluded for its lack of fit.

Whereas the reliability question focuses the court's attention on the research, the fit question focuses the court on the facts. The expert must not only provide the necessary research, but also be able to link the research to facts in the case. In a leading federal case on the admissibility of expert testimony on eyewitness identification, the Third Circuit held that "A defendant who seeks the admission of expert testimony must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration. The offer of proof should establish the presence of factors (e.g. stress, or

difference in race or age as between the eyewitness and the defendant) which have been found by researchers to impair the accuracy of eyewitness identification” (United States v. Downing (3rd Cir.1985), p. 1242). The court noted that a “[f]ailure to make such a detailed proffer is sufficient grounds to exclude the expert’s testimony” (id.).

The inquiry into fit is a searching one. In a number of federal cases dealing with exposure to toxic substances and subsequent injuries, appellate courts have upheld the exclusion of expert testimony when the experts assumed facts that were not supported by the record. An expert cannot testify that a particular amount of chemical A causes disease B, unless there is evidence that the plaintiff ingested chemical A (Sorensen v. Shaklee Corp. (8th Cir. 1994) p. 648), evidence that the plaintiff ingested the particular amount of A necessary to cause B (Moore v. Ashland Chemical, Inc. (5th Cir.1998) p. 278), and evidence that the plaintiff ingested chemical A before contracting disease B (Heller v. Shaw Industries, Inc. (3rd Cir. 1999), pp. 149-150; Porter v. Whitehall Laboratories, Inc. (7th Cir. 1993) p. 616). In the context of children’s suggestibility, these decisions suggest that in order to testify that various types of suggestive techniques lead to false responding, there must be evidence that the suggestive techniques were indeed used, that they were used in sufficient amounts to lead to false responding, and that the suggestive techniques predated the child’s initial allegations of abuse.

In several state appellate cases, courts have upheld the exclusion of expert testimony where the proffered experts could only speculate that inappropriate questions were asked (State v. Kirschbaum (Wis. Ct. App. 1995); State v. Mazerolle (Me. 1992); State v. Russell (Me. 1990); Stringer v. Commonwealth (Ky. 1997)). An adequate assessment of fit would go still further: the types of “inappropriate “ questions asked in the case must match the types of suggestive questions asked in the research.

If there is no factual basis for asserting that interviews were suggestive, experts might resort to commenting on the “typical” interview. What is “typical” is itself a factual issue, however, requiring reference to the observational research on forensic interviewing. Because observational research has failed to document that the use of pretense and guided imagery, stereotype induction, or a number of other suggestive factors are “typical” in forensic interviews, research on these issues would not be admissible (Lyon, 1999). Moreover, generalizations about the “typical” interview should not be allowed when interviews are available. In State v. Hulbert (Iowa 1992), after hearing a fourth-grade program on “good, bad, and confusing touches,” a ten-year-old girl told her school counselor that her custodial father had abused her on several occasions. Shortly thereafter, she was interviewed on videotape by a social worker. At trial, the court allowed the expert testifying for the defense (Dr. Ralph Underwager) to testify as to “techniques generally employed by child abuse investigators,” including their “tendency...to interview children in a way that confirms the investigator’s own hypothesis as to what occurred” (p. 334). What is particularly troubling about the expert’s testimony is that the videotape was available and offered into evidence, but was excluded due to the objections of the *defendant*. If specific assertions about inappropriate interviewing are barred by the jury’s inability to see the interview for themselves, then generalizations about interviewing ought to be barred as well.

Whereas the party offering the expert testimony must provide foundation for fit, the party opposing the expert may argue that other facts lead to a lack of fit. In *United States v. Nguyen* (D.N.J. 1992), the court excluded expert testimony on errors in cross-racial identification despite the fact that the eyewitness and the defendant were of different races. The court did so on the grounds that the research on cross-racial identification failed to fit the facts of the case, given the witness' greater exposure and familiarity with the defendant's race, the witness' attentiveness to the defendant's features (knowing that he would have to identify him later), and the length of exposure (see also *United States v. Downing* (E.D. Penn. 1985), where the court excluded expert testimony on eyewitnesses on similar grounds).

