

Comments

INVASIVE, INCONCLUSIVE, AND UNNECESSARY: PRECLUDING THE USE OF COURT-ORDERED PSYCHOLOGICAL EXAMINATIONS IN CHILD SEXUAL ABUSE CASES

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I. INTRODUCTION

It is difficult, given varying estimates, to determine precisely how many children have been sexually abused in the United States. It is clear, however, that sexual abuse in this country is a massive problem by any measure.¹ And its consequences are grave, both for society and for the vic-

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¹ Jodi Leibowitz, *Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse*, 25 *CARDOZO L. REV.* 907, 907 n.2 (2003) (noting that as many as one in three women and one in four men have been sexually abused in the United States (citing Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Re-*

tims. One cannot deny that sexual abuse inflicts severe psychological wounds on its victims.² Once a family decides to move forward against the perpetrator of a sexual assault, the criminal process can be a difficult and damaging collateral experience for the child victim.³ Thus, courts should strive to prevent further harm to these brave children who turn to the criminal justice system.

The legislatures who enact laws criminalizing child sex abuse, the police and prosecutors who enforce these laws, and society at large have grown increasingly aware of the need to protect children throughout the criminal process.⁴ The growing emphasis on child victim rights in this process has led to debate within the legal community regarding how to balance the welfare and rights of the victim with those of the defendant. Society's pronounced interest in and concern over child sexual assault creates a danger of the law providing too much protection for the child victim, thereby infringing on the rights of the accused.⁵ Courts and legislatures have put forward an array of standards designed to achieve the correct balance.⁶

dress, 61 BROOK. L. REV. 199, 205 (1995)); *id.* at 941 n.134 (estimating that about fifteen percent of female children and up to eight percent of male children have been victims of molestation, kidnapping, or rape (citing KATHRYN QUINA & NANCY L. CARLSON, RAPE, INCEST AND SEXUAL HARASSMENT: A GUIDE FOR HELPING SURVIVORS 6 (1989))).

² See, e.g., John E. B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 52 (1989) (referring to study finding that over eighty percent of psychiatric inpatients had sexual abuse history (citing A. Jacobson & B. Richardson, *Assault Experiences of 100 Psychiatric Inpatients: Evidence of the Need for Routine Inquiry*, 144 AM. J. PSYCHIATRY 908 (1987))); Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 PENN ST. L. REV. 487, 509–10 (2004) (referring to studies that demonstrate a higher incidence of past child sexual abuse among prison inmates and substance abusers than the general population and that outline the long term psychological effects of child sexual abuse, "includ[ing] fear, anxiety, depression, anger, hostility, inappropriate sexual behavior, poor self-esteem, and difficulty in forming close relationships" (citing PETER J. PECORA ET AL., THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 469 (2d ed. 2000); Childhelp USA, National Child Abuse Statistics, available at <http://www.childhelpusa.org>)).

³ Roger J. R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 LAW & PSYCHOL. REV. 59, 75 (1995) ("The bulk of studies . . . suggest that sexually abused children who testify are often harmed by their experiences in the legal system, particularly in the criminal justice system." (emphasis omitted)).

⁴ See, e.g., 18 U.S.C. § 3509 (2000) (federal statute outlining protections for child abuse victims during the judicial process); JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 324–25 (2d ed. 2002) (noting that increased prosecutions of child sex offenders in the 1980s increased the awareness that children need protection from the negative effects of the criminal process).

⁵ See Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 286–87 (1990) (describing the difficulty for the criminal justice system of both protecting the child's interests and ensuring that the defendant receives a fair trial).

⁶ See, e.g., Alan J. Klein, *Forensic Issues in Sexual Abuse Allegations in Custody/Visitation Litigation*, 18 LAW & PSYCHOL. REV. 247, 259 (1994) (reporting that thirty-seven states allow videotaped testimony for purpose of protecting child victim witness); Jane Dever Prince, *Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 113, 120–26

A major issue at the center of this debate is whether courts should have the authority to compel independent psychological examinations of child sex crime victims at the defendant's request. Often, the only witnesses to sex crimes against children are the victims themselves.⁷ Proponents of allowing courts to compel these examinations under at least some circumstances claim that psychological examinations are necessary to assess the reliability of a child witness and to ensure that an adequate defense can be presented.⁸ In contrast, opponents view such court-ordered examinations as an infringement on the welfare and rights of the victim⁹ and as an unnecessary and unreliable discovery tactic that will deter future victims from coming forward.

In 2006, two state supreme courts faced this issue and reached contrary conclusions. The Supreme Court of Virginia held in *Nobrega v. Commonwealth*¹⁰ that "a trial court has no authority to order a complaining witness in a rape case to undergo a psychiatric or psychological examination."¹¹ The court reasoned that this outcome reflected the proper balance between criminal defendants' and victims' rights; altering this balance by giving trial courts the power to compel independent psychological examinations of victims was "properly left to the General Assembly to consider as an issue of public policy."¹²

In contrast, the Supreme Court of Nevada determined in *Abbott v. State*¹³ that "[d]enying the defendant an opportunity to examine the victim could have disastrous consequences, especially where the victim's veracity is seriously called into question and the defendant needs an independent psychological examination to present an adequate defense."¹⁴ In so ruling, the court overturned its previous decision that had strictly limited a trial court's ability to compel an independent psychological examination.¹⁵ The

(2004) (surveying the differing levels of authority in various jurisdictions to compel child psychiatric examinations).

⁷ Prince, *supra* note 6, at 113.

⁸ *Abbott v. State*, 138 P.3d 462, 468 (Nev. 2006) (noting that an independent psychological examination of the victim may be necessary for the defendant to "present an adequate defense").

⁹ These include the victim's right to privacy and the victim's right to have his or her welfare protected throughout the criminal process, which many states recognize. See, e.g., *State v. Horn*, 446 S.E.2d 52, 54 (N.C. 1994) (noting that compelled psychological examinations of the victim infringe on the victim's right to privacy); *Nobrega v. Commonwealth*, 628 S.E.2d 922, 926 (Va. 2006) (recognizing the need to protect the right of crime victims to be treated with respect, dignity, and fairness).

¹⁰ 628 S.E.2d 922.

¹¹ *Id.* at 926.

¹² *Id.*

¹³ 138 P.3d 462.

¹⁴ *Id.* at 468.

¹⁵ *Id.* at 470 ("[W]e conclude that *Romano*[], 97 P.3d 594 (Nev. 2004)] impermissibly infringes on a defendant's fair trial rights, and we return to *Koerschner*[], 13 P.3d 451 (Nev. 2000)] as the appropriate test to determine whether a criminal defendant is entitled to an independent psychological examination of a victim.").

new test by the Nevada Supreme Court¹⁶ was significantly less restrictive of a court's discretion to order such an examination.¹⁷

The opposite positions taken by these two courts reflect a divide over how to approach such a delicate balance of rights. This Comment explains the relevant issues in this debate and argues that courts should not have the authority to compel independent psychological examinations of children who are the complainant witnesses in sex abuse cases under any circumstances.

Many jurisdictions allow courts to compel psychological examinations to determine the *competency* of a witness.¹⁸ Unfortunately, in the child sex crime context, many courts—like the *Abbott* court—are using this authority to compel examinations aimed at determining the *credibility* of the victim. Such action usurps the role of the trier of fact as the ultimate arbiter of witness credibility, injects an imperfect science into the trial process, risks misleading the jury, and unnecessarily infringes on the rights of victims. This Comment argues that, in light of courts' consistent misuse of compelled psychological examinations, the uncertain value of expert psychological assessments, and the important public policy of protecting child sex crime victims, courts should be prevented absolutely from ordering independent psychological examinations of child sexual abuse victims.¹⁹

Part II first examines the decisions of the *Nobrega v. Commonwealth* and *Abbott v. State* courts and outlines the reasoning behind *Nobrega's* conclusion that the court did not have the authority to compel a psychological examination of the complainant witness and *Abbott's* conclusion to the contrary. Part III describes the background of psychological examinations in the context of child sexual abuse trials. Part III.A categorizes the different approaches taken by different jurisdictions to the issue of compelled psychological examinations in child sex-abuse trials. Part III.B explores the intersection of the scientific and legal dimensions of this debate. Part III.C examines the moral considerations of the issue.

Part IV argues that courts should not have the authority to order independent psychological examinations of child sex abuse victims. Legal, sci-

¹⁶ This was the reinstatement of an old test used by the Nevada Supreme Court. *Id.*

¹⁷ *Id.* at 468 (describing the test under *Romano*).

¹⁸ *See, e.g.*, *United States v. Gates*, 10 F.3d 765, 766 (11th Cir. 1993) (holding that the court has the power to order a psychiatric examination to determine competency when a “witness is incapable of testifying”); *United States v. Gutman*, 725 F.2d 417, 420 (7th Cir. 1984) (“[The] district judge has the power, and in an appropriate case the duty, to hold a hearing to determine whether a witness should not be allowed to testify because insanity has made him incapable of testifying in a competent fashion.”).

¹⁹ However, my argument does not refute the right of the legislature to overrule the presumption that courts do not have the authority to compel independent psychological examinations. To date, no legislatures have made such a determination (with one limited exception discussed *infra* Part III.A), and it seems unlikely that we will see a legislature in the near future find that courts should be allowed to order a psychological examination to determine the credibility of a child sex crime victim.

entific, and moral considerations all weigh against court-ordered mental examinations in the course of a criminal proceeding in a child sex case.

Part V recommends a course of action for courts and legislatures that will ensure that the rights of both defendants and victims are preserved in child sexual assault cases.

