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## Legal and Scientific Issues Surrounding Victim Recantation in Child Sexual Abuse Cases

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## LEGAL AND SCIENTIFIC ISSUES SURROUNDING VICTIM RECANTATION IN CHILD SEXUAL ABUSE CASES

### INTRODUCTION

A man receives a 45-year prison sentence after a jury convicts him of sexually abusing his children.<sup>1</sup> Society is safer for him being behind bars. His children are safer for him being behind bars. Or are they? The man's eldest son comes forward saying his father never touched him, that he has made a horrible mistake that has sent his father to prison. The man's daughter also denies her previous story of abuse and says her father never touched her. The children tell their story to anyone who will listen, anyone they think can help them get their father out of prison. At first they think it will be easy—and why shouldn't they? If it was their allegations that sent their father to prison, surely telling people those allegations were false will get him released. After talking to several people they believe *should* care about their story, the reality of their situation becomes clear: no one *does* care about what they have to say. No one cares about their declarations that their father never hurt them—at least, no one with any power to help them. No one listens to their protestations that an innocent man is spending the majority of his life in prison. No one cares that their father has been wrongly and forever branded as one of the worst kinds of criminals—a child molester. The children become frustrated. They find the uncaring reactions of people who are supposed to be interested in seeing justice done to be not only inexplicable, but also gravely unjust. They simply do not understand why no one seems willing to believe them when they say that an innocent man is in jail because they lied.

The problem presented by recanting victims in child sexual abuse cases is one that contains many dimensions and one that has left the

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1. This is the true story of Jerry Biggs, a man currently serving a 45-year sentence in a Georgia state prison for child molestation. *See generally* Georgia Innocence Project, Case File of Jerry Biggs (on file with the Georgia Innocence Project) [hereinafter Biggs File].

legal system struggling to develop a satisfactory approach. The myriad of legal, psychological, and societal issues that coalesce when a child victim recants results in a complex problem the courts seem ill-equipped to handle.<sup>2</sup> Decisions in these cases are inevitably counterintuitive to a layperson's sense of justice, particularly when the layperson is someone who truly believes that his or her false testimony has sent an innocent person, usually a family member, to prison. Indeed, after trying to make their voices heard, many recanting child victims of sexual abuse are usually left asking the same question: why will no one listen to me?

This Note will attempt to define and clarify the issues that ultimately lead to the feeling of helplessness experienced by many recanting victims. It will also suggest ways in which the legal system could better address the recanting person's legitimate concerns that an injustice has been perpetrated while still striving to protect child victims of sexual abuse. Part I of this Note will offer a more in-depth look at the case of Jerry Biggs, examining how some of these issues play out in a real case where a child victim has recanted his testimony against an alleged child molester. This account will provide some insight into the personal and emotional struggles faced by all of the parties involved when a child recants his or her prior allegations of sexual abuse.

Part II of this Note will explore some of the relevant psychological issues that courts must address when considering a victim recantation. These issues include several psychological theories that either the prosecution or defense may advance in an effort to explain a recanting child's behavior, such as Child Sexual Abuse

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2. See, e.g., John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 5 (1989) (noting that the law regarding expert testimony in child sexual abuse cases is "in a formative stage of development, and a coherent theoretical framework for decisionmaking has yet to emerge."); Sharon Cobb, Comment, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 970 (1986) ("[p]rocedurally, the law is reluctantly prepared to handle the situation presented by a witness's recantation."); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1436 (1986) (arguing that even though "encouraging strides have been made" for dealing with recantation in a just manner, the "history of recantation treatment reveals the inadequacies that have plagued, and remain in, our system.").

Accommodation Syndrome or studies exploring the extent to which children's memories are prone to the suggestions and influences of third parties. Part III will outline the legal issues raised when a child recants his or her allegations of abuse and offer suggestions for developing a legal framework for handling these cases which will ensure that the ultimate disposition of these cases is one that is just to all of the parties involved.

### I. STORIES OF ABUSE, MANIPULATION, AND RECANTATION: FROM THE CASE FILES OF THE GEORGIA INNOCENCE PROJECT

The Georgia Innocence Project (GIP) is a nonprofit organization dedicated to establishing the innocence of wrongly convicted persons through the use of DNA evidence.<sup>3</sup> The GIP has received over 3,200 letters requesting assistance since it started in August 2004.<sup>4</sup> The vast majority of these letters present cases with legal issues that the GIP is unable to address because there is no DNA evidence available for testing.<sup>5</sup> One type of case falling into this category is that of an inmate who is in prison because a child, usually a relative, accused him of sexual abuse, and now the alleged victim is recanting his or her accusation. The GIP receives these types of cases on a regular basis, but is currently unable to assist these inmates in their pursuit of exoneration, despite the compelling stories told not only by the inmates, but also by the recanting children. One such case is that of Jerry Biggs.

#### A. *Jerry Biggs*

As noted, the story outlined at the beginning of this article is a true-life account of the experience of Jerry Biggs, a man who

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3. Georgia Innocence Project, <http://www.ga-innocenceproject.org/history.html> (last visited Mar. 17, 2008).

4. *Id.*

5. The rigorous requirements a case must meet in order to qualify for legal representation by the GIP help to explain the fact that the GIP has only officially represented nineteen clients since its inception. *Id.*

contacted the GIP to ask for assistance. In 1996, Mr. Biggs received a 45-year sentence after a jury found him guilty of molesting his children.<sup>6</sup> At Mr. Biggs's trial, his eldest son and daughter testified against him, stating that their father had sexually abused them. A year after the trial, Mr. Biggs's son recanted his testimony during an interview he requested with an attorney and an investigator. Based on the son's recantation, an attorney filed an extraordinary motion for a new trial for Mr. Biggs. The motion was denied. The son related his recantation to a friend of the family, who related his account to the GIP. He told the family friend that after his parents separated, his father requested that his mother not leave the children alone with her brother (the children's uncle), who Biggs's wife accused of molesting her when she was a child. When Biggs's wife left the children alone with their uncle against Biggs's wishes, Biggs sued for custody of the children.

It was after Biggs filed suit for custody that the allegations of abuse came out. Biggs's son stated that his mother pressured the children into saying that Biggs molested them in order to retain custody. The son also claimed that his account of suffering from abuse was true, but that it was his uncle who molested him, not his father. The fact that the uncle was later convicted of molesting Biggs's daughters lends credence to the son's story.<sup>7</sup> The daughter who testified at trial also recanted her testimony. She said that counselors "drilled" her and "told" her what her father did using anatomically correct dolls. Eventually she told them what she believed they wanted to hear so that they would leave her alone.<sup>8</sup>

Biggs's son has fought for nine years to correct what he believes to be a grave injustice. Just thirteen at the time of the trial, Biggs's son is now a young man who has grown increasingly frustrated and disillusioned as he pursues his quest to find someone in the legal

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6. See Biggs File. Unless specifically cited, all of the information in detailing Mr. Biggs's case in Part I.A come from the general contents of the Biggs File, *supra* note 1.

7. Biggs File, *supra* note 1.

8. *Id.*

system who cares enough to take the time to listen to his story.<sup>9</sup> He has written numerous letters to judges, attorneys, and the district attorney of the county where Mr. Biggs stood trial, all to no avail. His letters eloquently communicate some of the pain, frustration, and guilt he feels because of his inability to rectify what he believes is his father's wrongful conviction:

I would first like to say that I was coerced into making the testimony that I made against my Father when I was young. I did not understand the situation at the time and I had become very angry with him for I thought at the time he had abandoned my brother, my sisters and me . . . .