There are a number of grounds upon which research on children's suggestibility will fail to fit individual cases. Most of the recent research on children's suggestibility has focused on the preschool child. Given the "dramatic developmental trends" often found within age ranges from three to six years of age (Leichtman & Ceci, 1995, p. 568), much of the research is inapplicable to the older child. For example, special attention should be paid to the age of the child when an expert hopes to criticize the use of anatomically correct dolls, because the critical research has focused on preschool children (Bruck, Ceci, & Francoeur, 1997; Bruck, Ceci, Francoeur, & Renick, 1995; DeLoache & Marzolf, 1995), whereas research examining 5-year-old and older children has found substantially lower rates of error (Saywitz, Goodman, Nicholas, & Moan, 1991). Indeed, the lead author of much of the most critical research has emphasized the importance of age differences in reconciling otherwise inconsistent findings on the rates of false positive reporting by children interviewed with the dolls (*Commonwealth v. Amirault*, 1998 [testimony of Maggie Bruck]). Expert testimony that the use of dolls with 8-year-olds and older children is unreasonably suggestive (*Commonwealth v. Allen* (Ct. App. Mass. 1996), *State v. Erickson* (Minn. Ct. App. 1990)) is simply not supported by the available research.

One court that has recognized the lack of fit between expert testimony and cases with older children is *State v. Biezer* (Mo. Ct. App. 1997), in which the defendant was convicted of sexually assaulting his 11-year-old grandniece and two of her friends, 11 and 17 years old. The court was confronted with the same expert whose proffered testimony was the basis for reversal in *Sloan*, and bound by *Sloan's* holding that the expert's opinion regarding the appropriateness of questions asked by investigative interviews is "evidence only an expert could give not within the knowledge of a juror" (*State v. Sloan* (Mo. Ct. App. 1995), p. 597). Nevertheless, the court upheld exclusion of the expert testimony, emphasizing that the victims were older than the 6-year-old child in *Sloan*.

Another important factor is whether the interviewers encouraged children to pretend or imagine that the events in question had occurred. Some of the most impressive demonstrations of suggestibility in young children were in studies that encouraged children to fantasize about fictitious events over multiple interviews (among other suggestive techniques) (Bruck, Hembrooke, & Ceci, 1997; Ceci, Loftus, Leichtman, & Bruck, 1994). In contrast, Ceci and a group of social scientists called Scientists for the Accurate Communication of Data (SACD) (1998) have noted that if there is an "air of seriousness" in the interviews it is "very difficult to elicit consistent false reports from young children" (p. 24). The SACD cites a study by Shyamalan and Lamb (1995), who found

virtually no false reporting among preschoolers who were asked whether a man who had visited their classroom four months prior to the interview had gotten angry and yelled at them (he had not). Only one child out of 24 ever made a false claim; he did so at the first interview, and consistently denied it in subsequent interviews. Shyamalan and Lamb and the SACD emphasize that at the outset of each interview the interviewer told the child to “[t]ry to remember if it REALLY happened to you” and that “I need to make sure that you tell me the truth” (SACD, 1998, p. 24; see also Myers, Saywitz, & Goodman, 1996, for a similar discussion of Shyamalan and Lamb’s study). Other factors that are important in assessing the fit of suggestibility research are discussed elsewhere (Ceci & Bruck, 1995; Holmgren, 1997; Lyon, 1999; Westcott, 1999).

The state courts are free to reject the Daubert standards, because the case interprets the Federal Rules of Evidence and the states have their own rules. The reception has been mixed: some states have in fact rejected Daubert; others have found it persuasive (Faigman, Saks, Kaye, and Sanders, 1997).. Rejection of Daubert should not stop the state courts from considering the reliability and relevance of expert testimony on suggestibility, however, because the same approach discussed here under Daubert can be taken under universally accepted rules of evidence. State courts may exclude expert testimony on suggestibility that fails to fit the facts of the case because it does not assist the jury, because expert’s testimony has “little relevance or probative value” (State v. Mazerolle (Me. 1992) p. 72), or because it would confuse or mislead the jury (State v. Biezer (Mo. Ct. App. 1997); State v. Russell (Me. 1990)). The specifics of Daubert may not be universally adopted by the states, but rules requiring that expert testimony assist the jury, be relevant, and not be misleading are ubiquitous.