II. *NOBREGA V. COMMONWEALTH* AND *ABBOTT V. STATE*: VIEWING CHILD SEXUAL ASSAULT CASES IN DIFFERENT LIGHTS

A. *Nobrega v. Commonwealth*

In *Nobrega*, the defendant was charged with having sexual intercourse with his daughter on two occasions before she reached the age of ten.²⁰ Before the trial began, the defendant, Nobrega, filed a motion for a court order compelling his daughter to undergo an independent psychological examination, asserting that such an examination was crucial to his defense.²¹ The defendant claimed that his daughter had a long history of emotional and mental instability for which she had received treatment from multiple mental health professionals.²² Nobrega provided medical records demonstrating that his daughter “had been diagnosed with various psychological disorders and at times had exhibited dysfunctional behavior.”²³ Nobrega further argued that his daughter was prone to “suggestibility,”²⁴ and could not differentiate between reality and imagination.²⁵ The trial court denied Nobrega’s motion, reasoning that testimony by such an expert witness “would usurp the responsibility of the trial court to determine the child’s competency to testify and the responsibility of the fact-finder to determine the child’s credibility as a witness.”²⁶ Nobrega was subsequently found guilty on two counts of rape and two counts of sexual abuse.²⁷

Nobrega appealed his conviction to Virginia’s intermediate appellate court and ultimately to the Supreme Court of Virginia.²⁸ There, Nobrega argued that the intermediate appellate court had erred in holding that the trial court had no authority to compel his daughter to undergo the examina-

²⁰ *Nobrega v. Commonwealth*, 628 S.E.2d 922, 923 (Va. 2006).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* “Suggestibility” is addressed in Part III.B. It involves the idea that children’s memories and statements can be shaped by suggestions made by adult interviewers. Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of State of New Jersey v. Michaels Presented by Committee of Concerned Social Scientists*, 1 PSYCHOL. PUB. POL’Y & L. 272, 272 (1995).

²⁵ *Nobrega*, 628 S.E.2d at 923.

²⁶ *Id.* at 924.

²⁷ *Id.*

²⁸ *Id.* at 925.

tion.²⁹ The supreme court held that Nobrega's right under Virginia's constitution as a criminal defendant to "call for evidence in his favor" did not imply a power on the part of the trial court to order a psychological examination of the victim.³⁰

In reaching this conclusion, the court stressed the countervailing right of the victim under Virginia's constitution to be "treated with respect, dignity[,] and fairness at all stages of the criminal justice system."³¹ In holding that the trial court did not have the authority to authorize such an invasive discovery procedure, the Virginia Supreme Court expressed its concern that such defense tactics might "deter victims from coming forward"³² and could "put the victim on trial."³³ The court found that there were sufficient means available to a defendant to present a full defense in a rape trial, including "an accused's ability to voir dire a complaining witness, the trial court's skill and experience in observing testimony, and the presentation of the mental health records and expert testimony regarding those records."³⁴ Ultimately, the court held that if Virginia courts were to have the power to compel these independent psychological examinations—a change that would alter the balance between criminal defendants' and crime victims' rights in Virginia courts—such authority should come as a result of a policy decision by the Virginia legislature.³⁵

B. *Abbott v. State*

In *Abbott*, the defendant, Abbott, was charged for lewd acts committed against his girlfriend's nine-year-old daughter.³⁶ Prior to filing charges against Abbott in this case, the victim had allegedly made false allegations against her father, her schoolmates, and on a previous occasion, Abbott himself.³⁷ In addition, the victim had previously engaged in sexual behavior and witnessed others engaging in sexual activity.³⁸ On these grounds, Abbott attempted to introduce the evidence of previous false allegations and requested an independent psychological investigation of the victim.³⁹ Using a test set forth by the Nevada Supreme Court in *State v. Romano*,⁴⁰ the trial

²⁹ *Id.* at 923.

³⁰ *Id.* at 926.

³¹ *Id.* (quoting VA. CONST. art. I, § 8-A).

³² *Id.*

³³ *Id.* (quoting *Winfield v. Commonwealth*, 301 S.E.2d 15, 19 (Va. 1983)) (internal quotation marks omitted).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Abbott v. State*, 138 P.3d 462, 464 (Nev. 2006).

³⁷ *Id.*

³⁸ *Id.* at 464, 467.

³⁹ *Id.* at 467.

⁴⁰ 97 P.3d 594 (Nev. 2004).

court denied Abbot's request.⁴¹ The court in *Romano* held that a "defendant is entitled to a psychological examination of an alleged sexual assault victim only where: (1) the State notifies the defendant that it intends to examine the victim by its own expert and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination," and further held that a victim retained a right to refuse "to submit to an examination."⁴²

On appeal, the Nevada Supreme Court overturned *Romano*, finding that it "impermissibly restrict[ed] a defendant's access to an independent psychological examination of an alleged victim-witness."⁴³ After dissenting in *Romano*, Justice Rose, writing for the majority in *Abbott*, found that although "it is necessary to protect the victim's privacy in sexual assault cases, this cannot come at the expense of the defendant's right to a fair trial."⁴⁴ The court reasoned that if a child victim can decline to submit to a psychological examination even though the defendant has demonstrated a compelling need, the defendant will be unable to "present an adequate depiction of the child's character for truthfulness,"⁴⁵ thereby leaving the defendant "in essence . . . without a defense."⁴⁶ The court was not persuaded that a victim, especially a child victim, would consider the likelihood of a psychological examination in deciding whether to report a sexual assault.⁴⁷

The court's decision that a psychological examination was necessary in this case rested on three grounds: (1) the prosecution's use of an expert to testify that the victim's accusations seemed accurate;⁴⁸ (2) the absence of corroborating evidence beyond the victim's testimony;⁴⁹ and (3) the existence of "a reasonable basis for believing that the victim's mental or emotional state may have affected her veracity."⁵⁰ The court in *Abbott* ultimately held that the defendant "demonstrated a compelling need for a psychological examination, and the district court abused its discretion by denying his request."⁵¹

So which case got it right, *Nobrega* or *Abbott*? Before we can answer this question, we must examine the legal history of compelled psychological examinations, the empirical research regarding the effectiveness of children as witnesses, and the role of mental health experts in child sexual abuse cases.

⁴¹ *Abbott*, 138 P.3d at 464.

⁴² *Romano*, 97 P.3d at 600–01.

⁴³ *Abbott*, 138 P.3d at 464.

⁴⁴ *Id.* at 469.

⁴⁵ *Id.* at 469–70.

⁴⁶ *Id.* at 470.

⁴⁷ *Id.* at 469.

⁴⁸ *Id.* at 472.

⁴⁹ *Id.*

⁵⁰ *Id.* at 473.

⁵¹ *Id.*

III. BACKGROUND LEADING TO *NOBREGA* AND *ABBOTT*A. *Legal Background*

The general public is now aware that “sexual abuse of children is widespread and pervasive, occurring with distressingly high frequenc[y].”⁵² In recent decades, legislatures have enacted increasingly stiff penalties for child sex offenders.⁵³ Law enforcement authorities have expanded the investigation and prosecution of these crimes.⁵⁴ In this context, changes to statutory frameworks, evidentiary rules, and standards of prosecutorial conduct have placed greater emphasis on respecting the welfare and rights of child sex abuse victims throughout the criminal process.⁵⁵

In *Maryland v. Craig*,⁵⁶ the United States Supreme Court held that testimony by the child victim witness via a one-way closed circuit television outside the defendant’s physical presence did not violate the rights of the accused under the Confrontation Clause.⁵⁷ The Court reasoned that a state’s interest “in the protection of minor victims of sex crimes from further trauma and embarrassment” is compelling⁵⁸ and “may be sufficiently impor-

⁵² Klein, *supra* note 6, at 247.

⁵³ See, e.g., *People v. Straight*, 424 N.W.2d 257, 263 nn.14–15 (Mich. 1988) (collecting state statutes); Todd, *supra* note 2, at 550 (describing the stiffer penalties enacted by the Pennsylvania legislature); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 n.16 (1985) (collecting state statutes).

⁵⁴ See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpseo06.pdf> (noting that six in ten child sex crime offenders were prosecuted in 2006 versus four in ten in 1994); Parker Howell, *Sex Abuse Cases Hit Record Number: Better Awareness, Enforcement Cited*, SPOKESMAN-REVIEW, Feb. 4, 2007 (commenting on the increasing number of sex crimes against children filed by prosecutors in Idaho since 2004); see also Levesque, *supra* note 3, at 60 (documenting a twenty-five fold increase in verified cases of child sexual abuse since the mid-1970s).

⁵⁵ See TEMKIN, *supra* note 4, at 324–25 (noting that prosecutors of child sex crime defendants have come to “appreciate[] that it [is] necessary both to protect [child victims] from the adverse effects of involvement in the criminal justice process and also to ensure that they [are] not too intimidated by court proceedings to act as effective witnesses”); Dana D. Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2123 (1996) (“A reform movement . . . [led to the] expansion of the use of evidentiary rules that govern what out-of-court declarations can be heard at trial as well as the creation of new evidentiary rules at the state level.”); see also 18 U.S.C. § 3509 (2000) (specifically protecting the child victim throughout the criminal process). The protective mechanisms in this federal statute include providing alternatives to live in-court testimony, establishing guidelines for competency examinations, and closing the courtroom to the public and the press. *Id.*

⁵⁶ 497 U.S. 836 (1990).

⁵⁷ *Id.* at 860; see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

⁵⁸ *Craig*, 497 U.S. at 852 (quoting *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982)) (internal quotation marks omitted).

tant to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.⁵⁹ Thus, *Craig* established that the welfare of a child who is a witness at the trial of his alleged sexual aggressor may prevail over the rights of the defendant in some instances.