. . . .

People say that kids do not lie on the stand. This is simply not true. They do lie. I did. I told so many lies during that time that I could not even remember who I had told what to . . . .

. . . .

. . . I have stuck by my Dad's innocence ever since that day I finally found the courage to tell the truth about what I did. I will stand by him for the rest of my life and I will never give up on him. My dad has paid eight years of his life for something that I did because I was a dumb kid who was angry with his dad and had an adult manipulate me to do something that I as a child had no idea what would happen.<sup>10</sup>

After this letter proved to be ineffectual, Mr. Biggs's son again wrote the district attorney nine months later in an attempt to gain assistance. In this second letter, he discussed his sister's recantation in more detail:

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9. *Id.*

10. Letter from Mr. Biggs's son to Patrick H. Head, Cobb County District Attorney (Apr. 7, 2004) (on file with the Georgia State University Law Review).

My sister wants to come forth also but she is still a minor and there is no way my mom will let her come forth. Mom found out that she was writing to my dad and that she was wanting to tell her story so mom put her back into counseling and for a long time kept telling her she was going to send her away to a state institution . . . . [My sister] remembers telling them it didn't happen over and over again but they would not give up. They kept "telling" her what he did and showed her things using dolls. She said one day she just said yes, daddy touch[ed] me so can I go play now. She was rewarded by getting to play and not having to listen to all of that stuff over and over again. You learn to tell people what they want to hear so they will just leave you alone when you are a kid and you have no choices . . . . [My sister] stood her ground for a long time before she gave in. I think it was a couple of months before she made that statement to that counselor. If you think about it, is that not what it [sic] done when someone is trying to brainwash you? They say the same thing over and over again and confuse the situation until you just give up on the truth or you just give in to them?<sup>11</sup>

He ended the letter with a final plea for help:

I need your help Mr. Head. I know what I did was wrong. I just want to make it right. I know that people say that kids feel guilty or sorry for the person they told on and that is why they recant but that is not always true. I recanted because I was living with what I had done and it haunted me.<sup>12</sup>

This letter proved equally ineffective at getting a desired response. In his quest to exonerate his father, Mr. Biggs's son has talked to staff at the GIP several times. After conducting several interviews, GIP director Aimee Maxwell stated that she believes the recantation is

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11. E-mail from Mr. Biggs's son to Patrick H. Head, Cobb County District Attorney (Jan. 31, 2005) (on file with the Georgia State University Law Review).

12. *Id.*

genuine.<sup>13</sup> Ms. Maxwell, who is no stranger to hearing lies from desperate inmates and their families, calls this case the “best” recantation case currently present at the GIP, and she too is frustrated that there is little legal recourse available to even obtain a new trial for Mr. Biggs based on his children’s recantations.<sup>14</sup>

## II. PSYCHOLOGICAL RESEARCH AND EXPERT TESTIMONY SURROUNDING RECONTATION, SUGGESTIBILITY, AND MANIPULATION IN CHILD SEXUAL ABUSE CASES

Expert testimony from psychological professionals is a mainstay of cases involving allegations of child sexual abuse.<sup>15</sup> Expert testimony is particularly useful to the prosecution, since in sexual abuse cases there is usually little existing physical evidence, and often the only witness is the alleged child victim.<sup>16</sup> Scientific evidence of a psychological or behavioral nature is especially valuable to prosecutors who desire to explain puzzling victim behavior, such as recantation, to jury members.<sup>17</sup> Before examining how various courts treat such evidence when faced with a child’s recantation, it is necessary to have a basic understanding of the primary psychological theories advanced by expert witnesses in child recantation cases. Particularly interesting is the latest research exploring the reliability of the scientific foundation of these theories. It is also helpful to understand the ways in which parties utilize these theories when prosecuting or defending a child sexual abuse case.

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13. Interview with Aimee Maxwell, Director, Georgia Innocence Project, in Atlanta, Ga. (Sept. 15, 2006). Ms. Maxwell is impressed not only with the son’s sincerity, but his tenacity as well, exhibited by the fact that he has actively pursued his recantation claim for almost a decade. *Id.*

14. *Id.*

15. See Myers et al., *supra* note 2, at 4.

16. *Id.*

17. See Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933, 947 (1999).

## A. *Child Sexual Abuse Accommodation Syndrome*

### 1. *Exploring the Scientific Origin of and Foundation for Child Sexual Abuse Accommodation Syndrome*

In 1983 psychiatrist Roland Summit articulated what he believed to be a model for how children disclose sexual abuse, labeling his model Child Sexual Abuse Accommodation Syndrome (CSAAS).<sup>18</sup> Summit outlined five categories of behavior he believed sexually abused children generally manifested.<sup>19</sup> The fifth category of behavior he classified as “Retraction,” stating that “[w]hatever a child says about sexual abuse, she is likely to reverse it.”<sup>20</sup> Summit’s article is a seminal work in the field of child sexual abuse and has had significant influence on researchers, clinicians, and scholars in the field.<sup>21</sup> Although commentators have noted that Summit “did not intend to imply that CSAAS is present in all abused children, or that it should be treated as a diagnostic of abuse, many professionals have adopted CSAAS as a template by which to diagnose sexual abuse.”<sup>22</sup>

A group of researchers, prompted by the wide-ranging influence and general acceptance of CSAAS in the psychological field, became interested in examining available empirical evidence gathered in numerous studies to see if the data would support Summit’s posited

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18. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Although this Note focuses on CSAAS as a well-defined and often-cited psychological framework intended to explain the behavior of child victims of sexual abuse, it should be noted that similar theories have been advanced and collected under the label of Child Sexual Abuse Syndrome. For a further discussion of the slight distinction between the two constructs, see Michael D. Stanger, *Throwing the Baby out with the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed as a Rehabilitative Tool in the Florida Courts*, 55 U. MIAMI L. REV. 561, 565–66 (2001).

19. Summit, *supra* note 18, at 181.

20. *Id.* at 188. The remaining four categories of behavior identified by Summit are (1) secrecy; (2) helplessness; (3) entrapment and accommodation; and (4) delayed, conflicted, and unconvincing disclosure. *Id.* at 181.

21. See Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL., PUB. POL’Y, & L. 194, 195 (2005). For further discussion and reference, London’s article contains a partial list of clinicians and scholars who have used and endorsed Summit’s CSAAS. *Id.* at 195–96.

22. *Id.* at 196.

model.<sup>23</sup> In 2005 they published their findings.<sup>24</sup> In their examination, the authors reviewed and evaluated the empirical data from two main sources.<sup>25</sup> The first was “retrospective accounts from adults who claimed to have been abused as children;” the second was “examinations of children undergoing sexual abuse evaluations.”<sup>26</sup> For the purpose of this Note, the most relevant conclusion the authors came to was that “the evidence fails to support the notion that denials, tentative disclosures, and *recantations* characterize the disclosure patterns of children with validated histories of sexual abuse.”<sup>27</sup> Indeed, given the widespread acceptance (based on the CSAAS model) of the theory that a sexually abused child is likely, even expected, to recant his or her allegations, it is all the more striking that the review by London and her co-authors found that “analysis show[s] that recantation is uncommon among sexually abused children. In fact, it shows just the opposite; that is, only a small percentage of children in these studies recant.”<sup>28</sup>

It is important to note that London et al.’s conclusion regarding recantation rates has itself been challenged by other professionals who have likewise reviewed the empirical data presented in the literature on disclosure patterns in child sexual abuse cases.<sup>29</sup> One relevant article stated that because “[m]ost studies of recantation rates contain serious methodological flaws,” the authors were unable to agree with the conclusions from the London et al. review.<sup>30</sup> The authors went on to conclude that “we simply do not yet know how

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23. See *id.* at 197.

