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## Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence

David McCord

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# CRIMINAL LAW

## EXPERT PSYCHOLOGICAL TESTIMONY ABOUT CHILD COMPLAINANTS IN SEXUAL ABUSE PROSECUTIONS: A FORAY INTO THE ADMISSIBILITY OF NOVEL PSYCHOLOGICAL EVIDENCE

David McCord\*

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## I. INTRODUCTION

In the 1890's, in dealing with his adult female patients, Sigmund Freud heard many complaints that the patients had been sexually abused as children. Unable to believe that child sexual abuse was as prevalent as the reports seemed to indicate, Freud concluded that the reports were fantasies:

[T]here was the astonishing thing that in every case blame was laid on perverse acts by the father, and realization of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverse acts against children were so general.<sup>1</sup>

For the next seventy-five years it was believed by society in general, mental health professionals, social service agencies, physicians, and the courts, that child sexual abuse was a rare occurrence.<sup>2</sup> "As

<sup>1</sup> S. FREUD, *THE ORIGINS OF PSYCHOANALYSIS: LETTERS TO WILHELM FLIESS, DRAFTS AND NOTES: 1887-1902*, 215 (1954).

<sup>2</sup> Herman & Hirschman, *Father-Daughter Incest*, 2 *J. OF WOMEN IN CULTURE AND SOC'Y* 735 (1977), *reprinted in THE SEXUAL VICTIMOLOGY OF YOUTH* 97, 99 (L. Schultz ed. 1980); Rosenfeld, *Sexual Misuse and the Family*, 2 *VICTIMOLOGY: AN INTERNATIONAL J.*, 226, 227

recently as ten years ago, [child] sexual abuse was regarded as . . . [an] uncommon problem.”<sup>3</sup> In the mid-1970’s, however, mental health professionals and behavioral scientific researchers began to publish alarming data indicating that child sexual abuse was much more prevalent than had previously been believed.<sup>4</sup> After the problem was brought to light, it was pushed further into the spotlight by a coalition of two highly visible groups, the children’s protection movement and the women’s movement.<sup>5</sup> As the problem gained notoriety, reports of child sexual abuse began to mushroom at a much more rapid rate than reports of other forms of abuse.<sup>6</sup> By the 1980’s, Freud’s belief that it was “hardly credible that perverted acts against children were so general”<sup>7</sup> had given way to the realization that child sexual abuse was a societal problem of alarming proportions.

Several extensive surveys have found that significant portions of both the male and female populations of the United States were sexually abused as children. The lowest percentage found for females was eight percent,<sup>8</sup> and for males three percent.<sup>9</sup> More typically, the percentages are in the range of twelve to twenty-two percent for females<sup>10</sup> and five to six percent for males.<sup>11</sup> One study found a percentage as high as twenty-eight percent for females,<sup>12</sup> and another found a percentage as high as nine percent for males.<sup>13</sup> While the exact figures varied because of the populations surveyed, the definitions used, and the sensitivity of the questions asked, the re-

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(1977), reprinted in U.S. DEP’T. OF HEALTH & HUM. SERVICES, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 91, 91-93 (1980).

<sup>3</sup> D. FINKELHOR, *CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH* 1 (1984). For example, in 1976 the number of cases of child sexual abuse reported to the nationwide data collection systems of the American Humane Association was only 1,975. As publicity concerning the problem grew, so did reports—4,327 in 1977, 22,918 in 1982. Even the latter figure is thought by most experts to be the proverbial “tip of the iceberg.” *Id.*

<sup>4</sup> Rosenfeld, *supra* note 2, at 230, 90-91.

<sup>5</sup> D. FINKELHOR, *supra* note 3, at 3.

<sup>6</sup> D. FINKELHOR, *supra* note 3, at 4.

<sup>7</sup> S. FREUD, *supra* note 1, at 215.

<sup>8</sup> Frity, Stoll, and Wagner, *A Comparison of Males and Females Who Were Sexually Molested as Children*, 7 *J. SEX AND MARITAL THERAPY* 54 (1981).

<sup>9</sup> G. KERCHER, *RESPONDING TO CHILD SEXUAL ABUSE* (1980).

<sup>10</sup> D. FINKELHOR, *supra* note 3, at 1 (fifteen percent); D. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 55 (1979) (nineteen percent); Fromuth, *The Long Term Psychological Impact of Childhood Sexual Abuse*, Ph.D. dissertation, Auburn University (1983) (twenty-two percent); G. KERCHER, *supra* note 9 (twelve percent).

<sup>11</sup> D. FINKELHOR, *supra* note 3 (six percent); Fritz, Stoll, and Wagner, *supra* note 8, at 54 (five percent).

<sup>12</sup> Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 *CHILD ABUSE AND NEGLECT* 133 (1983).

<sup>13</sup> D. FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* at 56 (1979).

sults clearly establish, in the words of one of the foremost researchers in the field, "that sexual victimization occurs in the lives of an important minority of all children."<sup>14</sup> This researcher further calculates that even using the conservative figures that ten percent of all girls and two percent of all boys are victims of sexual abuse, this would mean that roughly 210,000 new cases of sexual abuse occur every year.<sup>15</sup> Of these cases, only a small proportion, probably no more than one-fifth, will ever be reported.<sup>16</sup>

Perhaps as startling as the dimensions of the problem is the growing realization that children are much more likely to be abused by someone they know than by a stranger. Although estimates on this point, as on many others in the child abuse area, vary widely due to the scanty data available, virtually all researchers agree that at least fifty percent of the abuse is by persons known to the child.<sup>17</sup> Estimates range upward to eighty-five percent.<sup>18</sup> Perhaps most disquieting of all is the finding that the most likely abusers among the persons children know are persons whom they know very well and who have authority over them: relatives.<sup>19</sup> There is unanimous agreement that most sexual abusers are male,<sup>20</sup> and that it is very common for them to abuse minor females in their own families.<sup>21</sup>

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> D. FINKELHOR, *supra* note 3, at 232; D. FINKELHOR, *supra* note 13, at 67.

<sup>17</sup> De Vine, *Sexual Abuse of Children: An Overview of the Problem*, in U.S. DEP'T HEALTH & HUM. SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 5 (1980); Brant & Tisza, *The Sexually Misused Child*, 47 AM. J. ORTHOPSYCHIATRY, 80, 81-82 (1977); De Jong, Hervada & Emmett, *Epidemiologic Variations in Childhood Sexual Abuse*, 7 CHILD ABUSE AND NEGLECT 153, 157 (1983); Summitt, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 179, 182 (1983); Swift, *Sexual Victimization of Children: An Urban Mental Health Center Survey*, 2 VICTIMOLOGY: AN INT'L J., 322, 325 (1977), *reprinted in THE SEXUAL VICTIMOLOGY OF YOUTH* 18, 22 (L. Schultz ed. 1980).

<sup>18</sup> Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in U.S. DEP'T OF HEALTH & HUM. SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 47 (1980).

<sup>19</sup> D. FINKELHOR, *supra* note 13, at 58; De Vine, *supra* note 17, at 5. See Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex, and Secrecy*, 10 NURSING CLINICS OF N. AM. 551, 552-53 (1975) *reprinted in THE SEXUAL VICTIMOLOGY OF YOUTH* 67, 69 (L. Schultz ed. 1980). "Relatives" here includes not only blood relatives, but stepfathers (whether or not they have legally adopted the child) and live-in boyfriends of the mother of the child.

<sup>20</sup> Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 129, 133 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi ed. 1978); Swift, *supra* note 17, at 322, 325.

<sup>21</sup> Brant & Tisza, *supra* note 17, at 80, 81-82; Swift, *Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 182 (1983); Swift, *supra* note 17, at 325.

Some researchers contend that "same generational" sexual activity, as between brothers and sisters or cousins is the most common form of sexual activity for minors. D. FINKELHOR, *supra* note 10, at 87, 89; THE SEXUAL VICTIMOLOGY OF YOUTH 26 (L. Schultz ed. 1980). However, most researchers and the legal system have not focused on

Estimates of the percentage of sexually abused children who are abused by family members range from twenty-four percent<sup>22</sup> to fifty percent.<sup>23</sup> With respect to abusers who are relatives, it is universally recognized that the most likely abuser is a father figure, either the biological father, a stepfather, or a live-in boyfriend of the mother.<sup>24</sup> Estimates of the percentage of abuse by relatives that is perpetrated by father figures range up to fifty percent.<sup>25</sup> One of the most recent estimates is that father-daughter abuse accounts for about one-third of all childhood sexual abuse.<sup>26</sup>

In view of the increasing number of reported cases of child sexual abuse and the accompanying perception that child sexual abuse is a major social problem, it is not surprising that in the late 1970's prosecutors began criminal proceedings against alleged abusers with increased vigor. One of the tools that prosecutors have increasingly sought to use during the last five years in their effort to obtain convictions is expert testimony regarding the psychology of the child complainant. Prosecutors have tried to use this testimony in four ways. The first is offering an expert diagnosis that the complainant is a victim of child sexual abuse, to prove that the abuse occurred.<sup>27</sup> The second is the use of experts to vouch for the complainant's credibility regarding the sexual abuse allegation.<sup>28</sup> The third is offering expert testimony to enhance the complainant's credibility by explaining the "unusual" behavior of the complainant that the defendant has highlighted.<sup>29</sup> The fourth is using an expert to enhance the complainant's credibility by explaining the capabilities of children as witnesses.<sup>30</sup> It is the purpose of this article to explore whether courts have allowed these uses of expert testimony, and whether they should be allowed. The article will examine each of the four uses of expert testimony through a three-step process.

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this type of behavior, perhaps because as long as the participants are relatively close in age, it is viewed more as mutual experimentation than abuse of one participant by the other.

<sup>22</sup> De Jong, Hervada & Emmett, *supra* note 17, at 157.

<sup>23</sup> De Vine, *supra* note 17; Burgess & Holmstrom, *supra* note 19, at 551, 69.

<sup>24</sup> I. STUART & J. GREER, VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN, AND MEN 58 (1984); Herman & Hirschman, *supra* note 2, at 735; Nelson, *The Impact of Incest*, in CHILDREN AND SEX 163, 166 (L. Constantine & F. Martinson ed. 1981); Tsai, Feldman-Summers & Edgar, *Childhood Molestation: Differential Impacts on Psychosexual Functioning*, 88 J. OF ABNORMAL PSYCHOLOGY 407 (1979), reprinted in CHILDREN AND SEX 206 (L. Constantine & F. Martinson ed. 1981).

<sup>25</sup> See Burgess & Holmstrom, *supra* note 19, at 551, 69.

<sup>26</sup> See D. FINKELHOR, *supra* note 3, at 227.

<sup>27</sup> See *supra* text accompanying notes 44-134 and 192-216.

<sup>28</sup> See *supra* text accompanying notes 215-295.

<sup>29</sup> See *supra* text accompanying notes 296-317.

<sup>30</sup> See *supra* text accompanying notes 318-26.

First, the case law will be collected and analyzed. Second, the behavioral scientific<sup>31</sup> research pertinent to the case law will be collected and analyzed. Finally, the admissibility of the evidence will be analyzed in light of the behavioral scientific research and the rules of evidence.

An in-depth analysis of the topic is desirable because of the confusion that exists among courts regarding the admissibility of psychological evidence concerning child complainants in sexual abuse prosecutions. This confusion is manifested in several ways. To begin with, the holdings of the cases are often flatly contradictory. Further, there is no uniformity in the modes of analysis used by various courts. Finally, there is a woeful lack of serious review of the existing behavioral scientific research by the courts. Even the courts that reach correct results often do so on incorrect or incomplete bases. Given the importance of the societal interests at stake in such cases and the significant possibilities for prejudice to a criminal defendant if such evidence is improperly admitted, the courts' confusion should be corrected.

Before this exploration can be undertaken, an important preliminary matter must be dealt with: the term "child sexual abuse" must be defined. Behavioral scientists have had difficulty both in developing a suitable definition of their own, and in dealing with existing legal definitions.<sup>32</sup> They have at times appropriated existing terms such as "incest,"<sup>33</sup> "pedophilia,"<sup>34</sup> and "hebephilia,"<sup>35</sup> and at other times have coined their own terms such as "accessory-

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<sup>31</sup> The term "behavioral science" as used herein will refer generally to the study of human behavior, including studies by psychiatrists, psychologists, nurses, sociologists, and social workers.

<sup>32</sup> Any attempt to define "sexual abuse of children" is fraught with difficulties, for all definitions are culture- and time-bound. They are not based on rigorous scientific inquiry but on values and beliefs of individuals, professional organizations, and societies at large. Indeed, the term "child sexual abuse" is not universally accepted and is frequently interchanged with "sexual exploitation," "sexual misuse" and "sexual assault." Rather than referring to any specific type of sexual behavior, the term sexual abuse may mean anything from exhibitionism to genital manipulation to intercourse to child pornography. Within a legal frame of reference, sexual abuse is classified by criminal act, such as rape, incest, unlawful sexual intercourse, buggery, and indecent assault. The incest laws have often failed to take into consideration the changing nature of the family, particularly step-parenthood and adoption. Medically, the definition may become confused with consequences such as genital injuries, venereal disease, or pregnancy. Clearly, legal and medical frameworks fail to consider the psychological and interactive aspects of the sexual experience.

Mrazek, *Definition and Recognition of Sexual Child Abuse: Historical and Cultural Perspectives in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* 5, 11 (P. Mrazek & C. Kempe ed. 1981).

<sup>33</sup> "Incest" in the strict, traditional sense "refers to sexual relations between two family members whose marriage would be proscribed by law or custom." D. FINKELHOR, *supra* note 13, at 83. Although much behavioral science literature speaks in terms of

to- sex victims,"<sup>36</sup> "sexual misuse"<sup>37</sup> and "sexual exploitation."<sup>38</sup> One researcher probably summarizes the current feelings of the behavioral scientific community when he states: "[C]hild sexual abuse is not a single entity. It cannot be defined, discussed, or treated as such."<sup>39</sup> Similarly, lawyers and legislators concerned with drafting criminal statutes that are not ambiguous and that are neither under-inclusive nor overinclusive have also recognized the difficulties of defining "sexual abuse."<sup>40</sup>

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incest, the term is not particularly helpful for either behavioral scientists or lawyers when dealing with child sexual abuse.

First, the definition is not limited to adult-child relations. Second, it fails to encompass stepfathers and others not related by blood. This has led some behavioral scientists to broaden the definition of "incest," such as the following: "overtly sexual contact between people who are either closely related or perceive themselves to be closely related (including stepparents, half-siblings, and even live-in lovers if they have assumed a parental role)." S. FORWARD & C. BUCK, *BETRAYAL OF INNOCENCE: INCEST AND ITS DEVASTATION* 3-4 (1978). Why behavioral scientists continue to use the term "incest" when dealing with child sexual abuse is perhaps explained by the following insight by one of the foremost researchers in the field:

In the past, I have tried to encourage people in the field of sexual abuse to relinquish the word "incest" and talk about "family or intrafamilial sexual abuse" (which is what they mean). But this advice has made little headway, especially given the evocative character of the word "incest," which makes it attractive to everyone from journalists to graduate students.

D. FINKELHOR, *supra* note 3, at 224.

<sup>34</sup> "Pedophilia" is a sexual deviation of an adult which leads him to direct his sexual desires toward prepubertal children. Groth, *Patterns of Sexual Assault against Children and Adolescents*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 3 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi ed. 1978).

<sup>35</sup> "Hebephilia" is a sexual deviation of an adult which leads him to direct his sexual desires toward pubescent children. *Id.*

<sup>36</sup> Defined as persons who are "pressured into sexual activity by a person who stands in a power position over them as through age, authority, or some other way. The victim is unable to consent because of either personality or cognitive development." Burgess & Holmstrom, *supra* note 19, at 560.

<sup>37</sup> Defined as "exposure of a child to sexual stimulation inappropriate for the child's age, level of psychosexual development, and role in the family." Brant & Tisza, *supra* note 17, at 81.

<sup>38</sup> This term has not been specifically defined. Instead, the subjects in this study were asked basically whether what had happened to them seemed abusive. If it did, then it fell within the category of "sexual exploitation." D. FINKELHOR, *supra* note 13, at 51-52.

<sup>39</sup> MacFarlane, Jenstrom & Jones, *Conclusion: Aspects of Prevention and Protection*, in U.S. DEP'T. HEALTH & HUM. SERVICES, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 123 (1980).

<sup>40</sup> One commentator has outlined six problems in drafting effective child sexual abuse legislation:

(1) the range of possible sexual activity . . . seems limitless, (2) it is often difficult to distinguish between appropriate displays of affection and the less damaging forms of sexual abuse. (3) . . . intent of the perpetrator . . . can be . . . difficult to determine. (4) there is . . . debate concerning the amount of trauma . . . to children who have been [abused]. (5) Minors today are much more sexually active than they were a decade ago . . . . (6) Sex remains an embarrassing subject for many adults . . . .



Fortunately, the fact situations in which experts are called to testify concerning the psychological aspects of "child sexual abuse" fit rather easily into a functional definition. One author has perceptively noted that sexual abuse of children may be classified into three different types: nontouching, touching, and violent touching.<sup>41</sup> The fact situations of virtually all the cases discussed in this article fall into the category of touching; that is, the cases do not include nontouching acts such as obscene phone calls, exhibitionism, and voyeurism, nor do they include touching acts coupled with serious bodily injury or threat of injury, the most typical example of which is rape. Other common denominators of virtually all of the cases are that the victim was sixteen years old or younger and female, while the abuser was substantially older and male.<sup>42</sup> Thus, the functional definition of "child sexual abuse" for purposes of this ar-

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Fraser, *Sexual Child Abuse: The Legislation and the Law in the United States*, in *SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* 55, 57 (P. Mrazek & C. Kempe ed. 1981).

For comprehensive reviews of statutory responses to child sexual abuse, see Kocen & Bulkeley, *Analysis of Criminal Child Sex Offense Statutes*, in *CHILD SEXUAL ABUSE AND THE LAW*, 1 (J. Bulkeley ed. 1981); Wulkan & Bulkeley, *Analysis of Incest Statutes*, in *CHILD SEXUAL ABUSE AND THE LAW* 52 (J. Bulkeley ed. 1981); *The Crime of Incest Against the Minor Child and the States' Statutory Responses*, 17 J. FAM. L. 93 (1979).

For purposes of this article, it is immaterial which type of statute is the basis for the criminal charge, since the content of the expert testimony does not vary on the basis of the statute under which the crime is charged.

<sup>41</sup> Non-touching acts include verbal sexual abuse (continual, ongoing discussions, referrals, or solicitations concerning sexual activity), obscene telephone calls, exhibitionism (a difficult issue if the perpetrator is a member of the child's household), voyeurism (again, a difficult issue if the perpetrator is a member of the child's household), and visual or auditory exposure to adults engaged in sexual activity.

The touching acts include fondling (once again, a difficult issue if the perpetrator is a member of the child's household), masturbation, fellatio, cunnilingus, anilingus, anal intercourse, and sexual intercourse.

Violent touching acts include fondling, masturbation, fellatio, cunnilingus, anilingus, anal intercourse, or sexual intercourse coupled with serious bodily injury or the threat of serious bodily injury (rape).

Fraser, *supra* note 40, at 58.

The dividing line between child sexual abuse and rape is not a bright one. In fact, feminists argue that child sexual abuse, whether it involves force or not, is rape. D. FINKELHOR, *supra* note 13, at 4. Even though the two concepts can merge, however, a substantial number of child sexual abuse cases can be distinguished from rape. Some of the general factors that make child sexual abuse cases distinguishable are: (1) the perpetrator is more likely to be known to the victim, (2) there are more often repeated abuses, often over a long period of time, (3) it involves less physical force, (4) males are more often victims, (5) the sexual act is usually something less than intercourse, and (6) it engages a different set of social agencies. D. FINKELHOR, *supra* note 13, at 2-3.

<sup>42</sup> While sexual abuse of boys is a substantial problem, boys are even less likely than girls to report the abuse. Because of this, and because a substantially larger number of girls are abused, virtually all behavioral science research focuses on girls. Only four appellate cases pertinent to the present topic have been found involving boy victims: *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985); *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983); *State v. Lash*, 237 Kan. 384, 699 P.2d 49 (1985); and *State v. Keen*, 309 N.C. 158, 305 S.E.2d 535 (1983).

title is as follows: sexual touching acts, either by the child of the adult or the adult of the child, from fondling up to intercourse, without the threat of serious bodily injury, where the complainant is sixteen years old or less, and usually female while the adult male participant is substantially older. It is also important to note that this article will deal almost exclusively with the use of expert psychological testimony regarding child complainants by the prosecution. Among the reported cases it is rare to find the defense attempting to use such testimony.<sup>43</sup>

## II. THE USE OF AN EXPERT DIAGNOSIS OF CHILD SEXUAL ABUSE TO PROVE THAT ABUSE OCCURRED.

### A. CASE LAW

When a prosecutor offers an expert diagnosis that the complainant has been sexually abused to prove that the crime occurred, the theory of proof is as follows: a sexually abused child exhibits certain characteristics not common to children who have not been sexually abused, these characteristics can be detected by a trained expert, and thus an expert diagnosis of sexual abuse is evidence that the crime occurred.

