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THE DEADLY CONSEQUENCES OF UNRELIABLE EVIDENCE: WHY CHILD CAPITAL RAPE STATUTES THREATEN TO CONDEMN THE INNOCENT DEFENDANT TO DEATH

Many that live deserve death. And some die that deserve life. Can you give it to them? Then be not too eager to deal out death in the name of justice . . . [e]ven the wise cannot see all ends.

—*J.R.R. Tolkien*[1]

I. INTRODUCTION

Is it ever right to execute a rapist? Gary Lee Graham, if found guilty, may make a compelling case. Between August 7, 2001, and early February 2006, a serial rapist who targeted children traumatized the city of Tulsa, Oklahoma.[2] Despite the creation of a city-wide task force in 2004, the Tulsa Police Department had few leads.[3] However, in a stroke of luck, the department traced fingerprints from a September 2003 attack on a nine-year-old girl to Graham.[4] The police arrested Graham on February 21, 2006, and subsequently charged him with thirty-five felonies and one misdemeanor.[5]

The Graham case is currently in its initial stages, but information revealed in preliminary hearings has been sickening.[6] At a May 2006 hearing, a thirteen-year-old girl testified that Graham placed a knife against her throat and told her that he would "kill her if she screamed."[7] Graham then forced her to the ground and sexually assaulted her.[8] In the same hearing, the mother of one of Graham's alleged victims testified that she awoke to find her four-year-old daughter wearing a different set of underwear.[9] Subsequent testimony revealed that Graham sexually assaulted the four-year-old.[10] Another mother testified that she found her six-year-old daughter standing outside her home with a bloody mouth and a frightened look on her face.[11] In that case, Graham

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1. J.R.R. Tolkien, *Lord of the Rings Trilogy: The Fellowship of the Ring* 93 (18th ed., Houghton Mifflin Co. 1991).
2. Nicole Marshall, *Arrest Made in Break-in, Assault,* Tulsa World A1, A3 (Feb. 21, 2006).
3. Nicole Marshall, *Task Force to Convene Regarding Sex Attacks*, Tulsa World A11 (Nov. 18, 2004).
4. Marshall, *supra* n. 2, at A3.
5. Nicole Marshall, *36 Charges Filed against Serial Rape Suspect*, Tulsa World A1 (Feb. 28, 2006).
6. Bill Braun, *Serial Rapes: Testimony: Victims Recount Assaults*, Tulsa World A1 (May 31, 2006).
7. *Id.* at A3.
8. *Id.*
9. *Id.* Upon a search of Graham's home, the Tulsa Police Department found thirty-eight pairs of children's underwear, presumably from his victims. Marshall, *supra* n. 5, at A3.
10. Braun, *supra* n. 6, at A3.
11. *Id.*

was charged with a number of sexually related crimes including "forcible oral sodomy and lewd molestation."[12] In all, Graham has been linked to sexual assaults on nine girls and women, their ages ranging from four to twenty-three.[13]

On June 9, 2006, Oklahoma Governor Brad Henry signed into law Senate Bill 1800,[14] which he and the State of Oklahoma believe will dissuade individuals like Gary Lee Graham from preying on innocent victims.[15] Specifically, the law mandates that any person with a prior record of child molestation who is subsequently convicted of forcible rape of a child under the age of fourteen may be executed.[16] Oklahoma State Senator Jonathan Nichols, author of the law, has said "'[t]his death penalty provision sends a clear message to child predators in [Oklahoma]. . . . We will find you, we will prosecute you, and then, we will put you to death.'"[17] Other states have passed similar forms of child capital rape statutes. One day before Oklahoma's bill became law,[18] South Carolina passed a similar act, allowing the invocation of the death penalty if a person had been twice convicted for the rape of a child under the age of eleven.[19] Upon signing the bill, South Carolina's governor remarked that the law sent "an incredibly powerful deterrent to offenders that have already been released."[20] After the signing of Senate Bill 1800 in June, a small but increasing minority of states assert that the execution of a habitual child molester is an appropriate punishment under certain circumstances.[21]

New statutes like those passed in Oklahoma and South Carolina mark a trend where crimes other than murder may now result in a capital sentence.[22] As is the case

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12. *Id.*

13. David Harper, *Suspect in Sex Assaults to Stand Trial*, Tulsa World A1 (June 27, 2006).

14. Okla. Sen. 1800, 50th Leg., 2d Reg. Sess. (June 9, 2006).

15. Adam Liptak, *Death Penalty in Some Cases of Child Sex is Widening*, N.Y. Times A9 (June 10, 2006).

16. Okla. Stat. Ann. tit. 10, § 7115(I) (West 2006). Section 7115(I) reads:

> Notwithstanding any other provision of law, any parent or other person convicted of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age subsequent to a previous conviction for any offense of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age shall be punished by death or by imprisonment for life without parole.

Id.

17. Oklahoma State Senate, *Senator Nichols Targets Child Predators with Death Penalty, Child Abuse Response Team*, http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060526d.htm (May 26, 2006).

18. Tim Talley, *Oklahoma Oks Death for Repeat Molesters*, Daily Breeze (Torrance, Cal.) A11 (June 10, 2006).

19. S.C. Code Ann. § 16-3-655(C)(1) (2006).

20. Liptak, *supra* n. 15.

21. Talley, *supra* n. 18. The five states that now allow for a capital sentence upon conviction of sexual assault of a minor are Louisiana (La. Stat. Ann. § 14:42(D)(2)(a) (2007) (authorizing sentence of death if victim is under thirteen years of age)); Georgia (Ga. Code. Ann. § 16-6-1(b) (2007) (authorizing sentence of death if victim is under ten years of age)); Montana (Mont. Code Ann. § 45-5-503(3)(c)(i) (2007) (authorizing sentence of death if defendant was previously convicted for forcible rape)); Oklahoma (Okla. Stat. Ann. tit. 10, § 7115(I) (authorizing sentence of death if defendant was previously convicted of forcible rape of child under the age of fourteen, and the subsequent victim is under the age of fourteen)), and South Carolina (S.C. Code Ann. § 16-3-655(C)(1) (authorizing sentence of death if defendant was previously convicted for forcible rape of a child and the subsequent victim was under the age of eleven)).

22. Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 197, 210–12 (2003).

with most novel penal statutes, such laws have come under heated resistance.[23] Most legal scholars and commentators believe they are unconstitutional and impermissibly mete out a disproportionate and excessive punishment.[24] Others have attacked these new statutes maintaining that they will actually discourage the reporting of child rape, since the vast majority of such assaults are committed by a parent or close relative.[25] Still others suggest that capital child rape statutes only aggravate the child's ordeal after an assault, because the child may be required to testify against a parent or close relative in a capital trial.[26] Finally, some posit that a rapist will kill the child if he already knows the crime he is committing is a capital offense.[27] Although these criticisms are valid, an equally important concern with these new laws has received little attention. Specifically, child capital rape statutes may sentence an innocent defendant to death.

Accurate child testimony regarding sexual assault is often difficult to obtain.[28] Unfortunately, in the zeal to acquire testimony from a child suggesting abuse, a child advocate will often utilize improper forensic interview techniques that render any statement elicited by the child tainted.[29] Even more concerning, although many statements made by children are inaccurate due to faulty questioning techniques, courts have been hesitant to prohibit any evidence suggesting abuse.[30] A defendant, therefore, may be partially or wholly convicted for a crime based upon testimony and evidence that is inherently unreliable.[31] The United States Supreme Court has noted that capital punishment is "unique in its severity and irrevocability"[32] and must be applied with

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23. *See* Joanna H. D'Avella, Student Author, *Death Row for Child Rape? Cruel and Unusual Punishment under the* Roper-Atkins *"Evolving Standards of Decency" Framework*, 92 Cornell L. Rev. 129, 155 (2006).

24. *See e.g.* J. Chandler Bailey, Student Author, *Death* is *Different, Even on the Bayou: The Disproportionality of Crime and Punishment in Louisiana's Capital Child Rape Statute*, 55 Wash. & Lee L. Rev. 1335 (1998); Pamela J. Lormand, Student Author, *Proportionate Sentencing for Rape of a Minor: The Death Penalty Dilemma*, 73 Tul. L. Rev. 981 (1999); Emily M. Moeller, *Devolving Standards of Decency: Using the Death Penalty to Punish Child Rapists*, 102 Dick. L. Rev. 621 (1998); Daniel W. Schaaf, Student Author, *What if the Victim is a Child? Examining the Constitutionality of Louisiana's Challenge to* Coker v. Georgia, 2000 U. Ill. L. Rev. 347 (2000).

25. Annaliese F. Fleming, Student Author, *Louisiana's Newest Capital Crime: The Death Penalty for Child Rape*, 89 J. Crim. L. & Criminology 717, 749 (1999).

26. Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 Am. J. Crim. L. 79, 112 (1997).

27. James H.S. Levine, Student Author, *Creole and Unusual Punishment—A Tenth Anniversary Examination of Louisiana's Capital Rape Statute*, 51 Vill. L. Rev. 417, 454–55 (2006).

28. *See* David Marxsen et al., *The Complexities of Eliciting and Assessing Children's Statements*, 1 Psychol. Pub. Policy & L. 450 (1995).

29. *See* Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* 87–105 (Am. Psychol. Assn. 1995).

30. Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 696–97 (1991).

31. For a discussion regarding child interview techniques that may lead to false accusations, consult *infra* section IV.

32. *Gregg v. Ga.*, 428 U.S. 153, 187 (1976). In *Woodson v. N.C.*, Justice Stewart, succinctly described the difference between a capital sentence and all others:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. 280, 305 (1976).

discretion and guidance.[33] This is nearly impossible in the instance of child sexual assault.

This comment begins, in Section II, with an abbreviated history of the death penalty as applied to rape and will then examine the recent promulgation of capital child rape statutes with an explanation of the rationale and reactions to them. Section III begins with an examination of the impact impermissible forensic questioning can have on an abuse investigation and then examines the utilization of forensic interviews today. Finally, Section IV explores the most commonly used forensic interviewing techniques that may lead to the false conviction of an innocent defendant.

II. HISTORY OF RAPE AS A CAPITAL CRIME

Capital rape statutes are not a new phenomenon and were, in fact, once commonplace in America.[34] In the seventeenth century, the American colonies sanctioned rape as a capital offense.[35] Even after independence, punishing rape with death was not unusual. In 1897, the federal government made rape one of only three crimes for which death could be instituted.[36] By 1925, only the federal government and eighteen states still maintained capital rape statutes,[37] however, up until 1971, sixteen states still included rape as a capital crime.[38]

Two important decisions by the U.S. Supreme Court spelled the death knell for capital rape statutes.[39] In 1972, the U.S. Supreme Court in *Furman v. Georgia*[40] determined that the discretionary imposition of the death penalty, although not the punishment itself, was unconstitutional.[41] The *Furman* majority was particularly concerned with state capital-sentencing statutes that gave judges and juries almost complete discretion in determining whether the death penalty was appropriate.[42] The *Furman* court concluded that the outcome of such open discretion led to a capital punishment system where capital sentences were "freakishly imposed" in an arbitrary

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33. For relevant discussion on the Supreme Court's attempt to assure proper application and guidance of capital sentences, consult *infra* notes 38–47 and accompanying text.

