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Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme

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I. INTRODUCTION

Child sexual abuse[1] prosecutions present distinctive evidentiary problems. Often these cases pit the word of a traumatized child against that of an adult.[2] Child sexual abuse typically occurs in private, when the abuser is confident that there will be no witnesses.

1. For the purposes of this Comment, "child sexual abuse" will be used to describe forced, tricked, or coerced sexual activity between a person sixteen years old or less and a substantially older person. *See* Richard J. Gelles & Jon R. Conte, *Domestic Violence and Sexual Abuse of Children: A Review of Research in the Eighties*, 52 J. MARRIAGE & FAM. 1045, 1050 (1990); David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 8-9 (1986) [hereinafter McCord, *Foray*]. Because a substantially higher number of girls are abused than boys, and because boys are less likely than girls to report abuse, most of the behavioral science research and reported opinions focus on female sexual abuse victims. *See id.* at 8. Thus, throughout this Comment, the victim will be referred to as "she."

2. Rebecca J. Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97, 97 (1985). For the purposes of this discussion, it is assumed that the child complainant involved in a sexual abuse prosecution actually was abused. *See infra* section II.A.3. for discussion regarding false accusations of sexual abuse.

Therefore, the child victim is usually the only eyewitness.[3] The prosecution's case is severely hampered if the court finds the child to be too young to be a witness or incompetent to testify.[4] Even if the child does testify, several factors often limit the effectiveness of this testimony. The child's cognitive and verbal abilities may not enable her to give consistent, spontaneous, and detailed reports of her sexual abuse.[5] A child who must testify against a trusted adult, such as a parent or relative, may experience feelings of fear and ambivalence, and may retract her story because of family pressures or insensitivities in the legal process.[6]

Prosecutors face another dilemma when offering the child victim as a witness if the child has delayed reporting the abuse.[7] Jurors may interpret delayed disclosure as evidence of fabrication, especially if defense counsel suggests this conclusion during cross-examination of the child.[8] Furthermore, jurors may hold misconceptions that a child has memory deficits, is suggestible, cannot distinguish between fact or fantasy, or is likely to fabricate sexual experiences with adults.[9] These problems are compounded by the lack of corroborative physical or

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3. *See* John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 3 (1989); Veronica Serrato, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 158 (1988).

4. Josephine Bulkley, *Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse Cases*, 6 BEHAVIORAL SCI. & L. 153, 155 (1988) [hereinafter Bulkley, *Legal Proceedings*]. Sometimes the prosecutor or the child's family determines that the child should not testify because of the additional trauma that may result from testifying. A child who testifies must face the defendant, the jury, and the public in court while under intense direct and cross-examination. *Id.* at 157. The child also may be subjected to delays and long waiting periods before she can testify. *Id.* If the defendant is convicted, the child may feel guilt for testifying against the defendant, who may be a parent or relative. *Id.* at 155. If the defendant is acquitted, the child may feel a sense of hopelessness and face possible reprisals by the offender. *Id.* at 155-56.

5. Serrato, *supra* note 3, at 159.

6. *See id.* at 159-60; Bulkley, *Legal Proceedings*, *supra* note 4, at 155.

7. *See* Roland C. Summit, M.D., *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181, 186 (1983). Contrary to the general expectation that a sexually abused child would seek help, the child often does not report the abuse out of fear of being blamed for the incident or fear that no one will able to protect her from retaliation by the abuser. *Id.* at 181. See *infra* notes 102-05 and accompanying text for discussion regarding the child sexual abuse accommodation syndrome.

8. Serrato, *supra* note 3, at 160-61.

9. Bulkley, *Legal Proceedings*, *supra* note 4, at 155. In addition to the particular problems facing sexually abused children as witnesses are those commonly facing all child witnesses. Serrato, *supra* note 3, at 161. Children often are confused by dates, times, and frequencies of events. As a result of this confusion, a cross-examiner can lead a child to contradict previous statements with questions not phrased in age-appropriate language. Jurors may interpret a child's apparent confusion, hesitancy, and inconsistency as indicative of unreliability. *Id.*

medical evidence in many child sexual abuse cases.[10] Faced with these unique problems, prosecutors have increasingly relied on mental health professionals to bolster child sexual abuse cases with expert psychological testimony.[11]

Only since the early 1980s have appellate courts addressed the special evidentiary problems of child sexual abuse prosecutions. Prior to the 1980s, the media rarely discussed and the public little understood the subject of child sexual abuse.[12] Society regarded child sexual abuse as a rather uncommon problem until the late 1970s, when the women's movement and the child protection movement succeeded in drawing public attention to what statistics were indicating was a problem of significant proportions.[13] The increasing public awareness of child sexual abuse and the new candor born of the sexual revolution then paved the way for the media's "discovery" of child sexual abuse.[14] By the mid-80s, the once undiscussed subject had become "something of a national obsession."[15] The onslaught of media coverage, the resulting perception of child sexual abuse as a major social problem, and the passage of mandatory reporting laws[16] all brought an increased number of reported cases of child sexual abuse to the criminal justice system.[17]

The battle to win public recognition of child sexual abuse as a

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10. Only 10 to 50 percent of cases involve physical or medical evidence of child sexual abuse. Myers et al., *supra* note 3, at 34 n.120. Often the abuser has used threats and intimidation, rather than actual violence, to induce the child's submission. Serrato, *supra* note 3, at 159.