Some in the legal community have resisted the increased protection of victims in the child sexual abuse context, of which *Abbott* is one example. In 1990, Judge Kermit Lipez, then a Maine trial court judge, reported complaints by "frustrated defense attorneys" that "the courts have made so many accommodations to the needs of child witnesses that defendants accused of sexual abuse no longer receive a fair trial" and, less stridently, that courts had "become so protective of the child witness that the rare false accuser will go undetected at trial."⁶⁰

Abbott underscores that limits to concern for victims' welfare and rights exist. Less than two years prior to writing the majority opinion in *Abbott*, Justice Rose dissented in *Romano*, commenting that the majority opinion "effectively eliminated the ability of a defendant to secure an examination of the child victim under almost any circumstances."⁶¹ Presumably, in helping to overturn *Romano*, Justice Rose believed he was correcting the *Romano* court's absolute concern for "the welfare of the child victim," and complete lack of concern "about the fairness of the process for the accused."⁶²

Abbott preserved a trial court's ability to order a psychological examination. *Nobrega* effectively eliminated it. Yet *Abbott* and *Nobrega* present just two approaches to compelled psychological examinations; state courts' understanding of their power to order victims to undergo examinations varies widely.⁶³ Jane Denver Prince groups the approach of states' courts to this question into four main categories: "(i) lack of authority because of a statute; (ii) lack of inherent authority; (iii) implied lack of authority; (iv) inherent authority subject to a balancing test."⁶⁴

The first category encompasses California, which in 1980 banned psychological examinations of victims in sex offense cases under Penal Code section 1112,⁶⁵ and Illinois,⁶⁶ which enacted 725 ILCS 5/115-7.1 in 1984,

⁵⁹ *Id.* at 853.

⁶⁰ Lipez, *supra* note 5, at 286–87.

⁶¹ *State v. Romano*, 97 P.3d 594, 605 (Nev. 2004) (Rose, J., dissenting).

⁶² *Id.* at 606.

⁶³ Prince, *supra* note 6, at 113 ("The nationwide disparity in the treatment of compelled psychiatric examinations for child victims of sexual crimes reflects the courts' difficulties in balancing those competing interests.").

⁶⁴ *Id.* at 120.

⁶⁵ CAL. PENAL CODE § 1112 (West 2004) ("[T]he trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.").

⁶⁶ Interestingly, Prince's list of categories overlooks Illinois, which also forbade courts from ordering psychological examinations of victims in sex offense cases by statute only four years after California

stating that courts do not have the authority to “order [the] mental examination of [a] sex victim.”⁶⁷

The second category encompasses jurisdictions in which courts have held that they lack the power to order psychological examinations absent legislative authorization.⁶⁸ This category includes New York, North Carolina, Oregon, Texas, Virginia, and the District of Columbia.⁶⁹ As exemplified by the decision in *Nobrega*, these courts have determined that the rights of the victim outweigh any interest the defendant may have in compelling a victim to undergo a psychological examination.⁷⁰ The North Carolina Supreme Court has made clear that “zealous concern for the accused is not justification for a grueling and harassing trial of the victim.”⁷¹

Moreover, just as *Nobrega* emphasized the alternatives to a psychological examination that a defendant may use to attack the credibility of the victim witness, the North Carolina Supreme Court in *State v. Horn* stressed the means by which a trial judge can ensure that the defendant receives fair treatment.⁷² These include (1) “allow[ing] the defendant to submit evidence rebutting the alleged victim’s mentally deficient status,” (2) “deny[ing] the admission of the State’s proffered psychological evidence demonstrating the alleged victim’s mentally deficient status,” and (3) “dismissing the case against the defendant if the defendant’s right to adequately present a defense is imperiled.”⁷³ With the privacy rights of the victim in jeopardy from a psychological examination and with other sufficient means at a defen-

did. 1983 Ill. P.A. 289, § 1 (codified at 725 ILL. COMP. STAT. ANN. 5/115-7.1). Prince does note that the Kansas Supreme Court, in *State v. Gregg*, used a similar categorizing system and included Illinois in the category of states denying courts the “inherent power to compel psychiatric examination.” Prince, *supra* note 6, at 120 n.57 (citing *State v. Gregg*, 602 P.2d 85, 89 (Kan. 1979)). However, *State v. Gregg* refers to Illinois law in effect prior to the 1984 public act precluding courts from ordering psychological examinations of sex offense victims.

⁶⁷ 725 ILL. COMP. STAT. ANN. 5/115-7.1 (West 2002) (“Court may not order mental examination of sex victim. Except where explicitly authorized by this Code or by the Rules of the Supreme Court of Illinois, no court may require or order a witness who is the victim of an alleged sex offense to submit to or undergo either a psychiatric or psychological examination.”).

⁶⁸ See, e.g., *State v. Horn*, 446 S.E.2d 52, 54 (N.C. 1994) (noting that the state legislature is the body to properly adopt a change in criminal procedure such as granting trial courts the authority to order a victim to undergo a psychological examination); *Nobrega v. Commonwealth*, 628 S.E.2d 922, 926 (Va. 2006) (“[A]uthorizing a trial court to require a rape victim to undergo an independent psychiatric or psychological examination to assist in the determination of the victim’s competency to testify is a matter properly left to the General Assembly to consider as an issue of public policy.”); Prince, *supra* note 6, at 121 (listing states where courts have ruled that they lack inherent authority to compel psychiatric examinations of sex crime victims, including the North Carolina Supreme Court, which ruled that such examinations contravene public policy (citing *State v. Horn*, 446 S.E.2d 52, 54 (N.C. 1978))).

⁶⁹ See Prince, *supra* note 6, at 121.

⁷⁰ *Nobrega*, 628 S.E.2d at 926.

⁷¹ *State v. Looney*, 240 S.E.2d 612, 627 (N.C. 1978).

⁷² *Horn*, 446 S.E.2d at 54.

⁷³ *Id.*; see also Prince, *supra* note 6, at 121–22 (describing the remedies laid out by the North Carolina Supreme Court).

dant's disposal, the *Horn* court held that it had no authority to order a psychological examination, "even when the victim's mental status is an element of the crime charged."⁷⁴

Prince's third category focuses on an "interesting twist" presented by Massachusetts, whose courts have held that they lack inherent authority to compel examinations, but whose legislature has granted courts the authority to do so in limited circumstances—and, crucially, for limited purposes. In *Commonwealth v. Widrick*,⁷⁵ the Supreme Judicial Court of Massachusetts held that a statute⁷⁶ granting the trial court discretion to order a psychological examination of a witness for the specific purpose of determining competency did not extend "to the separate and distinct determination of credibility, which rests within the province of the trier of fact."⁷⁷ In other words, similar to the jurisdictions in the second category above, the *Widrick* court recognized its inherent lack of authority to compel a whole class of compelled examinations—namely, those examinations meant to determine the *credibility* of the child victim.⁷⁸ Prince writes approvingly of this approach in Massachusetts to separate the question of credibility and competency, noting that "the Massachusetts Supreme Judicial Court held that compelling a psychiatric examination for credibility imposed a corroboration requirement where none exists."⁷⁹

The result of *Widrick* placed Massachusetts in a unique position within the area of compelled mental health examinations. While a psychiatric examination can still be ordered to assess competency, the Massachusetts court made clear that "[t]he traditional methods for assessing the credibility of a witness are adequate."⁸⁰ Such methods may include expert testimony regarding a witness's ability to tell the truth, cross examination of the witness, and jury instructions "outlin[ing] the factors which enter into a determination of a witness's credibility."⁸¹

⁷⁴ *Horn*, 446 S.E.2d at 54.

⁷⁵ 467 N.E.2d 1353 (Mass. 1984).

⁷⁶ MASS. GEN. LAWS ANN. ch. 123, § 19 (West 2003) ("In order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department to assign a qualified physician or psychologist, who, if assigned shall make such examinations as the judge may deem necessary.").

⁷⁷ *Widrick*, 467 N.E.2d at 1356.

⁷⁸ The *Widrick* case is an example of a case like that described above, *see supra* note 19, where the legislature stepped in to grant courts the authority to compel independent psychological examinations. This was, however, a limited grant of authority restricted to questions of competency, not credibility. *Widrick*, 467 N.E.2d at 1356. While I would argue that such a grant of authority is still susceptible to abuse, at least in the instant case, the court in Massachusetts recognized its limited authority and restricted itself to *competency* examinations. *Id.* The ideal approach would be that taken by the California and Illinois legislatures that withholds any authority for courts to order independent examinations.

⁷⁹ Prince, *supra* note 6, at 123 (citing *Widrick*, 467 N.E.2d at 1358).

⁸⁰ *Widrick*, 467 N.E.2d at 1357.

⁸¹ *Id.*

Prince's fourth category comprises jurisdictions that use a balancing test to determine whether a "compelling" need exists to order a psychological examination of the victim.⁸² The majority of jurisdictions in the United States employ this standard.⁸³ Its application varies across jurisdictions, but the unifying factor is that courts have the authority to order a psychological examination when necessary.⁸⁴ In determining whether an examination is necessary, courts generally balance the rights and welfare of the victim against the rights of the defendant based on the fact-specific circumstances of the case.⁸⁵ Notable jurisdictions that employ some form of this balancing test include federal courts, South Dakota, and South Carolina.⁸⁶

Federal courts are bound by 18 U.S.C. § 3509(c), which provides, *inter alia*, that the defendant must show a compelling need for the court to order a competency examination of a child witness.⁸⁷ The statute does not prescribe factors that federal courts must weigh in determining whether such a need exists, but courts typically analyze whether a defendant has shown good reason to suggest there are unique problems with a particular victim.⁸⁸ In *United States v. Snyder*,⁸⁹ the Seventh Circuit upheld the denial of the defendant's motion for an independent psychological examination of the eleven-year-old complaining witness because (1) the defendant failed to demonstrate that the victim could not differentiate between reality and fantasy simply because the victim made some unfounded statements, and (2) the defendant did not assert that the victim's medication had in fact made the victim incompetent, only that the medication "could" render him incompetent to testify.⁹⁰ In *Government of the Virgin Islands v. Leonard A.*,⁹¹ the Third Circuit determined that the victims (1) were not so young that "their ability to perceive the events and recount them" was in question, and (2) did not suffer from mental illness.⁹²

⁸² Prince, *supra* note 6, at 123.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Moor v. State, 709 P.2d 498, 508 (Alaska Ct. App. 1985) (weighing the defendant's rights to a fair trial and to challenge the credibility of the witness against the witness's right to privacy and protection from harassment); *see* Prince, *supra* note 6, at 123.