34. Approximately 1,004 men were executed from 1800 to 1964 after being convicted for rape and attempted rape. Corey Rayburn, *Better Dead than R(AP)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 St. John's L. Rev. 1119, 1129 (2004).

35. Bradley Chapin, *Criminal Justice in Colonial America, 1606–1660* 125–26 (U. Georgia Press 1983).

36. Meister, *supra* n. 22, at 200.

37. *Id.*

38. *Coker v. Ga.*, 433 U.S. 584, 593 (1977).

39. *Furman v. Ga.*, 408 U.S. 238 (1972); *Gregg*, 428 U.S. 153.

40. 408 U.S. 238.

41. *Id.* at 256. The court's 5–4 *per curiam* decision in *Furman* is the longest decision in Court history and is unique in that each of the nine justices wrote separate opinions. Randall Coyne & Lyn Entzeroth, *Capital Punishment and the Judicial Process* 148 (3d ed., Carolina Academic Press 2006). Among the majority, Justices Marshall and Brennan found the death penalty to be a violation of the Eighth Amendment's prohibition against cruel and unusual punishment in all circumstances. Justices Stewart, White, and Douglas, took an intermediary view. Specifically, they felt that although pre-*Furman* capital state sentencing procedures were unconstitutional, the death penalty itself was not constitutionally infirm. *Id.* Justice White reflected such sentiment saying, "I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment." *Furman*, 408 U.S. at 310–11 (White, J., concurring).

42. *Id.* at 255–57 (Douglas, J., concurring).

manner.[43] The Court concluded that the remoteness of being sentenced to death severely undermined the retributive and deterrent effects capital punishment was supposed to create.[44] The *Furman* Court also objected to unbridled sentencing statutes finding they encouraged racism[45] and did not accomplish any cognizable penalogical goals.[46]

Furman's impact was immediate and powerful. Every state statute imposing the death penalty was unconstitutional.[47] In response, thirty-five states created new penal statutes with more instructive sentencing guidelines.[48] In its 1976 decision in *Gregg v. Georgia*,[49] the Supreme Court later determined that a majority of these new statutes met the guidelines set down in *Furman*.[50] In *Gregg*, the Court held that it would likely find a state capital-sentencing statute constitutional so long as it (1) effectively narrowed the number of death-eligible defendants, (2) allowed for limited jury discretion, and (3) did not include mandatory death sentences.[51] The Court also recommended that state capital-sentencing procedures provide both an automatic appellate review upon conviction and a bifurcated trial so that the determination of guilt and sentencing could be held in separate trials.[52] Beyond its impact on the imposition of capital sentences, *Furman* also effectively allowed legislatures to revisit which crimes deserved death. In consequence, of the sixteen states that had capital rape statutes before *Furman*, only six states reinstated rape as a capital crime.[53]

A. Coker v. Georgia:[54] *The End of Rape as a Capital Crime?*

The history of rape as a capital crime appeared to come to an end after the Supreme Court's decision in *Coker v. Georgia*, where the Court found Georgia's aggravated capital rape statute unconstitutional.[55]

In *Coker*, the Court held that the Georgia statute violated the Eighth Amendment because the punishment was excessive and disproportionate.[56] The Court based its

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43. *Id.* at 310 (Stewart, J., concurring).

44. *Id.* at 302 (Brennan, J., concurring).

45. *Id.* at 364 (Marshall, J., concurring) ("It is immediately apparent that Negroes [are] executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination."). Unfortunately, the specter of race as a determinative factor in who receives the death penalty may still be at play today. *See* David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 Wash. & Lee. L. Rev. 359, 417 (1994).

46. *Furman*, 408 U.S. at 311 (White, J., concurring).

47. Hugo A. Bedau, *The Death Penalty in America: Current Controversies* 15 (Oxford U. Press 1997).

48. *Gregg*, 428 U.S. at 179–80.

49. 428 U.S. 153.

50. *Id.* at 206–07.

51. *Id.* at 188–89. In 1976, the year *Gregg* was decided, the Supreme Court in *Roberts v. Louisiana*, held that mandatory death sentences for certain defined crimes violated the Eighth Amendment because such a sentencing structure violated *Furman*'s mandate that the jury still be provided some discretion when deciding upon a sentence. *Roberts v. La.*, 428 U.S. 325, 334 (1976).

52. *Gregg*, 428 U.S. at 195.

53. *Coker*, 433 U.S. at 594.

54. 433 U.S. 584.

55. *Id.* at 592.

56. *Id.* at 597–98.

determination on an earlier test established in *Gregg* stating:

> Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.[57]

The Court determined that Georgia's statute violated the second prong of the *Gregg* test because it was "grossly out of proportion" to the crime committed.[58] The Court articulated that while rape was "highly reprehensible . . . [and] [s]hort of homicide, . . . the 'ultimate violation of self[,]'"[59] it nevertheless did not reach the level of murder.[60] The Court rationalized that rape, by definition, did not have the same level of moral culpability as murder because it did not involve the "unjustified taking" of a life, where murder, by definition, always does.[61] The *Coker* majority concluded that since the state imposition of death was a distinct, imitable punishment, it should only be invoked upon conviction of the most indignant crime, first-degree murder.[62]

Beyond proportionality concerns, the Court also found the Georgia statute objectionable because outside objective evidence and evolving standards of human decency[63] demonstrated capital rape statutes were no longer appropriate.[64] The Court observed that before its landmark decision in *Furman*, which found all capital statutes unconstitutional, sixteen states included rape as a capital offense.[65] After *Furman*, thirty-five states conformed new capital statutes to the guidelines set down in *Furman*.[66] However, of these thirty-five, only Georgia, Florida, and Mississippi reinstituted rape as a capital offense.[67] Of these three states, only Georgia chose to reinstitute rape of an adult woman as a capital crime.[68] The Court determined that such evidence

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57. *Id.* at 592 (citing *Gregg*, 428 U.S. 153).

58. *Id.*

59. *Coker*, 433 U.S. at 597 (citations omitted).

60. *Id.* at 598.

61. *Id.* Some commentators feel that the Court underestimates the damage rape may cause. For a more detailed explanation, consult *infra* notes 113–14 and accompanying text.

62. *Id.* at 600.

63. The Supreme Court first discussed "evolving standards of decency" in *Weems v. U.S.* but further defined the doctrine in *Trop v. Dulles*, where the Court found a punishment excessive if it did not comport with "evolving standards of decency that mark the progress of a maturing society." *Weems v. U.S.*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86, 101 (1958). To determine whether punishments are within the "evolving standards" laid out in *Trop*, the Court in *Coker* states "judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted." *Coker*, 433 U.S. at 592. Other justices believe moderns standards of decency may be found by looking at international criminal law practices. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting that the United States practice of executing juveniles was not practiced in other civilized countries). However, some justices, and in particular Justice Scalia, feel that international policy has no place in the American courtroom. *Id.* at 627 (Scalia, J., dissenting) ("The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions.").

64. *Coker*, 433 U.S. at 592.

65. *Id.* at 593.

66. *Id.* at 593–94.

67. *Id.* at 594–95.

68. *Id.* at 595–96 (citing Fla. Stat. Ann. § 794.011(2) (West 1976); Miss. Code Ann. § 97-3-65 (Lexis

demonstrated an increasing reluctance by state legislatures to enact capital rape statutes.[69] The Court also noted that Georgia citizens were also unwilling to sentence a convicted rapist to death since nine out of ten juries in rape trials chose not to impose a capital sentence.[70]

Coker seemed to end the classification of rape as a capital crime in America. This was untrue, however, because the *Coker* holding was only applicable to the rape of an adult woman.[71] In *Coker*, the Court never specifically stated that capital punishment for the rape of a child was inappropriate.[72] In fact, in *Coker*, the Supreme Court distinguished Georgia's rape statute from statutes in Florida and Mississippi, because these aforementioned states only instituted the death penalty when the victim was a child.[73]

Although *Coker* was limited in applicability to the rape of an adult woman, capital child rape statutes nevertheless began to lose favor.[74] By 1989, Tennessee, Florida, and Mississippi had invalidated statutes imposing death for the rape of a child.[75] However, all three states invalidated the statutes on state law grounds.[76] Consequently, the question of whether a sentence of death for the rape of a child was permissible under the U.S. Constitution was hazy at best.[77] The state of Louisiana took advantage of this indecision.

B. State v. Wilson:[78] *Capital Rape Reemerges*

In 1995, Louisiana amended its aggravated rape statute in order to sentence convicted child rapists to either death or life imprisonment.[79] Subsequent to its passage, Louisiana became the first state since 1972 to enact new legislation making child rape a capital crime.[80] The constitutionality of the statute was immediately called into question.[81]

In *State v. Wilson*, the Louisiana Supreme Court found Louisiana's aggravated rape statute constitutional.[82] In *Wilson*, defendant Anthony Wilson was indicted for the

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1976); Tenn. Code Ann. § 39-3702 (Lexis 1974)).

69. *Coker*, 433 U.S. at 596.

70. *Id.* at 597.

71. *Id.* at 592.

72. *Id.* at 595–96.

73. *Id.*

74. *Buford v. State*, 403 So. 2d 943, 954 (Fla. 1981); *Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989).

75. Before 1995, Louisiana was the last state to impose death upon conviction of child rape. *Leatherwood*, 548 So. 2d 389, 406 (Roberts, J., concurring).

76. *Buford*, 403 So. 2d at 951 (holding that a sentence of death upon conviction of the rape of a child was impermissibly disproportionate and excessive, thus violating the Eighth Amendment as "cruel and unusual"); *Leatherwood*, 548 So. 2d at 403 (determining that state statute imposing death upon conviction of child rape was invalidated by later statute that determined that death could only be imposed when defendant took or attempted to take the life of another).

77. *Buford*, 403 So. 2d at 950.

78. 685 So. 2d. 1063 (La. 1996).

79. La. Rev. Stat. Ann. § 14:42(D)(2)(a); Bailey, *supra* n. 24, at 1358.

80. Bailey, *supra* n. 24, at 1358.

81. *Wilson*, 685 So. 2d 1063.

