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Expert Testimony on the Suggestibility of Children

Does It Fit?

Thomas D. Lyon

State v. Sloan (1995 [Mo. Ct. App.]) was a criminal case of child sexual abuse. A.D., the 6-year-old alleged victim, was dropped off on Friday by her mother at her grandmother’s house, where the child’s aunt Evelyn and the defendant also resided. Two days later, on Sunday, the child’s aunt Anita phoned the child’s mother and told her that something was wrong. A.D. then told her mother that the defendant had sexually assaulted her the day before. The mother called the child abuse hot line. On Thursday, 5 days after the alleged abuse, a social worker and a 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 his finger in her punkie,” that she had touched his “wiener,” and that defendant “had placed her on his wiener.” Approximately 3 weeks later, the police detective reinterviewed 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 her 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 appellate court held 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, 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 the expert 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 indicating that 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). The appellate court opinion had two effects. First, the defendant was entitled to a retrial, at which the expert testimony on suggestibility would be admissible. Second, future trial courts reading the opinion would be more inclined to admit this kind of expert testimony.

Sloan reflects a new trend among American courts toward admitting defense expert testimony on the suggestibility of children (Myers, 1997). Traditionally, psychological experts in child abuse cases have been clinical psychologists retained by the prosecution to explain the dynamics of child sexual abuse (Lyon & Koehler, 1998) or, more recently, to lay the foundation for special courtroom procedures designed to minimize the trauma of testifying (McAuliff & Kovera, this volume). Of late, experimental psychologists have entered the fray to explain how children may be led astray by leading and coercive questioning. Typically, these experts are retained by the defense, but prosecutors have also presented their own suggestibility experts to rebut the claims of defense experts.

The courts’ receptivity to expert testimony provides researchers with a distinct opportunity to educate and influence legal decision makers. At the same time, researchers’ new-found influence brings with it additional responsibilities, which require careful attention to detail and a commitment to rigorous and transparent research methods.
The case is quite unlike the multivictim ritual abuse day-care cases that have caught the public’s eye and inspired a rash of research examination of both science and law. Consider the facts of Sloan. In some of these cases, large numbers of asymptomatic children were repeatedly questioned in highly coercive ways months after their last contact with the day-care providers (Ceci & Bruck, 1995). In contrast, in Sloan 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 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 detailed dolls. In short, the case was an unexceptional, routine sexual abuse case that criminal attorneys see every day. Nevertheless, an expert agreed to testify for the defense, and the conviction was overturned because the trial court did not allow the expert to testify.

Whether the courts ought to admit defense expert testimony on suggestibility raises issues regarding the law of expert testimony and the psychology of children. Commentators have argued that because most experts agree on the factors that influence children’s suggestibility, and because the research on suggestibility is scientific, expert testimony on suggestibility is scientifically valid and therefore admissible (Kovera & Borgida, 1998). Their argument is based on two cases regulating the admissibility of expert testimony: Frye v. United States (1923 [D.C.Cir.]) and Daubert v. Merrell-Dow Pharmaceuticals (1994). Under Frye, scientific expert testimony is admissible if the expert’s methodology is generally accepted by other scientists in the field. Under Daubert, expert testimony is admissible if it is scientifically valid. Frye is the rule in many states and, until Daubert was decided, the rule in many federal courts (Mueller & Kirkpatrick, 2000). Daubert is now the rule in federal courts, but it incorporates the “general acceptance” test from Frye as part of its inquiry into what is scientifically valid. Under either standard, the goal of the courts is to admit good science and exclude junk science.

However, the more general rules regarding the admissibility of expert testimony, the relevance of evidence, and the exclusion of evidence that misleads the jury are at least as important as the definitions of good science in Frye and Daubert. These rules continue to apply whether a court follows Frye or Daubert. In assessing expert testimony on suggestibility, perhaps the most important consideration is fit: a rule of relevance whereby the expert’s testimony must fit the facts of the case. Expert testimony is prone to influence jurors even if the testimony is inapplicable to the facts of the case (Kovera, Gresham, Borgida, Gray, & Regan, 1997). The courts are appropriately cautious because of the risk that jurors may defer too much to experts and because jurors lack the skills to appraise expert testimony critically. Social scientists have raised concerns regarding the applicability of suggestibility research findings to typical cases of abuse (e.g., Garven, Wood, Malpass, & Shaw, 1998; Goodman, Emery, & Haugaard, 1998; Lyon, 1999; Saywitz & Lyon, 2002; Westcott, 1998). Much of the research both uses suggestive techniques that are atypical of 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). Attention to fit requires experts to tailor their testimony to match the facts of the case at bar.