The case law reveals two types of expert diagnoses of child sexual abuse that prosecutors have offered to prove that abuse occurred. The most full-blown type of diagnosis is where the expert identifies a child sexual abuse "syndrome," then compares the child's symptoms with the symptoms of that syndrome, and comes to a diagnosis that the child has been sexually abused. The second type of testimony is similar, but omits the "syndrome" designation. The expert simply bases the diagnosis on the comparison of the complainant's symptoms to those manifested by other child sexual abuse victims. The expert can explicitly list common symptoms and then make the comparison. Or the expert's diagnosis can take place without the expert listing the common symptoms, but instead explaining his or her own experience in dealing with sexually abused children. The comparison of symptoms is then implicit rather than explicit.

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That the vast majority of sexual abusers are male is borne out by the case law. No case has been found pertinent to the present topic where the alleged abuser was female.

<sup>43</sup> Only three cases pertinent to the present topic were found where the expert testimony was offered by the defense: *State v. Roberts*, 139 Ariz. 117, 677 P.2d 280 (1983)(see discussion *infra* note 319 and accompanying text); *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980)(see discussion *infra* notes 223-24 and accompanying text); and *State v. Munro*, 68 Or. App. 63, 680 P.2d 708 (1984)(see discussion *infra* note 321 and accompanying text).

## 1. "Syndrome" Testimony

In the reported cases, experts do not usually couch their diagnosis testimony in terms of a child sexual abuse "syndrome." Testimony in that form has been offered only in three cases, two of them from Minnesota. In the first Minnesota case, *State v. Danielski*,<sup>44</sup> the prosecution sought to introduce testimony that the complainant was suffering from "familial sexual abuse syndrome." The substance of the testimony was that the following symptoms manifested by the complainant were typical of victims of sexual abuse: depression, "feeling of having ruined her mother's life," desire not to "cross" her stepfather (the defendant), and attempted suicide.<sup>45</sup> The trial court denied the state's pretrial motion in limine to allow such testimony, and the state appealed. The Minnesota Court of Appeals held that the trial court had not abused its discretion in refusing to allow the testimony.<sup>46</sup> The court relied on an earlier Minnesota case which had held rape trauma syndrome testimony regarding an adult complainant inadmissible because it was considered to be of no help to the jury, unfairly prejudicial, and not generally accepted in the scientific community as was required by the test first enunciated in *Frye v. United States*.<sup>47</sup> The Minnesota Court of Appeals in *Danielski* was not persuaded that expert familial sexual abuse testimony was any more scientifically accurate than rape trauma syndrome testimony.<sup>48</sup> The rape trauma syndrome case had mentioned a possible exception to the ban on such testimony in "unusual" cases such as those in which the complainant was mentally retarded or a minor.<sup>49</sup> The Minnesota Court of Appeals, however, held that this exception did not apply in *Danielski* because the complainant was now seventeen years old and therefore not a child anymore.<sup>50</sup>

Six months later, the Minnesota Court of Appeals in *State v.*

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<sup>44</sup> 350 N.W.2d 395, 396 (Minn. App. 1984).

<sup>45</sup> *Id.* at 398.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982). The *Frye* test originated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). For a discussion of *Frye*, see *supra* notes 146-58 and accompanying text.

"Rape trauma syndrome" is a term used to describe the typical symptoms of an adult victim of forcible rape. Although conceptually close to the type of testimony discussed here, it is quite distinct from a behavioral scientific standpoint because it involves adult victims, not child victims, and because it involves violent touching, not non-violent touching acts. For a detailed analysis of rape trauma syndrome evidence in the courts, see McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C.L. Rev. 1143 (1985)(*hereinafter* McCord).

<sup>48</sup> *Danielski*, 350 N.W.2d at 397.

<sup>49</sup> *Saldana*, 324 N.W.2d at 231.

<sup>50</sup> *Danielski*, 350 N.W.2d at 398.

*Carlson*<sup>51</sup> reversed a trial judge for abusing his discretion in summarily rejecting "child sexual abuse syndrome" expert testimony. During that six-month interval, the Minnesota Supreme Court had decided *State v. Myers*,<sup>52</sup> in which the Minnesota Supreme Court held that expert testimony diagnosing a child complainant as suffering from symptoms typical of sexually abused children and diagnosing the complainant as a victim of child sexual abuse was admissible.<sup>53</sup> Although the testimony in *Myers* was not couched in terms of a "syndrome," the Minnesota Court of Appeals in *Carlson* obviously, and probably correctly, viewed *Myers* as broad enough to sanction even "syndrome" testimony. Although the holding in *Danielski* may still be good law in Minnesota on the narrow ground that the complainant was no longer a child when she testified, the other bases of the decision are no longer valid after *Myers*.

The third case involving syndrome testimony contains the most ringing endorsement of such testimony.<sup>54</sup> In that case, the expert testified that child sexual abuse victims often experience a five-phase "child sexual abuse accomodation syndrome" consisting of secrecy, helplessness, entrapment and accomodation, delayed disclosure, and retraction.<sup>55</sup> Then, based upon a review of the police reports and preliminary hearing transcripts of the complainants' testimony, the expert asserted that the complainants had been sexually abused.<sup>56</sup> The California Court of Appeals held that the testimony was properly admitted, reasoning that it would have aided the jury's understanding in an area where the jury's common knowledge would perhaps have been an inadequate basis for reaching a decision.<sup>57</sup> The court rejected the defendant's argument that the syndrome did not meet the general acceptance test for scientific evidence, holding that the test simply did not apply to expert medical testimony.<sup>58</sup>

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<sup>51</sup> 360 N.W.2d 442, 443 (Minn. App. 1985). The characteristics of the "syndrome" to which the expert would have testified is not set forth in the opinion.

<sup>52</sup> 359 N.W.2d 604 (Minn. 1984). See *infra* notes 74-83 for a discussion of this case.

<sup>53</sup> *Id.* at 609-11.

<sup>54</sup> *People v. Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (1985).

<sup>55</sup> *Payan*, 173 Cal. App. 3d at —, 220 Cal. Rptr. at 128. The expert's testimony was based in large part upon Summit, *The Child Abuse Accomodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177 (1983).

<sup>56</sup> *Payan*, 173 Cal. App. 3d at —, 220 Cal. Rptr. at 128.

<sup>57</sup> *Id.* at —, 220 Cal. Rptr. at 131-33.

<sup>58</sup> *Id.* at —, 220 Cal. Rptr. at 133. One other jurist has indicated that he is convinced that a "child sexual abuse syndrome" exists. In a concurring opinion in *State v. Middleton*, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983)(Roberts, J. concurring), a case which did not involve testimony in the "syndrome" form, Justice Roberts of the Oregon Supreme Court indicated that he was persuaded by "a significant body of writing . . . addressing intrafamily sexual abuse" that such a syndrome exists. *Id.* at 440, 657 P.2d at

2. *Comparison of symptoms without the use of the term "syndrome"*

The second form of expert diagnosis of child sexual abuse is very similar to "syndrome" testimony, except that it does not attach the term "syndrome" to the typical characteristics of sexually abused children to which the complainant is being compared. Courts have divided virtually equally regarding the admissibility of such testimony.

The earliest case admitting this type of opinion testimony was *State v. Kim*.<sup>59</sup> The state's expert testified that there were common emotional reactions frequently found in child sexual abuse victims consisting of "fear of safety, fear of future sexual abuse, feelings of depression or anxiety, embarrassment . . . a negative view of sex, and doubts that one parent will be strong enough to protect [against] further sexual abuse."<sup>60</sup> The Hawaii Supreme Court upheld the admissibility of this testimony against the defendant's objections that it invaded the province of the jury, was not a proper subject matter for expert testimony, and its probative value was outweighed by its prejudicial effect.<sup>61</sup> The court found the critical inquiry to be whether the evidence would assist the trier of fact.<sup>62</sup> The court noted that in order to assist the jury an expert "must base his testimony upon a sound factual foundation; any inferences or opinions must be the product of an explicable and reliable system of analysis; and such opinions must add to the common understanding of the jury."<sup>63</sup> Further, even if the evidence will assist the jury, the judge must determine that its probative value is not substantially outweighed by its prejudicial effect.<sup>64</sup> The court then held that the trial judge had not abused his discretion in finding that the evidence

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1222. He identified some of the elements of the syndrome as the child becoming anxious, guilt-ridden, confused in their feelings for the abuser, and typically responding by "running away or recanting their story." *Id.* For a case where the prosecution claimed that syndrome testimony is "the wave of the future," but the court found that it did not need to reach the issue, see *State v. Snapp*, 110 Idaho 269, —, 715 P.2d 939, 942 (1986).

<sup>59</sup> 64 Haw. 598, 645 P.2d 1330 (1982).

<sup>60</sup> *Kim*, 64 Haw. at 601, 645 P.2d at 1333. This testimony was given in the course of the expert's explanation of why he found the complainant's testimony credible. This demonstrates that it is not always easy to find a clearcut dividing line between evidence offered to prove that the crime occurred, and evidence offered to vouch for the complainant's credibility. This is so because these two issues in a sexual abuse case usually almost exactly coincide. For a further discussion of this issue, see *infra*, text accompanying note 225.

<sup>61</sup> *Kim*, 64 Haw. at 602-10, 645 P.2d at 1334-39.

<sup>62</sup> *Id.* at 604-05, 645 P.2d at 1336 (citing HAW. R. EVID. 702)(identical to FED. R. EVID. 702).

<sup>63</sup> *Kim*, 64 Haw. at 604, 645 P.2d at 1336.

<sup>64</sup> *Id.* at 607, 645 P.2d at 1337. This balancing is mandated by HAW. R. EVID. 403, which is identical to FED. R. EVID. 403.

would assist the jury and that its probative value was not substantially outweighed by its prejudicial effect.<sup>65</sup> The court specifically noted that the common experience of the jury “may represent a less than adequate foundation for assessing the credibility” of a child sexual complainant.<sup>66</sup> The court found the expert’s experience with child sexual abuse victims, in conjunction with his education and training, a sufficient basis for the reliability of his testimony.<sup>67</sup>

The testimony in the next two cases allowing expert evidence concerning the typical behavior of victims of child sexual abuse was much less explicit. In *State v. Middleton*<sup>68</sup> the state’s expert testified that when she interviewed the complainant she “found her behavior very much in keeping with children who have complained of sex molestation at home.”<sup>69</sup> The Oregon Supreme Court upheld the admissibility of this testimony over the defendant’s objections that it invaded the province of the jury and was improper opinion testimony.<sup>70</sup> In the other nonexplicit case where such testimony was admitted,<sup>71</sup> all that appears in the appellate opinion concerning the expert’s testimony was that the complainant’s “unusual behavior” around the time of the alleged abuse was consistent with, and could be indicative of, sexual assault.<sup>72</sup> The court reasoned that since parents have long been allowed to testify concerning a child’s physical appearance after sexual abuse, there is no reason to preclude either a parent or an expert from testifying about behavioral changes.<sup>73</sup>

In *State v. Myers*,<sup>74</sup> an important case in which the diagnosis of child abuse was admitted, the testimony was quite explicit. The expert testified that the following constituted characteristics usually

<sup>65</sup> *Kim*, 64 Haw. at 607, 645 P.2d at 1338-39.

<sup>66</sup> *Id.* at 607, 645 P.2d at 1337.

<sup>67</sup> *Id.* at 608, 645 P.2d at 1338.

<sup>68</sup> 294 Or. 427, 657 P.2d 1215 (1983).

<sup>69</sup> *Id.* at 432, 657 P.2d at 1218. This case also involved expert testimony that falls into the third category, testimony offered to enhance the complainant’s credibility without vouching for it. For a discussion of this aspect of the case, see *infra* text accompanying notes 301-03.

<sup>70</sup> *Middleton*, 294 Or. at 435-38, 657 P.2d at 1219-21. The court’s reasoning—that the opinion was proper to explain the complainant’s superficially bizarre behavior—really applies to the testimony by the other expert in that case, whose testimony fell into the different category of testimony offered to enhance the complainant’s credibility without vouching for it. The court did not set forth any reasoning with respect to the first expert’s testimony that appears to fall into the category of offered to prove that the crime occurred.

<sup>71</sup> *State v. Claffin*, 38 Wash. App. 847, 690 P.2d 1186 (1984).

<sup>72</sup> *Id.* at 854, 690 P.2d at 1191.

<sup>73</sup> *Id.*

<sup>74</sup> 359 N.W.2d 604 (Minn. 1984).

found in sexually abused children: fear of blame or punishment, fear of possible breakup of the family, fear that she won't be believed, confusion because the child feels that the acts are "not right" while the adult perpetrator tells the child the contrary, and a poor relationship between mother and daughter.<sup>75</sup> The expert stated that more specific characteristics include "fear of men, nightmares . . . [with] an assaultive content, [and] sexual knowledge unusual in a child . . . of [that] age."<sup>76</sup> The child may also look and act older than she is.<sup>77</sup> On the basis of these symptoms the expert diagnosed the complainant as a sexually abused child.<sup>78</sup> The Minnesota Supreme Court analyzed the admissibility of this testimony on the basis of whether it assisted the jury in resolving the factual question presented<sup>79</sup> and whether its probative value was substantially outweighed by its prejudicial effect.<sup>80</sup> The court found that the evidence was properly admitted, primarily because jurors are particularly uninformed regarding the reaction of children to sexual abuse and thus "by explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant."<sup>81</sup> The court also rejected the defendant's contention that the testimony was unreliable because the conditions described by the expert were "highly subjective and not necessarily the result of sexual molestation."<sup>82</sup> The court held that this objection went to the weight of the testimony, not to its admissibility.<sup>83</sup>

Thus, four courts have held that a diagnosis of a complainant as a victim of child sexual abuse on the basis of a comparison with other children who have been sexually abused is admissible.<sup>84</sup>

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<sup>75</sup> *Id.* at 609.

<sup>76</sup> *Id.* at 608-09.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 609. The expert also gave testimony that falls into the second category, *i.e.* expert testimony vouching for the complainant's credibility. For a discussion of this aspect of the testimony, see *infra* note 217.

<sup>79</sup> *Myers*, 359 N.W.2d at 609 (citing MINN. R. EVID. 702)(identical to FED. R. EVID. 702).

<sup>80</sup> *Myers*, 359 N.W.2d at 609 (citing MINN. R. EVID. 403)(identical to FED. R. EVID. 403).

<sup>81</sup> *Id.* at 610.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 611.

<sup>84</sup> See *State v. Snapp*, 110 Idaho 269, 715 P.2d 939 (1986) (such diagnosis made at trial with no objection by defendant). Worthy of note is the case of *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984). The case is not discussed in this article because it was a non-criminal, child custody matter. The case does, however, contain a rather ringing endorsement of this type of testimony. See *id.* at 1116-18, 200 Cal. Rptr.

On the other hand, five courts either held such testimony to be inadmissible, or indicated strong doubts concerning its admissibility. In the earliest case on this subject,<sup>85</sup> a gynecologist who examined the complainant the day that she reported the abuse testified that in his opinion, based on the history given to him by the complainant, she had been abused.<sup>86</sup> The Rhode Island Supreme Court held that the testimony was improperly admitted because such a diagnosis was not within the doctor's expertise, and because it constituted an improper bolstering of the complainant's credibility.<sup>87</sup>

Two years later in *State v. Maule*,<sup>88</sup> the expert testified that the typical characteristics of sexually abused children included sleep and appetite disruption, nightmares, withdrawal or regressive behavior, clinging to the mother, and fear of being alone with a particular person.<sup>89</sup> Although the Washington Court of Appeals reversed the case on another ground,<sup>90</sup> the court felt compelled to express its doubts concerning the admissibility of the expert's testimony. The court noted that under Washington law expert testimony must assist the trier of fact<sup>91</sup> and must be based upon facts of a type reasonably relied upon by experts in the field.<sup>92</sup> The court then expressed its doubt that this testimony would be admissible under these rules. It stated that the expert's theory that sexually abused children manifest particular identifiable characteristics was not shown to be supported by accepted medical or scientific opinion.<sup>93</sup> Further, there was no evidence that experts reasonably relied upon the factors set forth by this expert in coming to diagnoses of child sexual abuse. Also, there was no evidence of any statistical study that had been conducted in the field, nor was there an indication that the characteristics are considered adequate indicia of child abuse.<sup>94</sup> Addition-

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799-801. The fact that different standards regarding the admissibility of expert testimony apply in criminal and non-criminal matters is, however, highlighted by a subsequent California Court of Appeals criminal case involving similar testimony that was held to be inadmissible, distinguishing *In re Cheryl H.* as a non-criminal case. *People v. Roscoe*, 168 Cal. App. 3d 1093, 1100, 215 Cal. Rptr. 45, 50 n.4 (1985).

<sup>85</sup> *State v. Castore*, 435 A.2d 321 (R.I. 1981).

<sup>86</sup> *Id.* at 325.

<sup>87</sup> *Id.* at 326.

<sup>88</sup> *State v. Maule*, 35 Wash. App. 287, 667 P.2d 96 (1983).

<sup>89</sup> *Id.* at 289-90, 667 P.2d at 97 n.1.

<sup>90</sup> For a discussion of the grounds of reversal, see *infra*, note 104.

<sup>91</sup> *Maule*, 35 Wash. App. at 292, 667 P.2d at 99 (citing WASH. R. EVID. 702)(identical to FED. R. EVID. 702).

<sup>92</sup> *Maule*, 35 Wash. App. at 294-95, 667 P.2d at 100 (citing WASH. R. EVID. 703)(identical to FED. R. EVID. 703).

<sup>93</sup> *Maule*, 35 Wash. App. at 294-95, 667 P.2d 96, 100.

<sup>94</sup> *Id.*



ally, there was no showing that the underlying data base could be verified, that is, no showing that the other children to whom the expert was comparing the complainant actually had been sexually abused.<sup>95</sup> And finally, there was no evidence that any statistical study had been done showing a correspondence between the characteristics and sexual abuse as their cause.<sup>96</sup>

The next three cases holding expert diagnosis of sexual abuse inadmissible sounded a common theme in their holdings: that such testimony was, in effect, an impermissible opinion that the complainant was telling the truth. In *State v. Haseltine*,<sup>97</sup> the state presented a psychiatrist's testimony concerning the pattern of behavior exhibited by incest victims, and the psychiatrist went on to give his opinion that there was "no doubt whatsoever" that the complainant was an incest victim.<sup>98</sup> Without commenting on whether the portion of the testimony setting forth the pattern of behavior of incest victims was proper, the Wisconsin Court of Appeals held that the psychiatrist's expression of his opinion that the complainant was an incest victim was impermissible since no witness may testify "that another mentally and physically competent witness is telling the truth."<sup>99</sup>

The Washington Court of Appeals came to a similar conclusion in *State v. Fitzgerald*.<sup>100</sup> There a pediatrician testified that based on her interviews with the two complainants, "she believed that they had been molested."<sup>101</sup> The court held that this testimony was improperly admitted because an expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.<sup>102</sup>

The most recent in the line of cases equating the expert's opinion that the child has been abused with an opinion that the child is

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 120 Wis. 2d 92, 352 N.W.2d 673 (Wis. Ct. App. 1984).

<sup>98</sup> *Id.* at 95-96, 352 N.W.2d at 675-76.

<sup>99</sup> *Id.* at 96, 352 N.W.2d at 676. This holding highlights the fact that the first category of testimony—that offered to prove that abuse occurred—is closely related to the second category—an expert's vouching for the complainant's credibility. This is necessarily true because usually the credibility of the complainant is the key issue in such a case. It will be demonstrated that the results of the admissibility analysis with respect to the two categories of testimony yields identical results. See *infra*, text accompanying notes 192-214, 231-64, and 273-95. For purposes of analysis, however, it is helpful to keep the two categories of evidence separate.

<sup>100</sup> 39 Wash. App. 652, 694 P.2d 1117 (1985).

<sup>101</sup> *Id.* at 656, 694 P.2d at 1121.

<sup>102</sup> *Id.* at 657, 694 P.2d at 1121 (quoting 5A K. TEGLAND, WASHINGTON PRACTICE, EVIDENCE, § 292 n.4 at 39 (2d ed. 1982), *United States v. Samara*, 643 F.2d 701, 705 (10th Cir. 1981), *cert. denied*, 454 U.S. 829 (1981)).

telling the truth is *People v. Roscoe*.<sup>103</sup> The California Court of Appeals held that such a diagnosis was improperly admitted, stating:

Where the expert refers to specific events, people, and personalities and bases his opinion as to credibility on his diagnosis of this witness, then the conclusion that the witness is credible rests upon the premise that the diagnosis is accurate, and that in fact molestation had occurred. The jury in effect is being asked to believe the diagnosis, to agree that the doctor's analysis is correct and that the defendant is guilty.<sup>104</sup>

Thus, courts that have ruled on the issue of the admissibility of non-syndrome diagnoses of child sexual abuse are virtually evenly divided between the view that such evidence is admissible and the view that it is inadmissible.<sup>105</sup>

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<sup>103</sup> 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

<sup>104</sup> *Id.* at 1099-1100, 215 Cal. Rptr. at 50. The court would allow the expert in rebuttal to give testimony falling into the third category—enhancing the complainant's credibility without vouching for it. For discussion of this aspect of the case, see *infra* text accompanying notes 302.

<sup>105</sup> Five cases in which a diagnosis was offered, but where its admissibility was not expressly ruled upon, deserve mention. In *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983), the expert gave a diagnosis along with testimony relating directly to the complainant's credibility. *Id.* at 218. The court, without discussing the diagnosis, held that the admission of the credibility testimony was error (albeit harmless) because the credibility of the child had not been attacked at the stage of the proceedings when the testimony was offered. *Id.* at 218.