11. Bruce Gardner, *Prosecutors Should Think Twice—Before Using Experts in Child Sex Abuse Cases*, 3 CRIM. JUST. 12, 13 (1988). Most often, experts in child sexual abuse cases are social workers, psychologists, psychiatrists, and pediatricians. This Comment will use the term "mental health professional" to refer to all of these professionals.

12. DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR 3-5 (1988).

13. DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 1, 3 (1984). From 1976 to 1982, the number of child sexual abuse cases reported to the nationwide data collection system of the American Humane Association increased from 1,975 to 22,918. *Id.* at 1. Currently, there are more than 445,000 cases of physical and child sexual abuse reported every year involving parents, baby-sitters, day care workers, and other caregivers. Christopher Scanlan, *A Child's Word*, MIAMI HERALD, Aug. 5, 1991, at 1C.

14. *See* HECHLER, *supra* note 12, at 6.

15. Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 429 (1985). For example, in 1984, *ABC World News Tonight* focused on sexual abuse in a five-part series, CBS' *Sixty Minutes* ran two stories on sexual abuse, and the *Washington Post* ran a front-page story on one family's experience with sexual abuse. In addition, the media publicized sexual abuse charges against seven former teachers at the McMartin Preschool in Manhattan Beach, California, and against 24 adults in Jordan, Minnesota throughout 1984 and 1985. *Id.* at 429-30 n.3.

16. *See* Gardner, *supra* note 11, at 13.

17. *See* McCord, *Foray*, *supra* note 1, at 5.

social problem has been followed by an equally strong backlash. Notorious cases alleging mass molestation in Jordan, Minnesota and at the McMartin Preschool in California polarized the camps.[18] Many have claimed that an atmosphere of hysteria has led to an epidemic of "sex accuse"—that "what we see now is a blizzard of false accusations."[19] Often, the admissibility of expert testimony in a child sexual abuse case depends on the relative weight the court places on the consequences of failing to detect actual abuse versus the consequences of false accusations. A California appellate court has expressed the competing concerns:

> Thus there is very substantial conflict between two important goals of society. On the one hand is the need to care and treat an abused child and the need as a treatment device to accept as true his report whether truthful or not; and on the other hand the preservation of the constitutional right to presumption of innocence in a criminal case.[20]

In light of these concerns, courts and legal commentators have begun to question the role of the expert witness in a child sexual abuse prosecution. Unless the expert's opinion meets a threshold level of reliability, it cannot assist the jury.[21] Expert testimony regarding

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18. HECHLER, *supra* note 12, at xiii.

19. *Id.* at 1.

20. People v. Leon, 263 Cal. Rptr. 77, 86 (Cal. Ct. App. 1989); *see also* State v. Rimmasch, 775 P.2d 388 (Utah 1989), where the court noted:

> We are aware that child sexual abuse is of great concern to the American public. . . .
>
> However, the fact that child sexual abuse has emerged as a critical problem about which the public is seriously concerned does not mean all legal rules that may constitute obstacles to increasing the conviction and incarceration rates of those accused of such crimes, as opposed to those actually guilty, can properly be brushed aside. Fundamental changes in long-standing evidentiary rules should not be made lightly . . . .

Id. at 390.

Another court has observed that "a sexual abuse charge by itself imposes a stigma on the accused and conviction provides a serious penalty. In interpreting our rules of evidence, we must be aware not only of the needs of society in general but also the defendant's right to a fair trial." Wheat v. State, 527 A.2d 269, 275 (Del. 1987).

21. Rule 702 of the Federal Rules of Evidence generally governs the admissibility of expert testimony in the federal courts: "If scientific, technical, or other specialized knowledge will *assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (emphasis added). Although the majority of child sexual abuse prosecutions are brought in the state courts, nearly all the 29 states that have adopted rules of evidence modeled on the Federal Rules have followed this treatment of expert witnesses either exactly or in substantial measure. Michael H. Graham, *Expert Witness Testimony and The Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 43 (1986). Courts generally exclude testimony that does not meet this threshold level of reliability on the ground that it is based on

child sexual abuse presents particular reliability problems for several reasons.[22] Perhaps most importantly, research indicates that no typical child sexual abuse victim exists, thus furnishing doubt that mental health professionals have any expertise to diagnose child sexual abuse and to offer expert opinion on the subject.[23] Often, mental health professionals who testify in court have little understanding of their role as an expert witness. Furthermore, recent studies have indicated that mental health professionals may encourage false accusations of sexual abuse through improper interviewing methods.[24]

In response to the problems associated with expert testimony in child sexual abuse prosecutions, courts generally have restricted its admissibility. Whether or not a jurisdiction permits the testimony often depends on the purpose for which the prosecutor offers it. The types of testimony offered generally fall into four categories.[25] With the first type of testimony, the expert evaluates the credibility of the child and asserts that the child's allegations of abuse are truthful ("Type 1").[26] With the second type, the expert offers a direct opinion that the child has been abused ("Type 2").[27] With the third type, the expert describes certain behavioral characteristics, such as nightmares, difficulty sleeping or concentrating, or withdrawal from social relationships and activities, as consistent with being abused ("Type 3").[28] Finally, with the fourth type, the expert explains behaviors of the child, such as delay in reporting or recantation of the allegations, that are seemingly inconsistent with abuse in order to rebut the implication that the child's allegations are false ("Type 4").[29] This last type of testimony is based—either by name or in concept—on the "child sexual abuse accommodation syndrome" (CSAAS).[30] With

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conjecture or speculation. MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS, AND PROBLEMS 249 (rev. 2d ed. 1989).