⁸⁶ *See* Prince, *supra* note 6, at 123–25.

⁸⁷ *See, e.g.,* United States v. Snyder, 189 F.3d 640, 645 (7th Cir. 1999) ("Children are presumed to be competent to testify. Accordingly, a 'competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist . . .'" (citing 18 U.S.C. § 3509(c)(2), (4) (2000))).

⁸⁸ *See, e.g.,* Gov't of the Virgin Islands v. Leonard A., 922 F.2d 1141, 1143 (3d Cir. 1991) (holding that a witness must "deviat[e] from acceptable norms" of human conditions to necessitate a court-ordered psychiatric examination).

⁸⁹ 189 F.3d 640.

⁹⁰ *Id.* at 645.

⁹¹ 922 F.2d 1141.

⁹² *Id.* at 1144.

In contrast to the federal courts' determination whether a compelling need exists based on unenumerated, case-specific factors, South Dakota courts apply a clearly delineated set of factors. In *State v. Osgood*, the Supreme Court of South Dakota listed a series of factors:

[1] [T]he victim's age; [2] the nature of the examination requested and whether it might further traumatize the victim; [3] whether the prosecution employed a similar expert; [4] whether the evidence already available to the defendant suffices for the purpose sought in the examination; [5] whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; [6] whether evidence of the crime has little or no corroboration beyond the testimony of the victim; [7] whether there is other evidence available for the defendant's use; and [8] whether the child will testify live at the trial.⁹³

Although not always using precisely the same set of factors, other jurisdictions have adopted similar tests for determining whether an independent psychological examination is warranted.⁹⁴

South Carolina is a unique member of Prince's fourth category in that it limits the court's discretion to order psychological examinations to cases involving children and not adult victims.⁹⁵ The state's supreme court held in *In re Michael H.* that child sexual abuse crimes "present special concerns" that tip the scales in favor of allowing courts to order psychological examinations where the defendant shows a compelling need.⁹⁶ The *Michael H.* court set out factors for determining whether the defendant has such a need that resemble those used by South Carolina courts and other courts in Prince's fourth category.⁹⁷

B. Empirical Research on the Effectiveness of Children as Witnesses

Sex crimes have historically raised questions of a victim's veracity with a distinctly psychological dimension. Tess Wilkinson-Ryan observes that, as late as 1970, John Henry Wigmore's classic treatise on evidence advised that complainant witnesses in rape cases should always be subjected to a psychological examination: "The unchaste (let us call it) mentality

⁹³ *State v. Osgood*, 667 N.W.2d 687, 693–94 (S.D. 2003).

⁹⁴ *See, e.g., State v. Delaney*, 417 S.E.2d 903, 907 (W.Va. 1992) (applying the following factors: "(1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use").

⁹⁵ *In re Michael H.*, 602 S.E.2d 729, 735 (S.C. 2002).

⁹⁶ *Id.* at 734.

⁹⁷ *Id.* at 732–33 (stating that the trial judge should weigh the nature and intrusiveness of the examination requested, the victim's age, the likely effects of the examination on the victim, the examination's probative value, the interval between the examination and the alleged criminal act, and the evidence already available to the defense).

finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim.”⁹⁸

In recent decades, reforms aimed at correcting the misconception surrounding a victim’s propensity for imagination and false accusation have taken hold—at least in cases involving adult victims of sexual assault. Rape shield statutes, enacted in most states between the mid-1970s and early 1980s⁹⁹ and embodied in Federal Rule of Evidence 412,¹⁰⁰ typically prevent a victim’s sexual past from playing any role in a jury’s decision (with limited exceptions¹⁰¹). At roughly the same time, courts shifted away from the uniform requirement that complaining witnesses in rape cases undergo a psychiatric examination (the approach urged by Wigmore) and, in most jurisdictions, toward a discretionary regime that required the accused to demonstrate a compelling need.¹⁰² Moreover, Prince notes that the *Widrick* court relied on Massachusetts’s public policy as embodied in its

⁹⁸ Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1373 (2005) (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (James H. Chadbourn ed., rev. vol. 1970)). Wilkinson-Ryan interprets the quoted passage of Wigmore’s treatise as expressing the view that “some women falsely accuse men of rape because, either intentionally or inadvertently, they have confused a sexual fantasy with a violent crime.” *Id.*; see also *United States v. Benn*, 476 F.2d 1127, 1130–31 (D.C. Cir. 1972) (“Wigmore has suggested that the danger of false accusations and the potential for prejudicial impact is so severe in sexual assault cases that every sex offense complainant should be examined.” (citing WIGMORE, *supra*)).

⁹⁹ Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 (1986) (documenting the “nationwide reform of evidentiary law applicable to rape prosecutions that swept through state legislatures and Congress in the mid-1970’s”); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1219 (noting that between 1975 and 1985 the federal government and forty-eight states enacted rape shield statutes).

¹⁰⁰ Federal Rule of Evidence 412(a) reads:

- (a) Evidence generally inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior;
 - (2) Evidence offered to prove any alleged victim’s sexual predisposition.

FED. R. EVID. 412(a); see also Wilkinson-Ryan, *supra* note 98, at 1374.

¹⁰¹ For instance, Federal Rule of Evidence 412(b) reads:

- (b) Exceptions:
 - (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

FED. R. EVID. 412(b).

¹⁰² See, e.g., Prince, *supra* note 6, at 118 (“The early 1960s signaled a significant retreat from [the] harsh rule [of mandatory psychiatric examinations].”).

rape-shield law to uphold the denial of the defendants' request that his accuser undergo a mandatory psychological examination.¹⁰³

Yet skepticism still prevails with regard to child claims of sexual abuse,¹⁰⁴ despite a widespread view that a child is presumed competent.¹⁰⁵ South Carolina's rule as expressed in *Michael H.* demonstrates the belief that a child complainant's reliability is more in question than is that of an adult victim.¹⁰⁶

Scholars have used one prominent case to show the limits of child victim witnesses' memories and the accuracy of their accusations—albeit in the context of manipulation by those investigating the alleged abuse. In an amicus brief addressing the suggestibility of children in sexual abuse cases, developmental psychologists Maggie Bruck and Stephen Ceci wrote that “newer research indicates that under certain conditions, young children . . . make errors of commission about personally experienced events involving their own bodies.”¹⁰⁷ Bruck and Ceci's amicus brief was submitted in the appeal of Margaret Kelly Michaels, a New Jersey childcare worker who was convicted on 115 counts of sexual abuse and sentenced to forty-seven years in prison for sexual acts involving children under her supervision.¹⁰⁸

The New Jersey Supreme Court affirmed the Appellate Division's reversal of Michaels's conviction in 1994.¹⁰⁹ The court's decision rested on its determination that law enforcement officials who investigated Michaels's case had used inappropriately suggestive interrogatory techniques to obtain statements from the children Michaels was prosecuted for abusing.¹¹⁰ Bruck and Ceci's amicus brief used the extreme facts of the in-

¹⁰³ *Id.* at 118–19.

¹⁰⁴ Anderson, *supra* note 55, at 2118, 2121, 2131 (noting that “[h]istorically the American judicial system has treated the testimony of child witnesses with skepticism,” and that “[f]or many years in this country, young children were considered incompetent to testify in criminal court proceedings,” and describing the use of “taint hearings” to determine the reliability of interviews of alleged child sexual abuse victims as an example of such skepticism); Prince, *supra* note 6, at 113 (“Prosecutors who handle these crimes against young children face lingering issues surrounding both the competency of children as witnesses and public skepticism associated with victims of sex crimes.”).

¹⁰⁵ *See, e.g.*, 18 U.S.C. § 3509(c)(2) (2000); *Mickens v. State*, 428 So. 2d 202, 204 (Ala. Crim. App. 1984) (seven-year-old witness presumed competent); Lipez, *supra* note 5, at 287–89 (describing the presumption of competency in Maine).

¹⁰⁶ *In re Michael H.*, 602 S.E.2d 729, 735 (S.C. 2002) (allowing compelled psychological examinations only for children, not adults).

¹⁰⁷ Bruck & Ceci, *supra* note 24, at 273.

¹⁰⁸ *State v. Michaels*, 642 A.2d 1372, 1375 (N.J. 1994).

¹⁰⁹ *Id.* at 1385.