In this chapter, I outline what I believe are the most useful means by which the courts should evaluate expert testimony on suggestibility. I will describe the various legal objections and note their limitations. First, I 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 this objection, and the resulting rules may actually encourage expert testimony that is less helpful and more misleading. Second, I 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 do not already know. Because laypeople probably understand that young children are suggestible, this objection has some force, but it is limited by the fact that expert testimony can almost always be packaged so as to transmit information of which the average juror is unaware. Third, I discuss the concern that expert testimony be scientifically valid, a requirement highlighted by
Given the quality of the scientific research on this topic, the courts have been surprisingly reluctant to admit expert testimony as scientifically valid. I argue that this situation will likely change. At the same time, *Daubert* provides a useful framework for requiring experts to describe the research on which they rely in greater detail so that the courts can assess admissibility intelligently. Finally, I consider the objection that expert testimony on suggestibility often does not fit the facts of the individual case, which is derived from the rules of relevance and helpfulness. I argue that this is the most important and compelling objection to some types of expert testimony. Experts who misapply research or assert facts beyond what research supports should not be permitted to testify.

**The Rule Against Invading the Province of the Jury to Assess Credibility**

One objection against expert testimony on suggestibility is that it concerns the credibility of witnesses, and expert testimony on credibility invades the province of the jury to assess the veracity of witnesses. The “province of the jury” objection has had an uneasy history. The argument was criticized long ago 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.

Recently, the argument that expert testimony commenting on the credibility of witnesses invades the province of the jury was considered by the U.S. Supreme Court in assessing the constitutionality of an evidentiary rule barring the results of polygraph tests (*United States v. Scheffer*, 1998). Although the majority opinion upheld the rule, only four of the justices accepted the argument 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]). Hence, a majority of the Supreme Court would reject the argument that expert testimony on credibility invades the province of the jury.

Nevertheless, the rule continues to exert some force. In spite of *Scheffer*, the Seventh Circuit Court of Appeals recently upheld the exclusion of expert testimony on the failings of eyewitnesses in part on 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*, 1999, p. 1107). State courts, which are not bound by federal cases interpreting the rules of evidence, have sometimes rejected expert testimony in child sexual abuse cases on similar grounds (e.g., *Commonwealth v. Ianello*, 1987 [Mass.]).

**Limitations on the Rule Against Invading the Province of the Jury to Assess Credibility**

On the federal level, several circuit courts of appeal have acknowledged an “increasing hospitality” toward the testimony of experts on adult eyewitness identification (*United States v. Brien*, 1995 [1st Cir.]; *United States v. George*, 1992, p. 1432 [9th Cir.]; *United States v. Harris*, 1993 [4th Cir.]). In part, this reflects a distinction that some courts have drawn between expert testimony that a particular witness is or is not credible (inadmissible) and expert testimony about the unreliability of eyewitnesses more generally (admissible). Specific opinions may invade the jury’s province, but generalities are admitted.²

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 Court of Appeals has queried, “as the expert applies his or her general opinions to the

² Of course, this distinction does not survive *Scheffer* (1998), because the expert in that case would have testified that a specific witness was being truthful in his responses to the polygraph. Nevertheless, the Court did not believe that the expert’s testimony would have invaded the jury’s province.
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, 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 on whether the child witness’s report was believable. This holding was not challenged on 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. However, the trial court did not allow the expert to criticize the practices used by the interviewer in the particular case. This holding was challenged on appeal, and the appellate court held that this was an error: Future experts can criticize methods of interviewing both in general terms and with respect to the case at bar. Contrast this to an Eighth Circuit Court of Appeals case decided one year previously, United States v. Kime (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. The puzzle for future trial courts is this: How is testimony regarding an in-court identification more specific than testimony regarding an interview? Why does the former invade the province of the jury but not the latter? 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, 1990 [Minn. Ct. App.]; State v. Kirschbaum, 1995 [Wis. Ct. App.]; State v. Malarney, 1993 [Fla. Ct. App.]). Some say they cannot (Commonwealth v. Allen, 1996 [Mass. Ct. App.]; State v. Steffes, 1994 [Mont.]).