22. *See infra* part II.A.

23. *See infra* notes 43-48 and accompanying text.

24. *See infra* notes 69-78 and accompanying text.

25. Legal commentators have devised various methods for categorizing the various forms of expert testimony offered in child sexual abuse prosecutions. *See, e.g.*, McCord, *Foray*, *supra* note 1, at 41-61; David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 41-48 (1987) [hereinafter McCord, *Syndromes*]; Myers et al., *supra* note 3, at 32-142; Serrato, *supra* note 3, at 163-91. The categories described here were chosen for their broad relevance and are listed in the order in which they impact on the ultimate issue in the case: whether the defendant committed the alleged incident(s) of sexual abuse against the child complainant.

26. *See infra* notes 81-85 and accompanying text.

27. *See infra* notes 86-89 and accompanying text.

28. *See infra* notes 90-99 and accompanying text.

29. *See infra* notes 100-06 and accompanying text.

30. *See infra* note 102.

Types 3 and 4, the expert either limits the testimony to an explanation of general principles or applies these principles to the facts of the case.[31]

Courts unanimously exclude Type 1 testimony,[32] and only a few courts allow Type 2 testimony.[33] Courts are split on the admissibility of Type 3 testimony.[34] The overwhelming majority of courts permit Type 4 testimony.[35]

The Superior Court of Pennsylvania has adopted the most

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31. *See infra* notes 236-41, 251-54 and accompanying text.

32. *See, e.g.*, State v. Lindsey, 720 P.2d 73 (Ariz. 1986); People v. Gaffney, 769 P.2d 1081 (Colo. 1989); Tingle v. State, 536 So. 2d 202 (Fla. 1988); Head v. State, 519 N.E.2d 151 (Ind. 1988); State v. Brotherton, 384 N.W.2d 375 (Iowa 1986); State v. Jackson, 721 P.2d 232 (Kan. 1986); Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987); Commonwealth v. Ianello, 515 N.E.2d 1181 (Mass. 1987); People v. Beckley, 456 N.W.2d 391 (Mich. 1990); Townsend v. State, 734 P.2d 705 (Nev. 1987); State v. Bailey, 365 S.E.2d 651 (N.C. Ct. App. 1988); State v. Milbradt, 756 P.2d 620 (Or. 1988); State v. Rimmasch, 775 P.2d 388 (Utah 1989); State v. Madison, 770 P.2d 662 (Wash. Ct. App. 1989); Zabel v. State, 765 P.2d 357 (Wyo. 1988). For a further list of cases, see State v. J.Q., 599 A.2d 172, 188 (N.J. Super. Ct. App. Div. 1991).

33. *See, e.g.*, Broderick v. King's Way Assembly of God, 808 P.2d 1211 (Alaska 1991); Matter of Cheryl H., 200 Cal. Rptr. 789 (Cal. Ct. App. 1984); Glendening v. State, 536 So. 2d 212 (Fla. 1988); State v. Hester, 760 P.2d 27 (Idaho 1988); Townsend v. State, 734 P.2d 705 (Nev. 1987); State v. Timperio, 528 N.E.2d 594 (Ohio Ct. App. 1987). Most courts exclude Type 2 testimony indirectly by allowing Type 3 testimony with the qualification that the expert not opine that the child was abused. *See, e.g.*, State v. Bachman, 446 N.W.2d 271 (S.D. 1989); State v. Gokey, 574 A.2d 766 (Vt. 1990); State v. Edward Charles L., 398 S.E.2d 123 (W. Va. 1990).

34. For cases allowing Type 3 testimony, see United States v. St. Pierre, 812 F.2d 417 (8th Cir. 1987); Rodriguez v. State, 741 P.2d 1200 (Alaska Ct. App. 1987); Ward v. State, 519 So. 2d 1082 (Fla. 1st D.C.A. 1988); State v. Reser, 767 P.2d 1277 (Kan. 1989); State v. Davis, 422 N.W.2d 296 (Minn. Ct. App. 1988); State v. Dana, 416 N.W.2d 147 (Minn. Ct. App. 1987); In re Nicole V., 518 N.E.2d 914 (N.Y. 1987); State v. Bachman, 446 N.W.2d 271 (S.D. 1989); State v. Edward Charles L., 398 S.E.2d 123 (W. Va. 1990); Griego v. State, 761 P.2d 973 (Wyo. 1988). *Compare* Nelson v. State, 782 P.2d 290, 297-99 (Alaska Ct. App. 1989); State v. Moran, 728 P.2d 248, 255 (Ariz. 1986); Russell v. State, 712 S.W.2d 916 (Ark. 1986); People v. Jeff, 251 Cal. Rptr. 135 (Cal. Ct. App. 1988); State v. Black, 537 A.2d 1154 (Me. 1988); People v. Beckley, 456 N.W.2d 391 (Mich. 1990); State v. Hudnall, 359 S.E.2d 59 (S.C. 1987); State v. Gokey, 574 A.2d 766 (Vt. 1990); State v. Jensen, 415 N.W.2d 519, 522 (Wis. Ct. App. 1987).