24. See *id.* at 194. In providing the background for the study, London et al. explain that “Summit’s . . . article contained no data and seemed to be predicated solely on clinical intuition. Almost a decade later, Summit . . . clarified, ‘It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument. . . .’” *Id.* at 197 (citation omitted).

25. London et al., *supra* note 21, at 197.

26. *Id.*

27. *Id.* at 194 (emphasis added).

28. *Id.* at 217. In discussing the results, the authors noted studies of sexual abuse which address recantation rates are fewer in number than those which examine the rate of denials and disclosure of abuse. Thus, the authors were only able to examine the data from eight studies. *Id.* at 216.

29. Erna Olafson & Cindy S. Lederman, *The State of the Debate About Children’s Disclosure Patterns in Child Sexual Abuse Cases*, 57 JUV. & FAM. CT. J. 27, 31 (2006).

30. *Id.* at 34.

often and why children recant their statements about actually having been sexually abused.”<sup>31</sup> Although this report did not agree with the findings of London et al., it is telling that it also did not support Summit’s often-cited assertion that recantation is an expected behavior from child victims of sexual abuse.<sup>32</sup> Instead, the authors merely assert that “[f]urther research is needed about recantation rates,”<sup>33</sup> and that “[r]ecantations should not be interpreted to mean that an allegation is necessarily false.”<sup>34</sup>

## 2. Overview of the Legal Utilization of Child Sexual Abuse Accommodation Syndrome

Although a more thorough exploration of the issues surrounding admission of expert testimony regarding behavioral science theories such as CSAAS follows in Part II.D, it will be helpful for the reader to have a basic framework for understanding how parties may use CSAAS evidence at trial.<sup>35</sup> Almost no jurisdiction allows the admission of CSAAS testimony in order for a party to *prove* that sexual abuse of a child has occurred.<sup>36</sup> Thus, an expert witness generally cannot examine an alleged victim and then testify that any observed manifestations of CSAAS behaviors constitute *proof* of sexual abuse.

More jurisdictions do allow expert testimony involving CSAAS to establish *implied* evidence of abuse, although this use is still relatively rare.<sup>37</sup> In these jurisdictions, an expert may “present[] evidence of abuse through implication, but refrain[] from giving an explicit opinion on whether the abuse occurred.”<sup>38</sup> Ultimately, the

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31. *Id.*

32. *See id.* at 35–36.

33. *Id.* at 37.

34. *Id.* at 35.

35. It should be made clear that the parties are not really allowed a choice as to how they may use such expert testimony. Rather, the decision is made for them based upon the treatment of such testimony by the jurisdiction where the action is brought. *See infra* notes 37–40 and accompanying text.

36. Stanger, *supra* note 18, at 570.

37. *Id.*

38. *Id.*

most common use of CSAAS allowed by courts is as a means to rehabilitate a child victim's testimony when there is a possibility that the child's behavior will be inexplicable to a layperson on the jury.<sup>39</sup> Many prosecutors argue that a child's recantation of his or her previous allegations of abuse falls into this category of "inexplicable behavior." Courts often agree with this reasoning and thus allow an expert witness to testify about the theories surrounding the existence of syndromes such as CSAAS as a means of "helping" the jury understand possible motivations behind a child's recantation.<sup>40</sup>

### *B. The Suggestibility of Child Witnesses*

Another psychological theory to consider in any case where a child victim has recanted allegations of sexual abuse is the idea that memories are malleable and capable of being changed, shaped, or even implanted due to various influences.<sup>41</sup> Although many researchers have examined the suggestibility of human memories in general,<sup>42</sup> it is a long-held belief among the scientific and legal communities that children's memories are particularly susceptible to suggestion.<sup>43</sup> In the context of child abuse allegations, sources such as parents, teachers, clinicians, counselors, and investigating law enforcement officials are advanced as individuals who may have "suggested" to a child, often unintentionally, that the child has been a

39. See *id.* at 571.

40. For one commentator's examination of the extent to which such evidence is actually "helpful" to a jury, see Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867 (2005). Professor Brodin notes that "admitting social science evidence of dubious reliability on the untested assumption that it is necessary to counteract jurors' false beliefs about victims may, ultimately, result in the substitution of another set of false beliefs, this time coming from the 'expert.'" *Id.* at 932.

41. See generally Elizabeth Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 NATURE REVIEWS NEUROSCIENCE 231 (2003). Loftus, a leading expert in the field of human memories, summarizes some of her best known memory studies and discusses their societal and legal implications. For a further discussion of Loftus's groundbreaking and often controversial work, see Elizabeth F. Loftus: *Award for Distinguished Scientific Applications of Psychology*, 58 AM. PSYCHOLOGIST 864, 865-66 (2003) (including a bibliography for a further exploration of Loftus's research into the nature of human memory).

42. See Loftus, *supra* note 41, at 231-32.

43. See Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 34-35 (2000).

victim of sexual abuse, when in fact such abuse has not occurred.<sup>44</sup> The fact that children are inevitability questioned about alleged abuse multiple times by multiple persons merely adds to the probability that they might develop a sincere yet mistaken belief that they are victims of sexual abuse.<sup>45</sup> Even interviewers trained to minimize any potential contamination of a child's testimony by using only "mildly" suggestive interview techniques can have "more than a trivial impact" on the suggestibility of a child witness.<sup>46</sup> Even more alarming is the fact that "research on the actual practices of interviewers has shown that some frequently used techniques are highly suggestive by any definition and raise a particularly high danger of false positives in light of suggestibility research."<sup>47</sup>

Professors Ceci and Friedman have conducted a review of current research in this area and have concluded that while researchers "disagree considerably over the degree to which the suggestibility of young children may lead to false allegations of sexual abuse, there is an overwhelming consensus that children are suggestible to a degree that . . . must be regarded as significant."<sup>48</sup> They also contend that even those studies which argue that children are *less* suggestible than is commonly believed *still* support the contention that "young children are highly suggestible."<sup>49</sup> Ceci and Friedman maintain that there is little disagreement among researchers "over *how* vulnerable children are to various degrees of suggestion. Instead, the disputes tend to concern whether the emphasis should be on the degree to which children *are* suggestible or the degree to which they are *not* . . ."<sup>50</sup> More specifically, Ceci and Friedman contend that:

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44. *See id.* at 60.

45. *See id.*

46. *See id.* at 62.

47. *Id.*

48. *Id.* at 36.

49. Ceci & Friedman, *supra* note 43, at 71. In their analysis, Ceci and Friedman take particular issue with the conclusions set forth in a review of suggestibility research conducted by Thomas D. Lyon (whom the authors place in a camp of researches they label as "child advocates"). *Id.* at 52–53. Lyon's article may prove useful for further background, study, and comparison. *See generally* Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999).