A few courts have attempted to avoid 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 (Barlow v. State, 1998 [Ga.]; State v. Sloan, 1995 [Mo. Ct. App.]). 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 [was] directed at the activities of the witness” (p. 596). This position is problematic. Whether an interviewer’s questions are unreasonably suggestive depends to a large extent on the suggestibility of the child. The court’s distinction would mean that experts can testify to outside influences on a witness but not on equally important endogenous factors that affect the perception, memory, and sincerity of a child witness, both directly and in interaction with outside influences.

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 Court of Appeals 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 have argued that experts could properly testify as to the characteristics of sexually abused children in general, or 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 (1996 [Mass. Ct. App.]), 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, 1995, p. 420 [Mass.]). 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 detailed dolls “suggest[s] to the complainant that the interviewer wants to hear about genitalia or sexual acts,” but the court did not allow the expert to “comment specifically on the questions employed in the videotape itself” (Commonwealth v. Allen, 1996, p. 109).

The facts of Allen raise the question of 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 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, 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, 1993, p. 742 (Dimitrouleas, J., dissenting [Fla. Ct. App.])). Once the invading the province argument is dispensed with, the courts may recognize the need to regulate expert testimony on credibility through other rules.

In sum, the argument that expert testimony on credibility invades the province of the jury has been weakened 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.

The Rule Against Telling the Jury What They Already Know

In order to reach the jury, an expert must be prepared to tell the jurors something they do not already know. This requirement is derived from the rules regarding the admissibility of expert testimony and the exclusion of prejudicial evidence. Under Rule 702 of the Federal Rules of Evidence (2001), expert testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue.” Assessing the admissibility of expert opinion on the accuracy of adult eyewitnesses, the Fourth Circuit Court of Appeals explained that “the 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, 1993, p. 534). The Harris court and a number of other courts have upheld the exclusion of expert testimony on the grounds that jurors are already generally aware of the dangers of misidentification (United States v. Daniels, 1995 [7th Cir.]; United States v. Kime, 1996 [8th Cir.]; United States v. Larkin, 1992 [7th Cir.]; United States v. Shaw, 1995 [1st Cir.]). 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 (People v. Gibbs, 1990 [N.Y.]; State v. Long, 1990 [N.J.]; Utley v. State, 1992 [Ark.]).

Another basis for excluding expert testimony that fails to teach the jurors what they do not already know is that it will mislead or confuse the jury or that it is simply a waste of time, rendering it inadmissible under Federal Rule of Evidence 403 (2001). As the helpfulness of the expert decreases, the potential to mislead the jury looms large. Jurors may infer that the expert is testifying on behalf of the defense because the expert believes that the eyewitness is mistaken. Indeed, this is precisely what a good defense attorney offering an expert on behalf of his or her client hopes will happen. Therefore, the Seventh Circuit Court of Appeals has held that a trial court’s decision to bar expert testimony on eyewitness identification on the grounds that the jury was already generally aware of the dangers of misidentification was justified under either Rule 702 (assisting the jury) or Rule 403 (misleading the jury) (United States v. Curry, 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. Ellis, 1996 [Me.]; State v. James, 1989 [Conn.]; State v. Swan, 1990 [Wash.]). 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 this is common knowledge.