35. *See, e.g.*, Bostic v. State, 772 P.2d 1089 (Alaska Ct. App. 1989); State v. Moran, 728 P.2d 248 (Ariz. 1986); People v. Leon, 263 Cal. Rptr. 77 (Cal. Ct. App. 1989); State v. Spigarolo, 556 A.2d 112 (Conn. 1989); Wheat v. State, 527 A.2d 269 (Del. 1987); Allison v. State, 353 S.E.2d 805 (Ga. 1987); People v. Server, 499 N.E.2d 1019 (Ill. App. Ct. 1986); State v. Tonn, 441 N.W.2d 403 (Iowa Ct. App. 1989); State v. Black, 537 A.2d 1154 (Me. 1988); People v. Beckley, 456 N.W.2d 391 (Mich. 1990); State v. Garden, 404 N.W.2d 912 (Minn. Ct. App. 1987); Smith v. State, 688 P.2d 326 (Nev. 1984); State v. Bailey, 365 S.E.2d 651 (N.C. Ct. App. 1988); People v. Benjamin R., 481 N.Y.S.2d 827 (N.Y. 1984); State v. Middleton, 657 P.2d 1215 (Or. 1983); Duckett v. State, 797 S.W.2d 906 (Tex. Crim. App. 1990); State v. Hicks, 535 A.2d 776 (Vt. 1987); State v. Madison, 770 P.2d 662 (Wash. Ct. App. 1989); State v. Jensen, 415 N.W.2d 519 (Wis. Ct. App. 1987); Griego v. State, 761 P.2d 973 (Wyo. 1988). For a further list of cases, see State v. J.Q., 599 A.2d at 183. *But see* Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991); Dunnington v. State, 740 S.W.2d 896 (Tex. Ct. App. 1987).

restrictive position on admissibility in the nation. In the case of *Commonwealth v. Garcia*,[36] the court held that expert testimony explaining the reasons for a child's delayed reporting of sexual abuse—Type 4 testimony—impermissibly infringes on the credibility-determining function of the jury.[37] With this holding, the court, as Judge Ford Elliott lamented in his dissent, "effectively [drove] the expert from the courtroom in cases involving the sexual abuse of children."[38]

This Comment argues that the Superior Court of Pennsylvania has adopted an unnecessarily extreme position. Part II acknowledges the distinctive reliability problems of expert testimony regarding child sexual abuse, and describes national trends in limiting its admissibility. Part III explains the development of the case law in the Pennsylvania courts, and analyzes the Superior Court of Pennsylvania's recent opinion in *Commonwealth v. Garcia*. Part IV criticizes the basis of the *Garcia* holding, arguing that neither precedent nor social science research warranted the court's elimination of the type of testimony offered. This Part describes approaches taken by other jurisdictions to limit the problems associated with expert testimony regarding child sexual abuse without completely eliminating the expert from the courtroom. Finally, Part V concludes that courts should not permit expert testimony of the first three types described above unless and until social science research finds scientifically reliable indicators of child sexual abuse, and the mental health profession can show that its members who testify in child sexual abuse prosecutions can competently make reliable judgments based on this research. Courts should, however, admit testimony based on the child sexual abuse accommodation syndrome when such testimony is limited solely to explaining seemingly unusual behaviors of the child in order to rebut the inference that the child has fabricated the allegations.[39]

Testimony based on the child sexual abuse accommodation syndrome is a necessary consequence of the peculiarities of the child sexual abuse case. This Comment encourages prosecutors to use expert testimony to communicate the body of knowledge that has developed regarding the coping behaviors of child sexual abuse victims so that a jury can better understand why a child would delay in reporting an incident of abuse or recant her allegations. Prosecutors and courts must work to carefully confine expert testimony in child sexual abuse

36. 588 A.2d 951 (Pa. Super. Ct. 1991), *appeal denied*, 604 A.2d 248 (Pa. 1992).

37. *Id.* at 956.

38. *Id.* (Ford Elliott, J., dissenting).

39. A recent article on a child sexual abuse case decided by the Michigan Supreme Court reached a similar conclusion. *See generally* Monique K. Cirelli, *Expert Testimony in Child Sexual Abuse Cases: Helpful or Prejudicial?*, 8 COOLEY L. REV. 425 (1991).

prosecutions to that based on the child sexual abuse accommodation syndrome in order to balance the competing needs of protecting the child from further victimization and the defendant from false accusation and imprisonmnent.