50. Ceci & Friedman, *supra* note 43, at 71 (emphasis added).

[E]ven if one looks no further than the body of research favored by child advocates . . . the proportion of false claims—that is, the proportion of children who were not exposed to a given type of behavior who nevertheless asserted that they were—ranged between 3 and 40%. Even the lowest end of this range can lead to unacceptably high decision-making errors in some circumstances, as we demonstrate with the aid of probability theory . . . .<sup>51</sup>

Ceci and Friedman ultimately conclude that even a small probability that a child would make false allegations can (or should) have significant consequences for the prosecution's ability to meet its high burden of proof.<sup>52</sup> They support this conclusion by conducting several probability assessments using Bayes's Theorem, which they describe as "a basic principle of logic that indicates how to adjust probability assessments in light of new evidence—which in this context is the child's allegation."<sup>53</sup> The details of the hypothetical probability analyses in which the authors engage is outside the scope of this Note, but the conclusions they draw from the exercise are relevant. They assert that the completed Bayesian probability analyses "vividly illustrate" that even a low probability that a child would spread false accusations of sexual abuse may result in a situation where the fact-finder is unable to find *correctly* in favor of the prosecution, given that a fact-finder *must be highly confident* in the defendant's guilt before properly reaching a guilty verdict.<sup>54</sup>

In contrast to the CSAAS evidence previously discussed,<sup>55</sup> which is generally utilized by the prosecution, evidence relating to the

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51. *Id.* at 53.

52. *Id.* at 81.

53. *Id.* at 76.

54. *Id.* at 81. It is worth noting that the authors make a compelling argument that "false positives," situations which arise when a person is convicted of abuse that did not occur, are worse than "false negatives," which arise when a person is *not* convicted of abuse that did occur. This principle is constitutionally mandated, they conclude, and is "not an idiosyncratic value assessment, but one that has deep roots in our adjudicative system and that the Supreme Court has adopted as a matter of constitutional principle." *Id.* at 73–76.

55. *See supra* Part II.A.

suggestibility of children is frequently utilized by the defense, “usually to show that the child’s [allegations] may have resulted from suggestive questioning.”<sup>56</sup> Many courts do allow such expert testimony intended to show how suggestive interview techniques can shape and influence a child’s testimony.<sup>57</sup>

### C. False Allegations of Child Sexual Abuse

In contrast to false allegations arising from suggestive interview techniques, as outlined in Part B, there is less research exploring the complete fabrication of false allegations of sexual abuse by children. According to one review of the research in this area, “[a] small number of systematic studies of false allegations exist.”<sup>58</sup> Based upon their review of these studies, as well as their own clinical observations, Myers et al. conclude that “[d]eliberate false allegations of sexual abuse are rare,” and that among these allegations, “most are made by parents, not children.”<sup>59</sup>

The authors do note that there are several studies which indicate that there is a significantly higher probability that an increased number of fictitious allegations occur in the context of divorce or custody disputes.<sup>60</sup> Myers et al. seem to believe, however, that even with the increased possibility of false allegations in this limited context, that concern for this occurrence “should not turn [in] to exaggeration.”<sup>61</sup> Indeed, the authors maintain that “the higher percentage of fabricated allegations occurring in custody cases should not lead to undue skepticism about such allegations. Many are

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56. Ceci & Friedman, *supra* note 43, at 98.

57. *State v. Kirschbaum*, 535 N.W.2d 462, 466–67 (Wis. Ct. App. 1995) (citing cases from multiple jurisdictions, both federal and state, which have ruled such expert testimony admissible).

58. Myers et al., *supra* note 2, at 112.

59. *Id.* at 112–13. In further support of the assertion that deliberate false allegations of child sexual abuse are rare, see Thea Brown, *Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce*, 41 FAM. CT. REV. 367, 374 (2003); Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 14 WOMEN’S RTS. L. REP. 123, 132 (1992).

60. See Myers et al., *supra* note 2, at 113.

61. *Id.*

true.”<sup>62</sup> While it may be true that in the final analysis of child sexual abuse allegations, “many are true,” it is undoubtedly also the case that some are not. Thus, the issue becomes what the appropriate legal response is to this possibility, given our society’s “constitutionally compelled principle that an inaccurate criminal conviction is a far worse result than a failure to gain an accurate conviction . . . .”<sup>63</sup>

#### *D. Expert Testimony Concerning the Above Behavioral and Psychological Theories*

As related above, there are a number of behavioral scientific theories that parties may utilize in an effort to bolster their case when recantation evidence is present.<sup>64</sup> The degree to which courts admit such evidence is of course dependent upon the jurisdictional rules governing each particular court.

##### *1. The Federal Rules of Evidence and the Daubert Test*

When federal courts consider expert testimony, they are bound to apply the Federal Rules of Evidence.<sup>65</sup> The rule most directly applicable to testimony given by experts is Rule 702, which states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of

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62. *Id.* at 115.

63. Ceci & Friedman, *supra* note 43, at 34.

64. See *supra* Part II.B–C.

65. See generally FED. R. EVID.

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>66</sup>

This version of Rule 702 reflects a 2000 amendment which codified the analysis set forth by the United States Supreme Court in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>67</sup> This is relevant because some state courts have adopted the *Daubert* standard and thus should generally treat expert testimony the same as federal courts, despite the fact that they are not bound by the Federal Rules of Evidence.<sup>68</sup>

There are other general Federal Rules of Evidence which may also have bearing on any examination of expert testimony. Rule 402 establishes a general relevancy requirement, stating that: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."<sup>69</sup> Rule 403 serves as a safeguard against unduly prejudicial evidence, stating: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>70</sup> Although the Rules of Evidence are only binding on the federal courts, the majority of states have adopted their own evidence rules, and most of them "mirror the framework and general approach of the Federal Rules of Evidence."<sup>71</sup>

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66. FED. R. EVID. 702.

67. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

68. See Steele, *supra* note 17, at 953–54.

69. FED. R. EVID. 402.

70. FED. R. EVID. 403.

71. Steele, *supra* note 17, at 950 n.98 (compiling a list of states which have adopted the Uniform Rules of Evidence, which are "almost identical to the Federal Rules of Evidence").

## 2. *The Frye Test*

Although it no longer applies to federal courts, many states retain the *Frye* test, a standard applied by federal courts prior to the development of *Daubert* as a means for deciding the admissibility of expert testimony.<sup>72</sup> Less exact than the *Daubert* standard, the *Frye* test merely states that “while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”<sup>73</sup>

## 3. *The Treatment of Social Science and Experience Based Expert Testimony under the Frye and Daubert Standards*

Expert testimony relating to inexact social sciences such as psychology has received a variety of treatments by courts applying both the *Daubert* and *Frye* tests.<sup>74</sup> Expert testimony regarding such theories as CSAAS and the suggestibility of child witnesses, both examined in Part II of this Note, fall into this category.<sup>75</sup> Courts differ in the approach they take when examining the admissibility of behavioral expert testimony in child sexual abuse cases.<sup>76</sup> Some jurisdictions, labeled “intermediate” jurisdictions by one commentator, do not allow an expert to evaluate a *specific* victim’s credibility, but do allow rebuttal or rehabilitation testimony regarding *general* manifestations of child sexual abuse.<sup>77</sup> Other “conservative” jurisdictions prohibit *all* expert testimony regarding child sexual abuse.<sup>78</sup>

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72. *Id.* at 953.

73. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

74. *See Steele, supra* note 17, at 954–58.

75. *See supra* Part II.

76. *See, e.g.,* Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1404–05 (1995).

77. *Id.* at 1405.