¹¹⁰ *Id.* at 1383–85 (criticizing the investigatory practices used, including “the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as failure to videotape or otherwise document the initial interview sessions”).

vestigation in Michaels's case to highlight weaknesses in the reliability of child victim witnesses.¹¹¹ Specifically, it warned that "[a]lthough young children are often accurate reporters," "[t]here are reliable age effects in children's suggestibility"—meaning that younger children are “more vulnerable . . . to a host of factors that contribute to unreliable reports” about incidents of sexual abuse.¹¹²

Other scholars have emphasized the difficulty of verifying the credibility of a young child's allegations. Alan Klein asserts that:

The accuracy of abuse allegations made by young children is often difficult to verify because such victims have limited language skills, limited memory and recall, and a reluctance to speak to strangers. Moreover, the wide range of emotional, social and developmental skills typical of early childhood make evaluations difficult. The problem is further complicated because many forms of abuse are not intrusive and do not produce clear and convincing evidence of sexual abuse.¹¹³

Such scholarship has contributed to what Dana Anderson feared would be some courts' (such as the *Abbott* and *Michael H.* courts') presumption that child testimony is unreliable.¹¹⁴

Yet there is a counterweight of opinion regarding the reliability of children's claims and the value that their testimony provides in the criminal process. In contrast to Bruck and Ceci, who caution that children are vulnerable to suggestibility,¹¹⁵ Kay Bussey and her coauthors assert that there is little empirical evidence to support the claim that a child's allegations are the result of coaching or a desire to please a third party.¹¹⁶ Moreover, while Bruck and Ceci maintain that younger children are more likely to make false claims and that such claims have a long-lasting effect (i.e., the child will not recant),¹¹⁷ Bussey and her coauthors argue that such false statements by young children are less credible than allegations of older children

¹¹¹ Bruck & Ceci, *supra* note 24, at 272.

¹¹² *Id.* at 309.

¹¹³ Klein, *supra* note 6, at 249.

¹¹⁴ Anderson, *supra* note 55, at 2119.

¹¹⁵ Bruck & Ceci, *supra* note 24, at 302.

¹¹⁶ Kay Bussey, Kerry Lee & Elizabeth J. Grimbeek, *Lies and Secrets: Implications for Children's Reporting of Sexual Abuse*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 147, 154 (Gail S. Goodman & Bette L. Bottoms eds., 1993); *see also* Anderson, *supra* note 55, at 2121 (noting that research done in the late 1970s “indicated that children were less suggestible than once believed”); Myers et al., *supra* note 2, at 102 (“[T]here is little evidence that children four years of age and over are more suggestible than adults regarding central aspects of events that are salient and meaningful, well understood, and directly experienced.”).

¹¹⁷ Bruck & Ceci, *supra* note 24, at 302, 309.

and adults and are not likely to stand up to scrutiny (i.e., the younger the child, the less likely he or she will sustain a false allegation).¹¹⁸

Similarly, Roger Levesque's review of the relevant research supports the proposition that child witnesses should be believed:

[T]he major legal issue regarding children's testimony has concerned whether or not children are believable witnesses. . . . [D]espite popular notions that children are prone to fabrication, the available evidence has shown that deliberate fabrication is uncommon. The evidence further shows that children are neither more or less likely to lie than adults. Indeed, children have been shown to be unable to maintain lying.¹¹⁹

Levesque's view is not necessarily at odds with Bruck and Ceci's, however. Levesque does admit that "[i]n terms of legal intervention, the most relevant and persuasive findings have been that the investigative process may actually foster fabrication."¹²⁰ Similarly, Bruck and Ceci concede that a child's statement prior to suggestive interviewing, or in the course of non-suggestive interviewing, is likely to be true.¹²¹ Anderson summarizes the situation well when she writes that "much evidence suggests that although children are capable of incorporating suggestive ideas into their memories, they are clearly also capable of remembering and telling the truth."¹²² Thus, while children are not necessarily unreliable witnesses, heightened concern about the reliability of their testimony is warranted where, as in Michaels's case, that testimony is subject to manipulation and suggestion.

C. Mental Health Professionals and the Quest for the Truth

The role of experts presents one final piece of the background necessary for understanding the stakes in *Nobrega* and *Abbott*. The complex and delicate questions raised by child sexual abuse cases have led to significant involvement by expert psychiatrists, psychologists, and professionals from other fields (such as medicine and social work) in these cases.¹²³ Whether their involvement provides a net benefit to the criminal process in these cases is questionable, however.

In theory, mental health experts' role is to assist the jury in understanding the facts surrounding the alleged abuse and the psychological factors

¹¹⁸ Bussey, Lee & Grimbeek, *supra* note 116, at 155; *see also* Myers et al., *supra* note 2, at 111 ("A young child is unlikely to succeed at maintaining a conscious fabrication about sexual abuse over time.").

¹¹⁹ Levesque, *supra* note 3, at 72–73 (footnote omitted).

¹²⁰ *Id.* at 73 (emphasis omitted).

¹²¹ Bruck & Ceci, *supra* note 24, at 305, 309.

¹²² Anderson, *supra* note 55, at 2118.

¹²³ *See, e.g.*, Myers et al., *supra* note 2, at 11 n.24 (citing child sexual abuse cases in which professionals in psychology, medicine, psychiatry, and social work were considered qualified experts); *id.* at 145 (arguing that "qualified experts can assist in attaining justice").

involved.¹²⁴ Experts may be used to “offer opinions regarding the allegations of abuse.”¹²⁵ Evidentiary rules allow considerable “latitude with regard to the nature of expert testimony.”¹²⁶ Thus, expert witnesses are permitted to testify to such facts as (1) “that a . . . child experienced age-inappropriate contact,” (2) “that a child’s symptoms or behaviors are consistent with child sexual abuse,” or (3) “that a child demonstrates age-inappropriate sexual knowledge or awareness.”¹²⁷

Although experts may bring valuable assistance to the trial, the use of these experts is not without concern. First, matters of credibility are the province of the trier of fact.¹²⁸ This means that “an expert may not testify as to whether a child is telling the truth” or “validate, verify or refute the allegations of a child witness.”¹²⁹ Thus, the expert is often placed in a position where he or she must walk a tightrope between opining on the facts of the case and reaching a legal conclusion about the victim’s credibility.¹³⁰

Second, the value that experts in mental health disciplines bring to the judicial process is questionable. In addressing the use of mental health experts for female adult rape victims, which presents some concerns similar to those presented by cases with child sex victims, Tess Wilkinson-Ryan shows that the complexity of psychology can easily confuse courts and juries.¹³¹ Wilkinson-Ryan further asserts that “psychiatry is an unusually controversial science and many of its methods are notoriously unreliable.”¹³²

¹²⁴ See FED. R. EVID. 702 (“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 on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

¹²⁵ Klein, *supra* note 6, at 248.

¹²⁶ *Id.* at 263.

¹²⁷ Myers et al., *supra* note 2, at 18–19.

¹²⁸ See *Commonwealth v. Widrick*, 467 N.E.2d 1353, 1356 (Mass. 1984) (“Evaluations of credibility are, of course, within the exclusive province of the trier of fact.” (quoting *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978))); *Commonwealth v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (“[T]he question of a witness’ credibility has routinely been regarded as a decision exclusively reserved for the jury.”); Myers et al., *supra* note 2, at 121–22 (“The great majority of courts reject expert testimony which comments directly on the credibility of individual children or on the credibility of sexually abused children as a class.” (footnote omitted)).

¹²⁹ Klein, *supra* note 6, at 263.

¹³⁰ See Myers et al., *supra* note 2, at 18.

¹³¹ Wilkinson-Ryan, *supra* note 98, at 1375–76.

¹³² *Id.* at 1376; see also Terence W. Campbell, *Challenging Psychologists and Psychiatrists as Expert Witnesses*, MICH. B.J., Jan. 1994, at 68, 71 (“Given psychology’s and psychiatry’s reliance on unsubstantiated theory, the unreliability of diagnostic classifications, the biases of clinical judgment, and the enormous flaws of psychological tests, one can legitimately argue that psychologists and psychiatrists rarely assist a trier of fact to understand issues or evidence that might otherwise be overlooked without their input.”).

Third, the complexity of child sexual abuse cases means that the involvement of multiple experts can easily result in multiple, conflicting expert opinions. Klein notes that some cases can turn into a “battle of the experts.”¹³³ Klein gives the example of a case in which a three-year old male complainant was evaluated by seven professionals in an attempt to determine the validity of his accusations.¹³⁴ These evaluations resulted in at least five different opinions regarding what may have happened to the child.¹³⁵ As Klein stated, “differing opinions among professionals regarding abuse allegations is typical in custody and visitation cases.”¹³⁶

In sum, the involvement of psychological and psychiatric experts in child sexual abuse trials is not without costs or uncertainties, and may not provide a net benefit to the criminal process.

IV. COMPELLED PSYCHOLOGICAL EXAMINATIONS FOR CHILD SEXUAL ABUSE VICTIMS ARE NOT THE ANSWER

In 2006, the Virginia Supreme Court and the Nevada Supreme Court were faced with the same question: Can the trial court compel the complainant witness in a child sexual abuse case to undergo a psychological evaluation pursuant to a request from the defendant? The opposite results reached by the two courts reflect the difficulty in deciding this question and the divide prevalent in the American legal community. Although legitimate considerations appear to favor these court-ordered examinations when the defense shows a compelling need, the legal, scientific, and moral case against courts having the power to order independent psychological examinations is overpowering.

A. Legal Considerations

First, the defendant has no right to force a victim to undergo an independent psychological examination.¹³⁷ As described in Part III.A, an examination may be compelled only when judges exercise their discretion under federal and state rules of evidence.¹³⁸ A defendant may request that

¹³³ Klein, *supra* note 6, at 248 (footnote omitted) (internal quotation marks omitted).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 249.

¹³⁷ 81 AM. JUR. 2D *Witnesses* § 187 (2004) (“A psychiatric or psychological examination of a complaining witness in a sex offense prosecution is not constitutionally required since the jury has the opportunity to appraise the credibility of a witness in light of the facts impugning his or her veracity, and this embodies the constitutional safeguard of a defendant’s rights.”).