82. *Id.* at 1073.

aggravated rape of three children under the age of nine, one of whom was the defendant's daughter.[83] It was later revealed that at the time of the assault, the defendant was HIV positive.[84] After being indicted under Louisiana's aggravated rape statute, the defendant sought to quash the indictment on the grounds that the sentence of death for the crime of rape was disproportionately excessive, that it violated the Eighth Amendment of the U.S. Constitution, and that it violated Article I, § 20 of the Louisiana Constitution.[85]

The Louisiana Supreme Court found that Louisiana's statute was constitutional on three grounds. First, the Court held that wide discretion should be given to a state legislature.[86] Second, evolving standards of decency and objective evidence suggested that Louisiana's law was appropriate.[87] Thirdly, the Court rationalized that the especially heinous nature of child rape made a sentence of death a proportional punishment.[88] The court began its analysis by noting that since the state legislature is charged with creating new laws and punishments, it should be given wide discretion as to the severity of the punishment created.[89] Thus, the relative severity of a punishment was not proof, in of itself, of a violation of the Eighth Amendment.[90] The court also noted that the decisions and laws passed by the state legislature reflected society's contemporary standards and that the judiciary should not become involved in the question of whether such contemporary standards are correct.[91]

The Court next argued that although outside "objective" evidence might indicate that capital rape statutes were generally inappropriate, such outside determinations were not conclusive.[92] The Court admitted that when Louisiana adopted its statute in 1995, it was the only state that permitted a capital sentence for rape.[93] However, the Court observed that capital rape statutes were certainly not a new phenomenon, noting that since *Furman*, three states had had statutes that imputed a capital sentence for the rape of a child.[94] The court also found it telling that although these states eventually invalidated their statutes, two of the three state statutes were invalidated on grounds wholly irrelevant as to whether or not the punishment itself was violative of the Eighth Amendment.[95] The Court also determined that although Louisiana was the only state with a capital rape statute, such evidence did not infer that the statute was de facto unconstitutional.[96] The Court postulated that because the *Coker* decision was "'less than

83. *Id.* at 1065.
84. *Id.*
85. *Id.*
86. *Wilson*, 685 So. 2d at 1067.
87. *Id.* at 1070.
88. *Id.*
89. *Id.* at 1067.
90. *Id.*
91. *Wilson*, 685 So. 2d at 1067.
92. *Id.* at 1067–68.
93. *Id.* at 1068.
94. *Id.* at 1069.
95. *Id.*
96. *Wilson*, 685 So. 2d at 1069.

lucid . . . on the Eighth Amendment'"[97] regarding rape, it was natural that other states would be reluctant to pass similar statutes for fear of being deemed unconstitutional.[98] The Court also reasoned that merely because Louisiana's law was the first of its kind did not make it unconstitutional, remarking "[i]f no state could pass a law without other states passing the same or similar law, new laws could never be passed."[99] The Court finally determined that although it had been over a year since Louisiana's statute was passed and no state had yet to pass a similar law, "[i]t is quite possible that other states are awaiting the outcome of the challenges to the constitutionality of the [Louisiana aggravated rape statute] before enacting their own."[100]

The Louisiana Supreme Court finally addressed the issue of whether Louisiana's aggravated rape statute was disproportionately excessive.[101] The Court noted that the U.S. Supreme Court in *Enmund v. Florida*[102] found that the imposition of the death penalty was disproportionate and excessive when involving felony murder.[103] In that case, the Supreme Court observed that the death penalty should only be utilized for crimes that were "'grievous'" and "'an affront to humanity.'"[104] The Louisiana Supreme Court rationalized that a death sentence for the rape of a child was appropriate because the Louisiana legislature had determined that such a crime was a "'grievous affront to humanity'" and thus deserved the most severe punishment.[105]

The Louisiana Supreme Court also noted that beyond contemporary standards, the courts should also "consider the harm the defendant caused to the victim."[106] The Court determined that the psychological and physical effects of rape on a child were particularly devastating.[107] It also noted that beyond the harm inflicted upon the child victim, the harm to society in general is greater when the victim of rape is a child, as opposed to an adult.[108] As a final note, the Court observed that four of the nine justices in *Enmund* would have allowed the death penalty in instances even when a death did not occur.[109] This evidence, combined with the fact that the rape of a child was especially heinous, compelled the court to conclude that a capital sentence for the rape of a child was a proportional punishment.[110]

In *Wilson*, the Louisiana Supreme Court predicted that its decision might

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97. *Id.* (quoting *Coker*, 433 U.S. at 614).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Wilson*, 685 So. 2d at 1069–70.

102. 458 U.S. 782 (1982).

103. *Wilson*, 685 So. 2d at 1069 (citing *Enmund*, 458 U.S. 782).

104. *Id.* (quoting *Enmund*, 458 U.S. at 798).

105. *Id.* at 1069.

106. *Id.* at 1070 (citing *Enmund*, 458 U.S. at 816 (O'Connor, J., dissenting)).

107. *Id.* Commentator Bridgette M. Palmer notes, "[s]exual abuse in childhood not only immediately traumatizes the child, but it also alters the child's life forever, and the rape experience, the ultimate form of sexual abuse, causes emotional, social, economic, behavioral, and sexual problems." Bridgette M. Palmer, Student Author, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 Ga. St. U. L. Rev. 843, 843–44 (1999).

108. *Wilson*, 685 So. 2d at 1070.

109. *Id.*

110. *Id.*

encourage other states to enact similar laws in order to protect children.[111] Ten years after its decision, the Louisiana Supreme Court appears a soothsayer as five states now have statutes imposing death in some circumstances when a state convicts a defendant of child rape.[112] The rationales given for the sudden resurgence of child rape statutes are wide-ranging. Some commentators suggest that a societal interest in preventing sexual assaults on children has precipitated the new laws.[113] Others feel that the there is a renewed attempt to classify rape as "fate worse than death" and thus, death is an appropriate punishment.[114] Still, others believe that such laws will have a powerful deterrent effect on child predators.[115] Whatever the reason, it is clear that such statutes are gaining in favor with the public. Their constitutionality is another issue.

C. *Arguments in Favor of Child Capital Rape Statutes*

Despite the decision in *Coker*, a capital sentence for the rape of a child may not be a disproportionate punishment because child rape in particular is "distinctly devastating."[116] Although the Supreme Court in *Coker* reasoned that homicide, in the end, is a crime that is worse than rape, the *Coker* Court may have failed to appreciate the awful consequences that a violent sexual assault often creates.[117] Even if *Coker* is taken at face value and rape in general is presumed a disproportionate punishment, *Coker* may still carry little precedential merit because the decision may only apply to the rape of an adult woman.[118] As mentioned prior, the *Coker* Court carefully contrasted Georgia's capital rape statute with similar statutes from Florida, Mississippi, and Tennessee because those states only executed individuals convicted of child rape.[119] Because *Coker*'s holding was limited to the rape of an adult woman and did not address or even

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111. *Id.* at 1073.

112. Liptak, *supra* n. 15. J. Richard Broughton believes that the *Wilson* decision has been important in two ways. First, he argues that it has motivated other states to pass capital child rape statutes, and second, he believes the *Wilson* decision illustrates a growing public mandate for capital sentences for crimes that do not necessarily involve death. J. Richard Broughton, *"On Horror's Head Horrors Accumulate": A Reflective Comment on Capital Child Rape Legislation*, 39 Duq. L. Rev. 1, 24 (2000).

113. *Id.* at 20–21 (citing John Q. Barrett, *Death Penalty for Rapists May Not Save Children*, Nat. L.J. A21 (Aug. 18, 1997); Michael Mello, *Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship*, 4 Wm. & Mary J. Women L. 129, 139 (1997)).

114. Rayburn, *supra* n. 34, at 1124 (emphasis omitted). Rayburn feels that notions of rape as a crime worse than death merely perpetuate misogynistic views of women and capital rape statutes only exacerbate such problems.

> There is a new, but very old, rhetoric buttressing proponents of these death penalty statutes. As long as populations and politicians can make the appeal that rape is an evil worse than death, they can push these laws with a load of Victorian, patriarchal baggage attached. Womyn [sic] and children become objects to be owned and controlled and the consequences of the rhetoric can be devastating on their lives. As long as womyn [sic] are told that they would be better off dead than raped . . . [c]hildren will continue to feel that their meaningful life is over and suicides and trauma will be more common.

Id. at 1164.

115. Liptak, *supra* n. 15.

116. Meister, *supra* n. 22, at 208.

117. Palmer, *supra* n. 107, at 863–64.

118. Broughton, *supra* n. 112, at 26.

119. 433 U.S. at 594–95 (citing Fla. Stat. Ann. § 794.011(2); Miss. Code Ann. § 97-3-65; Tenn. Code Ann. § 39-3702).

attack child capital rape statutes, the *Coker* Court may have actually found child rape statutes a cognizable penalogical solution.

Beyond *Coker's* limited applicability, a punishment of death for a convicted child rapist may be appropriate since the damage caused to child rape victims is decidedly worse than that to adult women.[120] All rape victims, regardless of age, experience severe physical and emotional trauma that may continue, unabated, for years.[121] The trauma inflicted on a child, however, is especially grievous.[122] Statistics suggest that twenty to forty percent of child rape victims require psychological counseling.[123] It is also reported that such victims are much more likely be incarcerated in the future.[124] More chillingly, there is clear evidence that many children who are victims of sexual assault will grow up and become sexual predators themselves.[125]

Some may argue that capital rape statutes reflect growing public sentiment that crimes other than murder may invoke the ultimate punishment.[126] From 1993 to 1997, "the number of [states] allowing the death penalty in non-homicide crimes more than doubled."[127] Although Louisiana was the only state that permitted a capital sentence to be placed on convicted child rapists in 1995, four states have since passed similar capital statutes, thus revealing a recent societal urge to punish child rapists more severely.[128] Beyond death sentences for child rapists, there has also been a general movement in the United States to punish child predators with greater vigilance.[129] Historically, rehabilitation of child predators has been notoriously ineffective and the chances that a predator will commit another sexual assault are as high as forty percent.[130] Such alarming evidence has forced Congress to change the rules of evidence to make criminal convictions of child predators easier.[131] Congress has also enacted legislation that requires persons convicted of child sexual assault to register as a sex offender.[132] Taken as a whole, the limited applicability of *Coker*'s holding and growing public sentiment may illustrate an emerging mandate for the execution of convicted child rapists.

D. *Arguments in Opposition to Child Capital Rape Statutes*

Despite the horrific nature of child rape, the death penalty may be an inappropriate

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120. *Wilson*, 685 So. 2d at 1067.

121. Palmer, *supra* n. 107, at 843.

122. *Id.*

123. Broughton, *supra* n. 112, at 38 (citing Arthur J. Lurgio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 Fed. Probation 69, 70 (Sept. 1995)).

124. *Id.*

125. *Id.*

126. Meister, *supra* n. 22, at 210. Meister notes that "[p]erhaps perceiving a shift in the Supreme Court's death penalty jurisprudence, a number of states have recently enacted the death penalty for crimes in which the victim is not killed." *Id.*

127. *Id.* at 210–11 (citing Schaaf, *supra* n. 24, at 366).

128. *Id.* at 212.

129. Broughton, *supra* n. 112, at 32.

130. Meister, *supra* n. 22, at 213 (citing Michael L. AtLee, Student Author, Kansas v. Hendricks*: Fighting for Children on the Slippery Slope*, 49 Mercer L. Rev. 835, 842–43 (1998)).