78. *See id.* at 1404–05. Lazo also asserts that there exist “liberal” jurisdictions which “allow[] a qualified expert not only to testify about common symptoms of child sexual abuse, but also to give an

Michigan is an example of a jurisdiction falling into an “intermediate” standard of admissibility of psychological expert testimony.<sup>79</sup> The Supreme Court of Michigan instituted a unique approach to the admissibility of behavioral science evidence.<sup>80</sup> In *People v. Beckley*, the Michigan court ruled that expert testimony based on observation and intended to explain certain behaviors should not be subject to the *Frye* standard.<sup>81</sup> Abandoning a rigid application of the test, the court proceeded to determine the admissibility of behavioral evidence in child sexual abuse cases by primarily focusing on whether the probative value of such evidence would be outweighed by its prejudicial nature.<sup>82</sup> In conducting this analysis, the court cautioned that “the evidence has a very limited use and should be admitted cautiously because of the danger of permitting an inference that as a result of certain behavior sexual abuse in fact occurred, when evidence of the syndrome is not a conclusive finding of abuse.”<sup>83</sup> The court ultimately held that “the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial.”<sup>84</sup>

Pennsylvania and Kentucky are two jurisdictions falling into the “conservative” category.<sup>85</sup> In *Commonwealth v. Dunkle*,<sup>86</sup> the Pennsylvania Supreme Court was presented with expert testimony similar to CSAAS (but not labeled as such) “about the behavior

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opinion as to the truthfulness of a child witness.” *Id.* at 1404. The author has been unable to verify Lazo’s assertion by finding jurisdictions adhering to this rule, however.

79. *Id.* at 1405, n.400.

80. See *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990).

81. *Id.* at 404. This case pre-dates *Daubert*.

82. See *id.* at 404–08. Note that in effect Michigan has hinged admissibility of this type of evidence on a basic FRE 403 analysis which weighs the probative value of evidence against its probable prejudicial impact. *Id.* at 406.

83. *Id.* at 405–06.

84. *Id.* at 406. It is interesting to note that in a subsequent decision, the Michigan Court of Appeals openly challenged the Michigan high court’s holding in *Beckley*, stating that “[w]e disagree with the statements in the plurality opinion of *People v. Beckley* . . . that theories of behavioral science are not subject to scrutiny under the test set forth in . . . *Frye v. United States*. ‘Junk science’ has no place in our courtroom.” *People v. Hubbard*, 530 N.W.2d 130, 134 n.2 (Mich. Ct. App. 1995).

85. See Steele, *supra* note 17, at 961–67.

86. *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

patterns exhibited by sexually abused children . . . .”<sup>87</sup> The *Dunkle* court held that such evidence was inadmissible because:

Permitting an expert to testify about an unsupportable behavioral profile and then introducing testimony to show that the witness acted in conformance with such a profile is an erroneous method of obtaining a conviction. For this reason, we hold that the expert should not have been permitted to testify about behavior patterns generally exhibited by abused children and that the error requires reversal.<sup>88</sup>

A key component of the court’s ruling in *Dunkle* was that the court believed that “syndrome” evidence of child sexual abuse was generally indiscriminate between “sexually abused children and those who have experienced some other type of trauma.”<sup>89</sup>

In *Newkirk v. Commonwealth*,<sup>90</sup> the Supreme Court of Kentucky similarly stated that expert testimony utilizing CSAAS would be inadmissible because it fails to meet both the *Frye* and *Daubert* standards.<sup>91</sup> In its decision, the court referenced its historical “distrust of expert testimony which purported to determine criminal conduct based on a perceived psychological syndrome.”<sup>92</sup> The court continued, saying that “our reasons have been the lack of diagnostic reliability, the lack of general acceptance within the discipline from which such testimony emanates, and the overwhelmingly persuasive nature of such testimony effectively dominating the decision-making process. . . .”<sup>93</sup> The court ultimately held that expert testimony based around CSAAS was inadmissible either under the *Daubert* standard

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87. *Id.* at 834.

88. *Id.* at 836.

89. *Id.* at 832. The court further explains that “[i]n order for a syndrome to have discriminant ability, not only must it appear regularly in a group of children with a certain experience, but it also must not appear in other groups of children who have not had that experience.” *Id.* For extensive criticism of this legal reasoning, see Steele, *supra* note 17, at 967–72.

90. *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996).

91. *See id.* at 690–91.

92. *Id.*

93. *Id.* at 691.

for expert scientific testimony or Kentucky's rule of evidence 403, which mirrors FRE 403.<sup>94</sup> Notably, the court recognized that its decision would inevitably be subject to criticism, which the court preemptively addressed, stating:

Some will wrongly conclude that we fail to recognize the extent of child sexual abuse or even that we elevate the rights of criminals over defenseless children. We remind those who hold such views that every person accused of committing a crime is entitled to the presumption of innocence and to have such presumption continue until guilt is proven beyond a reasonable doubt. The admission of theoretical expert evidence which presumes guilt from the very fact of the accusation is contrary to our most fundamental rights.<sup>95</sup>

Given the lack of consensus in the psychological community regarding the true frequency and veracity of victim recantations in child sexual abuse cases,<sup>96</sup> the approach adopted by "conservative" jurisdictions such as Pennsylvania and Kentucky is preferable over other jurisdictions. These courts are correct in determining that expert testimony suggesting that sexual abuse recantations are common (through advancing the theory of CSAAS for example) and should generally be ruled inadmissible under both the *Frye* and *Daubert* standards.<sup>97</sup> If courts conduct a serious, thorough review of the current research being conducted in this area, they should find that any assertions suggesting that recantations are a common occurrence in child sexual abuse cases are neither "based upon sufficient facts or

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94. *Id.* at 695.

95. *Id.*

96. *See supra* Part II.A.

97. Note that this article is only concerned with the phenomenon of recantation, and thus, the suggestion that CSAAS (and related) expert testimony should not be allowed under *Frye* or *Daubert* only pertains to the part of the theory which advances the idea that children commonly recant the allegations of sexual abuse they have made, even when the alleged sexual abuse actually occurred. No argument is advanced as to the relevance of the remaining characteristics outlined by CSAAS and other "syndromes" as common to sexually abused children.

data” (under a *Daubert*/Rule 702 analysis) nor a principle which has gained “general acceptance” (under a *Frye* analysis).<sup>98</sup>

Further, even if a court were to decide that such testimony is acceptable under either *Frye* or *Daubert*, it should be ruled inadmissible under the probative value versus prejudicial impact balancing test codified by FRE 403 and many state jurisdictions.<sup>99</sup> Although critics have attacked both jurisdictions, the supreme courts of Pennsylvania and Kentucky were correct in their assessment that testimony offered by a psychological professional regarding the unproven idea that a child victim of sexual abuse is likely to recant is simply too prejudicial to the defendant to be allowed into evidence.<sup>100</sup> Even with a limiting instruction from the judge stating that the testimony is for background purposes only, the likelihood is too high that members of the jury will interpret the expert testimony to mean that a child’s recantation is conclusive *proof* of sexual abuse, regardless of how emphatically the child denies that such abuse occurred.

### III. THE LEGAL CONSEQUENCES OF A CHILD’S RECANTATION OF SEXUAL ABUSE ALLEGATIONS

When a child recants allegations or testimony used to convict a person of sexual abuse, a court reviewing the conviction is presented with numerous legal issues that it must address in determining what course to take in light of the new information. This section will attempt to explore some of these issues, beginning with a summary of

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98. It could be argued that this proposition *has* gained “general acceptance,” given its pervasive appearance in judicial opinions, and should thus meet the *Frye* test. Just because a scientific theory has gained the general acceptance of the *legal* community, however, does not mean it has gained the general acceptance of the *scientific* community. The fact that an erroneous idea has been propagated time and again does not make the idea correct.