II. RECOGNIZING AND RESPONDING TO THE PROBLEMS

A. *Reliability Problems of the Testimony*

Many commentators have argued for the exclusion or limitation of expert testimony in child sexual abuse cases.[40] In a recent study on child sexual abuse commissioned by the National Institute of Justice, Debra Whitcomb called the increasing reliance on expert witnesses "[a]mong the most disturbing trends in the prosecution of child sexual abuse cases . . . ."[41] In the admirable pursuit of protecting our youngest victims, the legal system often allows the prosecution to admit unreliable[42] expert testimony against a defendant accused of sexually abusing a child.

1. LACK OF RESEARCH RESULTS

Perhaps the foremost reason for doubting the reliability of expert testimony in child sexual abuse cases is that the study of child sexual abuse is relatively new and many theories are not yet empirically supported.[43] Behavioral scientists did not begin to study intensively the problem of child sexual abuse until the late 1970s.[44] These studies have revealed the absence of a single, typical child sexual abuse victim.[45] Review of the research to date indicates that the type and severity of children's reactions vary greatly.[46] In fact, almost every study of the impact of sexual abuse on children has found a substan-

40. *See, e.g.*, Josephine A. Bulkley, *The Prosecution's Use of Social Science Expert Testimony in Child Sexual Abuse Cases: National Trends and Recommendations*, 1 J. CHILD SEXUAL ABUSE 73 (1992) [hereinafter Bulkley, *Social Science*]; Gary B. Melton & Susan Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise*, 44 AM. PSYCH. 1225 (1989).

41. *See* DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 111 (National Institute of Justice 1992); *see also* Diana Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L.J. 691 (1991).

42. "Reliability" is used throughout this Comment in two senses. First, in a scientific sense, it refers to consistency; that is, whether the same diagnosis is made over time and among different clinicians. *See* David Faust & Jay Ziskin, *Challenging Post-Traumatic Stress Disorder Claims*, 38 DEF. L.J. 407, 408 (1989). It is also used in the evidentiary sense that testimony must be reliable in order to assist the jury, as required by Federal Rule of Evidence 702.

43. *See, e.g.*, WHITCOMB, *supra* note 41, at 11; Bulkley, *Social Science, supra* note 40, at 81.

44. McCord, *Foray, supra* note 1, at 82.

45. Bulkley, *Social Science, supra* note 40, at 82.

46. Myers, *supra* note 3, at 55.

tial group of victims with little or no symptomatology.[47] In addition, certain behaviors may seem to indicate some other traumatic event or behavior of normal children.[48]

Methodological weaknesses in the existing studies of child sexual abuse also contribute to the questionable reliability of testimony. In 1986, researchers Browne and Finkelhor suggested that many of the then-available studies on child sexual abuse had sample, design, and measurement problems that might invalidate the findings.[49] One methodological concern stems from the fact that many of the sexually abused children studied were receiving psychological services.[50] This type of self-selected group may not be representative of all sexually abused children.[51] Furthermore, many of the studies did not use standardized measures of psychological disturbance and did not employ comparison groups.[52] Without comparison data, it is impossible to conclude that observed effects significantly differentiate abused from non-abused children.[53] As a result of the lack of definitive research results, several commentators have expressed doubts concerning professional competence to diagnose a child as having been sexually abused and to determine whether a child's behaviors are consistent with sexual abuse.[54]

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47. David Finkelhor, *Early and Long-Term Effects of Child Sexual Abuse: An Update*, 21 PROF. PSYCH. RES. & PRAC. 325, 327 (1990).

48. Bulkley, *Social Science*, *supra* note 40, at 82. Several recent studies (since 1988) have produced a few consistent results. Sexually abused children are consistently more behaviorally distressed than nonabused children. Myers, *supra* note 3, at 58. In addition, of the numerous reactions observed in sexually abused children, sexual behavior has the closest logical association with sexual abuse. *Id.* at 59.

Researchers also have compiled lists of variables that may affect a child's reactions to sexual abuse. Studies have shown that the closer the relationship between the offender and the child, the more intrusive the form of sexual behavior, the longer the duration of the abuse, the more frequent the episodes of abuse, and the greater the use of force, the greater the traumatic impact on the child. Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCH. BULL. 66, 72-75 (1986). Although these findings were reported in a 1986 review, Finkelhor notes in a 1990 update that "most of the new research has simply reinforced and consolidated what the earlier research had found." Finkelhor, *supra* note 47, at 325.

49. Browne & Finkelhor, *supra* note 48, at 75.

50. *Id.*

51. *Id.*

52. *Id.* at 76.

53. *Id.* Professor Myers observed that by 1989, several studies had achieved a more sound methodology and were beginning to provide a more complete picture of the effects of child sexual abuse. *See* Myers, *supra* note 3, at 325. In a 1990 article, Finkelhor agreed that more sophisticated studies were available. *See* Finkelhor, *supra* note 47, at 325.