¹³⁸ See 18 U.S.C. § 3509(c)(9) (2000) (“Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.”); *United States v. Benn*, 476 F.2d 1127, 1130–31 (D.C. Cir. 1972) (finding that psychological examinations are not something that should be ordered in every case but rather involve “a balancing of need against dangers, which is committed to the discretion of the trial judge”); *State v. Blanchette*, 134 P.3d 19, 31 (Kan.

the court exercise its discretion in his favor by taking this step, but the court may easily refuse if it determines that the defendant has not shown a compelling need, without violating the defendant's rights. More broadly, although a defendant has the right to a fair trial, this right is not without limits.¹³⁹ This right can be and often is limited when set in opposition to public policies that evince concern for the victim's welfare or to the rights of the victim.¹⁴⁰ For example, the Supreme Court in *Maryland v. Craig* held that the defendant's rights under the Sixth Amendment's Confrontation Clause are not "absolute";¹⁴¹ rather, a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accuser in court."¹⁴² If such an explicit constitutional right can be outweighed by the state's interest in protecting a child sexual abuse victim, it follows that an independent psychological examination, to which there is no explicit constitutional right, may be subordinated to the rights of the child victim or to public policies that evince concern for the victim's welfare.

Second, the logic of subordinating the defendant's ability to seek an independent psychological examination of his accuser is consistent with the role of the jury in the American legal system.¹⁴³ Allowing such examinations inevitably invades the province of the trier of fact, who is charged with determining witness credibility. There is little doubt that a defendant's goal in requesting a psychological examination is often not to determine the competency of the child for testifying, but rather to provide fuel for a defense that the child should not be believed.¹⁴⁴

Ct. App. 2006) (finding that Kansas law does not "even suggest that a defendant has a right to subject the child-victim witness to an independent psychological examination").

¹³⁹ *Ledbetter v. United States*, 350 A.2d 379, 380 (D.C. 1976) (holding that the defendant's Sixth Amendment right to effective assistance of counsel was not violated by the denial of a psychological examination); *State v. Garay*, 453 So. 2d 1003, 1006 (La. Ct. App. 1984) (holding that the defendant's constitutional rights were not affected by the denial of a psychiatric examination of a child victim witness because defendant had access to medical, psychiatric, and social history reports of victim and was able to cross examine witness); *State v. Maestas*, 207 N.W.2d 699, 700 (Neb. 1973) (holding that the defendant's due process rights were not violated by the denial of an independent psychiatric examination).

¹⁴⁰ *Commonwealth v. Widrick*, 467 N.E.2d 1353, 1357 (Mass. 1984) ("A witness undeniably has a right to fair treatment.").

¹⁴¹ 497 U.S. 836, 844 (1990).

¹⁴² *Id.* at 853.

¹⁴³ *See supra* note 128 and accompanying text. Unless and until Congress or state legislatures decide that it is up to scientific experts to determine the credibility of criminal defendants, the long history of American jurisprudence that holds that credibility determinations fall within the province of the trier of fact should be respected.

¹⁴⁴ *See, e.g., Gov't of the Virgin Islands v. Leonard A.*, 922 F.2d 1141, 1143 (3d Cir. 1991) (noting that the defendant requested an independent psychological examination, claiming that his daughters were liars); *see also Abbott v. State*, 138 P.3d 462, 473 (Nev. 2006) (ordering a psychological examination because the defendant demonstrated that the alleged victim's veracity was in question). It should be noted that the jury's role as the finder of fact is also invaded by the prosecution's attempts to use experts

Some argue that the role of the expert is crucial to the jury's ability to decide whether abuse has occurred.¹⁴⁵ While it may be important for experts to testify to the objective indicators of possible child sexual abuse,¹⁴⁶ this does not make an independent, court-ordered psychological examination of the victim necessary. If an expert testifies to a victim's credibility with the weight and authority that comes with an appointment by the court, a jury may be more likely to resolve the case based on the expert's opinion.¹⁴⁷ As Wilkinson-Ryan argues, "[i]t is the job of the jury to determine whether or not the complainant is a credible witness, and the expertise and authority of a mental health professional, or simply the taint of clinical diagnosis, may supplant a jury's own determinations."¹⁴⁸ Moreover, there is the problem, already discussed, that experts' opinions are unreliable and often contradictory.

By extension, compelled examinations that invade the factfinding province of the jury may also compromise the role of the trial judge. Deciding whether a witness is testifying truthfully is the task of the jury.¹⁴⁹ But in sexual assault cases, the purpose of a psychological examination is often to determine whether a victim is being truthful.¹⁵⁰ It is the duty of the judge to ensure that it is the jury who makes the conclusions about a witness's truthfulness.¹⁵¹ Thus, when a court allows an independent psychological examination of a child sex crime victim, the judge fails that duty.

Such failures are evidenced by cases such as *Osgood* and *Abbott*. In *Osgood*, the court described the conditions under which it might be neces-

to reach a conclusion that the abuse *did* occur. *Commonwealth v. Seese*, 517 A.2d 920, 922 (Penn. 1986) (finding error by the trial court in allowing the prosecution's expert to testify that witnesses like the victim do not lie); *Myers et al.*, *supra* note 2, at 85 (arguing that, because of the disagreement among experts on sexual abuse, and because of the consequences of being convicted, experts should not cast direct opinion on occurrence of sexual abuse).

¹⁴⁵ See, e.g., *Abbott*, 138 P.3d at 469–70; *In re Michael H.*, 602 S.E.2d 729, 733 (S.C. 2002).

¹⁴⁶ Klein, *supra* note 6, at 263–65 (noting that scientific data and analysis should be used in an objective manner to relate circumstances of the particular case to the broad field of child behavior for the purpose of aiding the jury).

¹⁴⁷ Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 123–41 (1998) (referring to studies suggesting that there is a greater risk that juries will be deferential to an expert who is appointed by the court).

¹⁴⁸ Wilkinson-Ryan, *supra* note 98, at 1385; see also *State v. Redd*, 642 A.2d 829, 834 (Del. Super. Ct. 1993) (finding that allowing this kind of expert testimony invades the province of the jury when the jury is capable of drawing the necessary conclusions (citing *Wheat v. State*, 527 A.2d 269, 272, 273 (Del. Super. Ct. 1987))).

¹⁴⁹ *United States v. Benn*, 476 F.2d 1127, 1130 (D.C. Cir. 1972) ("It remains for the jury, of course, to assess the credibility of the witness and the weight to be given her testimony."); *Commonwealth v. Widrick*, 467 N.E.2d 1353, 1356 (Mass. 1984) (holding that the determination of credibility is within the province of the jury).

¹⁵⁰ See *supra* note 144 and accompanying text.

¹⁵¹ *Widrick*, 467 N.E.2d at 1357 ("If a judge ordered a psychiatric examination to determine credibility, a determination within the province of the jury, he would intrude upon a vital function of the trier of fact.").

sary to order an independent psychological examination.¹⁵² One such condition was “evidence raising a concern about the victim’s *veracity*.”¹⁵³ Similarly, in *Abbott*, the court determined an examination may be necessary “in instances where the victim’s *veracity* is seriously called into question.”¹⁵⁴ Such explicit holdings demonstrate that the ultimate purpose of the psychological examination is to determine the veracity of the witness. Such determinations have historically been and should remain “within the exclusive province of the trier of fact.”¹⁵⁵

As the gatekeeper of evidence, the judge has an array of tools at her disposal to ensure that the defendant receives a fair trial without the need to order an independent psychological examination. *Abbott* illustrates this principle, albeit indirectly. In that case, the court was faced with two questions on appeal: (1) Should the defendant be able to order an independent psychological examination, and (2) should the court admit evidence of previous false allegations by the victim?¹⁵⁶ In attempting to “properly strike the delicate balance between a criminal defendant’s fair trial rights and a victim-witness’s privacy,” the court decided to allow both the examination and the previous allegations.¹⁵⁷

The *Abbott* court was right to admit the evidence of previous allegations, but went too far by allowing the psychological examination. The evidence of previous allegations would have alone been sufficient to ensure that the jury was aware of all relevant information and equipped to make the necessary determination regarding the victim’s credibility. In general, denying a defendant’s request that his accuser undergo an independent psychological examination does not preclude him from impeaching the witness.¹⁵⁸ The *Abbott* court’s decision to compel an independent psychological examination acted to usurp the role of the jury in determining what weight to give the previous false allegations.

In addition to evidence of previous false allegations, the defendant may also impeach the credibility of the witness by providing the jury with existing records of the victim’s previous medical and psychological examinations, supplemented by expert testimony to explain their contents. As the

¹⁵² State v. Osgood, 667 N.W.2d 687, 692 (S.D. 2003).

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *Abbott v. State*, 138 P.3d 462, 468 (Nev. 2006) (emphasis added).

¹⁵⁵ *Widrick*, 467 N.E.2d at 1356 (quoting *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978)).

¹⁵⁶ *Abbott*, 138 P.3d at 464.

¹⁵⁷ *Id.*

¹⁵⁸ FED. R. EVID. 607 (“The credibility of a witness may be attacked by any party, including the party calling the witness.”); FED. R. EVID. 608(a) (stating that “[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation” when the evidence refers to “character for truthfulness or untruthfulness”); FED. R. EVID. 608(b) (allowing for cross-examination regarding specific instances of conduct “for the purpose of attacking or supporting the witness’ credibility”).

court in *Nobrega* noted, “the presentation of mental health records and expert testimony regarding those records” can and should be used by the defendant.¹⁵⁹

Wilkinson-Ryan argues that even past mental records should not be available to the defendant because of the risk of confusing the jury and misrepresenting a patient’s records.¹⁶⁰ Yet this is one area where the use of expert testimony brings value to the process and helps avoid confusion. The expert’s testimony does not go to the truthfulness of the witness, only to the intricacies of his or her medical file as an indirect means of showing why the victim’s mental health history casts doubt on his or her credibility as a witness. In response, the prosecution will be able to provide its own experts to explain why the defense may have misstated the import of the file (thus alleviating Wilkinson-Ryan’s concerns). Moreover, the expert will not have examined the witness directly and thus there is less risk that the expert’s ultimate conclusion on the child’s credibility will be adopted wholesale by the jury.¹⁶¹

Armed with effective devices like those described above, the defendant will be able to use his or her cross-examination—which Wigmore called “the greatest legal engine ever invented for the discovery of truth”¹⁶²—to its fullest effect.¹⁶³

Some argue that because of the natural stigma against child sex offenders and because child victims’ uncorroborated testimony is often the only evidence offered by the prosecution in such trials, psychological examinations are crucial to ensuring that a defendant is proven guilty beyond a rea-

¹⁵⁹ *Nobrega v. Commonwealth*, 628 S.E.2d 922, 926 (Va. 2006).