99. See Brodin, *supra* note 41, at 926–33. Professor Brodin advances several arguments for generally excluding evidence based in behavioral sciences, including expert testimony regarding “syndromes” such as CSAAS, from criminal trials. See *generally* Brodin, *supra* note 41. One of his arguments is that the prejudicial impact of syndrome evidence (such as CSAAS) outweighs its probative value under the FRE 403 “calculus.” See *id.* at 927.

100. See *generally* Brodin, *supra* note 41.

the historical approach courts have generally taken when deciding how to deal with recantations in a wide variety of situations, not just child sexual abuse cases.<sup>101</sup> The section following this overview will examine the effect of recantations in the context of deciding motions for either an evidentiary hearing or a new trial.<sup>102</sup> The final section will explore the latest trends by courts when considering the unique problems presented by this situation.<sup>103</sup>

### A. *The Traditional Judicial Suspicion of Witness Recantation*

Numerous commentators have observed that judges have historically expressed profound skepticism when examining witness recantations, and many articles discussing the issue have gathered impressive lists of cases to support this assertion.<sup>104</sup> Numerous reasons, discussed below, are advanced by courts in support of upholding this tradition of skepticism.

#### 1. *The “Degraded Character” of the Recanting Witness*

In discussing the prevalence of judicial skepticism in recantation situations, commentators often turn to the opinion written by the New York Court of Appeals in *People v. Shilitano*.<sup>105</sup> *Shilitano* was a case where the defendant, convicted of first-degree murder, filed a motion for a new trial after several prosecution witnesses repudiated their trial testimony.<sup>106</sup> The *Shilitano* court neatly summarized the prevalent judicial attitude to witness recantations, saying “[t]here is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced

101. See *supra* Part III.A.

102. See *supra* Part III.B.

103. See *supra* Part III.B.3.

104. E.g., Cobb, *supra* note 2, at 969–70; Christopher J. Sinnott, Note, *When Defendant Becomes the Victim: A Child’s Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 574–75 (1993). See generally Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases*, 77 A.L.R.4TH 1031 (1990).

105. *People v. Shilitano*, 112 N.E. 733 (N.Y. 1916).

106. *Id.* at 735. The fact that *Shilitano* is an early 20th-century case illustrates the point that intense judicial skepticism is a long-used filter for judges considering witness recantations.

in the administration of the criminal law know well its untrustworthy character.”<sup>107</sup> In justification of its skepticism, the court forwarded the idea that “witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations.”<sup>108</sup>

## 2. *The Recanting Witness's Admission of Perjury*

Another commonly advanced basis for suspicion is the fact that by the very act of recantation, a witness destroys her own credibility by admitting that she has knowingly lied to the court under oath, either in her original testimony or through her subsequent recantation of that testimony.<sup>109</sup> As the Montana Supreme Court explained in *State v. Perry*,<sup>110</sup> “[o]n its face, recanted testimony demonstrates the unreliability of a witness . . . to grant a person of questionable credibility and motive carte blanche to overturn the determination of a jury . . . is not conducive to the sound administration of justice.”<sup>111</sup> Another court succinctly expressed the same sentiment even more emphatically, saying, “[a] recantation . . . is a confession to perjury which destroys the credibility of the witness.”<sup>112</sup>

## 3. *The Fear of Duress or Coercion*

Yet another basis for judicial skepticism of witness recantations is a belief that the recantation is motivated by either duress or coercion.<sup>113</sup> As one court has noted,

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107. *Id.* at 736. Modern-day courts continue to echo this sentiment. See, e.g., *State v. Clark*, 125 P.3d 1099, 1106 (Mont. 2005) (noting that “nothing in our decision negates the concern[] . . . that recantations are to be ‘viewed with great suspicion’ . . .”) (citation omitted).

108. *Shilitano*, 112 N.E. at 735.

109. See, e.g., *Cobb*, *supra* note 2, at 982; Sinnott, *supra* note 104, at 575.

110. *State v. Perry*, 758 P.2d 268 (Mont. 1988).

111. *Id.* at 275 (citations omitted).

112. *State v. Guidry*, 647 So. 2d 502, 509 (La. Ct. App. 1994) (citations omitted).

113. *Cobb*, *supra* note 2, at 983–89.

Scrutiny and skepticism of recantations . . . serves the dual purposes of protecting witnesses after the trial and promoting truthful testimony during the trial. By disbelieving recantations . . . judges protect witnesses . . . who, because of their testimony in court, have been subjected to scorn, fear, and intimidation. "Knowledge that obtaining a recantation will not affect the outcome of the trial makes it less likely that defendants and their friends will hound witnesses after trial."<sup>114</sup>

Of particular relevance is the observation made by one commentator who, when discussing this particular issue, noted that "[n]otions of duress and coercion seem to underlie many courts' denials of motions for new trial where the recanting witness is a minor and is related to the defendant."<sup>115</sup> She goes on to note that "[c]ourts seem to have a special concern for the susceptibility of minors to duress and coercion, whether such notions are enunciated or not."<sup>116</sup>

#### 4. *Judicial Policy Concerns*

Policy concerns such as judicial economy and the finality of judgments are among the final justifications for judicial skepticism of recantations.<sup>117</sup> In enunciating these policy concerns, the Supreme Court said:

The strong presumption against recantation testimony reflects an uneasy balance between, on the one hand, society's interest in

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114. *United States v. Schlesinger*, 438 F. Supp. 2d 76, 106 (E.D.N.Y. 2006) (quoting *Mendiola v. Schomig*, 224 F.3d 589, 593 (7th Cir. 2000)).

115. *Cobb*, *supra* note 2, at 985.

116. *Id.*

117. *See id.* at 991–93. "[I]f a primary purpose of a legal system is to create order within society, this purpose would be ill-served by a judicial posture which would permit the continuous relitigation of matters already thoroughly examined. General principles . . . of *res judicata* militate against an accommodating attitude toward recantation of testimony." *Id.* at 991. *Cobb* also expresses the idea that "there is also the concern that the granting of new trials based on recantations of testimony would 'license witnesses to trifle with the court,' and thereby permit the manipulation of the legal system." *Id.* at 992 (citation omitted).

resolving factual disputes in one proceeding and in according finality to those resolutions, and, on the other, the interests of a convicted individual and society at large in ensuring that only the guilty are punished.<sup>118</sup>

Commentators have also noted that judicial deference afforded to these policy concerns is often strengthened by the traditional disdain courts have for claims of newly discovered evidence, as courts often “harbor[] doubts about the underlying validity of the new evidence.”<sup>119</sup>

The cumulative effect of all of these considerations is, as one commentator has described, that “courts effectively indulge [in] a presumption that recantations are untrustworthy.”<sup>120</sup> This presumption makes it all the more difficult for a person convicted of child sexual abuse to successfully gain a new trial based on a child’s recantation.

### 5. *The Reduced Justification for Judicial Skepticism Regarding a Child’s Recantation*

For purposes of the current discussion, it is particularly relevant that several of the justifications used to defend judicial suspicion of witness recantation are not readily applicable to the specific context of victim recantation in child sexual abuse cases. First and most obviously, any judicial concern about the “low and degraded character”<sup>121</sup> of a recanting witness is obviously not generally applicable in cases where the recanting witness is a child victim of sexual abuse.