If experts can identify a misconception common among laypeople 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, 1984, p. 721 [Cal.]; see also United States v. Smith, 1984, p. 1106 [6th Cir.] [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 federal district court in United States v. Norwood, 1996 (D.N.J.) 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), that extreme stress impairs memory (rather than enhances it), and that increased confidence does not increase accuracy (contrary to jurors’ heavy reliance on confidence as a measure of veracity).3

In contrast to experts in adult eyewitness cases, experts on children’s suggestibility have rarely if ever argued that jurors harbor misconceptions about children’s reliability. Laypeople intuit that children are more suggestive than adults (Leippe & Romanczyk, 1987; McAuliff & Kovera, 1998; Ross, Dunning, Toglia, & Ceci, 1989; Yarmey & Jones, 1979).4 Experimental psychologists often attack “myths” regarding children’s suggestibility (e.g., State v. Sloan, 1995 [Mo. Ct. App.]), but these are beliefs about children espoused by social workers and clinical psychologists, who are themselves challenging commonsensical skepticism of young children’s reports.

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3 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).

4 This need not translate into a greater reluctance to convict when the witness is a child, because there are factors other than suggestibility that affect the decision to convict. Jurors may be more inclined to convict when the victim is a child because they believe that children are less likely to lie (Leippe & Romanczyk, 1987) or less likely to have consented to the abuse (Isquith, Levine, & Scheiner, 1993).
Some experts have emphasized that highly suggestive and repeated questioning can create false reports that may fool a jury. However, the admissibility question is not whether convincing false narratives can be created, but whether jurors believe they cannot be created. 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.

Limitations on the Rule against Telling the Jury What They Already Know

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. Gersin, 1996 [Ohio]; State v. Kirschbaum, 1995 [Wis. Ct. App.]; State v. Sloan, 1995 [Mo. Ct. App.]).

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 on the credibility of the witness also appear less invasive of the jurors’ province. Expert testimony that criticizes interviewers rather than interviewees thus moves from the jury’s province to the experts’.

In jurisdictions where specific discussion of the particular case is forbidden, experts may find it more difficult to avoid discussing the obvious generalities, but they can frame their discussion as a description of specific research rather than as a summary of general conclusions. Jurors may understand that younger children are more suggestible than older children but may be unable to predict the outcome of specific studies examining age effects. Similarly, experts could discuss factors influencing suggestibility and accuracy that jurors are either ignorant of or undervalue. Some factors understood by psychologists as influencing children’s reliability do not appear to be understood by laypeople, such as the centrality of details, the participation of the witness, and the prestige of the source (McAuliff & Kovera, 1998).

Third, it is unclear just how much jurors must understand in order for an expert’s testimony to be characterized as unhelpful. The drafters of the Federal Rules of Evidence suggest that expert testimony is unhelpful only if the “untrained layman” could determine the issue “to the best degree” without the help of the expert (Advisory Committee Notes Rule 702, Federal Rules of Evidence, 2001). Certainly the average expert on suggestibility can tell jurors something they did not 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 be 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. At least one court has criticized expert testimony regarding the behavioral consequences of sexual abuse on the grounds that jurors already understand that sexual abuse has negative behavioral consequences (People v. Dunkle, 1992 [Pa.]). Mason (1995) has made the same argument with respect to rehabilitative expert testimony, which rebuts defense arguments that factors such as delays in reporting prove allegations false (Mason, 1995). Although there is some empirical support for the belief that jurors have misconceptions about sexual abuse
(Morison & Greene, 1992), as experts qualify their statements to characterize the available research accurately (Lyon, 2002), their testimony sounds more like the average juror’s understanding. That is, when an expert conservatively states that “many” (rather than “most”) victims delay, his or her testimony comes close to merely affirming what a layperson might intuit about sexual abuse. A stringent standard for when expert testimony tells the jury something new would equally limit the prosecution and defense.

THE RULE THAT EXPERT TESTIMONY BE SCIENTIFICALLY VALID

In Daubert v. Merrell-Dow Pharmaceuticals (1993), the U.S. Supreme Court held that in order for scientific expert testimony to be admissible under the Federal Rules of Evidence, the theory or technique on which the expert’s testimony is based must be reliable. 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 set out a nonexhaustive list of factors for the trial court to consider: whether the expert’s theory or technique can be (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 and remains the standard in many states (Mueller & Kirkpatrick, 2000), a court simply considers 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 experts’ 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 in part]).

This 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 (1997) illustrates such an approach. The trial court excluded the expert’s testimony after considering the applicability of the expert’s studies to the facts of the 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., 1996, p. 532 [11th Cir.]). 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.