131. *Id.*

132. *Id.* at 214 (citing Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. Rev. 127, 131 (2001)).

punishment for crimes that do not involve murder because such crimes violate the Eighth Amendment's requirement of proportional punishments.[133] Specifically, an individual's culpability is of a different degree since rape does not include taking the life of another, while murder, by definition, does.[134] Furthermore, even if it were to be determined that child rape was an especially heinous crime deserving special punishment, the Supreme Court's decisions in *Enmund*[135] and *Tison*[136] suggest that death is only appropriate when an individual kills, intends to kill, attempts to kill, or has a reckless disregard for the life of the victim. An individual who sexually assaults a child obviously has no intent to kill because no death ensues, and a reckless disregard for the life of the child is also doubtful.[137]

Beyond the constitutional infirmities that child rape statutes may face, such statutes may actually do more harm than good.[138] Those in favor of capital punishment for the rape of a minor argue that such statutes act as a powerful deterrent because the fear of execution will discourage a child predator from sexually assaulting a minor.[139] Unfortunately, deterrence is most successful when the crime committed includes planning and premeditation.[140] For example, a contract killer who coldly calculates a murder may be dissuaded from committing the crime if he knows a possible consequence is execution. Deterrence is less effective in persuading individuals to refrain from raping a minor, because a majority of sexual assaults are often impulsive and spur of the moment decisions.[141] Additionally, the recidivism rate among child rapists is very high and the likelihood that the threat of death will deter an individual from raping again is minimal.[142] Finally, since Louisiana adopted its aggravated rape statute in 1995, there has been little change in the number of child rapes reported.[143]

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133. Schaaf, *supra* n. 24, at 354.

134. For background on the distinction between the culpability of an offender in murder as opposed to rape, consult *supra* notes 56–62 and accompanying text.

135. *Enmund*, 458 U.S. 782. In *Enmund*, the defendant was convicted and sentenced to death based upon a strict felony murder statute mandating that all persons involved in a felony murder, regardless of participation, be eligible for the death penalty. *Id.* at 784–85. The Court found the statute unconstitutional, determining that an execution under a felony murder theory was only proper if the defendant had the intent to kill. *Id.* at 801.

136. *Tison v. Ariz.*, 481 U.S. 137 (1987). The Supreme Court expanded its earlier holding in *Enmund* by finding that even if a defendant did not kill, attempt to kill, or intend to kill, a defendant might nevertheless be subject to execution under felony murder if participation in the underlying felony was substantial and created a reckless indifference to human life. *Id.* at 157–58.

137. Moeller, *supra* n. 24, at 647.

138. Meryl P. Diamond, Student Author, *Assessing the Constitutionality of Capital Child Rape Statutes*, 73 St. John's L. Rev 1159, 1186 (1999).

139. Despite the argument that deterrence is an important component in a successful capital sentencing structure, there is actually little evidence to show that deterrence works at all.

> [E]xisting evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results. . . . [T]he death penalty . . . is applied so rarely that the number of homicides it can plausibly have caused or deterred cannot be reliably disentangled from the large year-to-year changes in the homicide rate caused by other factors.

Coyne & Entzeroth, *supra* n. 41, at 26 (citing John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 794 (2005)).

140. Lormand, *supra* n. 24, at 1012.

141. *Id.*

142. Meister, *supra* n. 22, at 213.

143. Levine, *supra*. n. 27, at 453.

Capital sentencing statutes for the rape of a child may also have the unintended consequence of placing the child in more danger during the sexual assault.[144] Under a capital sentencing structure where the rape of a minor is a death-eligible crime, rapists may not have any incentive to let the child live, because the rape, in of itself, makes them subject to a capital sentence.[145] Moreover, since the potential consequences for child rape are grave, rapists may also kill in order to prevent the child from reporting the attack.[146] This argument seems to be more philosophical than reality-based.[147] As previously mentioned, most rapes are committed in the heat of passion and without premeditation.[148] It is therefore doubtful that the rapist will be aware of his actions and the possible consequences that they might create.[149] Additionally, the majority of child sexual assaults are perpetrated by family members or other persons close to the child, thus making it unlikely that such a rapist would kill someone with whom they share a close relationship.[150]

Beyond the increased danger to a child that capital-sentencing statutes may create, it is undoubtedly clear these statutes may decrease reporting of child abuse.[151] This is problematic, since less than one-third of child sexual assaults are currently reported to authorities.[152] Child sexual assault is notoriously underreported, in part, because the perpetrators of most child rapes usually have a close, familial connection with the child.[153] Therefore, a child may have difficulty accusing someone with whom they have a close relationship of abuse.[154] Additionally, the parents of an abused child often have no incentive to report the crime because doing so may result in dire financial and emotional consequences.[155] Unfortunately, child capital rape statutes may further chill the reporting of child sexual assault since the parent or victim reporting the crime must live with the guilt that they may have sentenced a close family member or friend to death.[156]

While the rape itself may have long-term emotional affects on a child victim, a

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144. Lormand, *supra* n. 24, at 1013.

145. *Id.* Commentator Corey Rayburn notes that many states overturned capital-kidnapping statutes partly due to fears that "the application of the death penalty was . . . an 'invitation to the criminal to kill the victim.'" Rayburn *supra* n. 34, at 1159 (citing Ala. Code § 13A-6-44 cmt. (Lexis 1994)).

146. Glazer, *supra* n. 26, at 105.

147. *Id.* at 106.

148. Lormand, *supra* n.24, at 1012.

149. *Id.*

150. *Id. But see* Rayburn, *supra* n. 34, at 1160–61.

> [P]roponents argue that murder of a child is unlikely because most rapists . . . are friends or family. . . . It hardly seems unreasonable[,] [however,] to argue that someone willing to torment, abuse, and rape a known child would also be willing to kill them . . . . Further, the argument that offenders would not murder or seriously injure a child is in contrast to evidence of a higher rate of murder among child rapes.

Id.

151. Diamond, *supra* n. 138, at 1189.

152. Meister, *supra* n. 22, at 198 (citing to Palmer, *supra* n. 107, at 844).

153. Glazer, *supra* n. 26, at 111.

154. *Id.* at 111–12 (quoting Douglas J. Besharov, *Recognizing Child Abuse: A Guide for the Concerned* 94 (Free Press 1990)).

155. *Id.* at 111.

156. Rayburn, *supra* n. 34, at 1158.

child's subsequent testimony at trial may cause additional trauma.[157] Children forced to testify against a close family member in a trial must answer difficult questions, and consequently, must revisit the sexual assault all over again.[158] Evidence shows that children who are involved in such trials take much longer to recover both emotionally and physically from the underlying rape.[159] The child's recovery is blunted further, however, if they are required to give testimony in a capital trial because such trials are usually much longer than non-capital trials.[160] More importantly, a child who testifies in a non-capital trial must only contend with the guilt of sending a close family member to prison; a child testifying in a capital trial, on the other hand, must contemplate that their testimony may sentence a loved one to death.[161] Aside from examining the constitutionally of aggravated child rape statutes, the majority of debate surrounding such laws has focused on the victim and whether such statutes provide additional protection or actually place the victim in greater danger.[162] The repercussions of child rape statutes on those accused of sexually assaulting a child have received little consideration. The remainder of this comment will therefore confront the serious, and seemingly untouched, concern that dynamics unique to child sexual assault cases may raise the specter of executing an innocent[163] defendant.

III. THE UNRELIABILITY OF FORENSIC INTERVIEWS IN CHILD SEXUAL ABUSE INVESTIGATIONS

In the early fall of 1983, the mother of a two and a half-year-old child alleged that school aid Ray Buckey, at the Virginia McMartin Preschool in Manhattan Beach, California, molested her son.[164] Based on the mother's allegations and the child's testimony, the Manhattan Beach Police Department sent a letter to all of the parents whose children attended McMartin and advised them that their children might be the

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157. Diamond, *supra* n. 138, at 1187 (citing John E.B. Meyers, *Legal Issues in Child Abuse and Neglect* 171–75 (2d ed., Sage Publications 1992)).

158. *Id.* at 1187–88.

159. *Id.* (citing Charles R. Petrof, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 Wayne L. Rev. 1677, 1687–88 (1994)).

160. *Id.*

161. Rayburn, *supra* n. 34, at 1158.

162. For a discussion concerning the risk of further harm to the victims of child sexual assault where capital statutes are enacted, consult *supra* notes 138–161 and accompanying text.

163. Perhaps the most powerful argument against capital punishment is that regardless of the safeguards created by the state, it is impossible to assure that an innocent defendant will not at some time be executed. Coyne & Entzeroth, *supra* n. 40, at 33. Justice Brennan noted "[p]erhaps the bleakest fact of all is that the death penalty is imposed not only in a freakish and discriminatory manner, but also in some cases upon defendants who are actually innocent." *Id.* (quoting William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 Notre Dame J.L., Ethics & Pub. Policy 1, 4 (1994)). Various studies have tried to determine the number of innocent defendants convicted of a capital crime. In an early 1980s study by Bedau and Radelet, the researchers observed that 350 defendants were wrongly convicted for potentially capital offenses in the twentieth century alone. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 23–24 (1987). More recent statistics indicate that since 1973, 127 innocent defendants have been released from death row. Death Penalty Information Center, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (accessed Mar. 20, 2008).

164. Edgar W. Butler et al., *Anatomy of the McMartin Child Molestation Case* 13 (U. Press America 2001). The mother making the allegations of sexual abuse had a history of alcohol abuse and mental illness. *Id.*

victims of molestation.[165] The results of the letter were immediate. Within weeks, dozens of children claimed persons at the preschool molested them, and by November, the number had reach three-hundred and sixty.[166] Even more shocking, the children's testimony suggested that the abuse was not isolated to school aid Ray Buckey, but involved nearly every teacher at the preschool.[167] By mid-March of 1984, seven people had been officially indicted, including Ray Buckey's mother Peggy, and his grandmother Virginia McMartin, the owner of the preschool.[168]

Immediately after the initial letter was sent to the parents of children enrolled at McMartin, parents, at the bequest of the local police, began sending their children to the Children's Institute International (CII) where forensic lead psychologist Kathleen MacFarlane conducted interviews.[169] The results of the interviews were repugnant. Many children testified that Ray Buckey forced them to play a game called "Naked Movie Star" where they were stripped of their clothes and forced to perform lewd sexual acts.[170] Children also reported that teachers at McMartin had forced them to engage in satanic rituals where live animals were slaughtered.[171] Some children even stated that they witnessed the sacrifice of an infant child while others said they drank human blood.[172]

As horrific as the children's story's were, other aspects of the stories bordered on the bizarre.[173] One child, who later testified on closed-circuit television at court, stated that Ray Buckey forced him to strip naked and play the "Naked Movie Star" game with other children.[174] The child also stated that the room where he and his classmates played the game had a trap door revealing underground tunnels that housed lions and that Ray used the lions to intimidate the children.[175] This same child also testified that Ray Buckey had taken him and other children to a local cemetery and had forced them to dig up bodies and that Buckey had dismembered the corpses.[176]

Other children's stories were equally strange. One child stated that he went to a

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165. *Id.* at 13–14.