As with the other objections to expert testimony discussed in this chapter, the Daubert inquiry is limited by the fact that issues such as reliability and fit are matters of degree without bright lines. Courts that are eager to admit expert testimony can justify findings that expert testimony is sufficiently scientifically reliable and fits enough to reach the jury. They can emphasize language in the case law that these standards are “not that high” (In re Paoli Railroad Yard PCB Litigation (3rd Cir. 1994), p. 745), and note Daubert’s admonition that expert testimony can always be tested through cross-examination and the other traditional tools of the adversary process. Nevertheless, there are some bright lines in Daubert and its progeny. The cases establish clear procedural guidelines that must be followed before the court can even consider admitting expert testimony on suggestibility: the research must be provided, and the fit between the research and the facts of the case must be specified. With the research in front of it, the court can see for itself the suggestive methods employed, the age of the subjects, and the inclusion of factors important in understanding the dynamics of sexual abuse allegations (such as fear, loyalty, and embarrassment). The well-informed court can overcome predispositions to admit testimony based on popularly held intuitions about children’s suggestibility or popularly received impressions of recent research. The court’s analysis will thus match what Bruck and Ceci call upon practitioners to do: to make “certain that the studies they call upon resemble the case in terms of the types of acts, the severity of suggestions, and so on. Failure to do this could lead to miscarriages of justice” (Bruck & Ceci, 1999, pp. 436-437).

## Conclusion

Recent developments in the law indicate that expert testimony on suggestibility can no longer be blocked by outdated assertions about the “province of the jury,” and that an increasing number of courts are receptive to such testimony. Increasing receptivity to such testimony requires increased scrutiny of the scientific basis for the testimony and the applicability of the testimony to the individual case.

Juries likely understand that young children are susceptible to coercive and suggestive questions. Experts who can offer more than platitudes may assist the jury, assuming there is a sound scientific basis for going beyond the obvious. As an example of the way in which the standards outlined here could be applied, consider the case discussed in the introduction: *State v. Sloan* (Mo. Ct. App. 1995).

Under the analysis outlined here, the party offering the expert must provide the court with the research underlying the expert’s conclusions. Most of the best-known research on suggestibility in the past decade is simply inapplicable to the facts of *Sloan*. It would be misleading to discuss research in which children are told to pretend or imagine how events occurred, are repeatedly reminded that the events did in fact occur, are told that other children have revealed wrongdoing, and are informed of other misdeeds by the alleged wrongdoers (see Bruck & Ceci, 1999, for a review of much of this research).

The expert’s condemnation of “affirms” (questions that inform the child she is on the right track) and “repeats” (questions that repeat back to the child information from the previous question) must be clarified and supported. The scientific basis for such a classification and criticism of these types of questions is unclear. Perhaps the expert intended to criticize the use of selective reinforcement or bribery for particular responses; this assertion conforms with intuition, basic principles of reward and punishment, and has some recent empirical support (Garven, Wood, & Malpass, 1999). On the other hand, if the expert intended to criticize reinforcement generally, there is some evidence that supportiveness may *increase* children’s accuracy and resistance to suggestion (Carter, Bottoms, & Levine, 1996; Davis & Bottoms, 1998). Perhaps the expert intended to refer to the literature on repeated questions (e.g. Poole & White, 1991; 1993), though the point of that literature is that repetition of questions implicitly tells the child that her initial response is incorrect, which is the opposite of the supposed effect of a “repeat.” Only attention to the research upon which the expert relies and the specifics of the interview enable the court to adequately assess the usefulness of the expert’s testimony.

The expert in *Sloan* also criticized the use of questions like “Where did he touch you” (a wh-question) and questions that can be answered “yes” or “no (yes/no questions). Psychologists have long recognized that as one moves from open-ended questions (questions that require more than one word to answer) to specific questions (which include wh- questions and yes/no questions) the proportion of errors increase. However, they emphasize that the total amount of information obtained also increases, particularly when questioning young children (Ceci & Bruck, 1993). Hence,

interviewers must balance “the need for a full and detailed account against the need to minimize the potential for error” (Ceci, Powell, & Crossman, 1999, p. 56). To the extent that some psychologists argue that specific questions should never be asked, this reflects a subjective value judgment regarding the appropriate tradeoff between false disclosures and false denials.