Second, the idea that by the very act of recantation a witness destroys her credibility by admitting to perjury is also less applicable

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118. *Dobbert v. Wainwright*, 468 U.S. 1231, 1237 (1984).

119. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 664–65 (2005).

120. Repka, *supra* note 2, at 1440. For interested readers, Repka offers a more complete chronicle of the evolution of judicial suspicion of recantation evidence. *Id.* at 1436–40.

121. See *supra* notes 111–14 and accompanying text.

to child victims. While the basic inference is undoubtedly logical and is proper for courts to address in cases of adult witness recantation, it is arguably much less applicable in cases involving child witness recantation. The research surrounding the suggestibility of children and implantation of memories discussed in Part II provides a reasonable basis for the possibility that some children's reports of sexual abuse are based on memories the children *believe are true*, but which are in fact created via suggestion.<sup>122</sup> In such a case it would therefore be erroneous to view a child's recantation with suspicion based on the generally logical assumption that a recanting witness is a verified liar.

Likewise, in child sexual abuse cases courts should consider mitigating some of the thorny policy issues surrounding recantation.<sup>123</sup> These cases are particularly sensitive to the conflicting policy concerns outlined by the Supreme Court—judicial efficiency and finality versus conviction of only guilty persons.<sup>124</sup> This is because false convictions in child sexual abuse cases have, as one commentator observed, “particularly nasty consequences, including destruction of a family and exposure of the defendant to intense public opprobrium and even physical danger.”<sup>125</sup> Of course, wrongful acquittals have similarly dire consequences, especially in light of the general societal need to both protect children from the horrors of sexual abuse and punish those individuals who would abuse them.<sup>126</sup>

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122. See *supra* Part II.

123. See *supra* notes 113–18 and accompanying text.

124. As previously noted, commentators such as Ceci and Friedman have argued that the weight which should be assigned to these conflicting policies is not actually equal, and therefore, there is no “balancing” to be done. See *supra* text accompanying note 63. The authors instead suggest that “[c]onvicting a person for a crime he did not commit—perhaps for a crime that never occurred—is an abhorrent outcome.” Ceci & Friedman, *supra* note 43, at 75. In further support of their position, they reference both Blackstone’s “celebrated statement that ‘it is better that ten guilty persons escape, than that one innocent suffer’” and the Supreme Court’s perception of “a ‘fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.’” *Id.* at 74 (citation omitted). See also Cobb, *supra* note 2, at 993 (“[I]f our criminal justice system must err, policy dictates that it be on the side of the guilty individual who is allowed to go free, rather than in the conviction of an innocent person.”).

125. Ceci & Friedman, *supra* note 43, at 75–76 (citation omitted).

126. See, e.g., *People v. Beckley*, 456 N.W.2d 391, 417 (Archer, J., dissenting in part) (stating that “sexual abuse of children is among the most cruel and heinous of criminal acts . . . [t]hus, society has the

This natural protective instinct is one of the principles underlying research indicating the existence of general prejudice by jurors against people accused of child sexual abuse.<sup>127</sup> This research hints at another possible policy reason for heightened vigilance against the possibility of wrongful conviction in child sexual abuse cases—the possibility that:

[F]or some jurors the mere fact that the defendant is charged with sexual assault against a child will cause the juror to consider the defendant probably guilty, or, at the very least, the burden will be placed on that defendant to prove his or her innocence . . . . [G]eneric prejudice involves more than mere abhorrence of the crime itself. It involves the juror's inability to impartially decide whether in fact a crime has occurred or, if it has occurred, whether the defendant is the guilty party.<sup>128</sup>

It should be noted that many of the other concerns expressed by courts regarding recantation evidence are indeed applicable to child sexual abuse cases. Of great legitimate concern in child recantations is the possibility that fear or duress has coerced the witness into recanting her testimony.<sup>129</sup> Courts are greatly concerned about duress in cases of child recantation, particularly given the perception that children are especially vulnerable to coercion.<sup>130</sup> However, while courts should be cognizant of this vulnerability when considering motions for the defense based on a child's recantation, it is not proper

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highest interest in protecting defenseless children from incurring substantial and permanent injury at the hands of a child abuser.”).

127. See Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 LAW & HUM. BEHAV. 5 (1997). Vidmar defines generic prejudice as “prejudice that involves the presence of general attitudes, beliefs, and biases held by the juror that prevent her or him from deciding the case with a fair and impartial mind.” *Id.* at 6.

128. *Id.* Although Vidmar contends that continued research is needed to draw more precise conclusions, he does assert that his review of research in the area, as well as his own studies, generally support the hypothesis that generic prejudice is a legitimate concern in sexual abuse cases. See *id.* at 20.

129. Cobb, *supra* note 2, at 983–87. Indeed, this is an instance where evidence concerning the suggestibility of children may work against a defendant, as it may presumably be possible to use suggestive techniques to convince a child to recant in cases of actual abuse. *Id.*

130. *Id.* at 986 (stating that this perception is “generally . . . borne out by empirical research”).

for courts to allow this cognizance to “serve as a basis for the wholesale rejection of recanting testimony.”<sup>131</sup>

### *B. Recantation Evidence as the Basis for a Motion for a New Trial*

The legal standards used by most courts to evaluate whether to grant a motion for a new trial based upon recantation evidence are generally ill-equipped to effectively deal with the complex issues which must be considered in a case of child sexual abuse. The following sections will briefly summarize the two most commonly applied standards and discuss specifically how they inadequately address recantation evidence in child sexual abuse cases.

#### *1. The Berry Standard*

The first standard, originally set forth by the Georgia Supreme Court in *Berry v. State*,<sup>132</sup> is a general test used to evaluate *all* newly discovered evidence, and is not specifically tailored to recantation cases. Although many jurisdictions have modified the standard throughout the years, the basic elements of the standard generally adhere to some variation of the original elements set forth by the court.<sup>133</sup> They are:

1st. That the evidence has come to [the defendant's] knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only . . . speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be

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131. *Id.*

132. *Berry v. State*, 10 Ga. 511, 527 (1851).

133. *See State v. Clark*, 125 P.3d 1099, 1103 (Mont. 2005).

granted, if the only object of the testimony is to impeach the character or credit of a witness.<sup>134</sup>

## 2. *The Larrison Standard*

The second standard, developed by the United States Court of Appeals for the Seventh Circuit in *Larrison v. United States*,<sup>135</sup> was designed to specifically address situations where a motion for new trial is based on recantation of a witness's testimony.<sup>136</sup> Like the *Berry* standard, numerous variations of the *Larrison* standard exist in various jurisdictions.<sup>137</sup> The original elements of the standard, as set forth by the Seventh Circuit, state that:

[A] new trial should be granted when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.<sup>138</sup>

Even though the *Larrison* standard is specifically intended to evaluate recantation evidence, it does not address the context in which the recantation occurs.<sup>139</sup> As previously discussed, there are different considerations involved when the recanting witness is an alleged child victim of sexual abuse versus when the recanting witness is an alleged adult co-conspirator or eye-witness.<sup>140</sup> There are a host of issues surrounding recantation of children in sexual abuse

134. *Berry*, 10 Ga. at 527.

135. *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928).

136. *Id.* at 87–88.

137. *See Clark*, 125 P.3d at 1104.

138. *Larrison*, 24 F.2d at 87–88. It should be noted that the Seventh Circuit subsequently abandoned the *Larrison* test, overturning its use in *United States v. Mitrione*, 357 F.3d 712 (7th Cir. 2004). However, some jurisdictions continue to use the *Larrison* test, either in its original form or some variation thereof. *Clark*, 125 P.3d at 1104.