166. Douglas Linder, *The McMartin Preschool Abuse Trial: Chronology of the McMartin Preschool Abuse Trials*, http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/mcmartinchrono.html (last updated 2003). This website, maintained by Linder, a faculty-member at UMKC law school, gives a detailed account of the McMartin controversy and paranoia surrounding the case.

167. Butler et al., *supra* n. 164, at 15.

168. *Id.* at 16.

169. Paul Eberle & Shirley Eberle, *The Abuse of Innocence: The McMartin Preschool Trial* 19 (Prometheus Bks. 1993).

170. Douglas Linder, *The McMartin Preschool Abuse Trial: A Commentary*, http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/mcmartinaccount.html (last updated 2003). One child testified that when playing the "Naked Movie Star Game," the children sang a song saying, "What you see is what you are, you're a naked movie star!" *Id.*

171. Butler et al., *supra* n. 164, at 21. *See* Kenneth V. Lanning, *Investigators Guide to Ritual Child Abuse*, http://www.geocities.com/jgharris7/lanning.html (Jan. 1992). Lanning, a member of the F.B.I.'s Behavioral Science unit, determined that there is no large-scale "Satanist conspiracy" and that in most cases of alleged abuse, other abuse of a less-serious and sometimes non-criminal nature, are the actual cause. *Id.*

172. Eberle & Eberle, *supra* n. 169, at 20.

173. *Id.* at 27.

174. *Id.*

175. *Id.*

176. *Id.* at 22, 27.

farm where Ray Buckey beat a horse to death with a baseball bat,[177] while other children said that many of the alleged sexual acts occurred in an intricate tunnel system located under the school that connected to other buildings.[178] Surprisingly, despite the far-fetched stories the children often told, the majority of people in California, and in America, were willing to believe the children.[179]

The case against the McMartin teachers progressed slowly.[180] By the time the actual trial began, the state dropped charges against all defendants, save Ray Buckey and his mother, due to insufficient evidence.[181] In July of 1987, the trial against the McMartin defendants began.[182] The defense focused its attack on what it perceived as improper interviewing techniques used by CII and Kathleen MacFarlane.[183] The defense alleged MacFarlane and her staff had engaged in leading and scripted questions, which led the children to make far-reaching and incredible claims.[184] Additionally, although

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177. Eberle & Eberle, *supra* n. 169, at 22.

178. An intricate tunnel system at the McMartin School was one of the most provocative allegations made by the children. In 1985, fifty McMartin parents conducted a rudimentary dig for the tunnels at the McMartin School but did not find anything. Linder, *supra* n. 166.

179. Eberle & Eberle, *supra* n. 169, at 23. Although the national attention created by the McMartin Abuse Case created a presumption of the defendant's guilt, nothing compared to the uproar the case caused in Los Angeles. An informal poll conducted before the start of the first McMartin trial found that ninety percent of Los Angeles residents thought the defendants were guilty. Hiroshi Fukurai et al., *Sociologists in Action: The McMartin Sexual Abuse Case, Litigation, Justice, and Mass Hysteria*, 25 Am. Sociologist 44, 45 (1994).

180. *Id.* at 44.

181. Butler et al., *supra* n. 164, at 105.

182. *Id.* at 153.

183. *Id.* at 176.

184. The following is an excerpt from an interview with one of the children in the McMartin Case:

> Kathleen MacFarlane: Mr. Monkey is a little bit chicken, and he can't remember any of the naked games, but we think that you can, 'cause we know a naked games that you were around for, 'cause the other kids told us, and it's called Naked Movie Star. Do you remember that game, Mr. Alligator, or is your memory too bad?
>
> Boy: Um, I don't remember that game.
>
> MacFarlane: Oh, Mr. Alligator.
>
> Boy: Umm, well, it's umm, a little song that me and [a friend] heard of.
>
> MacFarlane: Oh.
>
> Boy: Well, I heard out loud someone singing, "Naked Movie Star, Naked Movie Star."
>
> MacFarlane: You know that, Mr. Alligator? That means you're smart, 'cause that's the same song the other kids knew and that's how we really know you're smarter than you look. So you better not play dumb, Mr. Alligator.
>
> Boy: Well, I didn't really hear a whole lot. I just heard someone yell it from out in the _ Someone yelled it.
>
> MacFarlane: Maybe. Mr. Alligator, you peeked in the window one day and saw them playing it, and maybe you could remember and help us.
>
> Boy: Well, no, I haven't seen anyone playing Naked Movie Star. I've only heard the song.
>
> MacFarlane: What good are you? You must be dumb.
>
> Boy: Well I don't know really, umm, remember seeing anyone play that, 'cause I wasn't there, when - I -when people are playing it.

Douglas Linder, *The McMartin Preschool Abuse Trial: Sample Interviews by Investigators with Former Students of the McMartin Preschool*, http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/victiminterviews.html (last updated 2003).

there was some forensic evidence suggesting child molestation, the source of the abuse could not be pinpointed.[185] Furthermore, the mother of the child who initially brought charges against McMartin was mentally unstable,[186] and her child was not even able to point out Ray Buckey, his alleged abuser, in a line-up.[187] Finally, it was determined that the child had only been to the McMartin preschool fourteen times and only had contact with Ray Buckey twice.[188]

After two-and-a-half years of listening to countless hours of witness and expert testimony, the jury concluded that there was insufficient evidence to convict either defendant.[189] The costs of the McMartin trial had been enormous. From initial allegation to trial, the case had taken six years and cost fifteen million California taxpayer dollars to prosecute.[190] The defendants, although regaining their freedom, were penniless, having spent every last cent on their defense.[191] Sadly, the scandal destroyed Virginia McMartin's life work, and ironically, those who wrought the destruction were the very children to whom she had dedicated her life.

The McMartin "witch-hunt"[192] chillingly illustrates the devastating effects that unreliable forensic questioning can have in a child sexual assault case. Incredibly, a child's single initial accusation, without a shred of physical evidence, nearly sentenced the McMartin defendants to lengthy prison terms. The consequences of unreliable forensic questioning, however, if litigated in a state permitting execution upon conviction of child rape, would have meant that each of the McMartin defendants would not only have been facing prison, but execution. It is therefore imperative that any forensic interview evidence entered in a child abuse case be reliable because a defendant's life may well be at stake.[193] Unfortunately, as the McMartin scandal demonstrates, the credibility of statements elicited in a forensic interview may be anything but reliable.

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185. Butler et al., *supra* n. 164, at 174.

186. Eberle & Eberle, *supra* n. 169, at 32.

187. *Id.* at 33. Other alleged "victims" had equal difficulty in identifying their accusers. One child actually identified actor Chuck Norris as his assailant. Butler et al., *supra* n. 164, at 87.

188. *Id.* at 14.

189. *Id.* at 197. Although the jury completely exonerated Peggy Buckley, it was deadlocked on thirteen counts of abuse against Ray Buckey. *Id.* A second trial against Buckey on these thirteen deadlocked counts resulted in a mistrial and Buckey was finally absolved of all charges in July 1990. Linder, *supra* n. 166.

190. Fukurai et al., *supra* n. 179, at 44.

191. Linder, *supra* n. 170.

192. Douglas Linder, *The McMartin Preschool Abuse Trial: The Daycare Abuse Trials of the 1980s and the Salem Witchcraft Trials: Some Parallels*, http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/salemparallels.htm (last updated 2003). Linder has found many surprising parallels between the Salem Witch Trials and the McMartin Trials, noting that in both cases:

> 1. The testimony of children was found reliable and was used to prosecute defendants.
>
> 2. An individual, isolated allegation led to multiple allegations purporting widespread criminal misconduct.
>
> 3. Unreliable expert opinion was utilized.
>
> 4. Innocent statements of children were often misconstrued in order to prove guilt.
>
> 5. Faulty investigative techniques were used to produce unreliable evidence.
>
> 6. The paranoia and fervor to persecute overcame common sense.

Id.

193. *See* Ceci & Bruck, *supra* n. 29.

Up until the mid-1970s, child sexual abuse was considered an uncommon occurrence.[194] However, psychological studies conducted in the late 1970s and early 1980s suggested that child sexual assault might be more prevalent than previously thought.[195] At the same time, the number of children reporting abuse also increased.[196] Child welfare officials reported 7,559 incidences of child sexual assault in 1976; by 1986, the number had risen to around 200,000 reports annually.[197] In response to this child abuse "epidemic,"[198] courts began carefully constructing liberal evidentiary rules in child abuse cases to ease the prosecution of such allegations.[199] Today, some of these rules have been removed;[200] however, unique challenges in child sexual assault prosecutions still mandate specially tailored evidentiary rules.[201] Unfortunately, in the fervor to prosecute and convict child rapists, the courts have afforded a defendant precious few protections.[202]

Forensic interviews with a child conducted during the initial stages of a child sexual assault investigation by a clinical psychologist or social service worker often are among the most powerful weapons utilized by prosecutors in child sexual assault cases.[203] Beyond their evidentiary value at trial,[204] forensic interviews also serve an important dual purpose during the investigation stage. First, investigators conduct forensic interviews to determine if a preliminary allegation of abuse has merit.[205] Child sexual abuse is difficult to prove because children, without further persuasion, are usually reluctant to admit to abuse.[206] Interviews can solve this dilemma by utilizing specific types of questions designed to elicit responses from a reluctant child.[207] Second, since most abuse investigations do not include corroborative testimony or forensic material evidence, a prosecutor will often only press charges when interviews

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194. David McCord, *Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. L. & Criminology 1, 2–3 (1986).

195. Younts, *supra* n. 30, at 693–94.

196. *Id.*

197. *Id.*

198. For further discussion on child abuse scandals in the 1980s, see Mary Pride, *The Child Abuse Industry* (Crossway Bks. 1986).

199. Younts, *supra* n. 30, at 694.

200. Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027, 2030 (1994).

201. Younts, *supra* n. 30, at 694 (stating that "[t]hese reforms have included admitting psychological expert testimony, providing interdisciplinary teams to investigate allegations of abuse, establishing special child abuse prosecution units, assigning the same prosecutor to all stages of a case, abolishing corroboration requirements, and extending statutes of limitations").

202. *Id.* at 707.

203. *Id.* at 698.

204. Askowitz & Graham *supra* n. 200, at 2051–52.

> Because allegations of child sexual abuse usually are not supported by medical evidence or the testimony of eyewitnesses, prosecutors often offer mental health professionals to opine that the child was sexually abused and/or that the child's allegations are truthful. . . . Often the expert bases his or her testimony in whole or in part on information elicited during interviews with the child, either by the testifying expert or by another mental health professional.