54. *See, e.g.*, McCord, *Foray*, *supra* note 1, at 38. Commentators also have criticized the qualifications, or lack thereof, of mental health professionals who testify as experts in child sexual abuse prosecutions. *See, e.g.*, Ken Englade, *Mad Science: When it Comes to Psychological Testimony, Everybody's an Expert. So Who Does a Jury Believe?*, 32 STUDENT

2. CONFLICTING ROLES OF THE EXPERT WITNESS

Mental health professionals who testify as experts in child sexual abuse cases often do not understand that their role as an expert witness differs greatly from their role in the course of their normal practice.[55] For treatment purposes, the mental health professional is trained to rely heavily on the reported feelings of the child and to base therapy on an assumption that abuse has occurred.[56] However, a determination that the child meets the clinical criteria for sexual abuse does not establish satisfaction of the legal criteria.[57] The fact that a child honestly feels abused (the matter of primary clinical significance) does not necessarily indicate that the legal offense of child abuse has been committed.[58] Furthermore, a determination that the child was abused at some point in time does not prove that the child was abused by the defendant at the particular point in question.[59] A mental health professional who testifies as an expert must determine objective reality—i.e., whether the child exhibits certain symptoms, or whether the child was abused (depending on which types of testimony the jurisdiction allows)—rather than focus on the child's subjective feelings.[60] Mental health professionals who enter the forensic arena also must leave their more familiar role as the child's helping agent

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LAW. 31, 33 (1990); Robert J. Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383, 395; Myers, *supra* note 3, at 11-12; *see also Guidelines for the Clinical Evaluation of Child and Sexual Abuse*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 655, 655 (1988) (recognizing that "the legal profession is often confronted with an array of self-identified experts who have emerged to fill the void").

55. David Glasgow & Richard P. Bentall, *What Do Expert Witnesses in Child Sexual Abuse Think They Are Doing?—"Diagnosis" and The Sexually Accurate Doll "Test" As Professional Myths*, 11 LIVERPOOL L. REV. 43, 43 (1989). Law professors Bonnie and Slobogin summarized the confusion between the clinical and forensic tasks of a mental health professional:

> Many clinicians have no business in the courtroom. Their training in clinical methods of inquiry and treatment encourages them to err in the direction of diagnosing illness, invites many of them to speculate wildly about unconscious determinants of behavior, and frequently discourages systematic theoretical inquiry. Many clinicians are not sensitive to the limitations of their own disciplines; if they are not researchers, they focus on what they think they know rather than on what they do not know. More important, many clinicians are entirely untrained in, and insensitive to, the purposes and limitations of the legal process.

Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 457 (1980).

56. Lee Coleman & Patrick E. Clancy, *False Allegations of Child Sexual Abuse*, 5 CRIM. JUST. 14, 16 (1990).

57. David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 SCIENCE 31, 32 (1988) [hereinafter Faust & Ziskin, *Expert Witness*].

58. Melton & Limber, *supra* note 40, at 1229.

59. *Id.*

60. Faust & Ziskin, *Expert Witness*, *supra* note 57, at 32.

and instead seek to uncover the truth, regardless of its implications for the child's treatment.[61] The mental health professional thus becomes a potential adversary to the child, and the professional's ingrained tendency to support or empathize with the child may cloud objectivity.[62] In fact, the value systems of law and psychology directly conflict:

> The law demands precision, concise answers, and prefers yes or no formulations. Psychology, on the other hand, emphasizes process, behavior in change over time, prefers to review all relevant hypotheses and rule out irrelevant alternatives. The legal focus is on rule and order, concrete facts, on maintaining rights, and doing justice . . . . In psychology, the goal becomes *needs*, not *rights*, and the mode is collaborative, not adversarial . . . . It is reasonable to assume that the movement from one arena to the other will be fraught with some measure of difficulty and discomfort.[63]

Neither the "Ethical Principles of Psychologists"[64] nor the "Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse"[65] provide mental health professionals with guidance in fulfilling the role of an expert witness. In fact, no set of standards govern mental health expert testimony that can be enforced officially.[66]

On the other side of the spectrum are those experts who understand their role in the courtroom all too well. Courts and commenta-

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61. *Id.*

62. *Id.* The Supreme Court of Michigan recognized this problem in *People v. Beckley*, 456 N.W.2d 391, 408 (Mich. 1990):

> Given the abhorrence of [child sexual abuse], it is inevitable that those who treat a child victim will have an emotional inclination toward protecting the child victim. The expert who treats a child victim may lose some objectivity concerning a particular case. Therefore to avoid the pitfall of a treating professional being inclined to give an opinion regarding whether the complaining witness had been sexually abused, we caution the trial court to carefully scrutinize the treating professional's ability to aid the trier of fact when exercising discretion in qualifying such an expert witness.

63. Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 451-52 (1989); *see also* J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 157 (1990).

Conversely, part of the problem is that lawyers and judges are equally ignorant of and insensitive to clinical processes. *Cf.* McCord, *Syndromes*, *supra* note 25, at 26. Most lawyers and judges lack extensive scientific training or experience and are uncomfortable dealing with scientific matters. *Id.* at 25. *See also* Englade, *supra* note 54, at 32 ("In many courtrooms, psychiatry and psychology have little more respect than crystal-gazing or tea-leaf reading.").