139. *See generally Larrison*, 24 F.2d 82.

140. *See supra* Part III.A.

cases, and the *Larrison* standard fails to address these issues any more effectively than the *Berry* standard does.<sup>141</sup> The following section will explore this idea further through an examination of the practical application of both standards.

### 3. *Application of the Berry and Larrison Standards*

In *State v. Clark*,<sup>142</sup> the Montana Supreme Court engaged in an in-depth exploration of how various courts apply the *Berry* and *Larrison* standards as part of its effort to develop “a clearer test with a cogent rationale.”<sup>143</sup> The court correctly recognized that in any evaluation of evidence under the *Berry* or *Larrison* standards, the evaluating court’s focus would center on the *Berry* standard that the evidence would “probably produce a different verdict” or the *Larrison* standard that the evidence “might have reached a different conclusion,” depending on which standard the jurisdiction applied.<sup>144</sup> According to the plain meaning of both standards’ language, *Larrison* “theoretically offers a more lenient standard for the granting of new trials.”<sup>145</sup> The court in *Clark* agreed with this theory, stating that its newly adopted “reasonable probability” standard would fall “somewhere between” the *Berry* and *Larrison* standards.<sup>146</sup> In explaining why it desired to create a middle-ground approach for evaluating motions for a new trial, the court explained:

In any given case, a jury “might” have reached a different conclusion based on any small, even irrelevant, change in trial evidence because “might” means “any chance at all.” This retrospective test is simply too broad. In contrast, a district court

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141. Indeed, several commentators have argued that there is little substantive difference between the two standards. See, e.g., Sinnott, *supra* note 105, at 577–78.

142. *State v. Clark*, 125 P.3d 1099 (Mont. 2005).

143. *Id.* at 1105. The standard adopted by the court was a variation of the *Berry* standard which stated that “evidence must indicate that a new trial has a *reasonable probability* of resulting in a different outcome.” *Id.* (emphasis added).

144. *Id.* at 1106 (emphasis added).

145. Cobb, *supra* note 2, at 976.

146. *Clark*, 125 P.3d at 1106.

could be convinced that the new evidence before it has a strong chance of bringing about a different verdict upon a new trial, but it may not think this possibility so strong that it “probably” would produce a different verdict . . . This prospective test is too restrictive.<sup>147</sup>

Commentators have argued that in actual application, there is little practical difference between the standards.<sup>148</sup> This argument partly rests on the observation that *Larrison*’s more lenient standard is “counterbalanced by *Larrison*’s further requirement that the judge first be convinced of the truthfulness of the recantation.”<sup>149</sup> *Berry*, on the other hand, “appears to require more certainty that a different result would ensue, but does not require that the judge be as sure of the truthfulness of the recantation.”<sup>150</sup> Regardless of the differences between the application and use of the two standards, one thing is clear—it is a difficult task for a defendant to gain a new trial based on witness recantation.<sup>151</sup>

#### 4. *Possible Alternative Standards for Granting a New Trial Motion Based on a Child’s Recantation*

The judicial system should develop a new evaluative standard for the unique situation of recantation in child sexual abuse cases. This belief is based on the following factors: (1) the fact that neither standard effectively deals with recantations in child sexual abuse cases; (2) society’s constitutionally compelled interest in ensuring that only guilty parties are convicted of crimes;<sup>152</sup> (3) the fact that “[f]ew convictions carry the same degree of stigma and legal ramifications for the convicted”<sup>153</sup> as convictions given for child

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147. *Id.*

148. *See, e.g., Cobb, supra* note 2, at 978–80; *Sinnott, supra* note 105, at 577–78.

149. *Cobb, supra* note 2, at 978.

150. *Id.*

151. *See id.*

152. *See supra* note 63 and accompanying text.

153. *Olafson & Lederman, supra* note 29, at 36.

sexual abuse; and (4) the probability that recantations are only an issue in a small percentage of child sexual abuse cases.<sup>154</sup>

Recognizing the need for a new standard to determine whether a new trial should be granted based on a child's recantation, several commentators have offered possible alternatives to the *Berry* and *Larrison* standards. One commentator advocated for a "reasonable probability approach," wherein a new trial would be granted "[w]here the recanting occurred under . . . circumstances reasonably free from suspicion of duress . . . and, upon a new trial the original . . . testimony reasonably could be found false . . . ."<sup>155</sup> This alternative, while an improvement, does not appear to go far enough towards rectifying the inadequacies of the current evaluative process.

Another proposed standard, that of a "rebuttable presumption of reliability,"<sup>156</sup> does more to address the shortcomings of the current system. Under this standard, the prosecution would have the burden of proving that the recantation is unreliable, due to factors such as duress or coercion.<sup>157</sup> If the prosecution failed in meeting this burden, a new trial would be granted.<sup>158</sup> If the prosecution succeeded in meeting this burden, then a new trial motion would not be denied, but rather the burden would shift back to the defendant to present evidence showing the veracity of the recantation.<sup>159</sup> This standard, coupled with the restrictions to expert testimony proposed above, would result in a much more effective system for dealing with cases involving child recantations.

## CONCLUSION

Child sexual abuse cases are among the most difficult cases our criminal justice system must handle, for the stakes are almost impossibly high. As one pair of commentators has noted, not only are

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154. See *supra* note 29 and accompanying text.

155. Repka, *supra* note 2, at 1454.

156. Sinnott, *supra* note 104, at 593.

157. *Id.* at 593–94.

158. *Id.*

159. *Id.* at 593–96.

child sexual abuse cases “[t]he most difficult form of abuse to prove in court,” but the cases are further complicated by the fact that “[f]ew convictions carry the same stigma and legal ramifications for the convicted and the potential for serious emotional and psychological harm to the victim.”<sup>160</sup> Because of the challenges presented by these cases, and what is at stake for all the parties involved, the courts must earnestly strive to develop more effective methods for ensuring these cases are decided in a just manner. To effectuate this goal, courts should not allow evidence such as CSAAS to be admitted in regards to recantation unless and until the scientific community establishes reliable proof regarding the tendency of sexually abused children to recant. This view is bolstered by the possibility that at least some allegations of abuse are made based on the influence and suggestions of third parties.

Further, courts should evaluate a motion for new trial based on the recantation of a child victim with the presumption that the recantation is credible until proven otherwise by the prosecution, and even then courts should allow the defendant to offer rebuttal evidence to establish the credibility of the recantation.

In discussing the status of his father’s case with Aimee Maxwell, Jerry Biggs’s son expressed his frustration with the situation in the following way:

I do not understand why all of this has to be so hard. He didn’t do it!! My dad is sitting in prison for going on 10 years now for something he didn’t do. What more do I need to do to prove this to the DA’s office? I really do not feel they are going to help us at all . . . I hope I am wrong but so far the justice syst[em] just has not shown me that they ever care if justice is done or not. I have been telling them that he didn’t do it for years now and still

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160. Olafson & Lederman, *supra* note 29, at 36.

they just turn their heads to the truth. What more has to be done to get them to listen?<sup>161</sup>

If such procedures were adopted by the courts, Jerry Biggs's son very well may have already received what he began asking for almost ten years ago—someone who will listen to what he has to say.

*Cylinda C. Parga*

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161. E-mail from Jerry Biggs's son to Aimee Maxwell, Director, the Georgia Innocence Project (Oct. 10, 2005, 14:24) (on file with the Georgia State University Law Review).