¹⁶⁰ Wilkinson-Ryan, *supra* note 98, at 1391 (noting that “there are some basic tenets of psychotherapy that may skew the interpretation of the [victim’s mental health] file,” such as the likelihood of a generalized diagnosis designed to generate eligibility for insurance coverage of treatment, the therapist’s “philosophical orientation,” and the likelihood that a file will contain easily misinterpreted notes of treatment-appropriate statements by the victim).

¹⁶¹ See Myers et al., *supra* note 2, at 18 (“[I]t may be appropriate . . . to prohibit experts from offering opinions which state, in so many words, that a particular child was sexually abused.”).

¹⁶² 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (James H. Chadbourn ed., 1974).

¹⁶³ Some may argue that the grueling process of testifying at trial is more harmful and invasive for a child victim of sexual assault than is a psychological examination. While this may be true, the difference is that the tools described above are *necessary* for maintaining the rights of the defendant and discovering the truth. See Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 171 & n.28 (1989–1990) (“The American criminal justice system is often viewed primarily as a quest for truth. The adversarial design of the system, in which opposing parties ‘fight’ each other on questions of law and fact, is believed to promote the discovery of truth. The jury’s role is to weigh the evidence and arguments presented by the combatants and thereby reach the truth.” (citing J. FRANK, COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949))). As described throughout this Comment, the use of a court-ordered independent psychological examination is unnecessary and may actually distort the truth. Precluding the use of such examinations protects the rights of both the defendant and the victim by maintaining the integrity of the adversarial process.

sonable doubt.¹⁶⁴ But the rules should not be altered for one class of defendants simply because the general public is disgusted by the crimes of which they are accused. There is nothing inherent about child sex crime victims or child sexual abuse trials that should place those defendants on a higher plane than other criminal defendants.¹⁶⁵ In other types of criminal cases, court-ordered psychological examinations are generally limited to instances where a witness may be mentally incompetent to testify.¹⁶⁶ Yet in child sex abuse cases, this is rarely the basis for a defendant's request for a psychological examination. Rather, these examinations are sought for a witness whose credibility is called into question.¹⁶⁷

One commentator argues that children "pose special credibility problems" and thus writes approvingly of the decision in *Easterday v. State*, where the court ordered a psychological examination because the victim was only ten years old and had a history of lying.¹⁶⁸ It is hard to imagine a judge ordering an independent mental health examination in any other criminal proceeding simply because the victim lied in the past.¹⁶⁹ Such a special standard for child victims of sex crimes places those victims in a significantly subordinate legal position to victims of other crimes.¹⁷⁰ This position distorts the criminal process by putting "the complaining witness on trial" and shifting "the attention away from the accused."¹⁷¹

¹⁶⁴ *Abbott v. State*, 138 P.3d 462, 470 (Nev. 2006) (finding that, because sex crimes are upsetting and such stiff penalties attach for conviction, psychiatric examinations must be an option to ensure that only defendants deserving of punishment are found guilty).

¹⁶⁵ *See State v. R.W.*, 514 A.2d 1287, 1291 (N.J. 1986) (finding that children are capable of testifying accurately and that a child's age is not grounds for a psychological examination without some "identifiable or clinical psychiatric or similar disorder" to warrant such an examination).

¹⁶⁶ *See supra* note 18 and accompanying text.

¹⁶⁷ Judith Greenberg, Note, *Compulsory Psychological Examination in Sexual Offense Cases: Invasion of Privacy or Defendant's Right?*, 58 *FORDHAM L. REV.* 1257, 1261–62 (1990) (citing *Easterday v. State*, 256 N.E.2d 901, 901 (Ind. 1970)); *see supra* note 144 and accompanying text.

¹⁶⁸ Greenberg, *supra* note 167, at 1262.

¹⁶⁹ *See, e.g., Evans v. State*, 499 A.2d 1261, 1272 (Md. 1985) (finding that the lower court did not abuse its discretion by refusing to order a psychiatric examination because the witness had previously lied under oath, was a drug-using prostitute, and came from an unfortunate background, rendering it an issue of credibility, not admissibility).

¹⁷⁰ *See R.W.*, 514 A.2d at 1295 ("We fully appreciate the profound difficulties confronting both judges and juries in assessing the reliability of youthful witnesses. These difficulties, however, should not be weighed differently in the case of a witness who is a victim of a sexual offense. Victims of sex crimes are no less reliable as witnesses than other crime victims, who are not routinely subjected to psychiatric examinations as a pre-condition to their qualifications to testify."); Prince, *supra* note 6, at 128 ("There is no reason to create a different evidentiary standard for child victim witnesses of sexual crimes.").

¹⁷¹ *State v. Buckley*, 325 N.W.2d 169, 171 (N.D. 1982); *see also* Wilkinson-Ryan, *supra* note 98, at 1378 ("The defendant, not the complainant, is on trial; the focus of evidence should relate to the defendant's actions rather than to the complainant's character.").

B. *Scientific Considerations*

There is a definite risk in relying too much on scientific data and analysis. The studies described in Part III.B reinforce the flaws surrounding psychological examinations and the need to rely on the jury for assessing the credibility of witnesses. Generally, the use of expert testimony is not without problems and uncertainties. Scientific experts often rely on conflicting theories for diagnosis.¹⁷² Moreover, experts are human beings who are often influenced by their own prejudices and biases.¹⁷³

These general concerns are intensified when the science at issue relates to the mental health profession.¹⁷⁴ Psychiatry and psychology can hardly be described as “exact.”¹⁷⁵ Relevant research suggests that there are serious difficulties with ensuring the reliability of psychiatric and psychological expert testimony.¹⁷⁶ These difficulties are exemplified by Klein’s description, discussed in Part III.B, of the seven mental health professionals who reached five different opinions on whether a three-year-old boy was abused.¹⁷⁷ The likely reason for the five separate conclusions is that there was no one scientific conclusion. Such instances demonstrate the peril in relying on one court-appointed expert’s personal opinion.

C. *Moral Considerations*

Given the legal and scientific case against compelled psychological examinations, adding moral considerations may seem superfluous. Nonetheless, such a controversial topic invites an analysis of the relevant moral issues. Moreover, the moral considerations take on a greater importance after recognizing the legal and scientific problems associated with compelled psychological examinations.¹⁷⁸

¹⁷² Deason, *supra* note 147, at 121 (“[A]n appointed expert’s views will often reflect only one side of a genuine scientific and clinical controversy.”).

¹⁷³ *See id.* at 99–116.

¹⁷⁴ Campbell, *supra* note 132, at 68 (commenting that psychiatric and psychological testimony is often flawed and that the flaws are not easily recognizable).

¹⁷⁵ Edmund H. Mantell, *A Modest Proposal to Dress the Emperor: Psychiatric and Psychological Opinion in the Courts*, 4 WIDENER J. PUB. L. 53, 115 (1994) (noting that research on psychiatric and psychological expert testimony suggests that such evidence is not useful to the jury).

¹⁷⁶ *Id.* at 55 (“[A] growing number of research studies . . . point to the same conclusion: not only are ‘expert’ clinicians in the courtroom unreliable witnesses but their opinion evidence may actually do more harm than good.”).

¹⁷⁷ Klein, *supra* note 6, at 248.

¹⁷⁸ For the sake of argument, I concede that it is possible for a court to order an independent psychological examination that both respects the child and is minimally invasive. However, it is impossible to guarantee these conditions in every instance, and it is implausible to think that every child will react similarly to such an examination. Proponents of such examinations might be able to refute the moral considerations if not for the legal and scientific problems described above. Yet the logical conclusion is that there is no reason to risk harm to the child for a legally inappropriate and scientifically inconclusive procedure.

The United States Court of Appeals for the District of Columbia Circuit in *United States v. Benn* outlined the moral stakes in this area:

[A] psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the role of complainant to sex offense charges is sharply increased by the indignity of a psychiatric examination; the examination itself could serve as a tool of harassment; and the impact of all these considerations may well deter the victim of such a crime from lodging any complaint at all.¹⁷⁹

Other cases echo *Benn* in voicing such concerns, particularly the fear that compelled mental examination will deter future victims from coming forward.¹⁸⁰ The consequences of discouraging victims from standing up to those who subject them to sexual abuse may be drastic.¹⁸¹ Sex offenders who target children are more than twice as likely to have multiple victims than are sex offenders who target adults.¹⁸² Moreover, child abuse is a crime that "is also known to perpetuate itself, as perpetrators abuse victims who themselves may one day become perpetrators."¹⁸³

The risk that victims will be deterred from reporting incidents of child sexual abuse is exacerbated by the fact that such incidents already are underreported. Often, children are too frightened to report abuse or experience "intense feelings of shame [that] prevent children, and adults aware of the abuse, from seeking help."¹⁸⁴ Thus, it is likely that "official government statistics regarding the sexual abuse of children do not indicate actual rates of abuse."¹⁸⁵ The stakes are far too high and the costs too great to risk further deterring victims from coming forward.