In *State v. Keen*, 309 N.C. 158, 305 S.E.2d 535 (1983), the expert testified that the complainant was suffering from the typical symptoms of "anxiety, anger, shame, guilt, and feelings of worthlessness." *Id.* at 161, 305 S.E.2d at 537. The expert went on to state that he believed that the attack as testified to by the complainant "was a reality." *Id.* at 162, 305 S.E.2d at 537. Without discussing the admissibility of the typical symptom testimony, the court held that the admission of the expert's opinion that the attack "was a reality" was reversible error because it constituted an opinion concerning the defendant's guilt. *Id.* at 163, 305 S.E.2d at 538.

In *State v. Raye*, 73 N.C. App. 273, 326 S.E.2d 333, *review denied*, 313 N.C. 609, 332 S.E.2d 183 (1985), diagnosis testimony was offered, along with an opinion that children do not generally fantasize sexual abuse. *Id.* at —, 326 S.E.2d at 335. Without examining the diagnosis testimony, the court approved the use of the testimony regarding fantasy. *Id.* at —, 326 S.E.2d at 335-36. For a further discussion of the fantasy aspect of the testimony, see *infra* text accompanying note 268.

In *State v. Lash*, 237 Kan. 384, 699 P.2d 49 (1985), the trial court admitted diagnosis testimony, but refused to allow the expert to testify that he believed that the defendant was the perpetrator. *Id.* at 384-85, 699 P.2d at 50. The defendant was acquitted and the state appealed the exclusion of this evidence. Without discussing whether the diagnosis was properly admitted, the Kansas Supreme Court upheld the exclusion of the opinion concerning the identity of the perpetrator because an expert is not allowed to pass judgment upon the credibility of witnesses or the weight of disputed evidence. *Id.* at 386, 699 P.2d at 51.

Finally, in *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985), the expert testified that typical symptoms include "bedwetting, loss of appetite, refusal to go to school," clinging to a parent, being reluctant to go out of the house or yard, and developing a tic. *Id.* at 312, 692 S.W.2d at 770. Without discussing the admissibility of this

## B. BEHAVIORAL SCIENTIFIC RESEARCH

It is only in the last ten years that behavioral scientists have begun to intensively study the problem of child sexual abuse.<sup>106</sup> From the beginning of that period,<sup>107</sup> at its midpoint,<sup>108</sup> and through the present,<sup>109</sup> researchers have lamented the dearth of solid empirical research regarding child sexual abuse. In 1980 a researcher reviewing the literature on the subject, came to the conclusion that little had been learned about child sexual abuse during the preceding twenty-five years.<sup>110</sup> He also noted that the literature dealing with the sexual abuse of minors, was "scant, unintegrated, and ambiguous. Books on the topic are rare. Articles are scattered and hidden among a wide range of journals, many in nonaccessible medical and legal journals."<sup>111</sup>

One reason for the lack of solid research is simply that the subject is a very difficult one to study. Only a small percentage of cases is ever reported.<sup>112</sup> In those cases that are reported, the participants are often reluctant to discuss the situation. As a result of problems like these there are methodological difficulties virtually built into most research projects in the area.<sup>113</sup> Thus, even critics of

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testimony, the court reversed because the expert went on to opine about typical characteristics of offenders. *Id.* at 316, 692 S.W.2d at 773.

The offering of an expert opinion by the prosecution concerning the typical characteristics of offenders warrants further discussion because it has occurred in several cases in addition to *Hall*. In every case where such testimony has been admitted by the trial court, the appellate court has held it to be error because the evidence is in effect impermissible character evidence which tends to lead the jury to convict on the basis of probability. These holdings are clearly correct under FED. R. EVID. 404(a). See *State v. Maule*, 35 Wash. App. 287, 293, 667 P.2d 96, 99 (1983) (testimony that majority of sexual abuse cases involve a male parent figure with biological parents in the majority was reversible error where defendant was a father-figure of complainants); *State v. Petrich*, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984) (testimony that in eighty-five to ninety percent of child abuse cases abuser is known to victim, where defendant was complainant's grandfather, should not have been admitted); *State v. Clafin*, 38 Wash. App. 847, 852, 690 P.2d 1186, 1190 (1984) (testimony that forty-three percent of child molestation cases involved father-figures as perpetrators, where defendant was a father-figure, was inadmissible).

<sup>106</sup> D. FINKELHOR, *supra* note 3.

<sup>107</sup> See, e.g., the 1975 observation that there were a "limited number of research articles on the subject of the psychological components of the reactions of child victims to sexual offenses." Burgess & Holmstrom, *supra* note 19, at 562, 80-81.

<sup>108</sup> See, e.g., the 1980 observation that child sexual abuse is a "relatively unexplored area for researchers and many front-line providers." U.S. DEP'T HEALTH & HUM. SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 1 (1980).

<sup>109</sup> D. FINKELHOR, *supra* note 3, at vii-viii.

<sup>110</sup> THE SEXUAL VICTIMOLOGY OF YOUTH (L. Schultz ed. 1980) at vii.

<sup>111</sup> *Id.* at viii.

<sup>112</sup> See *supra* note 16.

<sup>113</sup> See *infra*, text accompanying notes 130-31.

the studies that have been conducted emphasize "that this is not an easy area to study by any method."<sup>114</sup>

Difficulties notwithstanding, there have been many serious attempts to discover what short-term psychological consequences children often suffer as a result from sexual abuse. The virtually uniform conclusion of these studies is that the short-term psychological consequences vary dramatically. The literature is rife with the observation that the reactions observed in children vary widely from study to study.<sup>115</sup> As one recent review of the literature on the subject noted, "In viewing literature on the consequences to the child of child-adult sexual interactions, one is impressed by the tremendous variability recorded by various authors."<sup>116</sup>

Because of the variability of responses, researchers have been frank to admit that they simply cannot tell what the reactions to sexual abuse of any particular child will be. On this important point it is probably best to let the researchers speak for themselves. These

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<sup>114</sup> Tsai, Feldman-Summers & Edgar, *supra* note 24. Indicative of the difficulty of research in this area is the fact that most empirical studies tend to be based on two methods, neither of which is ideal for studying the immediate impact of sexual abuse upon a child. One method is "retrospective" surveys, that is, surveys of the adult population asking them to report sexual abuse that was inflicted upon them years earlier. Several commentators have noted the predominance of retrospective studies. See, e.g., Brant & Tisza, *supra* note 17, at 80; Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 *AM. J. ORTHOPSYCHIATRY* 237 (1978), reprinted in U.S. DEP'T HEALTH & HUM. SERVICES, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 51, 57 (1980). As of 1980, one researcher who surveyed the literature found that eighteen of the twenty-eight major studies that had been conducted were retrospective. Constantine, *The Effects of Early Sexual Experiences: A Review and Synthesis of Research*, in *CHILDREN AND SEX* 217, 218 (L. Constantine & F. Martinson ed. 1981). The second type of study that has tended to be conducted can be described as "anecdotal." These studies describe a very small number of cases in minute detail. *THE SEXUAL VICTIMOLOGY OF YOUTH* 25 (L. Schultz ed. 1980). See, e.g., Boekelheide, *Sexual Adjustment of College Women Who Experience Incestuous Relationships*, 26 *J. OF THE AM. COLLEGE HEALTH ASS'N* 327 (1978)(based on six cases); Cormier & Boulanger, *Life Cycle and Episodic Recidivism*, 18 *CANADIAN PSYCHIATRIC ASS'N J.* 283 (1973)(studying two families); and Dixon, Arnold, & Calestro, *Father-Son Incest: Unreported Psychiatric Problems*, 135 *AM. J. OF PSYCHIATRY* 835 (1978)(based on six cases). In addition to these problematic types of studies, some of the predominant subject interests of the behavioral scientific researchers have not been particularly illuminating concerning children's reactions to sexual abuse. It has been noted that one major preoccupation of the research has been with family structure and dynamics, that is, what it is in a family that causes sexual abuse to occur. Constantine, *supra* at 236. Part and parcel of this inquiry is another major focus of the research, the typical characteristics of offenders. N. GAGER & C. SCHURR, *SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA* 35 (1976).

<sup>115</sup> B. JUSTICE & R. JUSTICE, *THE BROKEN TABOO: SEX IN THE FAMILY* 167 (1979); Constantine, *supra* note 113, at 222; LaBarbera & Dozier, *Psychological Responses of Incestuous Daughters: Emerging Patterns*, 74 *S. MEDICAL J.* 1478, 1478-79 (1981); Tsai, Feldman-Summers & Edgar, *supra* note 24, at 201.

<sup>116</sup> Abel, Becker, & Cunningham-Rathner, *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 *INTERNATIONAL J. OF LAW AND PSYCHIATRY* 89, 93 (1984).

observations, which are arranged in chronological order of their publication, indicate that from the beginning of research on the topic in the mid 1970's until the present time, researchers have never been able to pin down typical psychological symptoms of sexually abused children. "The specific emotional consequences of sexual abuse cannot presently be predicted . . ." <sup>117</sup> "Children can exhibit the entire gamut of behaviors in response to a sexual assault, ranging from the negative to the positive." <sup>118</sup> "[T]he actual response to a trauma, such as sexual seduction, varies considerably from 1 child to another." <sup>119</sup> "Children's immediate reactions to an assault vary." <sup>120</sup> "The literature on diagnosis does not indicate that professionals agree on any of the effects of sexual abuse on minors." <sup>121</sup> "Incest victims show a wide variety of symptom complaints or may show none at all." <sup>122</sup> Since there are no typical symptoms, diagnosis is very difficult. As one behavioral scientist noted, "even those professionals who have a clinical definition with which they are comfortable will still have problems in identifying sexually abused children." <sup>123</sup>

The reason that such a wide variety of symptoms has been noted is that child sexual abuse is a very complex psychological phenomenon from the point of view of the victim. This can perhaps best be illustrated by comparing it with adult rape, which is, by contrast, a very unambiguous psychological phenomenon from the victim's perspective. In a rape the victim is coerced by physical force or threats of physical force to engage in sexual activity which she does not desire. Under these circumstances, there is no possibility of the victim enjoying the activity or emerging from the situation with any positive psychological emotions. Accordingly, it is not surprising that the reactions of adult victims to forcible rape are remarkably similar to each other and are drastically negative. <sup>124</sup> By contrast, a child sexual abuse victim's feelings may be, and often

<sup>117</sup> Berliner & Stevens, *supra* note 18, at 48.

<sup>118</sup> Sgroi, *supra* note 20, at 135.

<sup>119</sup> Rosenfeld, Nadelson & Krieger, *Fantasy and Reality in Patients' Reports of Incest*, 40 J. OF CLINICAL PSYCHIATRY 162 (1979).

<sup>120</sup> U.S. DEP'T HEALTH & HUM. SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 5 (1980).

<sup>121</sup> Schultz, *Diagnosis and Treatment—Introduction*, in THE SEXUAL VICTIMOLOGY OF YOUTH 39 (L. Schultz ed. 1980).

<sup>122</sup> I. STUART & J. GREER, *supra* note 24, at 59. See also Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse*, CHILDREN TODAY May-June 1975 18, reprinted in THE SEXUAL VICTIMOLOGY OF YOUTH 25 (L. Schultz ed. 1980); and Tsai, Feldman-Summers & Edgar, *supra* note 24, at 202.

<sup>123</sup> Mrazek, *supra* note 32, at 14.

<sup>124</sup> See McCord, *supra* note 47.

are, ambivalent. The victim's will is usually much more malleable than an adult's, particularly when the perpetrator may be assuring the child that the activity is proper. The child may affirmatively desire attention from the perpetrator even if the attention is not of the type condoned by society. The coercion involved is usually less than physical force or threats of physical force. In these ambivalent circumstances, the child may even feel physical pleasure during the activity. As one researcher cogently put it:

Contrary to the stereotype, most victims in our study readily acknowledged the positive as well as the negative elements of their experience. They talked about the times the physical sensations felt good, or they remembered how their sexual experience with an adult or family member satisfied a longing for affection and closeness that was rarely met at any other time.<sup>125</sup>

While it is probably a correct perception that whatever positive feelings exist are part of a confusing flood of feelings and sensations with which the child's mind is not able to cope, and that the positive feelings are "usually dwarfed by an overwhelming sense of helplessness, guilt, anger, or fear,"<sup>126</sup> the existence of this ambivalence has prevented researchers from making a successful generalization regarding the immediate psychological consequences of child sexual abuse.

Realizing that children's reactions vary dramatically, researchers have attempted to compile lists of variables that may affect a child's reaction. A typical list is as follows: relationship between the perpetrator and the victim, the number of incidents, the length of time over which the incidents occurred, the degree of force used, the degree of gratification to the child, the age and developmental level of the child, and the reaction of parents and others to the reve-

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<sup>125</sup> D. FINKELHOR, *supra* note 13, at 65. While this researcher found that sixty-six percent of adult females who had been sexually abused as children remembered the experience as primarily negative, only seven percent remembered it as primarily positive. *Id.* Another researcher found the remembrances of the victims of the abuse to be fifty-five percent positive and only thirty-nine percent negative. Nelson, *supra* note 24, at 166. In another study, the four most common adjectives mentioned by victims were all positive with the first negative adjective, fear, being found in fifth place. Constantine, *supra* note 114, at 225-26.

None of this is meant to indicate the author's belief that there are *any* positive values to sexual activity between adults and children. Indeed, there is every indication that the long-term effects of child sexual abuse on the victim are usually devastating. For example, there is general agreement that victims of child sexual abuse often have grave difficulties with sex when they reach adulthood. LaBarbera & Dozier, *supra* note 115, at 1479. This notwithstanding, most studies have found some percentage of sexually abused children who suffer no negative consequences. Constantine, *supra* note 114, at 223-24.

<sup>126</sup> D. FINKELHOR, *supra* note 13, at 65-66.

lation of the abuse.<sup>127</sup> Yet despite the intuitions of researchers that all of these variables are significant, the one study which has attempted to assess the impact of such variables found that only two were statistically significant: the amount of force employed, and the age of the perpetrator.<sup>128</sup>

In summary, the words of one researcher express both the frustration felt by the scientific community because of its inability to get a handle on this ambivalent phenomenon and that community's continuing surprise that such a repugnant action as sexually abusing a child may result in little or no negative impact on the victim:

We seem to flounder when elements such as ingratiation, promise, or entreaty, rather than physical force, are used to gain compliance from the minor, or when some child victims report enjoying and prolonging the sexual relationship with adults. . . .

We simply do not have any criteria to determine how each minor will react to the sexual event, but it seems clear that some victim's personality may be plastic and highly adaptive, without indication of trauma. . . . While data are scanty, the conception of all child victims being sacrificed to adult lust would seem unfounded. Sexual behavior between adult and child or between two minors is neither harmful nor harmless always.<sup>129</sup>

As if it were not problem enough that researchers cannot find typical symptoms of sexually abused children, and cannot even be sure which variables affect reactions, many researchers note that the studies that have been done are almost always riddled with severe methodological difficulties. The most thorough critique of the methodologies employed suggests several difficulties: much "research" is really a compilation of diverse cases; samples tested are not representative; case reports on which much of the research is based do not permit the establishment of general principles; few studies have utilized any standardized outcome measures of cognitive or psychological functioning, but rather they have relied upon unstandardized psychiatric interviews; the criteria which researchers have used to assess psychological effects have often lacked specificity and accuracy; there has been insufficient consideration given to the question of whether associations between early sexual abuse and later consequences are causally related; and most studies have not utilized control groups.<sup>130</sup> Thus, one researcher has stated:

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<sup>127</sup> Sgroi, *supra* note 20, at 134-35. See also, D. FINKELHOR, *supra* note 13, at 106; THE SEXUAL VICTIMOLOGY OF YOUTH 21 (L. Schultz ed. 1980); U.S. DEP'T HEALTH & HUM. SERVICES, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 5 (1980); Abel, Becker, & Cunningham-Rathner, *supra* note 116, at 90-93; Schultz, *supra* note 121.

<sup>128</sup> D. FINKELHOR, *supra* note 13, at 107.

<sup>129</sup> Schultz, *supra* note 121, at 39-40.

<sup>130</sup> P. Mrazek & D. Mrazek, *The Effects of Child Sexual Abuse: Methodological Considerations*,

The methods employed differ in numerous ways, as do the samples studied, thereby making it virtually impossible to disentangle effects due to the research methods from effects due, for example, to differences among molested children in terms of age and gender of the child and the molester, the acts engaged in and so forth. In short, our knowledge about psychological impacts of sexual molestation is limited.<sup>131</sup>

Notwithstanding the general recognition that there are no typical symptoms of sexually abused children, and the methodological problems with the studies that have been done, some researchers have attempted to put together lists of symptoms. The common characteristic of such lists is that they are very general symptoms which occur to some extent in most children, and may be caused by many factors other than sexual abuse. A typical list is as follows: for children under five—developmental regression, clinging to mother, recurring night terrors; for school-age children—gain or loss of weight, drop in academic performance, insomnia, depression, anxiety, fears, conversion hysteria and running away; for older adolescents—social isolation delinquent behavior, depression, separation from important males, suicide, and aggressive behavior towards the mother.<sup>132</sup> The lack of the establishment of any causal relationship between these symptoms and child sexual abuse has been noted. “There is very little descriptive material in our literature on how to separate the manifestations of sexual abuse from nonsexual etiologies [causes] of the same problems in children and adolescents.”<sup>133</sup> Accordingly, these lists of symptoms must be viewed not as precise, empirically-derived criteria, but as the best general guidance that persons experienced in the area can give to those who are trying to detect sexually abused children.

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in *SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* 235, 238 (P. Mrazek & C. Kempe ed. 1981). See also, LaBarbera & Dozier, *supra* note 115, at 1479; Schultz, *supra* note 121, at 192-93; and Constantine, *supra* note 114, at 222. A particular methodological difficulty that is often mentioned is that the reported cases, on which much of the research is based, may be significantly different than the cases that are never reported. See D. FINKELHOR, *supra* note 13, at 34; Abel, Becker, & Cunningham-Rathner, *supra* note 116, at 90-93; Rosenfeld, Nadelson, Krieger & Backman, *Incest and Sexual Abuse of Children*, 16 *J. OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY* 338 (1977).

<sup>131</sup> Tsai, Feldman-Summers & Edgar, *supra* note 24, at 202.

<sup>132</sup> Woodling & Kossoris, *Sexual Misuse: Rape, Molestation and Incest*, 28 *PEDIATRIC CLINICS OF N. AM.* 489 (1981). See also S. FORWARD & C. BUCK, *supra* note 33, at 22-23; B. JUSTICE & R. JUSTICE, *supra* note 115, at 155-58; THE *SEXUAL VICTIMOLOGY OF YOUTH* 22 (L. Schultz ed. 1980); Berliner, Canfield-Blick & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in *CHILD SEXUAL ABUSE AND THE LAW* 161, 172 (J. Bulkley ed. 1981); Brant & Tisza, *supra* note 17, at 83; Burgess & Holmstrom, *supra* note 19, at 551, 75; and Nadelson & Rosenfeld, *Sexual Misuse of Children*, in *CHILD PSYCHIATRY AND THE LAW* 89, 94 (D. Schetky & E. Benedek ed. 1980).

<sup>133</sup> Nadelson & Rosenfeld, *supra* note 132, at 94-95.



In summary, behavioral scientific research does not support the existence of a sexually abused child "syndrome." Neither does it support the proposition that there are typical symptoms of sexually abused children, or even that certain symptoms predominate among sexually abused children. Finally, the research does not support the conclusion that an expert in the field of child sexual abuse has any accurate way to diagnose a particular child as a victim of sexual abuse.

### C. ADMISSIBILITY ANALYSIS

#### 1. *General Analytical Framework*

Before beginning an analysis of admissibility, a general analytical framework to be used throughout the remainder of this article regarding admissibility of expert testimony will be set forth. The framework will be constructed under the Federal Rules of Evidence. It is highly desirable that such an analytical framework be developed, because a consistent, helpful analytical framework can not be drawn from the case law. There appear to be three problems contributing to the unsatisfactory state of the case law.

First, the objections typically raised to expert testimony regarding a child complainant are imprecise, overlapping, and not explicitly sanctioned by the Rules. Perhaps the most common objection is that the testimony "invades the province of the jury."<sup>134</sup> This objection is not keyed to any particular Federal Rule of Evidence, and a reading of the cases shows that it can refer to three different contentions; first, that the testimony will not assist the jury because it does not relate to a subject that is "beyond the ken" of the jury;<sup>135</sup> second, that the determination of the credibility of a witness is peculiarly within the province of the jury and that expert testimony concerning witness credibility is thus an "improper bolstering";<sup>136</sup> and third, that the testimony is unfairly prejudicial because it overwhelms the jury with an aura of scientific reliability.<sup>137</sup> Another ob-

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<sup>134</sup> See, e.g., *State v. Kim*, 64 Haw. 548, 602-607, 645 P.2d 1330, 1334-39 (1982); *State v. Middleton*, 294 Or. 427, 435, 657 P.2d 1215, 1219-21 (1983). It will also be assumed throughout this article that the trier of fact is a jury, not a judge. This assumption comports with the reality of virtually every reported case in this area.

<sup>135</sup> See also, *Kim*, 64 Haw. at 602-07, 645 P.2d at 1334-39.

<sup>136</sup> See, e.g., *People v. Roscoe*, 168 Cal. App. 3d 1093, —, 215 Cal. Rptr. 45, 50 (1985); *State v. Fitzgerald*, 39 Wash. App. 652, 694 P.2d 1117, 1121 (1985); *State v. Haseltine*, 120 Wis. 2d 92, —, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984).