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. 186). Suggestibility research has been conducted by extremely well respected research psychologists, has been published in the highest-quality peer-reviewed psychological journals, and has been summarized in several influential books published by the American Psychological Association (Ceci & Bruck, 1995; Poole & Lamb, 1998). Social scientists since the turn of the 20th century have generally agreed that young children are suggestible (Ceci & Bruck, 1993), and surveys of research psychologists confirm this long-standing view (McAuliff & Kovera, 1998; Yarmey & Jones, 1979). More recently, in at least two high-profile child sexual abuse cases, dozens of research psychologists signed on to 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, 1993, reprinted in Ceci & Bruck, 1995; Scientists for the Accurate Communication of Data, 1998). Although it is notable that several prominent suggestibility researchers refused to sign, this would not preclude a judicial finding that the briefs’ conclusions are “generally accepted” by the research community (cf. People v. McDonald, 1984).

Despite this long-standing consensus, there is little case law upholding 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). 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).

Given the rapid growth of suggestibility research in the 1990s, these cases may be out of date. 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).

A more recent case – the Eighth Circuit Court of Appeals’ 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, 1997, p. 571). It is therefore unlikely that Rouse’s holding will facilitate the admissibility of expert testimony on suggestibility research.

Despite the lack of case support thus far, it is likely that future cases will hold that suggestibility research qualifies as scientific knowledge, if only because courts in general are exhibiting increased receptivity to expert testimony on children’s suggestibility. Courts that have held that 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, 1996, p. 1136 [D.N.J.]). In some cases, prosecutors have simply conceded that eyewitness research is scientific knowledge (United States v. Hall, 1999 [7th Cir.]).

Once the courts hold that suggestibility research is scientific knowledge, this does not make the Daubert analysis superfluous. Daubert provides a foundational prerequisite for the admissibility of expert testimony on issues that have been the subjects 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 Court of Appeals held that a review of eyewitness research that 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 describe the methodology of the research underlying their assertions (United States v. Brien, 1995 [1st. Cir.]; United States v. Downing, 1985 [E.D. Pa.]).

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 is undoubtedly scientific, but experts may
nevertheless make excessive claims about the implications of research, either because of their own predilections because of the pressures of testifying for one side in an adversarial dispute. 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. External validity is likely to be particularly important in assessing suggestibility research, because judges are poor at assessing internal validity (Kovera & McAuliff, 2000) and because the major concerns regarding suggestibility research involve their applicability to real-world cases (e.g., Goodman et al., 1998).

In Joiner, the studies on 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 believed 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 Court of Appeals in Joiner criticized the trial court’s willingness to second-guess the conclusions drawn by the proffered experts. However, the Supreme Court approved the trial court’s actions, noting 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 his or her conclusions is invalid. As the Supreme Court explained: “Trained 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. As of 2001, the Federal Rules of Evidence (2001) explicitly require that the court determine if the proffered expert “has applied the principles and methods reliably to the facts of the case.”

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 to draw conclusions, the expert must inject his or 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 RULE THAT EXPERT TESTIMONY FITS THE FACTS OF THE CASE

The expert who avoids excessive extrapolation, however, may run afoul of a different requirement for expert testimony to be admissible. In addition to qualifying as scientific knowledge, the information offered by the expert must assist the jury (Federal Rule of Evidence 702, 2001). 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. 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 that 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.6 One cannot rely on jurors to detect a mismatch; jurors

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6 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, 2001). 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...
are persuaded by expert testimony despite its lack of fit (Kovera et al., 1997).

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 Court of Appeals 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, 1985, p. 124 [3rd Cir.]). 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 proffered experts could only speculate that inappropriate questions were asked (State v. Kirschbaum, 1995 [Wis. Ct. App.]; State v. Mazerolle, 1992 [Me.]; State v. Russell, 1990 [Me.]; Stringer v. Commonwealth, 1997 [Ky.]). 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 find that the use of pre-tense and guided imagery, stereotype induction, and a number of other suggestive methods are as prevalent in real-world interviews as in suggestibility research, 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 (1992 [Iowa]), after hearing a fourth-grade program on "good, bad, and confusing touches," a 10-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 a foundation for fit, the party opposing the expert may argue that other facts lead to a lack of fit. In United States v. Nguyen (1992 [D.N.J.]), 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's greater exposure to and familiarity with the defendant's race, the witness's 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, 1985 [E.D. Pa.], where the court excluded expert testimony on eyewitnesses on similar grounds).