Id.

205. Ceci & Bruck, *supra* n. 29, at 76.

206. *Id.* at 3.

207. Younts, *supra* n. 30, at 720–21.

suggest that abuse has occurred.[208]

Beyond their importance in the initial stages of an abuse case, forensic interviews and the statements therein are often a vital part of an expert's testimony at trial.[209] At trial, experts examine both a child's statements and behavioral reactions to questions asked during forensic interviews and assess their credibility.[210] Although child statements made to a clinical psychologist or social worker are hearsay at trial, they are admissible under the Federal Rule of Evidence 807 "residual" hearsay rule. Rule 807 states that any statement not falling into a traditional hearsay exception must have "equivalent circumstantial guarantees of trustworthiness."[211] In the Supreme Court case *Idaho v. Wright*,[212] the Court listed five factors relating to characteristics of a child's testimony—spontaneity, consistent repetition, mental state, use of terminology unexpected of child of similar age, and lack of motive to fabricate—that helped determine if a child's testimony was accurate.[213] The *Wright* Court instructed subsequent child sexual assault courts to use these criteria to determine the validity of out-of-court child statements.[214] The courts, unfortunately, often inappropriately fail to investigate the validity of such statements and in many cases simply assume such statements are credible.[215]

Although courts generally find that statements made by children contain "equivalent circumstantial guarantees of trustworthiness," there is mounting scientific research showing that the opposite may be true, and that many of the techniques used by investigators during forensic interviews are overly suggestive.[216] Frighteningly, some of the most popular methods of conducting forensic interviews utilize inappropriate questioning techniques that may have the disastrous consequence of making a nonabused child believe they are a victim of sexual abuse.[217]

IV. POPULAR FORENSIC TECHNIQUES THAT MAY LEAD TO FALSE ACCUSATIONS

A forensic interview with a potentially abused child presents unique challenges to the child abuse investigator.[218] First, children often lack the basic comprehensive and cognitive skills to recall accurately incidences of abuse.[219] Additionally, as mentioned prior, children are often reluctant to speak about abuse and may not admit to any type of

208. *Id.* at 694.

209. Askowitz & Graham, *supra* n. 200, at 2051–52.

210. *Id.* at 2053.

211. Fed. R. Evid. 807.

212. 497 U.S. 805 (1990).

213. *Id.* at 821–22.

214. *Id.*

215. Younts, *supra* n. 30, at 696–97.

216. *See* Lee Coleman, *False Accusations of Sexual Abuse: Psychiatry's Latest Reign of Error*, 11 J. Mind & Behavior 545 (1990). *But see* Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004 (1999) (Lyon asserts that research concluding that suggestive interviewing techniques presumptively lead to false accusations of abuse are presumptive and that suggestive techniques are not employed as much as some critics suggest.).

217. Younts, *supra* n. 30, at 707–35.

218. Ceci & Bruck, *supra* n. 29, at 77.

219. *Id.* at 76.

improper sexual conduct when only asked open-ended, non-directional questions.[220] In consequence, child investigators often utilize a variety of interviewing techniques designed to elicit responses from even the most hesitant child.[221] However, while it is clear that suggestive techniques are useful in obtaining allegations of abuse, it is equally lucid that children are especially vulnerable to suggestive questioning.[222] Therefore, any overly suggestive question posited to a child may lead to a fallacious response.[223]

To temper the concerns that suggestive techniques may result in false allegations of abuse, social scientists believe that when suggestive questions are used, the interviewer should be highly skilled to ensure accuracy.[224] Unfortunately, the majority of persons conducting interviews are often undertrained.[225] As a result, such persons are often unaware that overly suggestive questions may render any statement given by the child defective.[226] More troubling, even interviewers who are fully aware of a child's vulnerability to suggestion may nevertheless engage in overly suggestive techniques because they feel that the defendant is guilty.[227]

Suggestibility is characterized by "the extent to which individuals come to accept and subsequently incorporate post-event information into their memory."[228] One suggestive technique often incorporated in a forensic interview is the leading question.[229] Essentially, leading questions introduce new information in an interview not previously stated by a child.[230] For example, "Did you kiss your teacher?" is a highly suggestive leading question in the abuse context because it introduces information

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220. Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, in *The Suggestibility of Children's Recollections* 92, 98 (John Doris ed., Am. Psychol. Assn. 1991) (Goodman and Clarke observe that in a study where children were given a medical check-up included an examination of the children's genitals, "[t]he majority of the children who experienced genital and anal touching failed to report it in open-ended interviews.").

221. Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 45–46 (2000).

222. *Id.* at 34–35.

223. Ceci & Bruck, *supra* n. 29, at 84–85.

224. Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 L. & Contemporary Problems 149, 150 (2002).

225. Younts, *supra* n. 30, at 694–95.

226. *Id.* One Swedish study found that even interviewers properly taught to guard against using overly suggestive questions were still prone to using suggestive techniques. Amye R. Warren & Dorothy F. Marsil, Student Author, *Why Children's Suggestibility Remains a Serious Concern*, 65 L. & Contemporary Problems 127, 144–45 (2002) (citing Ann-Christin Cederborg et al., *Investigative Interviews of Child Witnesses in Sweden*, 24 Child Abuse & Neglect 1355 (2000)). In the study, the researchers noted that despite general recommendations that interviewers use open-ended non-suggestive questions at the beginning of the interview, forty-nine percent of the trained interviewers began interviews with suggestive questions. *Id.* at 144. By the time the interviews were finished, the researchers noted that only six percent of the questions asked by the interviewers were non-suggestive. *Id.* at 145.

227. Ceci & Bruck, *supra* n. 29, at 87–93. Chapter 8, which specifically addresses interviewer bias, concludes that any interview conducted with the belief that sexual abuse has occurred will often lead to false accusations of sexual abuse. *Id.* at 92–93.

228. Younts, *supra* n. 30, at 721 (citing Gisli H. Gudjonsson, *The Relationship between Interrogative Suggestibility and Acquiescence: Empirical Findings and Theoretical Implications*, 7 Personality & Individual Differences 195 (1986)).

229. *See generally* William S. Cassel et al., *Developmental Patterns of Eyewitness Responses to Repeated and Increasingly Suggestive Questions*, 61 J. Experimental Child Psychol. 116, 117 (1996).

230. Sena Garven et al., *More Than Suggestion: The Effect of Interviewing Techniques from the McMartin Preschool Case*, 83 J. Applied Psychol. 347 (1998).

not mentioned by the child that would be suggestive of abuse. Although some researchers continue to profess that leading questions have no effect on the accuracy of a child's testimony,[231] the vast majority of experts believe children are more vulnerable to leading questions than adults.[232]

A recent study by Cassel confirmed first, that children are more suggestible than adults,[233] and second, that as the age of a child decreases, the child is more likely to be susceptible to suggestive questions.[234] In the study, researchers asked children in kindergarten, second grade, and fourth grade to watch a video.[235] The video was also shown to a group of adults.[236] The researchers then asked the children and adults a number of progressively leading questions.[237] When leading, "non-biased" questions—questions not suggesting a particular answer—were posed to the children and adults, the researchers noted that as the age of the interviewee increased, the likelihood that a question would be answered correctly also rose.[238] This finding is consistent with general research showing that adults are better able to remember past events and gives credence to child support advocates who say that specific leading questions about the abuse itself are often the only way in which children can recall a specific instance of abuse.[239] The Cassel study, however, did not end there. The researchers next asked the adults and children a series of "misleading" questions—questions suggesting a false answer—and found that adults answered the questions correctly in approximately the same percentage as when asked non-biased questions.[240] The children, however, performed poorly.[241] Only sixty percent of fourth graders, fifty-six percent of second graders, and thirty-one percent of kindergartners answered the questions correctly.[242] Therefore, the study suggests that while adults are not affected by misleading questions, children of progressively younger ages are.[243] In the abuse context, these findings are unnerving. First, it is apparent that children often do not have the cognitive ability to remember events as adults do.[244] Second, and more importantly, Cassel's findings suggest that even a non-abused child may allege abuse if inappropriate leading questions are used.[245]

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231. Child advocate Professor Myers claims "the developmental limitations of young children sometimes necessitate careful use of specific and, at times, leading questions. Furthermore, modern research discloses that young children are more resistant to suggestive questioning than many adults believe." Younts, *supra* n. 30, at 720–21 (quoting Br. of Amici Curiae Am. Prof. Socy. on the Abuse of Children et al. at 15–16, *Wright*, 497 U.S. 805).

232. Ceci & Bruck, *supra* n. 29, at 233–38.

233. Cassel, *supra* n. 229, at 128–31.

234. *Id.* at 130.

235. *Id.* at 119.

236. *Id.*

237. *Id.*

238. Cassel, *supra* n. 229, at 129.

239. Consult *supra* notes 203–08 and accompanying text.

240. Cassel, *supra* n. 229, at 130.

241. *Id.*

242. *Id.* at 125 (tbl. 4).

243. *Id.*

244. *Id.*

245. Cassel, *supra* n. 229, at 130–31.

Beyond leading questions, the use of anatomically correct dolls may be another overly suggestive method of eliciting statements of abuse during a forensic interview.[246] Dolls are often fundamental to an abuse investigation and nearly ninety-four percent of investigations involve anatomical dolls at some point.[247] Dolls have gained such popularity because many feel that children reluctant to talk to a social worker about abuse may alternatively show signs of abuse by playing with the sexual organs or orifices of the doll.[248] Anatomical dolls are also used frequently in the initial stages of an investigation because many investigators feel that dolls can quickly uncover whether an allegation of abuse is sincere.[249] Unfortunately, the science behind anatomical dolls as an effective indicator of abuse may be severely flawed, and research suggests that reliance on anatomical dolls may often result in false allegations of abuse.[250]

Many experts feel that anatomical dolls are a poor analytical tool in identifying abuse and are sexually suggestive because the "genitals and orifices of the dolls suggest a play pattern to children."[251] Recent scientific studies reinforce the proposition that the overly suggestive nature of anatomical dolls renders them poor indicators of abuse.[252] In a study conducted by R.M. Gabriel, researchers gave nineteen non-abused children anatomical dolls and observed how the children interacted with them.[253] The results were startling: Nearly half of the children "'showed several behaviors which could have been interpreted by other interviewers as indicating likely sexual abuse.'"[254] Similar studies have also shown that non-abused children will often play with anatomical dolls in a sexually suggestive manner indicative of abuse.[255]

Beyond their suggestibility, anatomical dolls may also be ineffective in identifying abuse, as research indicates that abused and non-abused children often engage in indistinguishable sexualized play with dolls.[256] In a study conducted by McIver, Wakefield, and Underwager, researchers discovered that abused and non-abused children

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246. Younts, *supra* n. 30, at 708.

247. *Id.* (citing Barbara W. Boat & Mark D. Everson, *Use of Anatomical Dolls among Professionals in Sexual Abuse Evaluations*, 12 Child Abuse & Neglect 171, 173 (1988)).