<sup>137</sup> So far this contention has not been made explicit with respect to expert testimony regarding sexually abused children. It has, however, often been made explicit with respect to the closely related topic of expert testimony regarding adult rape complainants. See, e.g., *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982); *State v. Taylor*, 663

jection that is sometimes made—that the topic is not a proper subject for expert opinion<sup>138</sup>—can mean either of two things that overlap with the “invades the province of the jury” objection: that the subject matter is not beyond the ken of the jury, and that the testimony constitutes an improper bolstering of the credibility of a witness. Another common objection is that the testimony is not sufficiently reliable to assist the jury.<sup>139</sup> This objection sometimes entails a discussion of the extent to which the ability of the expert to make the diagnosis is accepted by the pertinent scientific community.<sup>140</sup> As will be shown below, such an objection, which raises the spectre of the *Frye* rule, is problematic because the status of the *Frye* rule is itself problematic.<sup>141</sup>

The second factor contributing to the unsatisfactory state of the case law is that courts do not always begin their analyses at the obvious starting point: whether the testimony “will assist” the trier of fact.<sup>142</sup> Courts are often beguiled by easily-cited case law stating the principle that ordinarily a jury does not need expert assistance in determining the credibility of witnesses, without ever examining whether the expert testimony assisted the jury in the case before it.<sup>143</sup>

The third major factor contributing to the unsatisfactory state of the case law is that even the courts which do recognize the obvious beginning point<sup>144</sup> diverge dramatically in analyzing whether

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S.W.2d 235, 240 (Mo. 1984). Undoubtedly, this concern that the expert may overwhelm the jury a part in court decisions regarding expert testimony about sexually abused children, even if the concern is not made explicit.

<sup>138</sup> See, e.g., *State v. Danielski*, 350 N.W.2d 395, 397 (Minn. App. 1984); *State v. Maule*, 35 Wash. App. 287, 294, 667 P.2d 96, 100 (1983).

<sup>139</sup> See, e.g., *Maule*, 35 Wash. App. at 295, 667 P.2d at 100.

Whether cited or not, the inquiry concerning the extent of acceptance by the pertinent scientific community is derived from the famous case of *Frye*, 293 F. 1013, which held that for novel scientific evidence to be admissible, the technique from which the evidence was derived must be generally accepted by the scientific community from which it arose. *Id.* at 1014. For more about the *Frye* rule, see *infra* text accompanying notes 146-70.

<sup>140</sup> See, e.g., *State v. Kim*, 64 Haw. 548, 604, 645 P.2d 1130, 1136 (1982).

<sup>141</sup> See *infra*, text accompanying notes 146-70.

<sup>142</sup> FED. R. EVID. 702.

<sup>143</sup> *State v. Fitzgerald*, 69 Wash. App. 652, 657, 694 P.2d 1117, 1121 (1985).

<sup>144</sup> Some courts view FED. R. EVID. 701 as the second step of a three-step analysis, the first step of which is whether the evidence is relevant under FED. R. EVID. 401, and the third step of which is whether the probative value of the evidence is substantially outweighed by countervailing considerations under FED. R. EVID. 403. See, e.g., *State v. Brown*, 797 Or. 404, 409, 687 P.2d 751, 754-55 (1984). This three-step process is certainly correct under the Federal Rules, but a FED. R. EVID. 701 analysis concerning whether the evidence will assist the trier of fact also involves considerations of relevance (if the evidence is not relevant, it will not assist the trier of fact) and countervailing dangers (if the countervailing dangers substantially outweigh the probative value, the

expert testimony about "novel" scientific evidence will assist the jury. Although courts generally agree on one factor that must be present in the expert testimony in order to render it admissible—that it adds to the common understanding of the jury<sup>145</sup>—from this common ground courts head in several directions when dealing with "novel" scientific evidence.

The seeds for the divergence were planted in 1923 in the famous case of *Frye v. United States*.<sup>146</sup> The *Frye* case involved a rudimentary polygraph device, the results of which the defendant sought to have admitted at the trial, claiming that they tended to show his innocence. The United States Court of Appeals for the District of Columbia Circuit held that the trial court had properly refused to admit the evidence because there was no showing that the validity of the technique had been generally accepted in the relevant scientific community.<sup>147</sup>

For several decades the *Frye* general acceptance test constituted an unquestionably accepted principle of law in most jurisdictions when the admissibility of "novel" scientific evidence was at issue.<sup>148</sup> During the last decade, however, considerable criticism of the *Frye*

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evidence will likewise not be of assistance to the trier of fact). Thus, this article for the sake of convenience will focus on whether the evidence will assist the trier of fact under FED. R. EVID. 701. The results of the suggested analysis should be the same, however, whether the analysis is done in three steps under Rules 401, 701, and 403, or one step under Rule 701.

<sup>145</sup> See, e.g., *State v. Kim*, 64 Haw. 598, 604, 645 P.2d 1130, 1336 (1982). The Advisory Committee Note supports this requirement:

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

FED. RULE EVID. 701 Advisory Committee Note (quoting Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

The common phraseology that the subject matter must be "beyond the ken" of the trier of fact can be misleading if it is construed to mean that the subject matter must be entirely removed from the trier of fact's common experience. Note the language "and to the best possible degree" in the Advisory Committee Note. See also *Zenith Radio Corp. v. Matsushita Electric Industry Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1980).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1014.

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.*

<sup>148</sup> See, Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980). Gianelli points out, however, that

rule has developed.<sup>149</sup> The emerging major alternative mode of analysis is referred to as "relevance analysis" and seeks to treat "novel" scientific evidence in the same way that other expert testimony is treated, by weighing its probative value and helpfulness against the countervailing dangers of unfair prejudice and confusion of issues. Its earliest major scholarly proponent was Professor McCormick<sup>150</sup> and the position has been reinforced and fleshed out by a recent influential treatise in the field.<sup>151</sup>

The problems arising from the *Frye* rule are compounded when the "novel" scientific evidence at issue is "novel" *psychological* evidence. Both the *Frye* rule and "relevance analysis" as currently formulated are more easily and more often applied to "hard" scientific evidence, such as neutron activation analysis,<sup>152</sup> and gas chromatograph analysis.<sup>153</sup> "Novel" psychological evidence, which is "soft" and subjective, is a relative newcomer to the *Frye* scene, although it now seems to have arrived with a vengeance. Examples of such testimony offered over the last decade include rape trauma syndrome,<sup>154</sup> battered wife syndrome,<sup>155</sup> battered parent syndrome,<sup>156</sup> Vietnam veterans' syndrome,<sup>157</sup> and testimony regarding the fallibility of eyewitness identifications.<sup>158</sup> The courts have de-

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courts could and did avoid applying the rule simply by not considering particular expert testimony as "scientific." *Id.* at 1219.

<sup>149</sup> The criticisms of the *Frye* rule and the alternatives that courts have proposed are admirably analyzed in McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 886-905 (1982).

<sup>150</sup> C. McCORMICK, *McCORMICK ON EVIDENCE* 491 (2d ed. 1972).

<sup>151</sup> 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, 702[03] (1982). Indeed, there are some commentators who argue as a matter of statutory construction that since there is no mention of the *Frye* rule in the Federal Rules of Evidence, the Federal Rules did not incorporate it. C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5168 (1978). Even those who do not advocate abandoning *Frye* sometimes try to tinker with it. For example, one commentator has suggested that substantial acceptance, rather than general acceptance, should be required. J. RICHARDSON, *MODERN SCIENTIFIC EVIDENCE* 2.5 at 24 (2d ed. 1974). Some courts have equated the general acceptance of a technique with a showing of reliability. See cases cited in McCormick, *supra* note 149, at 892 n.83 (1982).

<sup>152</sup> See Karjala, *The Evidentiary Uses of Neutron Activation Analysis*, 59 CALIF. L. REV. 997 (1971).

<sup>153</sup> *United States v. Distler*, 671 F.2d 954, 961-62 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

<sup>154</sup> See McCord, *supra* note 47.

<sup>155</sup> *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981); Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

<sup>156</sup> *State v. Loebach*, 310 N.W.2d 58 (Minn. 1981).

<sup>157</sup> *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System*, 68 MARQ. L. REV. 647 (1985).

<sup>158</sup> *Admission of Expert Testimony on Eyewitness Identification*, 73 CALIF. L. REV. 1402 (1985).

vised varying approaches concerning how to deal with such "novel" psychological evidence.

One approach is to adhere strictly to the *Frye* general acceptance rule. With respect to "novel" psychological evidence, courts have applied the *Frye* rule to rape trauma syndrome,<sup>159</sup> battered wife syndrome,<sup>160</sup> and battered parent syndrome.<sup>161</sup> Another approach, under "relevance analysis," is to propose lists of factors to guide courts in determining whether the evidence will assist the trier of fact.<sup>162</sup> Other courts, without resorting to either *Frye* or "relevance

<sup>159</sup> *State v. Saldana*, 324 N.W.2d 227 (Minn 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

<sup>160</sup> *Ibn-Tamas*, 407 A.2d 626; *Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137.

<sup>161</sup> *Loebach*, 310 N.W.2d 58.

<sup>162</sup> Relevance analysis proponents have not focused on the applicability of their analysis to psychological evidence. There is no reason to suppose, however, that they would be loathe to apply their analysis to psychological evidence.

J. WEINSTEIN & M. BERGER, *supra* note 151, at 702[03] proposes seven guidelines:

- (1) The technique's general acceptance in the field;
- (2) The expert's qualifications and stature;
- (3) The use which has been made of the technique;
- (4) The potential rate of error;
- (5) The existence of specialized literature;
- (6) The novelty of the invention; and
- (7) The extent to which the technique relies on the subjective interpretation of the expert.

Justice McCormick in *McCormick*, *supra* note 149, at 911-12 lists eleven factors:

- (1) The potential error rate in using the technique;
- (2) The existence and maintenance of standards governing its use;
- (3) Presence of safeguards in the characteristics of the technique;
- (4) Analogy to other scientific techniques whose results are admissible;
- (5) The extent to which the technique has been accepted by scientists in the field involved;
- (6) The nature and breadth of the inference adduced;
- (7) The clarity and simplicity with which the technique can be described and its results explained;
- (8) The extent to which the basic data are verifiable by the court and jury;
- (9) The availability of other experts to test and evaluate the technique;
- (10) The probative significance of the evidence in the circumstances of the case;
- (11) The care with which the technique was applied in the case.

*See United States v. Clifford*, 543 F. Supp. 424, 430 (W.D. Pa. 1982), which relied on six factors in rejecting expert forensic linguistic testimony: (1) no other court cases had permitted such testimony; (2) the users of the technique were not satisfied that technique was reliable; (3) the expert involved used subjective judgment in assigning significance to results (speculative); (4) potential for misleading jury (prejudicial value too great); (5) no conformity with generally accepted scientific theory; (6) no qualified expert to present to jury. *See also*, *State v. Hall*, 297 N.W.2d 80, 84-85, *cert. denied*, 450 U.S. 927 (Iowa 1982) upholding the admission of blood spatter expert testimony after considering nine factors: (1) Weaknesses pointed out by cross-examination and adequate instructions; (2) expert's qualifications; (3) existence of extensive training organizations; (4) professional organizations; (5) academic programs; (6) professional use; (7) seminars; (8) extensive literature; (9) complexity of subject matter and understandability after expert's presentation.

analysis," have formulated their own approaches such as asking whether the state of the art or scientific knowledge permits assertion of a reasonable opinion,<sup>163</sup> or asking whether the information or opinion is the product of an explicable and reliable system of analysis.<sup>164</sup>

In summary, the state of the law with respect to the admissibility of "novel" psychological evidence in general, and evidence concerning the psychology of child sexual abuse complainants in particular, is confused. The basic choices for analyzing the admissibility of such evidence are (1) adhere to the *Frye* rule, (2) adopt "relevance analysis," or (3) construct a different analytical framework. This article argues for the third alternative. Although both the *Frye* rule and "relevance analysis" as currently formulated have helpful aspects to determine the admissibility of psychological testimony, neither of the approaches perfectly fits this type of evidence.

The *Frye* rule furthers two valid objectives. It serves to assure that only scientific evidence that is reliable will be placed before the jury.<sup>165</sup> Additionally, the general acceptance standard tends to assure that there will be a pool of available experts to which the opponent of the evidence can resort for advice and testimony.<sup>166</sup> On the other hand, there are four serious drawbacks to the use of the *Frye* rule with respect to "novel" psychological evidence. First, how to apply the *Frye* rule is often not entirely clear. It is not always clear what evidence is "scientific" and what evidence is not.<sup>167</sup> Further, it is unclear whether *Frye* requires general acceptance of the underlying scientific principle, the scientific technique employed, or both.<sup>168</sup> Second, the *Frye* rule's exclusive focus on general accept-

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Finally, see *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) holding that the trial judge abused his discretion by excluding expert testimony regarding the fallibility of eyewitness testimony, relying on five factors: (1) the existence of an extensive body of knowledge and trained experts in that subject; (2) abstention of judgment as to whether this witness' testimony is truthful; (3) limiting the testimony to the particular facts before the jury; (4) making the relationship clear between facts and expert's specialized knowledge; (5) jury well aware of its ability to reject or decrease weight of proffer.

<sup>163</sup> *United States v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984).

<sup>164</sup> *State v. Kim*, 64 Haw. 601, 606, 645 P.2d 1330, 1336 (1982).

<sup>165</sup> See, e.g., *United States v. Franks*, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975); *Pulakis v. State*, 476 P.2d 474, 479 (Alaska 1970); *People v. Bynum*, 192 Colo. 60, 62, 556 P.2d 469, 470 (1976); *State v. Hurd*, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981).

<sup>166</sup> *United States v. Addison*, 498 F.2d 741, 743-44 (D.C. Cir. 1974); *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

<sup>167</sup> See McCord, *supra* note 47, at 1181-89.

<sup>168</sup> Gianelli, *supra* note 148, at 1211; *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 208, 230 (remarks by Prof. Margaret Berger).

ance diverts attention from other important questions regarding the admissibility of expert testimony.<sup>169</sup> Third, the bedrock rationale of the *Frye* rule—to assure that the jury can rationally and intelligently weigh the evidence—leads to the conclusion that the rule is not even appropriate for simple, easily understood types of psychological expert testimony, which is by its very nature subjective and therefore not likely to overwhelm the jury.<sup>170</sup> Lastly, requiring general acceptance may deprive the trier of fact of helpful evidence both because of the lag time that is inevitably entailed in gaining general acceptance, and because psychological evidence by virtue of its subjective nature may have a more difficult time gaining general acceptance than will an objective, mechanical technique. Indeed, very few concepts are generally accepted by all behavioral scientists.

“Relevance analysis” has two virtues. First, by treating “novel” scientific evidence like all other expert testimony, rather than applying a special test to it as does the *Frye* rule, it promotes uniformity of analysis regarding the admissibility of expert testimony. Second, “relevance analysis” explicitly recognizes that there are many important factors that bear on the admissibility of expert testimony regarding “novel” scientific evidence other than whether it is generally accepted in the scientific community. “Relevance analysis,” as it has been formulated, however, is also deficient in two respects in its application to “novel” psychological evidence. First, the factors that its proponents list are too specific and do not necessarily lead to an analysis of the critical factors.<sup>171</sup> Second, several of the factors thus far suggested are not particularly pertinent with respect to psychological evidence<sup>172</sup> while some important factors regarding psycho-

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<sup>169</sup> See *infra* text accompanying notes 173-91.

<sup>170</sup> This sort of evidence has been referred to as “software” scientific evidence:

This is the sort of evidence least likely to awe the jury. When a layperson thinks of science, the layperson naturally thinks of sophisticated instruments capable of precise management. Software techniques are the farthest removed from the layperson's conception of science; and for that reason, in the minds of many laypersons these techniques hardly deserve the august title, “scientific.” The element of subjectivity in these techniques is patent to any juror.

Inwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 283 (1981).

For a more detailed discussion why the *Frye* rule should not apply to software psychological evidence, see McCord, *supra* note 47, at 1181-89.

<sup>171</sup> See *supra* note 162.

<sup>172</sup> For example, the seven guideline analysis in J. WEINSTEIN & M. BERGER, *supra* note 151, 702[03] uses the terms “technique” and “invention,” which connote “hard” scientific tests. A focus on “technique” with respect to psychological evidence will often be largely unproductive, since often the technique involved is simple interviews. This technique is certainly a generally accepted means by the behavioral scientific community of gaining information, but a focus on technique misses the point, which is whether the conclusions drawn from the interview are valid. Similarly, many of the eleven factors in

logical evidence are not mentioned at all.

A better approach is to ask what general factors have a bearing on whether expert testimony "will assist" the jury. A review of the case law and commentary suggests that there are four general factors that should be considered: necessity, reliability, understandability and importance.

The *necessity* factor simply means that the court should inquire how necessary the offered testimony is in the context of the case.<sup>173</sup> There are four sub-inquiries that will usually be helpful in ascertaining whether expert testimony is necessary. First, the subject matter may be one on which the ordinary juror would likely benefit from expert assistance because it is not a matter of common, everyday experience.<sup>174</sup> Second, the testimony may be necessary in order to counter existing irrational prejudices that may exist in an ordinary juror. This issue may have particular force in sex offense prosecutions.<sup>175</sup> Third, often facts which do not need expert explanation if they are *not* attacked by the opponent may need expert explanation if they *are* attacked in certain ways by the opponent. For example, testimony of a child complainant that she was abused by a relative might not on its face necessitate an expert explanation, but if the witness is thereafter cross-examined regarding an alleged earlier recantation of the accusation, then the necessity for expert testimony to explain that child sexual abuse victims often recant is more necessary.<sup>176</sup> A fourth reason why expert testimony may be necessary is to counter exceptional jury instructions, such as an instruction highlighting the assumed fallibility of child witnesses.<sup>177</sup> An overarching inquiry regarding necessity is whether there exist alternative means of proving the matter on which the expert testimony is offered.

The *reliability* factor, as its name suggests, involves an inquiry into how reliable the expert testimony is likely to be.<sup>178</sup> This impor-

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McCormick, *supra* note 149, at 911-12 relate to "technique" and seem to be more applicable to "hard" scientific tests.

<sup>173</sup> Note that necessity in this analysis is not viewed as an all-or-nothing concept, with the testimony viewed as either absolutely necessary or not necessary at all. Rather, it is viewed as a relative concept which envisions degrees of necessity such as: highly necessary, moderately necessary, not very necessary, etc.

<sup>174</sup> This is a familiar requirement for the admission of expert testimony. See *supra* note 145 and accompanying text.

<sup>175</sup> It is argued in McCord, *supra* note 47, at 1202-03, that one reason expert rape trauma syndrome testimony should be admissible in rape prosecutions involving adult complainants is that there exists in many jurors the irrational prejudice that many rape victims "bring it on themselves."

<sup>176</sup> See *infra* text accompanying notes 301-05.

<sup>177</sup> See *infra* text accompanying note 203.

<sup>178</sup> Although "reliability" is usually discussed by courts as a unitary concept, behav-



tant factor is recognized by both the *Frye* test<sup>179</sup> and "relevance analysis."<sup>180</sup> There are two specific sub-inquiries that will usually be important with respect to this factor. First, often the extent of general acceptance accorded by the pertinent scientific community to an expert's conclusion will be probative of reliability because, although scientific communities are not infallible, usually general acceptance connotes reliability.<sup>181</sup> Second, the error rate of the technique needs to be examined.<sup>182</sup> An important question that relates both to general acceptance and to error rate is to what extent the expert's conclusion is subjective.<sup>183</sup> Generally speaking, the more subjective the conclusion is, the more difficult it will be to make a case for general acceptance. Further, if the conclusion is subjective, there may be either a greater likelihood of a substantial error rate, or the error rate may be impossible to calculate. Interestingly, while the subjectivity of the conclusion tends toward inadmissibility as a matter of reliability, it cuts in favor of admission with respect to understandability<sup>184</sup> because it does not have the potential to overwhelm a jury as does an objective conclusion that purports to be highly reliable.

*Understandability* refers to the ability of the trier of fact to understand the testimony and to give it proper weight. There are five sub-inquiries that help to illuminate this factor. First, how far removed from the jurors' common experience is the subject matter of the testimony? The closer it is to their common understanding, the more likely they are to comprehend it.<sup>185</sup> Second, the clarity and simplicity with which the conclusion can be explained is an impor-

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ioral scientists correctly perceive that it has *two* components: validity and consistency. "Validity" refers to a test's ability to measure what it purports to measure, *i.e.*, is it accurate? "Consistency" (technically referred to by scientists as "reliability," but called "consistency" here to avoid confusion) refers to the percentage of cases in which independent examiners will draw the same conclusion from the test. Imwinkelried, *supra* note 170, at 279.

<sup>179</sup> See *supra* text accompanying note 165.

<sup>180</sup> See *supra* note 162.

<sup>181</sup> See *United States v. Downing*, 753 F.2d 1224, 1236 n.14, 1238 (3d Cir. 1985).

<sup>182</sup> J. WEINSTEIN & M. BERGER, *supra* note 151 and 162, specifically focus on this as the fourth factor in their suggested list of inquiries. McCormick, *supra* note 149, specifically focuses on this as the first factor in his list.

<sup>183</sup> J. WEINSTEIN & M. BERGER, *supra* note 151, focus on this as the seventh factor in their suggested list of inquiries.