There are a number of grounds on 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 3 to 6 years (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 detailed dolls, because the critical research has focused on preschool children (Bruck, Ceci, & Francouer, 2000; Bruck, Ceci, Francouer, & Renick, 1993; 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. Cheryl Amirault LeFave, 1998 [testimony of Maggie Bruck]). Expert testimony that the use of dolls with 8-year-old and older children is unreasonably suggestive (Commonwealth v. Allen, 1996 [Mass. Ct. App.]; State v. Erickson, 1990 [Minn. Ct. App.]) 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 (1997 [Mo. Ct. App.]), in which the defendant was convicted of sexually assaulting his 11-year-old grandniece and two of her friends, who were 11 and 17 years old. The court was confronted with the same expert whose proffered testimony was the basis for reversal in Sloan and was 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 on matters not within the knowledge of a juror" (State v. Sloan, 1995, p. 597 [Mo. Ct. App.]). 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 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 4 months prior to the interview had gotten angry and yelled at them (he had not). Only 1 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, 1998;
for a review of the literature on children's eyewitness testimony, see Schaaff, Alexander, Goodman, Ghettı, Edelstein, & Castelli, this volume).

Limitations on the Rule That Expert Testimony Be Scientifically Valid and Fit the Facts of the Case

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, Kaye, Saks, & Sanders, 1997). However, rejection of Daubert should not stop the state courts from considering the reliability and relevance of expert testimony on suggestibility, because the same approach discussed here under Daubert is applicable under universally accepted rules of evidence. State courts can 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, 1992, p. 72 [Me. 1992]), or because it would confuse or mislead the jury (State v. Biezer, 1997 [Mo. Ct. App.]; State v. Russell, 1990 [Me.]). 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 well 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, 1994, p. 745 [3rd Cir.]) 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 on 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 that 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 (1995 [Mo. Ct. App.]).

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, in which the child disclosed shortly after the alleged abuse occurred and repeated her allegation when questioned shortly thereafter. 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 affirm (questions that inform the child that he or 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, and with basic principles of reward and punishment, and has some recent empirical support (Garven, Wood, & Malpass, 2000). 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, 2002). 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 his or her initial response is incorrect, which is the opposite of the supposed effect of a repeat. Indeed, the structured protocol designed by Michael Lamb, Kathleen Sternberg, and others in their laboratory at the National Institute of Child Health and Development (Sternberg, Lamb, Esplin, Orbach, & Hershkowitz, 2002) recommends that interviewers repeat information the child provides in order to cue further recall. Only attention to the research on which the expert relies and the specifics of the interview enable the court to assess adequately 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 increases. However, they emphasize that the total amount of information obtained also increases, particularly when young children are questioned (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 trade-off between false disclosures and false denials.

The expert’s labeling a wh-question as inappropriately leading appears to express a subjective 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 too large to review here. 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 of 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 completeness of information children provide.

Among the 5-year-olds (the group closest in age to the 6-year-old child in Sloan), children were almost 100% accurate in responding to free recall questions, wh-questions, and yes/no questions (Peterson & Bell, 1996). 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 completeness of information children provide.

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 most 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, 1995 [1st Cir.]; United States v. Downing, 1985 [E.D. Penn.]; United States v. Kime, 1996 [8th Cir.]). In a review of the suggestibility research published in the Annual Review of Psychology, Bruck and Ceci (1999) highlight Peterson’s work when discussing the increased error associated with specific questions. Their discussion contains an unfortunate error: They assert that the children in Peterson’s sample were only 45% accurate when responding to wh- and yes/no questions (compared to 91% for free recall questions). 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. Researchers have generated means by which suggestibility can be reduced (Saywitz & Lyon, 2002; Sternberg et al., 2002) and by which courtroom procedures can be less traumatic for child witnesses (McAuliff & Kovera, this volume). Nevertheless, 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.

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