64. *Ethical Principles of Psychologists*, 45 AM. PSYCHOLOGIST 390 (1990).

65. *Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse*, *supra* note 54, at 655.

66. Englade, *supra* note 54, at 36.

tors alike have expressed concern about the venality of experts testifying in all types of cases.[67] Some mental health professionals, in their normal role of zealous child advocate, may blindly testify to whatever the prosecution desires.[68]

3. IMPROPER INTERVIEWING METHODS AND THE POTENTIAL FOR FALSE ACCUSATIONS

Both mental health and legal professionals have expressed concern about so-called improper methods of interviewing children and their potential "contaminating" effects upon the child's memory and the validity of the child's reports.[69] Improper interviewing methods may even cause children to make false accusations of sexual abuse.[70] For example, Coleman and Clancy, a public defender and a practicing psychiatrist, speak of a widespread occurrence of false accusations of child sexual abuse.[71] In their experience in reviewing hundreds of allegations and about 1,500 hours of audiotaped and videotaped interviews with children being investigated for possible abuse, they found that children quite regularly made allegations that could be proven factually false.[72] They assert that, in most cases, the interviewing style leads the child gradually to construct a mental picture of abuse. This picture then becomes the child's "memory."[73] Thus, it is difficult to determine whether the child's statements are based on memories of real events or on a mental image created by suggestive questioning.[74] The fact that most interviews are not taped, or are taped only after many sessions have taken place, exacerbates the problem.[75]

A report published in 1991 by the American Psychological Association titled "The Suggestibility of Children's Recollections" also suggests that adults can manipulate young children into making false accusations.[76] The report indicates that under persistent and accusa-

67. Graham, *supra* note 21, at 45. See Walter Olson, *The Case Against Expert Witnesses*, FORTUNE, Sept. 25, 1989, for a discussion of the increased use of expert witnesses in all types of cases. Webster's Dictionary defines "venal" as "capable of being bought or obtained for money or other valuable consideration . . .; open to corrupt influence . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2539 (1976).

68. Graham, *supra* note 21, at 45.

69. *See* Bulkley, *Legal Proceedings*, *supra* note 4, at 176.

70. *See* Mary de Young, *A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse*, 56 AM. J. ORTHOPSYCHIATRY 550, 551 (1986).

71. Coleman & Clancy, *supra* note 56, at 15.

72. *Id.* at 18.

73. *Id.*

74. *Id.*

75. *Id.* at 19.

76. Scanlan, *supra* note 13, at 1C.

tory questioning by an adult, an interviewer can influence a child to conform her story to the interviewer's version.[77] In addition, the juries in two highly publicized child sexual abuse trials, involving the founder of the McMartin Preschool in Manhattan Beach, California and a baby-sitter at the Old Cutler Presbyterian Church in Miami, Florida, explained their acquittals by citing the leading and suggestive questions of psychologists who interviewed the children.[78]

Significantly, the research done to date has been confined to highly controlled laboratory situations and does not involve a number of factors that tend to make children less prone to suggestibility: (1) a personally significant, meaningful event in which the child is actively involved; (2) a real-life event; (3) questions about central information; (4) an event lasting more than a few seconds; (5) a repeated event; and (6) possibly a traumatic event.[79] Another commentator also has noted that "[w]hen an event is salient, is experienced directly, and is well understood, children are likely to be more resistant to misleading inquiries than when the child is unsure or uninterested in what occurred."[80] These findings indicate that a child's resistance to suggestive questioning may be very high for questions involving important events, especially those related to sexual abuse.

B. *National Case Law Trends on Admissibility of the Testimony*

In response to the reliability problems of expert testimony in child sexual abuse prosecutions, courts have limited its admissibility. Courts have acted consistently nationwide in excluding an expert's opinion that the child has testified truthfully (Type 1).[81] These courts have espoused several arguments for holding such expert testimony inadmissible—primarily that an expert opinion regarding witness credibility has no more reliablility than a jury's determination of the witness' credibility.[82] In addition, courts have held credibility testi-

77. *Id.* In one series of experiments, a researcher posing as a janitor either cleaned a doll or roughly played with it. Another researcher, posing as the janitor's boss, later asked a group of five and six year old children if the man cleaned or played with the doll. All of the children answered accurately under gentle and neutral questioning. However, under persistent and ultimately accusatory questioning from the "boss"—who insisted that the janitor had played with the doll and not cleaned it—ninety percent of the children eventually changed their stories to conform to the boss' version. *Id.*

78. *Id.*

79. *Id.* at 177; *see also* Gail S. Goodman & Vicki S. Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. MIAMI L. REV. 181 (1985).

80. Bulkley, *Legal Proceedings*, *supra* note 4, at 177 (quoting Gary B. Melton & Ross A. Thompson, *Getting out of a Rut: Detours to Less Traveled Paths in Child Witness Research*, in CHILDREN'S EYEWITNESS MEMORY 209, 213 (Stephen J. Ceci et al. eds., 1987)).

81. *See supra* note 32.