<sup>184</sup> See *supra* text accompanying notes 189-90.

<sup>185</sup> McCormick, *supra* notes 149 and 162, suggests this inquiry by his eighth factor, *i.e.*, the extent to which the basic data relied upon by the expert is verifiable by the court and jury. See *People v. Marx*, 54 Cal. App. 3d 100, 110-11, 126 Cal. Rptr. 350, 356 (1975)(expert testimony regarding bitemark comparison involves a subject not far from the jurors' common experience a substantial factor in favor of admissibility); *Hall*, 297 N.W.2d at 86 (same reasoning on expert testimony regarding blood spatters).

tant factor.<sup>186</sup> Third, the availability of experts for the opponent's use in order to put the conclusion into perspective for the jury should be considered.<sup>187</sup> Fourth, the availability of a specialized literature concerning the subject matter of the testimony allowing opposing counsel to become familiar with the subject and to effectively cross-examine the proponent's expert is an important inquiry.<sup>188</sup> Fifth, a court needs to ask to what extent the testimony may have the tendency to overwhelm the jury.<sup>189</sup> As was noted above, the more subjective the conclusion the less likely it is to overwhelm the jury.<sup>190</sup>

The last factor to consider is the *importance* of the expert testimony. This refers to how crucial the point is, in the circumstances of the case, on which the expert testimony is being offered. If the expert opinion, if believed, would be dispositive or virtually dispositive of the case, that affects the admissibility analysis differently than if the testimony, even if believed, does not dictate the disposition of the case.<sup>191</sup>

This four-factor analysis has the virtue of providing a single framework that accommodates all important issues bearing on admissibility. It also has the virtue of demonstrating the interaction among the factors. One example of that interaction has already been noted: while the subjective nature of a conclusion undercuts its admissibility on the reliability factor, it aids its admissibility on the understandability factor. Another important relationship exists between reliability and importance: the greater the importance of the expert testimony, the greater should be the guarantees of its reliability. On the other hand, if the testimony is less important, then usually the court should be willing to accept a lesser degree of reliability. Yet another important relationship exists between reliability and necessity. For example, if the evidence has become neces-

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<sup>186</sup> McCormick, *supra* notes 149 and 162, includes this as the seventh factor on his list.

<sup>187</sup> This is one of the objectives sought to be secured by the *Frye* test, see *supra* text accompanying note 166. McCormick, *supra* notes 149 and 162, includes this as the ninth factor on his list.

<sup>188</sup> J. WEINSTEIN & M. BERGER, *supra* notes 151 and 162, include this as the fifth of their seven factors.

<sup>189</sup> With respect to "novel" scientific evidence, this concern most often surfaces regarding polygraph evidence. The concern has surfaced with respect to psychological evidence, however, particularly with respect to rape trauma syndrome evidence. See *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982) and *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

<sup>190</sup> See *supra* text accompanying note 183.

<sup>191</sup> Factors six and ten of the analysis of McCormick, *supra* notes 149 and 162, speak to this concern. Those factors are, respectively, the nature and breadth of the inference drawn, and the probative significance of the evidence in the circumstances of the case.

sary because the opponent chose to cross-examine regarding a particular point, then usually the court should be willing to tolerate a lesser degree of reliability since the proponent in a sense has been forced to offer the evidence, and the opponent has in a sense "brought it on himself." The interaction among these factors necessitates that the court perform a *balancing test* to determine whether the testimony will assist the jury. Thus, the recommended admissibility analysis is to analyze the factors and then to balance them to determine whether admission of the evidence will assist the jury. It should be noted that this analytical framework should also be helpful with respect to other kinds of "novel" psychological evidence.

## 2. *Regarding Expert Diagnosis of Child Sexual Abuse*

Having established a framework for analyzing admissibility, that framework should now be applied to expert testimony diagnosing a complainant as a victim of sexual abuse.

*Necessity:* The first sub-inquiry is whether the effects upon children of sexual abuse is a subject matter where expert testimony would likely assist the ordinary juror. Common sense dictates that the answer to this question is yes. To most people the topic of child sexual abuse is unfamiliar and mysterious. There is no reason to believe that most people would understand what effects sexual abuse has on a child and how those effects might be detected. Thus, this basis of necessity exists.

The second sub-inquiry is whether the testimony is necessary to counteract irrational prejudices that might exist in the minds of the jury. Two sources of possible irrational prejudices exist in child sexual abuse cases: the *nature of the case* and the *nature of the witness*.

The *nature of the case* is that the crime charged is a sex offense. Although with respect to most charges, there exist no easily identifiable irrational juror prejudices, sex offense prosecutions are different: there is good reason to suspect that some well-defined prejudices exist in this area.

One likely prejudice is against sex complainants who do anything less than resist to the point of incurring physical injury. This prejudice certainly seems to exist with respect to adult complainants in rape cases, where research has shown that many jurors entertain "a popular prejudice on the subject of sexual assault . . . that victims wish, on some level, to be raped or that victims, because of some imputed moral flaw, deserve to be raped, and that the failure to re-

sist to the utmost reveals the existence of this complicity. . . .”<sup>192</sup> Does this “popular prejudice” exist only with respect to adult complainants? Although there has been very little research done in this area, the one recent study that has addressed the topic concluded:

Another surprising find from the study concerns the matter of consent. In spite of laws that assume the contrary, the public apparently does feel that children bear substantial responsibility in matters of sexual conduct with older persons. The respondents in this survey tended to downgrade the abusiveness of any situation where the child did anything less than object strenuously. This finding held true even in the case of very young children.<sup>193</sup>

The author concluded, “undoubtedly some of this prejudice [against adult complainants] transfers to people’s thinking when the victims are children as well as when the victims are adults.”<sup>194</sup> It is to be doubted, however, whether the prejudice exists to the same extent with respect to child complainants, since jurors probably attribute less responsibility to a child than to an adult.

Another possible irrational prejudice arising from the nature of the case is the disinclination of jurors to believe that child sexual abuse is anything other than a rare occurrence and/or to disbelieve that a child is likely to be abused by someone the child knows. Again, there has been very little research on this topic, but the one study that has been done concluded that for the most part, the potential jury pool is surprisingly well-informed about the topic of child sexual abuse. The researcher began by noting:

Books and articles on the subject of child sexual abuse regularly start by debunking the popular “myths” about the problem. Among the most commonly targeted myths are: that children are molested primarily by strangers; that girls are the exclusive targets of sexual abuse; and that the abusers are violent, aggressive, senile, or mentally ill [citations omitted].<sup>195</sup>

The researcher then went on to note that nobody had ever attempted to empirically establish that these myths were indeed prevalent.<sup>196</sup> The researcher performed such a study, which showed that all but one of these myths was *not* widespread.<sup>197</sup> The one excep-

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<sup>192</sup> D. FINKELHOR, *supra* note 3, at 119. *See also*, McCord, *supra* note 47, at 1202-04.

<sup>193</sup> D. FINKELHOR, *supra* note 3, at 119.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 87.

<sup>196</sup> *Id.*

<sup>197</sup> Taken together, the findings reported from this survey suggest that the public is relatively knowledgeable and concerned about the problem of sexual abuse. Parents ranked it as a serious problem affecting children. They also believed it to be alarmingly common.

They seemed to be aware of some of the most important realities about sexual abuse: the fact that it affects both boys and girls, the fact that it occurs at hands of

tion was that many people tended to associate the notion of sexual abuse with strangers to the child.<sup>198</sup>

Even though the respondents were substantially on the low side in their estimates of the percentage of abuse attributable to non-strangers, they were not, however, wildly off-base.<sup>199</sup> Thus, there may be some moderate necessity for expert testimony when the defendant is a relative or acquaintance of the complainant.

The second possible source of irrational prejudice separate from the nature of the case is the *nature of the witnesses*: the complainant is a child and the defendant is an adult. Adults may tend to disbelieve child witnesses simply because they are children, or may tend to irrationally discount a child's testimony if it is contradicted by an adult.<sup>200</sup> Whether these prejudices exist, and whether if they do exist they are irrational, will be discussed in detail later in this article.<sup>201</sup> It is sufficient to note here that expert testimony may be necessary to counteract these prejudices.<sup>202</sup>

The third sub-inquiry under the necessity factor is the extent to which expert testimony is made necessary by the actions of the op-

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trusted family members, the fact that it can happen to young children, the fact that it involves fondling and touching as well as intercourse, the fact that many children do not tell, the fact that it can take place without brute force being used. Some of the classic myths about sexual abuse cited by professionals do not seem highly prevalent . . . .

*Id.* at 98-99.

<sup>198</sup> On one important matter, however, misconception appeared to prevail. There was still a large group of people who tended to associate the notion of sexual abuse primarily with strangers rather than people known to the child. The problem here, we guess, is not entirely one of misinformation. If the public has gotten other accurate information about sexual abuse, it has certainly heard the truth that abusers are more likely to be intimates than strangers. The problem is, rather, that this truth is a very difficult one to accept. It is unpleasant for people to harbor suspicions about friends, neighbors, relatives, members of their own family. So people continue to hold the image of the sexual abuser as a stranger, because the other image is so disconcerting.

*Id.*

<sup>199</sup> When asked what type of offender came to mind when the term sexual abuse was mentioned, fifty percent of the respondents said a stranger, twenty-two percent a relative, and twenty-eight percent someone known to the child other than a relative. *Id.* at 90. When asked to rate the most probable offenders, thirty-five percent of the respondents said a stranger, twenty-eight percent a step-parent, twenty-two percent a parent, and thirteen percent a friend or acquaintance of the child. *Id.* at 104. Compare these percentages with the best guesses of professionals in the area, *supra* text accompanying notes 17-26.

<sup>200</sup> The most forceful advocacy of this position occurs in Summitt, *supra* note 17, at 187: "Attorneys know that the uncorroborated testimony of a child will not convict a respectable adult. The test in criminal court requires specific proof 'beyond a reasonable doubt,' and every reasonable adult juror will have reason to doubt the child's fantastic claims."

<sup>201</sup> See *infra* text accompanying notes 232-63.

<sup>202</sup> Goodman, Golding & Haith, *Jurors' Reactions to Child Witnesses*, 40 J. Soc. ISSUES 139, 141, 151 (1984).

ponent. In most cases the opponent's main line of defense is to discredit the child. Accordingly, in most cases there will be some necessity for expert testimony to buttress the child's credibility as a result of this defense posture.

The fourth sub-inquiry under the necessity factor is whether the court is going to give cautionary instructions to the jury concerning the credibility of the child witness. Although the requirement that such instructions be given in a sexual abuse case has virtually disappeared, there is still case law in many jurisdictions allowing the judge in his discretion to give a cautionary instruction regarding the child witness.<sup>203</sup> If the court plans to give such an instruction, then the necessity for expert testimony increases.

In summary, there may be some necessity for expert testimony under all four of the necessity inquiries: the subject matter is likely to be beyond the ken of the trier of fact, the trier of fact may have irrational prejudices, the opponent's actions may have made expert testimony necessary and, jury instructions may also increase necessity. Overarching the necessity inquiry, however, is the question of whether there are equally acceptable or better alternatives to expert testimony in the nature of a diagnosis that the complainant has been sexually abused. With respect to some of the species of necessity there do exist alternative forms of expert testimony. For example, for those species of necessity related to the abilities of a child as a witness, recourse may be had to testimony regarding the general capabilities of children as witnesses.<sup>204</sup> With regard to particular points made by the defendant with respect to the child witness, for instance that she recanted the allegation after having made it, or that her delay in reporting the abuse is indicative of falsehood, resort may be had to general testimony that such behavior is not uncommon among sexual abuse victims.<sup>205</sup> These types of general testimony have the virtue of not being dispositive of the case if the jury believes them. This means that a lesser showing of necessity and reliability may be required for them than for testimony that the child has been abused, which, if believed, is virtually dispositive of the case. However, for some of the species of necessity, like the misperception that strangers are the most likely abusers, the most likely form of expert testimony would be a recitation of the percentage of abusers who are known to the child. Courts have unani-

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<sup>203</sup> For a good review of the case law, see 32 A.L.R. 4th 1196.

<sup>204</sup> For an in-depth discussion of such testimony, see *infra* text accompanying notes 323-26.

<sup>205</sup> For an in-depth discussion of such testimony, see *infra* text accompanying notes 296-317.

mously and properly ruled that testimony in this form is inadmissible because it is improper character testimony and because it tends to convict a defendant on the basis of statistics.<sup>206</sup> As to expert testimony which is necessary and as to which there exists no unobjectionable or less objectionable alternative, the question then becomes whether, after balancing the other factors, the testimony should be admitted.

*Reliability:* The first sub-inquiry under this factor is the general acceptance of the validity of the result by other experts in the field. The behavioral scientific literature conclusively demonstrates that there is no general acceptance of the ability of experts in the field to diagnose a child as having been sexually abused.<sup>207</sup>

The second reliability sub-inquiry is the error rate of the expert's conclusions that a child has been sexually abused. Here a conundrum arises, because although experts have no good basis for diagnosing a child as sexually abused, nonetheless their error rate is likely to be relatively small. The reason for this seeming anomaly is that in making their diagnoses, the experts are working with a sample population which is quite heavily stacked in their favor. This is so because there is every reason to believe that false reports of child sexual abuse are very rare. Although it is probably impossible to verify this observation empirically, as a matter of common sense and human experience it must be true. Most people simply do not make false crime reports.<sup>208</sup> It is even more unlikely that sex crimes will be falsely reported, given their intimate and embarrassing nature.<sup>209</sup> In the field of child sexual abuse the perception that false reports are rare is shared by almost all commentators.<sup>210</sup> Thus, when faced with a child who claims to have been sexually abused, the expert is likely to diagnose the child as sexually abused, and is likely to be correct. This accuracy is not a result of any expertise on the part of the examiner, but is simply a function of the fact that statistically the expert virtually cannot go wrong. Should this non-expertise based accuracy give this testimony a high score on the reliability scale? It seems that it should not, since an expert who claims to be able to

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<sup>206</sup> See *supra* note 105.

<sup>207</sup> See *supra* text accompanying notes 106-33.

<sup>208</sup> Most estimates are that less than five percent of crime reports are arguably questionable. See McCord, *supra* note 47, at 1196.

<sup>209</sup> Courts have recognized this fact with respect to adult rape victims. See McCord, *supra* note 47, at 1195 n.343.

<sup>210</sup> I. STUART & J. GREER, *supra* note 24, at 57; Goodwin, Sahd, & Rada, *Incest Hoax: False Accusations, False Denials*, 6 BULL. OF THE AM. ACAD. OF PSYCHIATRY AND THE L. 269 (1978); Rosenfeld, Nadelson & Krieger, *supra* note 119, at 159; Summitt, *supra* note 17, at 179, 190-91.

diagnose sexually abused children will claim to have made the diagnosis on the basis of that expertise, not on the basis of statistical probabilities. The reliability of the testimony should be judged on the basis the expert claims for making the diagnosis. On that basis, it is not demonstrably reliable.

*Understandability:* The first sub-inquiry under this factor is how far the testimony is beyond the ordinary experience of the jury. The testimony is not far removed from the common experience of the jury because it does not involve any mysterious or arcane tests or procedures. For the same reason, the second sub-inquiry cuts in favor of admissibility: the procedures and diagnosis can be explained to the trier of fact with relative clarity and simplicity.

On the third and fourth sub-inquiries—the availability of other experts and specialized literature for the opponent's use—the testimony does not score so high. Most persons who are “experts” regarding child sexual abuse work in social service agencies which exist for the purpose of treating sexually abused children. For the most part, it is unlikely that such persons will agree to serve as defense experts regarding the fallibility of expert testimony regarding child sexual abuse. Whether specialized literature is available to assist the defense in preparing for cross-examination of the prosecution's expert depends upon how much time and effort in research the defense lawyer can afford. An abundance of specialized literature showing the fallibility of expert testimony does exist in this area.<sup>211</sup> In practical terms, however, the literature is scattered throughout periodicals that are obscure and hard for a legal practitioner to obtain. Thus, while a defendant who is able to bankroll an impeccable defense will make it possible for his attorney to expend the time necessary to track down the various behavioral scientific articles, a less wealthy defendant may not be able to afford such research.

The last sub-inquiry under understandability is whether the testimony would have a tendency to overwhelm the jury. Although the concept of “unfair prejudice” is one of the fundamental tenets of the rules of evidence, there has been very little research done to determine what kinds of evidence tend to have such an impact on a trier of fact that the trier of fact cannot thereafter give that evidence the weight to which it would rationally be entitled.<sup>212</sup> Thus, the

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<sup>211</sup> See, e.g., authorities cited *supra* notes 106-33.

<sup>212</sup> The National Science Foundation Law and Social Science Project has recently begun some research in this field. See, e.g., Leitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147 (1983).



judgment that a certain type of evidence has the potential for "unfairly prejudicing" the jury is usually based on tradition and hunches. Courts have traditionally suspected that some types of expert testimony have such an impact on the trier of fact that the jury will simply succumb to the power of the evidence.<sup>213</sup> While it is impossible to say with any certainty exactly what types of expert testimony may have a tendency to overwhelm the trier of fact, it would seem that testimony about a subject not far removed from the trier of fact's common experience, explainable in simple terms, and which the opponent has a fair opportunity to put into perspective by presenting another expert, or by a searching cross-examination, should not be unfairly prejudicial. While an expert diagnosis that a child has been sexually abused is not far removed from the jury's common experience and can be explained in simple terms, it has been pointed out above that there exists a substantial question as to whether most opponents of that evidence would have an opportunity to put it into perspective for the jury. To the extent that the opponent does not have an opportunity, and the testimony remains unchallenged, then there does exist the potential that the jury will accede to the conclusion reached by the expert.

*Importance:* The last factor to be considered is the importance of the issue on which the expert testimony is being offered. It is clear that a diagnosis that a child has been sexually abused is offered on an issue of crucial importance in a child sexual abuse prosecution. Indeed, generally speaking, there are only two major issues in a child sexual abuse case: has the child been sexually abused? and was the abuse perpetrated by the defendant?<sup>214</sup> A diagnosis that the child has been sexually abused, if believed, is dispositive of the first of these issues.

*Balancing:* Having identified issues concerning the necessity, reliability, understandability and importance of an expert diagnosis

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<sup>213</sup> This hunch has been particularly powerful with respect to polygraph expert testimony. See, e.g., *State v. Brown*, 297 Or. 404, 440-41, 687 P.2d 751, 775-77 (1984). However, even here, where the hunch seems particularly reasonable from a common sense standpoint, empirical research seems to show that the hunch is wrong. Several studies have shown that juries frequently are willing and able to reject polygraphers' opinions and return verdicts inconsistent with the polygraphers' conclusions. See, e.g., Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 POLICE SCI. & ADMIN. 324 (1979); Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 A.B.A.J. 162 (1982).

Courts have been impressed by the unfair prejudice argument in rape trauma syndrome cases. See e.g., *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984).

<sup>214</sup> Often the first issue will be the only one in practicality, since in many cases there will be no other realistic candidate as abuser than the defendant.

that a child has been sexually abused, it remains to weigh those factors and determine whether such testimony should be admissible. Although the results of some sub-inquiries weigh in favor of admission, the balance clearly tips in favor of inadmissibility. Two factors stand out clearly: the importance of the issue on which the testimony is being offered is high, while the reliability of the diagnosis is low. It does not comport with our notions of criminal justice to permit a defendant to be convicted on the basis of such unreliable evidence. Accordingly, the decisions holding such testimony to be inadmissible constitute the better line of authority.

### III. THE USE OF AN EXPERT TO VOUCH FOR THE COMPLAINANT'S CREDIBILITY REGARDING THE SEXUAL ABUSE ALLEGATION

The case law shows two ways in which an expert's opinion has been used by the prosecution to vouch for the complainant's credibility regarding the sexual abuse allegation. The first is by an opinion from the expert that the complainant is telling the truth. The second is by an opinion from the expert that it is rare for a child to fabricate or fantasize a claim of sexual abuse. The common denominator of these two types of opinion is that the expert is opining that the complainant is almost certainly telling the truth. Expert testimony *vouching* for the complainant's credibility is to be contrasted with expert testimony *enhancing* the complainant's credibility by explaining some fact regarding the child's testimony.<sup>215</sup> Explanatory testimony used to enhance the complainant's credibility does not constitute a direct opinion by the expert that the child is telling, or is likely to be telling the truth.

#### A. BY AN OPINION THAT THE COMPLAINANT IS TELLING THE TRUTH

##### 1. *Case Law*

The case of *State v. Kim*,<sup>216</sup> has wholeheartedly embraced the notion of an expert giving an opinion that the complainant is telling the truth.<sup>217</sup> The Hawaii Supreme Court in that case upheld the

<sup>215</sup> See *infra* text accompanying notes 296-326.

<sup>216</sup> 64 Haw. 598, 645 P.2d 1330 (1982). For the prior discussion of this case, see *supra* text accompanying notes 59-67.

<sup>217</sup> In two other cases such testimony was held to have been properly admitted, but the courts were careful to indicate that this was only because of certain actions or inactions of the defendant in the cases before them. In *People v. Ashley*, 687 P.2d 473 (Colo. App. 1984), the court found that the defendant had "opened the door" by asking the expert on cross-examination why she had failed to use a "rape kit" to verify the abuse. Further, the defendant had then failed to object to the expert's answer: "because the child was telling me the truth as to who the assailant was." *Id.* at 475.