With the passage of such laws as the rape shield statutes,¹⁸⁶ legislators have expressed a clear public policy aimed at protecting victims of sexual

¹⁷⁹ *United States v. Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1972).

¹⁸⁰ *Nobrega v. Commonwealth*, 628 S.E.2d 922, 926 (Va. 2006) ("We have no doubt that the possibility of undergoing court-ordered psychiatric or psychological examinations as a consequence of reporting rapes could deter victims from coming forward."); *State v. Horn*, 446 S.E.2d 52, 54 (N.C. 1994) (finding that compelled psychological examinations would "discourage victims of crimes from reporting such offenses").

¹⁸¹ The court in *Michael H.* argued that children would not likely be dissuaded from reporting a crime because of the fear of a psychological examination. *In re Michael H.*, 602 S.E.2d 729, 734 (S.C. 2002). The court reasoned that children would not be "cognizant of the judicial process as to even consider the possibility of a judicially ordered psychological evaluation." *Id.* This is an overly simplistic view of the situation and ignores the reality that the parents or guardians of sexually abused children might be the ones dissuaded from pursuing criminal action. *See, e.g., Prince, supra* note 6, at 128 ("A parent of [a sexually abused] child would be reluctant to pursue charges if the process involves even more trauma to the child.").

¹⁸² Todd, *supra* note 2, at 514.

¹⁸³ *Id.* at 490.

¹⁸⁴ *Id.* at 497.

¹⁸⁵ *Id.* (citing Jim Hopper, Ph.D., Child Abuse, Statistics, Research and Resources, available at <http://www.jimhopper.com> (last revised Nov. 18, 2003)).

¹⁸⁶ FED. R. EVID. 412.

abuse crimes. Studies have shown the damage that the criminal process can inflict on a young child abuse victim.¹⁸⁷ If we are to give effect to the policy of protecting such victims, we should ensure that the defense is not able to use tools, such as compelled psychological examinations, that may harm the child-victim.¹⁸⁸

V. RECOMMENDATIONS

The first and most logical approach to resolving this problem is for legislatures to follow the lead of California and Illinois and enact legislation barring court-ordered independent psychological examinations of child sexual abuse victims. In the absence of such legislation, courts employing the “compelling need” standard should overrule their precedents to bring their decisions in line with public policies favoring victims’ welfare and rights. A categorical bar on compelled psychological examinations of child sex crime victims is the only way to fully preserve the integrity of the legal process and safeguard the welfare and rights of victims in such cases.

Critics of such a ban on court-ordered psychological examinations express concern regarding the legal system’s ability to fully ensure the rights of defendants. As described in Part IV, however, numerous other tools help ensure that the defendant can put forward a proper defense in a criminal trial.¹⁸⁹ In order to eliminate any remaining doubt regarding a defendant’s right to a fair trial, one remaining tool should be at the defendant’s disposal: the right to request a “taint” hearing.¹⁹⁰

¹⁸⁷ Levesque, *supra* note 3, at 75 (noting that a majority of studies “suggest that sexually abused children who testify are often harmed by their experiences in the legal system, particularly in the *criminal justice system*”).

¹⁸⁸ See, e.g., *People v. Lopez*, 800 N.E.2d 1211, 1219–20 (Ill. 2003) (noting that Illinois’s ban on compelled examinations arose from a desire to limit the “potential for embarrassment and intimidation of victims of sex offenses by defense counsel through the use of psychological evaluations focusing on the victims’ competency and credibility”).

¹⁸⁹ For instance, Prince argues that defendants should “rely on traditional courtroom tools such as cross-examination to challenge the child’s credibility.” Prince, *supra* note 6, at 128. However, her argument supporting these traditional means is limited to one sentence, and she does not provide any general prescription for how best to ensure a defendant’s rights. Moreover, she argues that competency issues should be isolated from credibility issues, but never fully explains how this should be done. *Id.* at 114. Perhaps this is because there is no practicable way to separate competency and credibility in the child sex crime context. That is why a categorical bar for compelled psychological examinations is the appropriate measure.

¹⁹⁰ In a taint hearing, “[t]he basic issue to be addressed . . . is whether the pretrial events, the investigatory interviews and interrogations, were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on defendant’s guilt.” *State v. Michaels*, 642 A.2d 1372, 1382–83 (N.J. 1994). The defense must meet a threshold burden to warrant a taint hearing. *Id.* at 1383. This threshold can be met if the defendant shows serious problems with the questioning of the child victim, such as “the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions . . .” *Id.* When this threshold

The *Michaels* case prompted the Supreme Court of New Jersey to authorize pretrial hearings to assess the investigatory procedures and determine the reliability of the evidence presented.¹⁹¹ These “taint” hearings are designed to determine “whether [a] child’s true recollections have, indeed, been distorted.”¹⁹²

In *Michaels*, the Court determined that a “taint” hearing was necessary to “prove by clear and convincing evidence that the statements and testimony elicited by the improper interview techniques nonetheless retain[] a sufficient degree of reliability to warrant admission at trial.”¹⁹³ Such an approach is logical and may be warranted in certain situations. Moreover, it gets to the root of the problem, which is the use of questionable investigatory techniques and not the child’s ability to testify truthfully.¹⁹⁴ As the court in *Michaels* stressed, however, any pretrial hearing should be subject to the rules of evidence¹⁹⁵ and the burden to trigger such a hearing should lie with the defendant.¹⁹⁶

Anderson expresses concern that the use of taint hearings will lead to the “unwarranted exclusion of child testimony.”¹⁹⁷ Although this is a valid concern, the use of a pretrial taint hearing does not place child sex victims on a separate evidentiary plane. Investigations of any crime that are deemed improper could be subject to such a hearing.¹⁹⁸ Moreover, as Anderson notes, “taint hearings focus attention on the interview process so that interviewers feel appropriate pressure to maintain proper procedures” and “provide a defendant like *Michaels* a remedy for defective interviewing

is met, the burden shifts to the state “to prove the reliability of the proffered statements and testimony by clear and convincing evidence.” *Id.* It is then up to the trial judge to determine “whether the transcripts of the interview and the child’s testimony should be admitted into evidence.” Clayton Gillette, Comment, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS U. L.J. 499, 500 (2005).

¹⁹¹ *Michaels*, 642 A.2d at 1382–83.

¹⁹² Anderson, *supra* note 55, at 2134.

¹⁹³ *Michaels*, 642 A.2d at 1384–85.

¹⁹⁴ See also Anderson, *supra* note 55, at 2135 (“The *Michaels* Court, however, did rightly emphasize a focus on the ‘propriety of the interrogation’ rather than on the credibility of a particular child witness.”).

¹⁹⁵ *Michaels*, 642 A.2d at 1382–83 (citing FED. R. EVID. 104).

¹⁹⁶ *Id.* (holding that the defendant “must make a showing of ‘some evidence’ that the victim’s statements were the product of suggestive or coercive interview techniques”).

¹⁹⁷ Anderson, *supra* note 55, at 2135 (stressing that the trial court is limited in its “knowledge and practices surrounding reliability assessments”).

¹⁹⁸ *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (noting that when identification evidence is in question, a hearing outside the presence of the jury may be advisable and in some circumstances constitutionally necessary); *Simmons v. United States*, 390 U.S. 377, 384 (1968) (“[E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.”).

procedures.”¹⁹⁹ Taint hearings do not infringe upon the rights of the child victim. Rather, they ensure the integrity of the investigation and preserve the rights of the defendant.

In sum, a categorical ban on compelled psychological examinations of complainant witnesses in child sex abuse cases would give effect to strong public policies that favor victims’ welfare and rights. Broader use of pre-trial “taint” hearings focused on the appropriateness of investigative techniques used to elicit child victims’ testimony, in conjunction with other tools available to the defense, would ensure that no significant net harm to the welfare and rights of the accused results.

VI. CONCLUSION

“Once the ‘best kept secret’ of our society, the sexual abuse of children has now emerged into the light of day—a topic regularly recurring in movies of the week, political debate, television talk shows, and celebrity confessions.”²⁰⁰ Society’s greater understanding of the prevalence and seriousness of child sex abuse has also brought a greater appreciation for the courage that child victims and their families show by seeking justice. As a result, society has enhanced the protections of child victims at each stage of the prosecution of sex crime defendants. Understandably, some members of the legal community have stressed that protection of child sex abuse victims in the legal process must not come at the cost of infringing on the rights of the accused.

It is in this context that the debate over compelled psychological examinations of complainant witnesses in child abuse cases has arisen. With strong arguments both in favor of and against such compelled examinations, states’ approaches to dealing with this issue have splintered in multiple directions.

Abbott and *Nobrega* exemplify the divide among jurisdictions regarding how to balance the victim’s welfare and right to be free of burdensome discovery techniques against the defendant’s right to a fair trial. In light of the relevant legal, scientific, and moral considerations, it is evident that courts should not have the authority to order psychological examinations of child sexual abuse victims. In short, the answer to our earlier question is that the *Nobrega* court got it right, and the *Abbott* court got it wrong.

Compelled independent psychological examinations usurp the duties assigned to the jury and may mislead the trier of fact. They may also serve to harm children and dissuade them and their families from coming forward to report instances of sexual abuse. Moreover, other legitimate means are available to the defendant to ensure a fair trial. The public policy of protecting children who are subjected to sexual abuse is too great a concern to

¹⁹⁹ Anderson, *supra* note 55, at 2135.

²⁰⁰ Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 215 (2001).

be overridden by an unnecessary and inconclusive discovery procedure. Legislatures and courts alike should recognize the limited value of and harm attendant to compelled psychological examinations in child sex abuse cases and foreclose their availability to child sex crime defendants.