248. *Id.*

249. *Id.* at 709.

250. Ceci & Bruck, *supra* n. 29, at 186 (The authors conclude "that there has been sufficient concern raised in the literature, and enough evidence of potential misuse, without sufficiently counterbalanced evidence to the contrary, to urge that dolls not be used diagnostically, at least not with very young children."). *See also* Andrea Weinerman, Student Author, *The Use and Misuse of Anatomically Correct Dolls in Child Sexual Abuse Evaluations: Uncovering Fact.... or Fantasy*, 16 Women's Rights L. Rptr. 347 (1995). *But see Newton v. State*, 456 N.E.2d 736 (Ind. 1983) (holding that extensive use of anatomical dolls during pre-trial forensic interviews and at trial did not prejudice the defendant).

251. Younts, *supra* n. 30, at 709 (quoting Mary Ann King & John C. Yuille, *Suggestibility and the Child Witness*, in *Children's Eyewitness Memory* 24, 31 (Stephen J. Ceci et al. eds., 1987)).

252. *Id.* at 711.

253. *Id.* at 716 (citing R.M. Gabriel, *Anatomically Correct Dolls in the Diagnosis of Sexual Abuse of Children*, 3 J. Melanie Klein Socy. 40, 45–50 (1985)).

254. *Id.* (quoting Gabriel, *supra* n. 253, at 42).

255. *Id.* at 717 (Research indicates "substantial evidence against the argument that anatomical dolls are too suggestive for use in sexual abuse evaluations with young children.") (quoting Mark D. Everson & Barbara W. Boat, *Sexualized Doll Play among Young Children: Implications for the Use of Anatomical Dolls in Sexual Abuse Investigations*, 29 J. Am. Acad. Child & Adolescent Psychol. 736, 741 (1990)).

256. Ceci & Bruck, *supra* n. 29, at 165–67.

were equally likely to engage in sexualized play with anatomical dolls.[257] Moreover, the researchers found that the abused children were actually *less* likely to engage in sexualized play than the non-abused children were.[258] Additional studies have found that while there is no correlation between children's sexualized play with a doll and abuse, there may be a socio-economic correlation with such play.[259] The researchers Everson and Boat conducted a study where two-hundred children interacted with anatomical dolls.[260] The study found that black boys and girls from lower social classes were most likely to engage in sexualized play with the dolls.[261] However, the researchers concluded that these findings did not suggest that abuse was more prevalent in certain communities, but instead, "suggest[ed] the existence of demographic pockets in [American] society [where] the exposure of preschool-aged children to the mechanics of sexual intercourse is [more] commonplace."[262] The almost universal conclusions that abused and non-abused children both engage in similar sexualized and non-sexualized play with anatomical dolls has led one researcher to conclude, "[a]t present, insufficient information exists to permit play with the dolls to be regarded as a clinically reliable screening test for sexual abuse."[263]

The effectiveness of anatomical dolls is also undermined because many investigators utilizing dolls during an interview may use them incorrectly.[264] Astonishingly, only forty-three percent of social workers and forty-seven percent of police officers receive even the most rudimentary training in the proper use of dolls.[265] A final, related problem with anatomical dolls is that no uniform, accepted protocol exists that clearly identifies what kind of sexualized play by a child may suggest abuse.[266] Therefore, even individuals supposedly trained in the proper usage of dolls may nevertheless come to very different conclusions about a child's interaction with a doll, because each uses a different method in identifying abuse.[267]

During the initial stages of an abuse investigation, and continuing until trial, investigators often repeatedly question a child about what occurred in separate interviews.[268] Child advocates feel that repeated interviews with similar questions serve

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257. Younts, *supra* n. 30, at 712.

258. *Id.* at 712–13 (The McIver study found that, "[f]orty-four percent of the nonabused and thirty percent of the abused [children] spontaneously talked about and/or touched the dolls' genitals, and sixty-two percent of the nonabused and fifty percent of the abuse placed the dolls in clear sexual positions.").

259. Ceci & Bruck, *supra* n. 29, at 168.

260. *Id.* at 167–68.

261. *Id.* at 168.

262. *Id.*

263. Younts, *supra* n. 30, at 716 (quoting Danya Glaser & Carole Collins, *The Response of Young, Non-Sexually Abused Children to Anatomically Correct Dolls*, 30 J. Child Psychol. & Psych. 547, 559 (1989)).

264. *Id.* at 708 (citing Gabriel, *supra* n. 253, at 42).

265. *Id.* at 709–10 (citing Boat & Everson, *supra* n. 247, at 173).

266. *Id.* at 709.

267. *Id.* at 710 (citing Boat & Everson, *supra* n. 247). The researchers Boat and Everson conducted a study where child abuse evaluators were asked to identify what types of play with anatomical dolls suggested abuse. Younts, *supra* n. 30, at 710. The survey revealed first that many of the evaluators had used very different criteria for identifying abuse. Second, Boat and Everson noted that many of the evaluators who identified certain types of behavior as indicative of abuse were actually behaviors that most respected researchers found to be normal. *Id.*

268. Ceci & Bruck, *supra* n. 29, at 107.

the important purpose of revealing every detail of abuse that was not disclosed in the initial interview.[269] There is some merit to using repeated forensic interviews in child abuse cases.[270] Some research suggests that both children and adults become more adept at recalling a past event if they are repeatedly questioned about it.[271] However, repeated interviews may also have a negative impact on the child's accurate recollection of an event.[272]

Although studies show that repeated interviews help reinforce a child's memory about an event, studies also reveal that as the time-period between the initial abuse event and subsequent interview occur, a child's statements are more likely to be inaccurate.[273] Researchers Poole and White conducted an experiment where both children and adults observed an event.[274] The researchers then questioned the children and adults about the event two years later and discovered the children's recollection of the past event was often inaccurate.[275]

Children's recollection of an event may also be inaccurate if the initial interview involves overly suggestive and misleading questions.[276] The authors Ceci and Bruck conducted a study where children visited a doctor's office and received a vaccination.[277] The researchers observed that children who were asked misleading questions about the initial doctor's visit in a forensic interview were more likely to give inaccurate statements about what had occurred in subsequent interviews.[278] In the context of an abuse investigation, such research suggests that if a child is asked overly suggestive questions indicative of abuse, even when abuse did not occur, such false suggestions by the interviewer can have a devastating effect on the child's memory.[279]

Beyond repeated interviews, forensic interviewers also often repeat the same question repetitively in the same interview.[280] Unfortunately, such a tactic can render a child's statement contaminated.[281] Research indicates that children who are subsequently asked the same question, after unambiguously answering the question

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269. *Id.* at 107–08.

270. *Id.* at 108 (The authors note that "[o]n the basis of a large tradition of memory research, it has been argued that repeated interviewing is itself a form of rehearsal that prevents memories from decaying over a period of time.").

271. *Id.* (citing generally R. Fivush, *Developmental Perspectives on Autobiographical Recall*, in *Child Victims and Child Witnesses: Understanding and Improving Testimony* 1 (G.S. & B. Bottoms eds., Guilford Press 1993); D. Poole & L. White, *Tell Me Again: Stability and Change in the Repeated Testimonies of Children and Adults* in *Memory and Child Testimony in the Child Witness* 24 (M.S. Zaragoza et al. eds., Sage 1995); A.R. Warren & P. Lane, *The Effects of Timing and Type of Questioning on Eyewitness Accuracy and Suggestibility* in *Memory and Child Testimony in the Child Witness* 44 (M.S. Zaragoza et al. eds., Sage 1995)).

272. *Id.*

273. Ceci & Bruck, *supra* n. 29, at 108.

274. *Id.*

275. *Id.* at 108–09.

276. *Id.* at 109.

277. *Id.* (citing Maggie Bruck et al., *"I Hardly Cried When I Got My Shot!": Influencing Children's Reports about a Visit to Their Pediatrician*, 66 Child Dev. 193 (1995)).

278. Ceci & Bruck, *supra* n. 29, at 109–10 (citing Bruck et al., *supra* n. 277).

279. *Id.* at 111.

280. *Id.* at 119–25.

281. *Id.* at 119.

initially, are more likely to give false testimony.[282] Many interviewers believe that repeating a question during an interview is essential because repeated answers by a child may confirm the veracity of the statements made.[283] Additionally, such investigators believe that repeating a question minimizes the risk of a child failing to fully disclose all information the first time a question is asked.[284] Although repeating a question may be a valuable tool in identifying abuse, investigators must be wary that certain types of repeated questions are more likely to elicit defective statements from a child.[285]

Studies have found that a repeated question may not infect the reliability of a child's statement if the question is opened-ended.[286] Therefore, an open-ended question of, "tell me what happened at your school that day," is unlikely to affect credibility. The downside, however, with repeated, open-ended questions is that while such questions help elicit more information from an adult, they do not generally increase a child's recollection of an event.[287] Child advocates have responded to the limitations of repeatedly asking open-ended questions by using "force choice" questions, which require a direct "yes" or "no" answer.[288] However, repetition of force choice questions creates the danger that a child's statement will be inaccurate.[289] Researchers Poole and White conducted an experiment where a group of progressively younger children and adults observed interactions between a female and male researcher.[290] The researchers then asked the children and adults repetitive force choice questions and measured the accuracy of the responses made.[291] Poole and White found that while the accuracy of the adult's statements was not affected by the force choice questions, the children, and particularly the youngest age group, were.[292] The researchers felt that two factors played an important role in making the children's statements less accurate.[293] First, they observed that children, and especially young children, do not have the cognitive ability to remember details about an observed event.[294] Poole and White thus hypothesized that children often reconcile this problem by simply fabricating details never actually remembered.[295] Second, the researchers determined that children are more likely to

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282. *Id.*

283. Ceci & Bruck, *supra* n. 29, at 119.

284. *Id.*

285. *Id.* at 119–25. In *Preparing Children for Court: A Practitioner's Guide*, author Lynn M. Copen states that attorneys must be careful when using repeated questions. Lynn M. Copen, *Preparing Children for Court: A Practitioner's Guide* 65–66 (Sage Publications 2000). Specifically, Cohen says that when an attorney uses repeated questions, he must inform the child why a question is repeated and assure the child that the repetition of a question does not insinuate that an earlier answer was incorrect. *Id.*

286. Debra A. Poole & Lawrence T. White, *Effects of Question Repetition on the Eyewitness Testimony of Children and Adults*, 27 Developmental Psychol. 975, 983 (1991).

287. *Id.* at 983.

288. Ceci & Bruck, *supra* n. 29, at 120.

289. Poole & White, *supra* n. 286, at 984.

290. *Id.* at 977.

291. *Id.*

292. *Id.* at 984. The researchers noted that young children were especially vulnerable to repeated yes/no questions finding that "24% of the 4-year-olds were inconsistent on at least one yes-no question, compared with only 6% of the older subjects." *Id.* at 980–81.