In *State v. Myers*, 359 N.W.2d 604 (Minn. 1984), the court asserted that although as

admissibility of the testimony against the defendant's objections that it invaded the province of the jury, was not a proper subject for expert opinion, and that its probative value was outweighed by its prejudicial effect. The court believed that the testimony was based on a sound factual foundation, that the inference was the product of an explicable and reliable system of analysis, and that the expert opinion added to the common understanding of the jury. Thus, it held that the trial judge had not abused his discretion in admitting the evidence.<sup>218</sup>

On the other hand, the remainder of the courts considering the question have ruled the testimony inadmissible. The rationale most often mentioned by these courts is that the testimony invades the province of the jury, which alone is responsible for determining the credibility of witnesses.<sup>219</sup> Another frequently mentioned basis is that the testimony constitutes an "impermissible bolstering" of the complainant's testimony where the complainant's testimony had not been sufficiently attacked to permit bolstering.<sup>220</sup> One court held

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a general rule it would reject expert opinion testimony regarding the truth or falsity of a witness' allegations about a crime because the expert's status may lend an unwarranted stamp of scientific legitimacy to the allegations, in this case, "Having sought, however, to discredit the child's credibility by showing that the child's mother (the ultimate expert' with respect to the complainant) did not believe her for several months, the defendant must be said to have waived objection to responsive opinion testimony even though elicited from an expert of a different kind." *Id.* at 611-12.

<sup>218</sup> *Kim*, 64 Haw. at 600, 608-10, 645 P.2d at 1334, 1338-39.

<sup>219</sup> *State v. Miller*, 377 N.W.2d 506, 508, (Minn. Ct. App. 1985); *People v. Fogarty*, 86 A.D.2d 617, 446 N.Y.S.2d 91, 92 (1982); *Black v. State*, 634 S.W.2d 356, 357 (Tex. Ct. App. 1982); *State v. Fitzgerald*, 39 Wash. App. 652, 657, 694 P.2d 1117, 1211 (1985). See also, *State v. Tharp*, 372 N.W.2d 280 (Iowa Ct. App. 1985), where the court held that the trial court had not erred in refusing to grant defendant's request for an order compelling a psychological evaluation of the complainant to evaluate "intra-family dynamics between stepfather and stepdaughter and its relation to the victim's credibility," *Id.* at 282, because such testimony might invade the jury's province to make credibility determinations. *Id.* at 282.

<sup>220</sup> *People v. Ortega*, 672 P.2d 215, 218 (Colo. App. 1983); *Fogarty*, 86 A.D.2d at 617, 446 N.Y.S.2d at 93; *Black*, 634 S.W.2d at 357-58. The courts are sometimes not clear concerning how much of an attack is necessary before bolstering is permissible. The statements in two of the cases are cryptic at best. In *Ortega*, the court stated that the complainant's credibility "had not been attacked at this stage in the proceedings," without explaining at which stage in the proceedings the testimony had been offered. *Ortega*, 672 P.2d at 218. In *Commonwealth v. Carter*, 9 Mass. App. Ct. 680, 403 N.E.2d 1191 (1980), the court simply noted without explanation that the testimony had been improper. *Id.* at 681, 403 N.E.2d at 1192.

In *Black*, 634 S.W.2d 356, the Texas court's reasoning was clear: a witness' testimony may not be bolstered simply because it may not be believed or because it has been contradicted by another witness, nor may it be bolstered even if it has been attacked on cross-examination if the witness has remained unwavering. Rather, "[o]nly by placing a witness in the position of having testified different [sic] from that which she had previously stated will one party be permitted to bolster its own case." *Black*, 634 S.W.2d at

that the veracity of a complainant is not beyond the ken of an ordinary juror.<sup>221</sup> Finally, one court held that under its state's law, an expert witness can only testify that an event could or might have caused the injury, not that the event did in fact cause the injury, unless his expertise leads him to that unmistakable conclusion. Under that rule of law the expert's testimony that the complainant's account "was reality" constituted an improper expression of an opinion as to the defendant's guilt.<sup>222</sup> Thus, the clear weight of authority is that an expert's opinion that a child sexual abuse complainant is telling the truth should not be admissible, although the rationales put forth to support that position vary considerably.

In one case, the shoe was on the other foot: rather than the prosecution offering an expert opinion that the complainant was telling the truth, the defense offered an expert to testify that the complainants were lying.<sup>223</sup> The trial court precluded the expert from testifying and the appellate court affirmed, reasoning that although the testimony would be allowable in a proper case, in this case the trial court had not abused its discretion in deciding that since the expert had never personally examined the complainant, the prejudicial effect of the testimony outweighed its probative value.<sup>224</sup>

## 2. *Behavioral Scientific Research*

In theory, there is a distinct difference between an expert rendering a diagnosis that a child has been sexually abused and an expert opining that the complainant is telling the truth. The first opinion does not on its face concern the credibility of the complainant; while on its face the second opinion directly comments upon the credibility of the complainant. As a practical matter, however, given that the major basis for a diagnosis that a child has been sexually abused is what the child tells the expert, there is really not much difference between the two types of opinions. Three courts have

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358. While this position has the virtue of clarity, it does not necessarily have the virtue of correctness to the extent that it would not allow bolstering even after a scathing cross-examination so long as the witness remained "unwavering." Compare FED. R. EVID. 608(a), which allows bolstering by an opinion as to the witness' truthfulness when the character of the witness regarding truthfulness "has been attacked by opinion or reputation evidence, or otherwise." *Id.* (Emphasis added).

<sup>221</sup> *People v. Sergill*, 138 Cal. App. 3d 34, 39, 187 Cal. Rptr. 497, 500 (1982). This court also held that the alleged "experts", who were ordinary policemen, were not qualified as experts regarding the credibility of complainants. *Id.* at 39, 187 Cal. Rptr. at 500.

<sup>222</sup> *State v. Keen*, 309 N.C. 158, 163-64, 305 S.E.2d 535, 538 (1983).

<sup>223</sup> *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

<sup>224</sup> *Id.* at 763-64, 617 P.2d at 153.

recognized this.<sup>225</sup> Thus, it is pertinent to incorporate here the research indicating that experts cannot reliably diagnose a child as having been sexually abused.<sup>226</sup>

Behavioral scientists have also recognized that determining the credibility of a child sexual abuse complainant is not a task for which they are particularly well equipped. The simplest and most forthright statement to be found by a behavioral scientist regarding this subject is, "Lying is not easily detectable by a psychiatrist."<sup>227</sup> One team of researchers has noted the "complex difficulties facing the clinician trying to separate fantasy from reality" in children's reports of sexual abuse.<sup>228</sup> Another has stated that despite every possible follow-up by the clinician, the clinician "may still be left questioning whether the reported events are reality."<sup>229</sup> Even a behavioral scientist, who claims the existence of a syndrome regarding sexually abused children, acknowledges that "a nagging uncertainty exists" regarding a clinician's distinguishing fantasy from reality.<sup>230</sup> These insights show that behavioral scientists themselves recognize that they have no particular expertise in evaluating the credibility of a child sexual abuse complainant.

### 3. *Admissibility Analysis*

As was pointed out above, in practical terms there is often little difference between an expert's diagnosis that a child has been sexually abused and an expert's opinion that the child is telling the truth.<sup>231</sup> Thus, it should not be surprising that many aspects of the admissibility analysis are identical with respect to the two types of opinions.

*Necessity:* The first sub-inquiry is whether the subject matter of the testimony—the veracity of the child complainant—is one which the jury would benefit from expert assistance. The traditional answer to this question would be "no," since it is commonly held that one of the preeminent virtues of the jury is its ability to determine the credibility of witnesses. One must recognize, however, that child sexual abuse is a particularly mysterious phenomenon, often involving an unusual cast of characters who are involved in relation-

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<sup>225</sup> See *supra* text accompanying notes 97-104.

<sup>226</sup> See *supra* text accompanying notes 106-33.

<sup>227</sup> Terr, *The Child as Witness*, in *CHILD PSYCHIATRY AND THE LAW* 207, 216 (D. Schetky & E. Benedek ed. 1980). Presumably, lying is no more easily detectable by other behavioral scientists, given that psychiatrists are the most exalted of behavioral scientists.

<sup>228</sup> Rosenfeld, Nadelson & Krieger, *supra* note 119, at 159.

<sup>229</sup> *Id.* at 314.

<sup>230</sup> Summitt, *supra* note 17, at 189.

<sup>231</sup> See *supra* text accompanying notes 225-26.

ships that are seemingly inexplicable to most people. It seems reasonable to suggest in these circumstances that there may often be some need for expert assistance in determining who is likely to be telling the truth.

As to the second sub-inquiry—whether the testimony is necessary to counter irrational prejudices—the possible irrational prejudices arising from the nature of the case still apply. The more pertinent type of irrational prejudices here, however, stem from the nature of the witnesses. Do jurors harbor irrational prejudices against child witnesses, either because they are children, or because an adult is offering contradictory testimony?

- a. Do jurors harbor irrational prejudices against child witnesses because they are children?

This question really involves two separate issues: first, do juries tend to discount a witness' testimony because of the witness' young age; and second, if they do, is that discounting irrational?

- i) *Do jurors tend to discount a witness' testimony because of the witness' young age?*

There have been only three significant studies dealing with this issue. In one survey, several groups of people were asked to judge the reliability of a hypothetical eight-year old's testimony. These groups included potential citizen jurors, psychologists who research eyewitness identification testimony, legal professionals, law students and college students.<sup>232</sup> Respondents were asked to indicate how they thought an eight-year old child would answer questions by police or in court. Fewer than fifty percent of any group felt that the child would respond accurately. Ninety-one percent of the researchers and sixty-nine percent of the citizen jurors believed that the child would either respond the way the questioner wished, or would say "I don't know."<sup>233</sup> One team of researchers stated that the fact that sixty-nine percent of the citizens felt that children would not provide accurate testimony "indicates a general bias against children's credibility as witnesses."<sup>234</sup> The other two significant studies in the field are mock jury simulations, only one of which supports this conclusion. In the earlier of the two studies members of a mock jury were given information about a trial concerning a

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<sup>232</sup> Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in *EVALUATING WITNESS EVIDENCE* 13 (S. Lloyd & B. Clifford ed. 1983).

<sup>233</sup> *Id.* at 35.

<sup>234</sup> Goodman, Golding & Haith, *supra* note 202, at 142.

vehicular homicide. All jurors received the same information about the case except for the age of the key eyewitness. Some subjects were led to believe that the eyewitness was six, others that he was ten, and others that he was thirty. The respondents were then asked to judge the credibility of the witness' testimony and the degree of guilt to be attributed to the defendant. The results indicated that the age of the witness had a powerful effect on the credibility rating. Younger witnesses were perceived as less credible.<sup>235</sup> Despite this, however, the jurors' assessment of the defendant's guilt did not vary significantly depending upon the age of the key eyewitness.<sup>236</sup> The researchers who conducted the study concluded that while the jurors were substantially more skeptical concerning the child's credibility than an adult's credibility, the jurors were willing to act on the basis of the child's testimony as long as there was sufficient corroboration from other sources.<sup>237</sup>

The other jury simulation reached a diametrically opposite conclusion.<sup>238</sup> In that study, mock juries viewed a videotaped trial in which a key prosecution witness was either an eight-year old boy or a twenty-five year old man. The juries were significantly more likely to return a guilty verdict on the basis of the young boy's eyewitness recollections than on the basis of the twenty-five year old man's recollections, even though the testimony was identical.<sup>239</sup> On the basis of the limited research conducted thus far it is unclear whether jurors harbor a prejudice against child witnesses.<sup>240</sup>

ii) *Assuming that jurors tend to discount a young witness' testimony because of his or her age, is that discounting irrational?*

Even assuming that they do harbor such prejudice, the second issue is whether that prejudice is "irrational." In order to know whether the jurors' prejudices against child witness testimony are irrational, it must first be determined exactly what makes jurors dis-

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<sup>235</sup> *Id.* at 148-151.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 151.

<sup>238</sup> Ceci, Ross & Toglia, Suggestibility of Children's Memory: Psycho-Legal Implications (unpublished manuscript)(available at the Department of Health and Family Services, Cornell University).

<sup>239</sup> *Id.* at 41.

<sup>240</sup> It should be noted that during the early part of this century, it was clear that both courts and researchers harbored irrational prejudices against children as witnesses due to their age. Schultz, *The Victim and the Justice System—An Introduction*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 171, 172 (L. Schultz ed. 1980); *See also*, Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 *J. Soc. ISSUES* 125, 127 (1984). The extent to which the courts and researchers reflected the state of mind of the public cannot be determined.

trust children as witnesses. Then it must be determined whether these bases of distrust are valid and therefore rational.

There has been no empirical research on the question of why jurors may tend to distrust child witnesses. It is possible, however, to suggest a list of commonsense reasons why jurors may tend to be skeptical of child witnesses.<sup>241</sup> This list can be related to the four basic requirements of witness competency: the moral ability to tell the truth, and the mental abilities to correctly perceive, remember and narrate.<sup>242</sup>

*Moral ability to tell the truth:* With respect to the moral ability to tell the truth, jurors may believe that children are more likely to lie than are adults. What little research has been done in this area points to the conclusion that if this prejudice exists, it is irrational.<sup>243</sup> One commentator has suggested that while courts have been particularly concerned with the ability of children to tell the truth, that concern seems misplaced since, "[t]here is in fact little correlation between age and honesty."<sup>244</sup> Indeed, police experience with child victims confirms the research experience in other settings: "From 1969 to 1974, Michigan police referred to a polygraph examiner one hundred forty-seven children whose veracity about allegations of sexual abuse was questioned. Only one child was judged to be lying."<sup>245</sup>

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<sup>241</sup> An intriguing discussion of the difference between the way lawyers and social scientists approach a problem is found in Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. Soc. ISSUES 65 (1971). The author, one of the leading pioneers of modern clinical psychological research, suggests that the legal system often relies on "fireside inductions" about human behavior, *i.e.* judgments based on common sense, anecdotal introspection and cultural beliefs, while social scientists are committed to judgments based on empirical research. *Id.* at 65. Both approaches have problems. "Fireside inductions" are often untestable (or at least untested) and may contain considerable sources of error. *Id.* Empirical research often has methodological problems and is usually inconclusive. *Id.* One argument in favor of "fireside inductions" is that given the difficulties of empirical research, even a rather obvious truth based on the reality of human experience may be difficult to prove empirically. Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1, 40 (1984). While this may be true, the problem with this approach is that the very judgment that something is "a rather obvious truth" may itself be incorrect. For an example of an induction that many people believe constitutes a rather obvious truth and which empirical research is tending to show is not a truth at all, see the discussion of the effect of polygraph evidence on jurors, *supra* note 213. The suggested list of reasons why jurors may distrust child witnesses is an example of "fireside induction."

<sup>242</sup> R. CARLSON, E. IMWINKERIED, & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 109 (1983).

<sup>243</sup> See Burton, *Honesty and Dishonesty*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* (F. Lickona ed. 1976).

<sup>244</sup> Melton, Bulkeley & Wulkan, *Competency of Children as Witnesses*, in *Child Sexual Abuse and the Law* 125, 136 (J. Bulkeley ed., 2d ed. 1981)(footnotes omitted).

<sup>245</sup> *Id.*



*Mental ability to perceive:* With respect to a child's mental ability to perceive, jurors may believe children are deficient in perceptive abilities. Based on the little research that has been done in this area, if such a prejudice exists, it probably is irrational. Research indicates that it is not clear that children notice less. Indeed, "there is some intriguing evidence that young children sometimes notice potentially interesting things that older children and adults miss."<sup>246</sup> Additionally, perceptive abilities are usually questioned where the child's perception is a fleeting impression of someone the child does not know, such as in an eyewitness identification situation. Serious questions concerning perceptual abilities would not seem to be implicated in sexual abuse situations, where the contact with the abuser is for a substantial duration, and the abuser is likely to be someone known to the child.

*Mental ability to remember:* With respect to the mental ability of children to correctly remember events, there are three possible reasons why adults may tend to distrust a child's memory. The first is a belief that children's memories are basically inferior to those of adults. To the extent that adults hold this belief, at least in child sexual abuse cases, it is probably irrational. While the research states fairly clearly that "on memory tasks involving recall children make more errors of omission than do adults,"<sup>247</sup> it is also to be true that a major reason for this difference is that children may not have the relevant prior knowledge that would allow them to organize disparate elements into a coherent whole or to relate one set of events to another. When this knowledge advantage of adults is eliminated, as when children are testifying about a situation with which they are particularly familiar, the adults' knowledge advantage seems to be eliminated.<sup>248</sup> The conclusion of the most recent research in this area is that, "To the extent that children are asked to testify about activities with which they are quite familiar, we might expect their memories to be at least as good, and on occasion better, than those of adults."<sup>249</sup> Particularly in child abuse cases, where the perpetrator is often known to the child, and the abuse often continues over a long period of time, there would not appear to be great reason to be concerned that the child has forgotten important facts such as the identity of the abuser or what occurred during the abuse.

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<sup>246</sup> Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. Soc. Issues 33, 35-36 (1984).

<sup>247</sup> *Id.* at 34; Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Soc. Issues 51, 54 (1984).

<sup>248</sup> Johnson & Foley, *supra* note 246, at 33-35.

<sup>249</sup> Johnson & Foley, *supra* note 246, at 35.

A second belief that adults may hold concerning why a child's memory should be distrusted, is that children are unable to separate remembered facts from remembered fantasies. Researchers in the area of child sexual abuse believe that this is a particularly likely prejudice for adults to hold.<sup>250</sup> A recent study in this area points to the conclusion that if this prejudice exists, it is partly rational and partly irrational, and that there is one important aspect which the existing research does not even address. The researchers summarized their findings as follows:

The belief is pervasive that children have more difficulty than adults in discriminating what they perceive from what they imagine, but it has little direct experimental support. Children in our studies did not appear to be more likely to confuse what they had imagined or done with what they had perceived. On the other hand, young children did have particular difficulty discriminating what they had done from what they had only thought of doing.<sup>251</sup>

The authors then go on to point out an important question not covered by their research:

An important question, for both theory and for courtroom testimony, is whether children only have difficulty with memories that involve themselves as agents or whether the same pattern would be found with another agent. Would children have the same difficulty separating what they saw someone else do from what they only imagined that person doing? We are currently investigating this question.<sup>252</sup>

It should be noted that there is an age, ranging from eight<sup>253</sup> to twelve<sup>254</sup>, after which researchers tend to believe that children have no problem in separating fantasy from reality. It must be remembered that many child sexual complainants are older than these ages. Thus, with respect to children over a certain age, it would seem to be irrational for jurors to believe that they cannot separate fantasy from reality. With respect to younger children, it would seem to be irrational for jurors to believe that children cannot distinguish between a memory of something they have merely perceived and something they have imagined or done, but it may not be irrational to believe that young children have difficulty distinguishing between what they have done and what they have only thought of doing. Furthermore, there is no basis for saying that it is irrational for adults to believe that children may have the same diffi-

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<sup>250</sup> Johnson & Foley, *supra* note 246, at 34 (citing six studies from 1911 through 1981 which assumed that, "Compared to adults, children . . . notice even less, forget faster, and, especially, . . . [to] intermingle imagination with memory." (citations omitted)).

<sup>251</sup> Johnson & Foley, *supra* note 246, at 45.

<sup>252</sup> Johnson & Foley, *supra* note 246, at 45.

<sup>253</sup> Rosenfeld, Nadelson & Krieger, *supra* note 119, at 161.

<sup>254</sup> *Id.*

culty separating what they saw someone else do from what they only imagined that person doing.

The third belief that adults may have about a child's memory, which may lead them to distrust it, is perhaps the most often mentioned: that children are particularly susceptible to suggestion. The fear is that children will not be testifying from actual memories, but from false memory implanted by an adult.<sup>255</sup> An important fact to be noted here is that recent research has revealed that adults are much more susceptible to suggestion than has previously been believed.<sup>256</sup> Thus, the question is not whether children are suggestible, but whether they are *more* suggestible than adults. On the basis of current research it is impossible to reach a conclusion on whether the belief that children are more suggestible is irrational. At least one study has concluded that children are no more susceptible to suggestion than adults.<sup>257</sup> However, another study concluded that children were substantially more ready to adopt the suggestion contained in a leading question than were older persons.<sup>258</sup> And the most recent study in the area concluded that very young children, three- and four-year olds for instance, are highly susceptible to suggestion.<sup>259</sup> Thus, on the basis of the available behavioral scientific research, it is impossible to state that adult prejudice over children's susceptibility to suggestion is irrational.

*Mental ability to narrate:* One possible source of adult prejudice with respect to the mental ability of children to accurately narrate what they perceive and remember, is the heavy emphasis placed on consistency of testimony. A child's testimony, may not be consistent either because the child's perception of consistency is not the same as an adult's or because children can be easily confused by leading and/or complex questions on cross-examination.<sup>260</sup> There is no research to suggest, however, that adults are not willing and able to

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<sup>255</sup> See Ceci, Ross & Toglia, *supra* note 238, at 3-4 (citing many studies asserting this belief).

<sup>256</sup> Loftus & Davies, *supra* note 247, at 56-57. These findings account in large part for the recent trend allowing expert testimony on the issue of the fallibility of eyewitness identifications. See, e.g., *United States v. Downing*; 753 F.2d 1224 (3d Cir. 1985); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

<sup>257</sup> See Duncan, Whitney & Kunen, *Integration of Visual and Verbal Information in Children's Memories*, 53 CHILD DEVELOPMENT 1215, 1221 (1982).