The expert’s labeling a wh-question as inappropriately leading appears to express a value judgment. On the other hand, her assertion that one “cannot judge the validity” of children’s answers to yes/no questions is expressed as a factual claim. Note that this claim is much different than the well-supported argument that yes/no questions increase the number of errors. Rather, the claim asserts that children’s answers to yes/no questions are uninformative.

I know of no evidence to support such a claim. It is clearly unsupportable given the child’s age (6 years) and the length of time between the alleged event and her first report of abuse (1 day, with interviews 5 days and 3 weeks later). The literature on yes/no questions is huge, and I discuss much of it elsewhere (Lyon, in press, b). A fairly representative study, however, and one that is referenced by other reviews of the literature (Bruck & Ceci, 1999), is Carole Peterson’s work on children’s memories for traumatic injuries resulting in an emergency room visit. Peterson and her colleagues have calculated the relative accuracy of responses to free recall questions, wh- questions, and yes/no questions (Peterson & Bell, 1996; Peterson & Biggs, 1997). They find the usual pattern: free recall is most accurate, whereas wh- questions increase the rate of error, and yes/no questions elicit the highest number of errors. However, also consistent with other research, supplementing free recall questions with wh- questions increases the number of accurate information children provide.

Among the 5-year-olds (the age group closest in age to the 6-year-old child in Sloan), children were near 100% accurate in responding to free recall questions (Peterson & Bell, 1996), 97% accurate in responding to wh- questions, and 80% accurate in responding to yes/no questions (Peterson & Biggs, 1997). Children’s accuracy improved appreciably with age, highlighting the limited applicability of work on preschoolers to school aged children.

Careful review of the suggestibility research thus has a number of advantages in assessing the admissibility of expert testimony. First, experts must tone down their conclusions: here, the best an expert could say is that answers to yes/no questions are “less accurate” than answers to free recall or wh- questions. It is clearly not justifiable to claim that answers to wh- questions and yes/no questions are invalid. Value judgments disguised as scientific opinion can be excluded.

Second, my scrutiny of the research on wh- and yes/no questions highlights the need for the courts to require that the foundation for expert testimony consist of the original research, rather than summaries of the research (United States v. Brien (1st Cir. 1995); United States v. Downing (E.D. Penn. 1985); United States v. Kime (8<sup>th</sup> Cir. 1996)). In a review of the suggestibility research published in the latest Annual Review of Psychology, Bruck and Ceci (1999) highlight Peterson’s work when discussing increased error associated with specific questions. Their discussion contains an unfortunate error: they assert that children in Peterson’s sample were only 45% accurate when responding to wh- and yes/no questions (compared to 91% for free recall). The mistake exaggerates

the unreliability of specific questions, and could lead courts unfamiliar with the original research to allow experts to condemn the use of such questions when questioning children in abuse cases.

Research on the suggestibility of children will continue to be a popular subject for scientific research. It has generated an enormous amount of useful information that should be disseminated to policymakers and professionals who question children. My hope is that it will improve the procedure by which children are interviewed and prepared for trial. Unfortunately, however, trials will continue to function as adversarial battles that polarize positions and potentially distort scientific findings. Expert testimony on suggestibility may inform, but it can easily mislead. The courts must take seriously their role as gatekeepers.

### Endnotes

<sup>1</sup> Even some of the most often repeated assertions about eyewitness identification are subject to question. For a recent criticism of the assertion that confidence is unrelated to accuracy, see Lindsay, Reed, and Sharma (1998).

<sup>2</sup> This need not translate into a greater reluctance to convict when the witness is a child, because there are other reasons besides suggestibility why witnesses may be disbelieved. Older children may be less credible than younger children in some circumstances because lay people believe them more likely to lie, or believe that they are more likely to have invited or consented to the alleged abuse.

<sup>3</sup> It is sometimes said that “fit” is essentially synonymous with relevance, which concerns the tendency of a piece of evidence to make a matter in issue more probable or less probable than it would be without the evidence (Federal Rules of Evidence 402, 1999). I believe it is useful to refer to the issue as “fit” rather than “relevance,” however, because of the higher standards established for the admissibility of expert testimony than for evidence more generally. An expert’s testimony might be marginally relevant but nevertheless be excluded as insufficiently fitting the facts to be helpful to the jury.

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