293. Poole & White, *supra* n. 286, at 984.

294. *Id.*

295. *Id.*

conform their behavior to any type of social pressure.[296] Although the force choice questions in the study did not pressure the children to choose between either yes or no, researchers postulated that a child may interpret repetitive questions as a request from the interviewer to give a different answer.[297]

In a child abuse investigation, the deleterious effects of repeated force choice questions to a child may result in a false allegation of abuse.[298] Suppose, for example, a questioner asks a child whether they have been touched inappropriately and the child initially responds in the negative. Further, suppose that the interviewer repeats the same question to the child and the child eventually relents and admits that inappropriate touching occurred. From the investigator's perspective, such an admission is presumptive proof of abuse. However, as the Poole & White study suggests, the change in the child's statement may in fact have nothing to do with whether the abuse occurred and may actually stem from a fear that a prior answer was incorrect.[299]

Forensic interviews also often utilize positive and negative reinforcement.[300] Positive reinforcement occurs when an interviewer praises a child for answering a question in the manner the interviewer wants.[301] Social science research notes that as "[a] positive reinforcer increases, and a punishment decreases, the probability that a behavior will be repeated" also increases.[302] Therefore, in a child abuse setting, a child may respond with allegations of abuse if rewarded for each instance they "cooperate" with the interviewer and claim abuse occurred.[303] Negative reinforcement occurs when an interviewer disputes or disparages a child's statement because the child has not answered a question in the manner the interviewer wants.[304] Again, in an abuse context, negative reinforcement will occur if a child states that they do not remember being touched by a family member and consequently are reprimanded by the interviewer.[305] Although a mountain of evidence suggests reinforcement is highly effective in molding an individual's behavior, few studies have examined the effects of reinforcement during a child abuse investigation.[306]

"Co-witness" information is another suggestive technique utilized during the interview process.[307] The process of co-witness interviewing occurs when the interviewer tells the child that they have received information from another person

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296. *Id.*

297. *Id.* Ceci and Bruck have observed that many of the studies conducted on repetitive questions "demonstrate that younger children are more prone to change their answers when asked the same question within a session. They are sensitive to the question repetition and seem to reason that the interviewer is requesting additional or new information." Ceci & Bruck, *supra* n. 29, at 120.

298. *Id.* at 121–25.

299. Poole & White, *supra* n. 286, at 984.

300. Sena Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 Applied Psychol. 38, 39 (2000).

301. *Id.* at 39.

302. *Id.* (citing Robert L. Crooks, *Psychology: Science, Behavior, & Life* (Harcourt Brace 1993)).

303. Ceci & Bruck, *supra* n. 29, at 145.

304. Garven et al., *supra* n. 300, at 39.

305. *Id.*

306. *Id.*

307. *Id.*

regarding the topic being discussed.[308] For example, an interviewer might tell a child that, "Tommy told me that your teacher liked to touch the other children on their bottoms." Co-witness techniques are especially effective in eliciting a certain kind of response because such questions encourage a child to conform their statements with those supposedly made by other peers.[309]

Psychological studies reveal that both children and adults are susceptible to interview questions that use co-witness information.[310] In a study conducted by Pynoos and Nader, the researchers examined the reactions of children to a sniper shooting that occurred near the children's school.[311] The researchers discovered that children not present at the school during the tragedy nevertheless fabricated stories suggesting that they had been present when the attacks occurred.[312] The researchers concluded that even children not present at the school when the shootings took place still attempted to give accurate accounts of the tragedy in order to conform their behavior with that of the children present.[313]

Adults may be equally vulnerable to co-witness information.[314] In 1996, researchers Saul Kassin and Katherine Kiechel conducted an experiment purporting to give undergraduate students extra-credit if they completed a computer competency test.[315] Before the test began, each student was instructed to refrain from touching the "alt" key because doing so would lose data.[316] After the test began, the computer each student used was shutdown by those conducting the experiment and the researchers accused the student of touching the alt key.[317] Interestingly, the researchers found that when another person said that they had observed the student pressing the alt button, a student was much more likely to admit they had touched the button even though they had not.[318] In some instances, *every student* admitted touching the alt key when certain types of co-witness information were utilized.[319] In a child abuse context, the Kassin findings are troubling because the study suggests a child given false co-witness

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308. *Id.* at 39–40. While interviewing children in the initial stages of the McMartin investigation, interviewers commonly relied upon co-witness information. Below is an example of a typical co-witness question that a child was actually asked from the McMartin case:

> Interviewer: I heard that, I heard from several different kids that they took their clothes off. I think that [first classmate] told me that, I know that [second classmate] told me that, I know that [third classmate] told me. [Fourth classmate] and [fifth classmate] all told me that. That's kind of a hard secret, it's kind of a yucky secret to talk of-but, maybe, we could see if we could find—/

Linder, *supra* n. 184.

309. Ceci & Bruck, *supra* n. 29, at 146–52.

310. Garven et al., *supra* n. 300, at 40.

311. *Id.* (citing Robert S. Pynoos & Kathleen Nader, *Children's Memory and Proximity to Violence*, 28 J. Am. Acad. Child & Adolescent Psych. 236, 236 (1989)).

312. *Id.* (citing Pynoos & Nader, *supra* n. 311, at 238).

313. *Id.*

314. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol. Sci. 125 (1996).

315. *Id.* at 126.

316. *Id.*

317. *Id.*

318. *Id.* at 127.

319. Kassin & Kiechel, *supra* n. 314, at 127.

information suggesting abuse is likely to agree with the false co-witness statement.[320]

It is clear that different types of suggestive interviewing techniques may all increase the probability of obtaining false statements. However, those effects intensify when the interviewer utilizes multiple types of suggestive questions in a forensic interview.[321]

A study conducted by clinical psychologist Sena Garven in 1998 tried to determine if a variety of suggestive techniques used by Kathleen MacFarlane in the McMartin interviews had the "synergistic effect" of increasing false allegations of abuse.[322] The researchers determined that in conducting her interviews, MacFarlane used suggestive leading questions, co-witness information, repetition of questions, and positive and negative reinforced questions.[323] To ensure accuracy, the researchers tried to mimic all of these techniques when conducting their study. The results were alarming. First, the researchers determined that seventeen percent of children made false allegations when asked any type of suggestive question.[324] However, when the researchers combined suggestive questions with co-witness and positive and negative reinforced questions, a staggering fifty-eight percent of the children made false accusations.[325] Although the researchers noted that the questions used by the McMartin investigators were atypical of those given in traditional forensic interview investigations,[326] the case nonetheless illustrates the serious flaws and consequence of impermissible questioning techniques in the child abuse context.

Outside the controlled sphere of social science laboratories, obtaining hard data on the incidence of false reports of child sexual abuse have been elusive.[327] Although many studies have tried to pinpoint the incidence of false allegations, the findings of these studies often run in direct opposition to each other.[328] For instance, one researcher examining one-hundred and forty-eight allegations of abuse found only three percent of the allegations false.[329] However, another study that examined the incidence of false reports in custody and visitation disputes found the number to be as high as fifty-five percent.[330] How can such divergent numbers be reconciled? First, it is clear that

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320. *See id.*

321. *See* Garven et al., *supra* n. 230.

322. *Id.* at 347.

323. *Id.* at 348–50.

324. *Id.* at 354.

325. *Id.* The researchers found that of all of the suggestive techniques used, co-witness information (also referred to as "other people" information), and positive and negative reinforcement were questioning techniques that would most likely lead to false reports of abuse. Garven et al., *supra* n. 230, at 357.

326. *Id.* at 354–55.

327. Younts, *supra* n. 30, at 732. The author notes that studies purporting to fix a number on false allegations made in a child abuse context are unreliable because the persons conducting the study often use such "findings" to support an agenda. Therefore, child advocates claim that incidences of abuse are rare while those at the other end of the spectrum speculate that the incidence of false reporting is much higher. *Id.*

328. *See* Ceci & Bruck, *supra* n. 29, at 30–36.

329. Younts, *supra* n. 30, at 734 (citing Katherine C. Faller, *Child Sexual Abuse: An Interdisciplinary Manual for Diagnosis, Case Management, and Treatment* 22, 126 (Columbia U. Press 1988)).

330. *Id.* (citing Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes* in *Emerging Issues in Child Psychiatry and the Law* 145, 155 (Diane H. Schetky & Ellissa P. Benedek eds., Brunel/Mazel 1985)).

allegations of abuse in custody and visitation setting hearings are probably higher.[331] Second, what is determined to be a false accusation is often limited to only those instances where a child is "deliberately" lying and thus does not account for abuse investigations where the questioner uses "subtle adult coaching or other faulty interviewing techniques" which may still create unsubstantiated findings of abuse.[332] Although pinning down hard numbers has been a difficult task, if history and psychological research has taught us anything, it is that children will make false allegations of abuse when asked impermissible suggestive questions.

V. CONCLUSION

Traditional notions of justice may be overcome and perverted when the cry for retribution is greater than that for common sense. The events that transpired in Salem, Massachusetts, in 1692 reflect such.[333] By all accounts, a single claim of witchcraft turned reasonable and docile colonial settlers into cruel and ruthless religious zealots.[334] Although sexual abuse of a child is a loathsome, "real" crime, and does not involve spells or incantations, it nevertheless has created a similar public outcry for justice, and in consequence, evidentiary rules have been relaxed in order to obtain convictions. Even more concerning, in the fervor to indict, convict, and now execute child predators, legislators and the public alike may have failed to consider that some persons convicted of child rape may actually be innocent This is especially true when a prosecutor relies heavily on overly suggestive forensic interviews.

Forensic interviews with children often are the most vital part in a child sexual assault investigation and trial. Unfortunately, many of the most popular techniques utilized by investigators may lead to false accusations of abuse. Although courts should verify the reliability of statements elicited during an interview, many courts have neglected this important duty. In consequence, unreliable forensic evidence routinely finds its way into the evidentiary record and may, as a result, lead to a false conviction. Before 1995, the worst outcome for a defendant wrongly accused and convicted of child rape due to unreliable forensic interviewing techniques was incarceration. Unfortunately, in five states, the outcome can now be much worse. The outcome may now result in death. Three hundred years later, and the lessons of Salem seem forgotten.

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331. Ceci & Bruck, *supra* n. 29, at 32.

332. *Id.* at 31. A study by Jones and McGraw revealed that the manipulation of numbers could be easily accomplished to artificially deflate the incidence of false reports of abuse. *Id.* Jones and McGraw determined that twenty-three percent of children made false allegations of abuse. David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27 (1987). However, a more careful examination shows that six percent included instances of "deliberate" false reports. In actuality, the author's findings indicate that the false allegations may occur in as many as one-quarter of abuse investigations. *Id.*

333. Douglas Linder, *Salem Witchcraft Trials 1692*, http://www.law.umkc.edu/faculty/projects/ftrials/salem/SALEM.HTM (last accessed Mar. 20, 2008).

334. *Id.*

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