<sup>258</sup> Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 L. AND HUM. BEHAVIOR 201, 208-09 (1980). For a review of the conflicting research results, see Ceci, Ross & Toglia *supra* note 238, at 5-10.

<sup>259</sup> ROSS & TOGLIA, *supra* note 238, at 5-10. This study did not focus on older children, since the researchers felt that very young children may be the ones most susceptible to suggestion, and little research had been done regarding children of that age.

<sup>260</sup> Goodman, Golding & Haith, *supra* note 202, at 144, 146-47.

give children more latitude with respect to consistency than they would to an adult witness. In any event, it is difficult to say that a juror's prejudice against someone whose testimony is not consistent is irrational.

Another possible prejudice associated with narration relates to the general demeanor and conduct of a child witness, which is likely to be more equivocal and less confident than that of an adult witness. Studies have demonstrated that certainty, confidence, and the ability to answer questions in narrative form rather than with short answers lend credibility to witness testimony.<sup>261</sup> Children are less likely to have these attributes as witnesses than are adults. Again, however, it is difficult to say that jurors may not make allowances for children on these counts, or that a juror's prejudice against a witness who is uncertain, lacks confidence, and who must respond with short answers rather than narrative answers, is irrational.

In reviewing this discussion of possible juror prejudices against child witnesses, three factors should be highlighted. First, the existence and extent of these prejudices is, in most cases, based on guesswork. Second, meaningful behavioral scientific research in this area is in the embryonic stages.<sup>262</sup> Thus all of the findings mentioned above should be treated as tentative and it should be recognized that much more research on all of them is necessary before any certain conclusions can be put forth.<sup>263</sup> Third, it is important to remember that if expert testimony is deemed necessary to overcome irrational prejudices, testimony by which the expert vouches for the particular complainant's credibility is not the only alternative. There also exists the alternative of general testimony concerning the capabilities of child witnesses. This general testimony has the virtue, even if believed, of not being dispositive or virtually dispositive of the case and therefore it would require a lesser degree of necessity and reliability.

- b. Do jurors tend to irrationally discount a child's testimony when it is contradicted by an adult's testimony?

Even assuming that jurors do not harbor irrational prejudices

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<sup>261</sup> GOODMAN, GOLDING & HAITH, *supra* note 202, at 144-45.

<sup>262</sup> 40 J. SOC. ISSUES is entirely devoted to the subject of child testimony. The coordinator of the issue wrote that it "represents perhaps the first attempt to provide a comprehensive, book-length treatment of psychological research, laws, and legal practices concerning child witnesses." Goodman, *The Child Witness: An Introduction*, 40 J. Soc. ISSUES 1, 2 (1984).

<sup>263</sup> For suggestions concerning the numerous areas in which research is necessary, see Goodman, *supra* note 262, at 157.

against children because of their age, it is possible that they may too readily discount a child's testimony if contradicted by an adult's testimony. There has been absolutely no behavioral scientific research to test whether this phenomenon occurs. If it does occur, it may be rational or irrational depending upon what bases the jurors have for crediting the adult at the expense of the child.

In summary, there may be some necessity for expert testimony due to certain irrational prejudices on the part of jurors.

*Understandability:* With respect to understandability of an expert's testimony that the child is telling the truth, the analysis does not differ significantly from the analysis of this factor regarding expert testimony diagnosing a child as sexually abused.<sup>264</sup> The fact that such subject matter would not be far removed from the understanding of a common juror and the fact that it can be expressed with clarity and simplicity cut in favor of understandability. On the other hand, the availability of experts for the opponent to use to put the testimony into perspective and the practical availability of the arcane, specialized literature are problematic. With respect to whether such testimony would tend to overwhelm the jury, although its "software" nature would have a tendency not to do so, it is possible that the jury could simply accede to the expert's conclusion if the expert is not tested by searching cross-examination or opposed by the testimony of another expert.

*Importance:* The testimony of an expert stating that the complainant is telling the truth rates even higher on the scale of importance than does testimony of an expert stating that the child has been sexually abused. This is true because whereas a diagnosis of sexual abuse speaks directly to only one of the major issues in the case—whether the child has been sexually abused—expert testimony asserting that the child is telling the truth goes directly to both of the major issues in the case. It is proof not only on the issue of whether the abuse occurred, but also on the issue of whether the identity of the abuser can be determined. If believed, it is completely dispositive of the case.

*Balancing:* Having analyzed all four factors it is still necessary to balance them to determine whether an expert's opinion on the veracity of the complainant's testimony should be admissible. It seems that the result here should be the same as the result with respect to expert diagnosis of child sexual abuse, for the same reason: the testimony should not be admitted because the importance of the testimony is very high while the reliability of the testimony is very low.

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<sup>264</sup> See *supra* text accompanying notes 211-13.

The necessity and understandability factors do not cut clearly enough in favor of admission to outweigh the unreliability of the testimony. Accordingly, the majority of courts which have held such testimony to be inadmissible are correct.

B. BY AN OPINION THAT IT IS RARE FOR A CHILD TO FABRICATE OR FANTASIZE A CLAIM OF SEXUAL ABUSE.

1. *Case Law*

Expert opinions that it is rare for children to fabricate or fantasize claims of sexual abuse are the second way in which experts have been used to vouch for a complainant's credibility.<sup>265</sup> This testimony vouches for the complainant's credibility because it concludes that the complainant is almost certainly telling the truth.

Two courts have held with very little meaningful discussion that such testimony was properly admitted.<sup>266</sup> In one case the court simply noted that testimony in the form of an opinion is not objectionable merely because it embraces an ultimate issue, that the testimony was especially appropriate in view of the defense counsel's cross-examination attack upon the victim's character for truthfulness, and that the trend in Colorado law was to allow expert testimony regarding the capacity of children to fabricate claims of sexual abuse.<sup>267</sup> In the other case, the court simply noted that the expert's qualifications put him in a position superior to the jury to determine whether

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<sup>265</sup> The terms "fabricate" and "fantasize" have not been differentiated by the courts. Presumably, "fabricate" implies an intentional untruth, while "fantasize" implies an untruth that is not willful, but rather is the product of an overactive imagination which the child truthfully cannot thereafter distinguish from reality.

<sup>266</sup> In two other cases the testimony has been held to have been properly admitted, but only for reasons peculiar to the cases. In *State v. Myers*, 359 N.W.2d 604 (Minn. 1984), the expert testified that it was rare for children to fabricate tales of sexual abuse, and that she believed the complainant. Without focusing on the rarity of testimony, the court held that the opinion concerning the complainant's truthfulness had been properly admitted because the defense had opened the door by seeking to establish that the complainant's mother had not believed her for a long time. *Id.* at 611-12. See *supra* note 217 for a more detailed discussion of this holding. The second case is also one where the defense "opened the door." In *State v. Maule*, 35 Wash. App. 287, 290-92, 667 P.2d 96, 97-98 (1983), it was held that the defense opened the door to similar testimony by asking the question, "Have you ever known any children who have lied?"

Also of interest is the case of *W.C.L. v. People*, 685 P.2d 176 (Colo. 1984), where the court indicated that if the Colorado rules of evidence had contained a residual hearsay exception, the court would have ruled, on the basis of expert testimony that it was rare for children to fabricate claims of sexual abuse, that the preliminary facts necessary to establish the reliability of a hearsay declaration by the complainant regarding the alleged abuse would have been established. *Id.* at 182-83. This case does not speak to the admissibility of the expert opinion, since under COLO. R. EVID. 104(a), the court was not bound by rules of admissibility in determining a preliminary fact.

<sup>267</sup> *People v. Ashley*, 687 P.2d 473, 475 (Colo. App. 1984).

or not a child would fantasize concerning sexual abuse.<sup>268</sup>

There have thus far been no cases holding the substance of such testimony to be inadmissible, although there has been one case in which the testimony has been held to have been improperly admitted for a procedural reason, namely, that the credibility of the complainant had not been sufficiently attacked to allow such bolstering.<sup>269</sup>

## 2. Behavioral Scientific Research

It has already been pointed out that despite the fact that there has been very little empirical research concerning the extent to which children lie or fantasize in making claims of sexual abuse, and the fact that it is difficult to see how such empirical research could be conducted, the feeling in the scientific community that deals with sexually abused children is that it is indeed rare for this to happen.<sup>270</sup> It has further been pointed out that as a matter of common sense, this feeling is probably correct, since there is little reason to doubt that most reports of all kinds of crime are legitimate and there is no reason to suspect any higher percentage of false reports with respect to child sexual abuse.<sup>271</sup> There has been a recognition in behavioral scientific literature that false reports can happen and discussions of reasons they might happen, but none of the discussions indicates the author's belief that false reports are anything other than isolated occurrences.<sup>272</sup> Thus, although empirical research cannot be cited in support of the conclusion, it seems fair to say that as a matter of experience among practitioners in the field and on the basis of common sense, behavioral scientists support the validity of the proposition that it is rare for children to fabricate or fantasize claims of sexual abuse.

## 3. Admissibility Analysis

*Necessity:* The necessity factor has already been analyzed in-

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<sup>268</sup> State v. Raye, 73 N.C. App. 273, 326 S.E.2d 333, 335, *review denied*, 313 N.C. 609, 332 S.E.2d 183 (1985).

<sup>269</sup> Farris v. State, 643 S.W.2d 694, 697 (Tex. Crim. App. 1982).

<sup>270</sup> See *supra* text accompanying notes 208-10. See also, Berliner & Barbieri, *supra* note 240, at 127.

<sup>271</sup> See *supra* text accompanying notes 208-10.

<sup>272</sup> See Mrazek, *The Child Psychiatric Examination of the Sexually Abused Child*, in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 143, 151 (P. Mrazek & C. Kempe ed. 1981); THE SEXUAL VICTIMOLOGY OF YOUTH 22 (L. Schultz ed. 1980); Brant & Tisza, *supra* note 17, at 82; Goodwin, Sahd, & Rada, *supra* note 210, at 269-70; Nadelson & Rosenfeld, *supra* note 132, at 104; Rosenfeld, Nadelson & Krieger, *supra* note 119, at 159; Weiss, *Incest Accusation: Assessing Credibility*, 1983 J. OF PSYCHIATRY AND L. 307, 307-08.

depth, and the same analyses are applicable with respect to this kind of expert testimony.<sup>273</sup> It is sufficient to note that there may well be a necessity for the testimony because it would assist the jury to know what percentage of sexual abuse complainants are truthful, and because it may be necessary to counter irrational prejudices of the jury, to counter points made by the opponent, or to counter jury instructions. Again, however, there do exist alternative forms of expert testimony to fulfill this necessity.<sup>274</sup>

*Reliability:* The first sub-inquiry is whether it is generally accepted by the scientific community dealing with sexually abused children that false reports are rare. It has been pointed out above that this conclusion does have general acceptance.<sup>275</sup> As to the second sub-inquiry—the error rate—it is not even applicable because there is no diagnosis regarding a particular complainant that can be deemed erroneous.

*Understandability:* The testimony scores well with respect to the first four sub-inquiries: the subject matter is not far removed from the common experience of the jury, the conclusion can be explained with clarity and simplicity, the availability of other experts seems immaterial since it would probably be impossible to find a reputable expert who would contradict the conclusion, and the availability of specialized literature would also not lead to any significant contradiction because there is no indication in the literature that such reports are anything other than rare. However, the fifth sub-inquiry—whether the evidence would have a tendency to overwhelm the jury—presents a substantial problem.

The problem is that such testimony invites the jury to convict the defendant on the basis of a statistical probability rather than on the basis of the evidence in the case.<sup>276</sup> Commentators have been virtually unanimous in their condemnation of the use of probability evidence on crucial points in criminal prosecutions.<sup>277</sup> Even com-

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<sup>273</sup> See *supra* text accompanying notes 192-206 and 227-63.

<sup>274</sup> See *supra* text accompanying notes 204-06 and 263-64. See also, *infra* text accompanying notes 296-326.

<sup>275</sup> See *supra* text accompanying notes 270-72.

<sup>276</sup> Although testimony that it is "rare" for a child sexual abuse complainant to fantasize or fabricate is not explicitly statistical, as a practical matter it seems to be no different in impact from statistical testimony, such as that ninety-nine percent of child sexual abuse complaints are true.

<sup>277</sup> L. COHEN, *THE PROBABLE AND THE PROVABLE* (1977); Dickson, *Medical Causation By Statistics*, FORUM 792, 801; Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1379 (1985); Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1974); *Statistics in the Law: Potential Problems in the Presentation of Statistical Evidence*, 40 WASH. & LEE L. REV. 313 (1983)



mentators who urge greater use of probability evidence in civil cases<sup>278</sup> agree that probability evidence is not appropriate in criminal cases.<sup>279</sup> There are four interrelated reasons that lead to this conclusion.

First, there is a basic incompatibility between the reasonable doubt standard and probability analysis. Although accuracy of verdicts is desirable in criminal cases as well as in other cases, there are deep societal values other than accuracy that must be vindicated through the criminal process.<sup>280</sup> These values include fairness, the appearance of fairness, and not convicting innocent people. Probability analysis is simply unable to quantify the concept of reasonable doubt.<sup>281</sup> In very basic terms, a probability less than one<sup>282</sup> does not speak directly to the question of whether the particular defendant on trial committed the crime in question.<sup>283</sup> Finally, this type of evidence suggests a concept incompatible with traditional notions of reasonable doubt: that a fixed rate of error is acceptable in criminal proceedings.<sup>284</sup>

The second reason why probability evidence is inappropriate on a key issue in a criminal case is the "overbearing impressiveness"

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<sup>278</sup> Brook, *The Use of Statistical Evidence of Identification in Civil Litigation: Well-Worn Hypotheticals, Real Cases, and Controversy*, 29 ST. LOUIS U.L.J. 293 (1985); Tyree, *Probability Theory and the Law of Evidence*, 8 CRIM. L.J. 224 (1984). Some recent commentators do not even countenance greater use of probability evidence in civil cases. See Jaffee, *Of Probability and Probability: Statistics, Scientific Evidence, and the Calculus of Chance at Trial*, 46 U. PITT. L. REV. 925 (1985).

<sup>279</sup> Brook, *supra* note 278, at 309-10; Tyree, *supra* note 278, at 233.

<sup>280</sup> Brook, *supra* note 278, at 309-310.

<sup>281</sup> Tyree, *supra* note 278, at 233.

<sup>282</sup> There does exist at least one type of "probability" evidence which is accepted as having a probability of one: fingerprint comparison. This type of evidence is not even considered to be "probability" evidence.

<sup>283</sup> *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968); Brook, *supra* note 278, at 320; Tribe, *supra* note 277, at 1355.

<sup>284</sup> Tribe, *supra* note 277, at 1374; Tyree, *supra* note 278, at 233. For example, the reasoning is that if testimony is presented in one hundred child sexual abuse cases that ninety-nine percent of complainants tell the truth, the juries in all one hundred cases could convict on the basis of the probability, even though the probability is that one of the accusations was false. Thus, the evidence implies that an error rate of one percent is acceptable. While undoubtedly erroneous guilty verdicts occur in criminal cases:

[S]uch unavoidable errors are in no sense *intended*, and the fact that they must occur if trials are to be conducted at all need not undermine the effort, through the symbols of trial procedure, to express society's fundamental commitment to the protection of the defendant's rights as a person, as an end in himself. On the other hand, formulating an "acceptable" risk of error to which the trier is willing deliberately to subject the defendant would interfere seriously with this expressive role of the demand for certitude—however unattainable real certitude may be, and however clearly all may ultimately recognize its unattainability.

Tribe, *supra* note 277, at 1374 (emphasis in original)(footnote omitted).

of numbers.<sup>285</sup> A jury is likely to simply be bowled over by a number demonstrating an alleged high probability that the defendant committed the crime.<sup>286</sup>

A third reason why probability evidence is inappropriate is that in most human situations there exist factors which simply cannot be quantified. The syndrome has been expressed as, "If you can't count it, it doesn't exist."<sup>287</sup> Thus,

[r]eadily quantifiable factors are easier to process—and hence more likely to be recognized and then reflected in the outcome—than are factors that resist ready quantification. The result, despite what turns out to be a spurious appearance of accuracy and completeness, is likely to be significantly warped and hence highly suspect.<sup>288</sup>

The fourth reason that probability evidence is inappropriate on a key issue in a criminal case is that the very nature of the evidence makes it difficult, if not impossible, for most jurors to deal with it rationally.<sup>289</sup> For one thing, a helpful understanding of what probabilities do and do not prove may well be beyond the capacity of most jurors.<sup>290</sup> Numbers may appear to be more irrefutable than other types of evidence, and thus less susceptible to attack by cross-examination and opposing experts.<sup>291</sup> Indeed, there is a real possibility that an understanding of probabilities thorough enough to permit an effective cross-examination may be beyond the ability of many lawyers.<sup>292</sup> Further, asking jurors to compare probability evidence with other evidence may be asking them to compare apples with oranges. In order to deal with all apples or all oranges, the jury would have to figure out a way to either translate the probability figure into the subjective mode in which they usually reason, or figure out a way to translate the subjective mode in which they usually reason into probabilities. There is no reason to suspect that jurors can perform such mental gymnastics.<sup>293</sup> The jury may see its role as becoming "mechanical and automatic" so that the jury

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<sup>285</sup> Tribe, *supra* note 277, at 1361.

<sup>286</sup> Collins, 68 Cal. 2d at 320, 438 P.2d at 34, 66 Cal. Rptr. 497 (1968); Brook, *supra* note 278, at 308; Tribe, *supra* note 277, at 1355; *Statistics in the Law: Potential Problems in the Presentation of Statistical Evidence*, *supra* note 277, at 334.

<sup>287</sup> Tribe, *supra* note 277, at 1361.

<sup>288</sup> *Id.* at 1362.

<sup>289</sup> This is perhaps merely a more detailed analysis of why numbers are overbearingly oppressive, see *supra* text accompanying note 285-86.

<sup>290</sup> Dickson, *supra* note 277, at 796; Tribe, *supra* note 277, at 1355.

<sup>291</sup> Dickson, *supra* note 277, at 801; *Statistics in the Law: Potential Problems in the Presentation of Statistical Evidence*, *supra* note 277, at 338.

<sup>292</sup> *Statistics in the Law: Potential Problems in the Presentation of Statistical Evidence*, *supra* note 277.

<sup>293</sup> Dickson, *supra* note 277, at 800.

abdicates the humanizing influence it can have on the law through the use of its intuition and sense of community values.<sup>294</sup> For all of these reasons probability evidence may overwhelm the jury to the extent that it attributes more probative value to the evidence than it actually has. This constitutes "unfair prejudice, confusion of the issues, or misleading the jury. . . ." <sup>295</sup>

*Importance:* Evidence that it is rare for a child to fantasize or fabricate a claim of sexual abuse speaks directly to both of the major issues in a child sexual abuse case: whether the abuse occurred, and whether the defendant was the perpetrator.

*Balancing:* The balancing test with respect to this type of expert opinion leads to the conclusion that it should not be admissible. The reliability factor clearly favors admission of the evidence. This factor is outweighed, however, by the extreme potential the evidence has to overwhelm the jury on the two dispositive issues in the case. The necessity factor is not clear-cut enough in favor of admission to tip the balance in favor of admissibility. Indeed, even if the necessity were clearer, it does not seem that it should tip the balance in favor of admissibility where the evidence may mislead the jury on the key issues in the case. Accordingly, the courts which have sanctioned the admission of such testimony are in error.

#### IV. THE USE OF AN EXPERT'S EXPLANATORY TESTIMONY TO ENHANCE THE COMPLAINANT'S CREDIBILITY BY EXPLAINING THE COMPLAINANT'S "UNUSUAL" BEHAVIOR

The preceding section of this article examined the use of expert opinions to *vouch for* a complainant's credibility. The focus of this section is on expert opinion testimony offered to *enhance* the complainant's credibility by explaining the complainant's unusual behavior. Enhancing testimony does not constitute an expert's vouching for the complainant's credibility because it does not involve a direct opinion by the expert about the veracity of the particular complainant. Rather, the testimony is of a general nature designed to explain why behavior by the complainant that might appear on its face to be unusual behavior by the complainant may not in fact be unusual.

##### A. CASE LAW

The invariable pattern at trial where enhancing testimony is sought to be introduced is that the defendant, usually by cross-ex-

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<sup>294</sup> Tribe, *supra* note 277, at 1376.

<sup>295</sup> FED. R. EVID. 403.

amination of the complainant, seeks to highlight some unusual aspect of her behavior. The prosecution then offers an expert in rebuttal to explain the unusual behavior.

The most common type of unusual behavior that the defendant seeks to highlight is delay by the child in reporting the abuse. From this fact of delay, the defense will argue the implication that a child who had really been sexually abused would have immediately reported the abuse and that because this complainant did not, it is likely that the report is untrue. Courts have unanimously upheld the admissibility of expert testimony introduced by the prosecution to take the steam out of this argument by explaining that often out of confusion, fear and ambiguous feelings about the abuser, children delay substantial periods of time in reporting the abuse, many times not reporting it until they reach puberty.<sup>296</sup> The courts have been very cryptic, however, in enunciating the reasoning supporting their conclusions. For one court it was enough that the knowledge was beyond the common experience of the jury.<sup>297</sup> For two others it was enough that the testimony would be useful to the jury in assessing the complainant's credibility.<sup>298</sup> Another court dealt with the issue simply by noting that it would not find that the trial judge had abused his discretion in finding that the evidence would assist the jury.<sup>299</sup> A court in a later case in that jurisdiction simply followed this precedent.<sup>300</sup>

The second most popular type of unusual behavior that defendants seek to exploit is that after the complainant made the sexual abuse allegation, she retracted it, while now at trial she is attempting to retract the recantation and reaffirm the original allegation. Thus, the complainant is impeached by means of a prior inconsistent statement. In rebuttal the prosecution offers an expert to explain that

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<sup>296</sup> *E.g.*, *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984); *Smith v. State*, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984); *People v. Benjamin R.*, 103 A.D.2d 663, 669, 481 N.Y.S.2d 827, 832 (1984); *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 377-78, 502 A.2d 253, 258 (1985); *State v. Petrich*, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984); *State v. Clafin*, 38 Wash. App. 843, 852, 690 P.2d 1186, 1190 (1984). Testimony to explain various kinds of unusual behavior has also been allowed in adult rape cases. *See McCord, supra* note 47, at 1177-78.

<sup>297</sup> *Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804.

<sup>298</sup> *Smith*, 100 Nev. at 572, 688 P.2d at 327; *Benjamin R.*, 103 A.D.2d at 669, 481 N.Y.S. 2d at 832.

<sup>299</sup> *Petrich*, 101 Wash. 2d at 576, 683 P.2d at 180.

<sup>300</sup> *Clafin*, 38 Wash. App. at 852, 690 P.2d at 1190. Note, however, that the court reversed in this case because the expert went on to testify that forty-three percent of cases of sexual abuse, in her experience, were committed by father figures. The defendant was a father figure, and the court held that this testimony that the defendant was statistically likely to have committed the crime, was error. *Id.*

because of fear, confusion and ambivalent feelings, it is not at all unusual for a child to retract an allegation of abuse, particularly when the alleged abuser is a family member. Two courts have upheld the admissibility of such expert testimony<sup>301</sup> and two other courts have indicated in dicta that such testimony is admissible.<sup>302</sup> Again, the reasoning of the courts is not illuminating. One court held that because such conduct was beyond the ordinary experience of the jurors and because it would help the jury assess the witness' credibility, it was properly admitted.<sup>303</sup> Two other courts reached their conclusions on the basis of precedent.<sup>304</sup> The last court reached its conclusion on the basis of the erroneous reasoning that recantation was a component of adult rape trauma syndrome.<sup>305</sup>

In summary, in no reported case has explanatory testimony of unusual behavior been found to be inadmissible. The rationales supporting the holdings of the courts which have admitted such testimony have been, however, far from clear.

#### B. BEHAVIORAL SCIENTIFIC RESEARCH

With respect to the contention that it is not unusual for children to delay in reporting sexual abuse, although there has been no empirical research done to determine in what percentage of reported cases delay has occurred, it is fair to say that there is a shared feeling among experts in the field that delay is not unusual.<sup>306</sup> Beyond this general feeling, two pieces of empirical data, when viewed together, lead to the conclusion that delay in reporting is not uncommon. First, a substantial portion of child sexual abuse cases involve abuse that continues over a long period of time.<sup>307</sup> Second, most children

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<sup>301</sup> *People v. Reid*, 123 Misc. 2d 1084, 1087, 475 N.Y.S.2d 741, 743 (1984); *State v. Middleton*, 294 Or. 427, 436, 657 P.2d 1215, 1220 (1983).

<sup>302</sup> *People v. Roscoe*, 168 Cal. App. 3d 1093, 1099, 215 Cal. Rptr. 45, 49 (1985); *State v. Haseltine*, 120 Wis. 2d 92, 97, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984).

<sup>303</sup> *Middleton*, 294 Or. at 436, 657 P.2d at 1220.

<sup>304</sup> *Roscoe*, 168 Cal. App. 3d at 1099, 215 Cal. Rptr. at 49; *Haseltine*, 120 Wis. 2d at 97, 352 N.W.2d at 676.

<sup>305</sup> *Reid*, 123 Misc. 2d at 1087, 475 N.Y.S.2d at 743. On one hand, there is no support in rape trauma syndrome research for the proposition that adult victims recant; on the other hand, rape trauma syndrome does not include sexual abuse within its ambit. Thus, the court was wrong both coming and going.

Other unusual complainant behavior that courts have allowed experts to explain include that it is not unusual for a sexually abused girl to act seductively toward adult males, *People v. Vollentine*, 643 P.2d 800, 803 (Colo. App. 1982), and that it is not unusual for children to perceive that sexual acts occurred during sleep. *State v. Harwood*, 45 Or. App. 931, 609 P.2d 1312 (1980).

<sup>306</sup> See, e.g., Summitt, *supra* note 17, at 186.

<sup>307</sup> D. FINKELHOR, *supra* note 10, at 39 found that about forty percent of experiences occur more than once, and about forty percent last more than one week, meaning that:

*never* report the abuse, leading to the conclusion that there is often reluctance to report at all.<sup>308</sup> Given this reluctance to report and the fact that many relationships involving sexual abuse are enduring, it would not be surprising to find a substantial number of cases where long-term abuse was eventually reported. Further, researchers generally attribute delay or nonreporting to the same factors: fear, confusion and ambivalent feelings.<sup>309</sup> Accordingly, child sexual abuse experts accept as true the proposition that it is not unusual for a child to delay in reporting sexual abuse.

With respect to the assertion that it is not unusual for a child to recant an allegation of sexual abuse, particularly an allegation against a family member, while there is again no empirical research concerning how often such recantations occur, it is fair to say that it is generally believed by child abuse experts that recantations are not unusual.<sup>310</sup> One author has gone so far as to state that recantation is so common that it is an integral part of something he terms the "child sexual abuse accommodation syndrome."<sup>311</sup>

Behavioral scientific research supports the validity of opinions that delay in reporting and recantation, although unusual behaviors at first glance, are in fact not unusual at all in the unnatural context of child sexual abuse.

### C. ADMISSIBILITY ANALYSIS

*Necessity:* Several bases of necessity related to the nature of the cases and the nature of the witnesses have already been discussed and are also pertinent here.<sup>312</sup> However, one particular necessity factor looms large in this situation: necessity because of actions taken by the defendant. This necessity weighs heavily in favor of

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"In other words, if the experience happens more than once, it usually goes on for longer than a week. The long relationships usually continue for a long time, which is illustrated by the fact that the *average* duration of relationships for girls is thirty-one weeks." *Id.* (emphasis in original).

<sup>308</sup> D. FINKELHOR, *supra* note 3, at 233; D. FINKELHOR, *supra* note 10, at 67.

<sup>309</sup> D. FINKELHOR, *supra* note 3, at 232-33; Summitt, *supra* note 17, at 186.

<sup>310</sup> V. DEFRANCIS, *PROTECTING THE CHILD VICTIMS OF SEX CRIMES COMMITTED BY ADULTS* (1969); Goodwin, Sahd, & Rada, *supra* note 210, at 272; Nakashima & Zakus, *Incest: Review and Clinical Experience*, 60 *PEDIATRICS* 696 (1977).

<sup>311</sup> Summitt, *supra* note 17, at 181, 188. This author undoubtedly goes overboard when he states categorically, "Whatever a child says about sexual abuse, she is likely to reverse it." *Id.* at 188 (emphasis added). There is no evidence that a *preponderance* of children recant. If such a remarkable fact were true, one would expect to find some strong indications of it in the literature. Such indications do not exist. On the other hand, there are indications that recantation is far from unusual. One article suggests that recantation may occur in thirty percent of cases. Goodwin, Sahd, & Rada, *supra* note 210, at 272.

<sup>312</sup> See *supra* text accompanying notes 192-206 and 227-63.

admission of explanatory testimony. As a matter of basic fairness, it does not seem unfair to allow such testimony against a defendant who has in a very real sense “brought it on himself” by attempting to highlight alleged defects in the witness’ testimony. What does seem unfair is to allow an impeachment of the complainant based on a prior inconsistent statement to carry more weight than it may deserve. Particularly with recantation testimony, where the prior inconsistent statement is the most obvious, it seems likely that a jury would see that as a major defect in the complainant’s testimony. While as a general rule expert testimony is not allowed to explain why a witness made a prior inconsistent statement, in most cases where a witness makes inconsistent statements there does not exist a recognized phenomenon that could account for the inconsistency. But in the peculiar context of child sexual abuse, there is a recognized phenomenon of recantation. It seems unfair to allow the powerful impeachment evidence to remain un rebutted when there exists a plausible reason why the jury should not give the impeachment the same weight as most prior inconsistent statements.

The case for allowing expert testimony to explain delay in reporting the abuse is not quite as strong, since there is no explicit prior inconsistent statement. More subtly, however, prior inconsistent statement impeachment is also at work here. Most authorities recognize that impeachment by prior inconsistent statement includes the situation where the cross-examiner tries to demonstrate “a failure to assert a fact it would have been natural to affirm” as constituting “an assertion of the non-existence of the fact which can be used to impeach testimony in which the witness admitted the fact’s existence.”<sup>313</sup> The “inconsistent” inference that the defendant seeks to establish—that because the complainant did not report the abuse earlier it did not happen—is likely to make a substantial impression on the jury<sup>314</sup> and should not be allowed to go un rebutted when there exists a recognized phenomenon which may explain it.

*Reliability:* Opinions by experts that delay in reporting abuse, recantation, and seductive behavior by a complainant are “not unusual” are clearly generally accepted and reliable. This type of general testimony should be contrasted with specific testimony such as diagnosing a particular child as sexually abused or identifying a particular child as truthful. These very specific determinations require

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<sup>313</sup> 3 J. WEINSTEIN & M. BERGER, *supra* note 151, at 607[06], and authorities cited therein.

<sup>314</sup> See *supra* text accompanying notes 312-13.

precision. Analogous testimony with respect to recantation testimony would be an opinion by an expert that the complainant in the case had recanted not because the allegation was untrue but because of fear, confusion and ambivalent feelings. Such a particularized opinion would not be demonstrably reliable. However, general testimony that such behavior is "not unusual" is reliable.

*Understandability:* The testimony is not far removed from the common experience of the jury and is clear and simple. With respect to the availability of other experts in specialized literature to put the testimony into perspective, it is unlikely that they will be available, but it is also unlikely that any respectable expert or writer would disagree with the general statements that recantation, delay in reporting and seductive behavior by a complainant are not unusual. With respect to whether the evidence would have a tendency to overwhelm the jury, this kind of testimony is clearly distinguishable from testimony that it is "rare" for a child to fantasize or fabricate concerning sexual abuse. The latter type of testimony, although reliable, should be inadmissible because of its tendency by virtue of its probabilistic nature to overwhelm the jury on the key issues.<sup>315</sup> Testimony that something is "not unusual" does not have the same aura of statistical authority.<sup>316</sup> In fact, the assertion that something is "not unusual" implies that it occurs substantially less than half the time. The jury can easily deal with such evidence without the raising spectre of conviction on the basis of probability.

*Importance:* The testimony, if believed, is not dispositive or virtually dispositive of the case. The evidence simply constitutes one fact that the jurors can use in assessing the complainant's credibility, and thus in deciding whether the defendant is guilty or not guilty. The jury would be compelled to examine the other facts in the case to see whether the crime was proven. Accordingly, while the testimony is important in the sense that it goes to the complainant's credibility, which is a key issue in the case, it is not dispositive.

*Balancing:* Balancing the factors explained above, it seems clear that this type of testimony should be admitted. The necessity for it is high, due to the fact that the opponent seeks to highlight the weakness in the complainant's testimony, and because the highlighting is likely to have the desired impact on the jury if an explanation

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<sup>315</sup> See *supra* text accompanying notes 276-95.

<sup>316</sup> If, on the other hand, the testimony was that it is "rare" for a recantation to be true, the same probability problems would arise, although perhaps not to the same degree, since the validity of the recantation is one step removed from the validity of the original accusation. It is not inconceivable that there are child abuse experts who would be willing to testify that true recantations are rare. See Summitt, *supra* note 17.



is not provided. The testimony is reliable and understandable. Finally, while the testimony is important, it is not, if believed, dispositive or virtually dispositive of the case. Accordingly, the courts which approved the admission of such testimony were correct, even though they were not able to convincingly explain the reasons for their holdings.<sup>317</sup>

V. THE USE OF AN EXPERT'S EXPLANATORY TESTIMONY TO ENHANCE THE COMPLAINANT'S CREDIBILITY BY EXPLAINING THE CAPABILITIES OF CHILD WITNESSES—A RELATIVELY UNEXPLORED POSSIBILITY

Thus far it seems that prosecutors have made very little use of expert testimony in child sexual abuse cases to explain the capabilities of child witnesses. Two possible forms of testimony exist.

The first possibility is testimony regarding the capacities of the particular complainant which stops short of vouching for the complainant's credibility. The distinction between enhancing and vouching here would be that the enhancing testimony would focus on the *ability* of this particular complainant to testify accurately, not on whether the complainant was *actually testifying* accurately. Testimony of this nature has been approved in one case, where it was held that an opinion concerning the complainant's "reality testing," that is, her ability to "differentiate what is real from what isn't real" was properly admitted.<sup>318</sup> In another case it was held to be an error

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<sup>317</sup> It was noted by this author with respect to rape trauma syndrome testimony that courts which subjected the testimony to searching inquiries regarding relevance, unfair prejudice, compliance with the *Frye* rule, etc. when it was offered in the case-in-chief to prove that the crime occurred, often, without explanation, treated the testimony much more leniently when it was offered in rebuttal to explain the unusual behavior of the complainant. McCord, *supra* note 47, at 1183-84. Thus, a court that held the testimony inadmissible as not generally accepted when offered in the case-in-chief could, in virtually the same breath, approve the use of similar testimony in rebuttal without even inquiring about general acceptance. *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 298, 301, 203 Cal. Rptr. 450 (1984). The four-factor balancing analysis proposed in this article provides a reasoned basis why testimony may appropriately be treated differently in the case-in-chief and in rebuttal, *i.e.*, the necessity, reliability, understandability and importance factors may balance differently. This analysis would have proven helpful to the court in *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1983), where the court tried to divine the meaning of the seemingly contradictory signals in *Bledsoe*. The *Roscoe* court correctly perceived that *Bledsoe* seemed to require general testimony rather than a particularized diagnosis, but seemed unable to explain why *Bledsoe* reached that result. *Roscoe*, 168 Cal. App. at 1099-1100, 215 Cal. Rptr. at 49-50. An Oregon court in *Munro*, 68 Or. App. 63, 680 P.2d 708 arrived at a similar perception regarding *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983), but was similarly unable to explain the reason behind the precedent. *State v. Munro*, 68 Or. App. 63, 66, 680 P.2d 708, 710 (1984).

<sup>318</sup> *Commonwealth v. Carter*, 383 Mass. 873, 417 N.E.2d 439 (1981).

to exclude expert opinion testimony offered by a defendant to show that the complainant had a defective memory, limited verbal ability and could only understand simple questions.<sup>319</sup> On the other hand, one court held that admitting testimony that the complainants were able to distinguish fantasy from reality and truth from falsehood was error because it improperly bolstered the complainants' credibility and usurped the jury's function.<sup>320</sup> Another court held that expert opinion testimony that the complainant was suffering from an emotional disturbance that rendered her ability to perceive and tell the truth suspect, was properly excluded as an improper comment on the credibility of the witness.<sup>321</sup>

The admissibility analysis of testimony concerning the capabilities of a particular complainant is likely to lead to varying results depending on what abilities are the subject of the testimony. The necessity factor is likely to be high with respect to most subjects, either because the defendant is seeking to highlight a certain alleged defect in the witness or because the child is very young and likely to be the most suspect in the eyes of the jury. The level of reliability of the expert's opinion will vary, however, depending upon the abstractness of the conclusion reached by the expert. For example, an expert's testimony regarding "reality testing," which is an aspect of sanity, is likely to be suspect since there exists convincing literature to the effect that behavioral scientists are notoriously unable to accurately diagnose complex issues such as sanity.<sup>322</sup> On the other hand, if the expert is testifying to a concrete conclusion, such as the verbal abilities of the complainant, the testimony may be quite relia-

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<sup>319</sup> State v. Roberts, 139 Ariz. 117, 124, 677 P.2d 280, 287 (1983).

<sup>320</sup> United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985). The majority was persuasively taken to task by Judge Wallace for equating an opinion concerning the *ability* to tell the truth with an opinion concerning truthfulness:

In this case, the experts testified only that the children were *capable* of telling the truth—they did not opine as to whether or not the children *actually had done so*. The difference between knowing a witness can tell the truth and concluding that he did not do so is fundamental. Thus, the jury was free to believe or disbelieve the children's testimony, and in my judgment, the expert testimony neither helped nor hindered that determination.

*Id.* at 605 (Wallace, J. concurring in part and dissenting in part)(emphasis in original).

<sup>321</sup> *Munro*, 68 Or. App. at 66-67, 680 P.2d at 710. It should be noted that in all three of these cases the complainant was not only a child, but also was mildly retarded. Since the effect of retardation on the witness' capabilities is probably a separate basis for allowing expert testimony, it cannot be determined whether the two courts that upheld the admission of the testimony would have done the same had the child not been retarded.

<sup>322</sup> 1 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 3 (3d. ed. 1981); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 737 (1974); Comment, *The Psychologist as Expert Witness: Science in the Courtroom?* 38 MD. L. REV. 539, 561 (1979).

ble. Understandability will also vary depending upon the abstractness of the conclusion. The testimony would generally do well on the importance factor because it would not, if believed, be dispositive or virtually dispositive of the case.

The second possible form of enhancing testimony with respect to the capabilities of a child witness is testimony not focused on the abilities of the particular complainant, but on the abilities of children in general. The topics on which testimony of this nature might be offered are suggested by the discussion of the kinds of prejudices that adults may have against child witnesses.<sup>323</sup> Examples of such testimony would be that children are no more likely to lie as witnesses than are adults, that children's memory by and large is not inferior to that of adults, that children are no more suggestible than adults, and that children are particularly susceptible to being tripped up on cross-examination by leading and complex questions even if they are telling the truth.

There is only one reported case in which testimony along these lines has been offered.<sup>324</sup> In that case, a psychologist testified that he had examined the complainant and had come to the conclusion that she was evasive in that she was not telling everything that had happened. He went on to testify, however, that "a lot of times children become very honest when they come into a courtroom . . ." <sup>325</sup> The appellate court, with no discussion, held that the quoted testimony was "admissible and relevant."<sup>326</sup>

The admissibility of general ability testimony is a close question under the four-factor balancing test. While the necessity is high because the opponent is seeking to highlight a defect in the child witness, the reliability of most of these assertions has not been established because of the embryonic nature of the research. The testimony, however, is likely to be understandable, and also fares well on the importance factor, since due to its general nature, even if it is believed it would not be dispositive of the case.

Behavioral scientific researchers seem to be interested in the topic of the capabilities of child witnesses. Perhaps in the near future behavioral scientific research will make clearer what types of assertions regarding child witnesses are reliable and what type are not. This is certainly an area that warrants further consideration by both behavioral scientists and prosecutors.

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<sup>323</sup> See *supra* text accompanying notes 241-63.

<sup>324</sup> *State v. Snapp*, 110 Idaho 269, 715 P.2d 939 (1986).

<sup>325</sup> *Id.* at —, 715 P.2d at 941.

<sup>326</sup> *Id.* at —, 715 P.2d at 941.

## VI. CONCLUSION

This article has demonstrated that there is a crying need for courts to recognize that with respect to expert testimony about child complainants in sexual abuse prosecutions the key inquiry is whether the testimony will assist the trier of fact. Courts must adopt a reasoned mode of analysis on that issue that will consider all pertinent factors and lead to well-reasoned results. The four-factor balancing analysis proposed by this article encompasses all of the concerns that have been raised by courts in this area.

With respect to the types of expert opinion testimony that have been offered regarding child sexual abuse complainants, the four-factor balancing test produces varying results. An expert diagnosis that a child is the victim of sexual abuse offered to prove that abuse occurred should not be admitted because the testimony is not demonstrably reliable, may be difficult to effectively cross-examine or otherwise put into proper perspective and, if believed, will be dispositive or virtually dispositive of the case. The use of an expert's testimony vouching for the complainant's credibility by the opinion that the complainant is telling the truth should also be inadmissible for the same reasons. An expert's vouching for the complainant's credibility by an opinion that it is rare for a child to fabricate or fantasize a claim of sexual abuse should not be admitted because of its tendency to overwhelm the jury on the key issue in the case. However, use of an expert opinion to enhance the complainant's credibility by explaining the complainant's unusual behavior should be admissible because generally the defendant has made this testimony necessary and it is not, even if believed, dispositive or virtually dispositive of the case. This article also suggests that another type of expert opinion used to enhance the complainant's credibility, by explaining either the capabilities of the particular child or the capabilities of children in general as witnesses, may be available to prosecutors.

This article also highlights an urgent need for research concerning exactly what jurors think about child witnesses in general, what preconceptions they have about child sexual abuse cases, and how children compare with adults as witnesses. Fortunately, it seems that behavioral scientists are interested in pursuing studies in this area, thus, more definitive answers to these questions may soon be available.

Child sexual abuse is a major problem in the United States. Such abuse is repugnant, and the increased zeal with which child sexual abusers are being prosecuted is laudable. Justice demands,

however, that convictions be obtained on the basis of properly admissible evidence. Accordingly, it is the hope of this author that this article will contribute to just and reasoned decisions on the part of courts faced with questions concerning the admissibility of expert testimony about child complainants in sexual abuse cases.