82. *See, e.g.*, State v. Lindsey, 720 P.2d 73, 76 (Ariz. 1986); State v. Batangan, 799 P.2d

mony inadmissible because it "is nothing more than the expert's opinion on how the case should be decided,"[83] and because it tempts the jury to surrender their own common sense when evaluating credibility to the opinion of the expert.[84] Furthermore, some courts have reasoned that mental health professionals have no specialized knowledge for discerning truth.[85]

Only a few courts permit an expert to directly opine that the complainant was sexually abused (Type 2).[86] In *Townsend v. State*,[87] the Nevada Supreme Court articulated the typical reason for allowing this type of testimony: "[I]t was proper for the State's expert to express an opinion on the issue of whether the child had, in fact, been sexually assaulted or abused. Such an opinion, although embracing an ultimate issue, *represents both the peculiar expertise and consummate purpose of an expert's analysis.*"[88] The courts that allow an expert to testify that the child has been sexually abused do not, however, allow the expert to further opine that the defendant was the child's abuser.[89]

48, 54 (Haw. 1990); *see also* Commonwealth v. Seese, 517 A.2d 920, 922 (Pa. 1986) ("The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness.").

The Supreme Court of Oregon vigorously condemned the use of credibility testimony:

> We have said before, and we will say it again, but this time with emphasis—we really mean it—*no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists.

State v. Milbradt, 756 P.2d 620, 624 (Or. 1988).

The Federal Rules of Evidence do not permit an expert to testify as to whether another witness is telling the truth. *See* FED. R. EVID. 704(a); GRAHAM, *supra* note 21, at 278.

83. *See* State v. Moran, 728 P.2d 248, 253 (Ariz. 1986) (In most child sexual abuse cases, where "the only evidence consists of the victim's accusation and the defendant's denial, expert testimony on the question of who to believe is nothing more than advice to jurors on how to decide the case.").

84. *See, e.g.*, United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986).

85. *See* People v. Beckley, 456 N.W.2d 391, 407 (Mich. 1990); *see also* State v. Rimmasch, 775 P.2d 388, 406 (Utah 1989) ("[N]othing has come to our attention suggesting a general acceptance of the proposition that those who regularly treat symptoms of sexual abuse are capable of determining with a high degree of reliability the truthfulness of allegations that one has been abused.).

86. *See supra* note 33.

87. 734 P.2d 705 (Nev. 1987).

88. *Id.* at 708 (emphasis added). Note that under the Federal Rules of Evidence, expert testimony is "not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704.

89. *See, e.g.*, Glendening v. State, 536 So. 2d 212, 221 (Fla. 1988); Townsend v. State, 734 P.2d 705, 708 (Nev. 1987); Matter of Cheryl H., 200 Cal. Rptr. 789, 801 (Cal. Ct. App. 1984) (to allow such testimony is to assume that "peering into the mind of one person allows a

Courts are divided on the admissibility of expert testimony that the complainant's behavior is consistent with the behavior of a person who has been sexually abused (Type 3).[90] With this type of testimony, the expert compares the complainant's behaviors or "symptoms" to those of known sexual abuse victims, but does not specifically opine that the child in issue was abused. The expert may explicitly match the behavioral characteristics of the child with the criteria for the psychiatric diagnosis of post-traumatic stress disorder (PTSD)[91] or may just rely on PTSD as a general concept. Symptoms of PTSD might include flashbacks, nightmares, numbing of affect, difficulty sleeping or concentrating, or withdrawal from social relationships and activities.[92] The expert provides the jury with sexual abuse

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psychiatrist not only to draw valid conclusions about the mental state and behavior of that person but to draw equally valid conclusions about the conduct of another person").

Courts also have rejected expert testimony that seeks to establish that the defendant matches a profile of the type of person who sexually abuses children. For example, the Supreme Court of Washington prohibited expert testimony that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know" in a case where the defendant was the child complainant's grandfather. The court so ruled because the testimony invited the jury to conclude that the defendant's relationship to the victim made him statistically more likely to have committed the crime. State v. Petrich, 683 P.2d 173, 180 (Wash. 1984).

90. *See supra* note 34.

91. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 248-49 (rev. 3d ed. 1987). PTSD comprises the following components: (1) an experience or event that would be markedly distressing to almost anyone; (2) reexperiencing the traumatic event; (3) avoiding stimuli associated with the trauma, or numbing of general responsiveness; (4) persistent symptoms of increased arousal; i.e., difficulty falling asleep, irritability, difficulty concentrating; and (5) duration of the disturbance of at least one month.

92. The complete diagnostic criteria for PTSD are as follows:

> A. The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat to one's life or physical integrity; serious threat of harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community; or seeing another person who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence.
>
> B. The traumatic event is persistently reexperienced in at least one of the following ways:
>
> (1) recurrent and intrusive distressing recollections of the event
>
> (2) recurrent distressing dreams of the event
>
> (3) sudden acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)
>
> (4) intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma.
>
> C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following:

as a possible cause of the child's behaviors. The theory underlying this testimony is that a sexually abused child exhibits characteristics not common to non-sexually abused children,[93] and that these characteristics can be detected by a trained expert.[94]

The courts that allow Type 3 testimony reason that it assists the jury in understanding the child's behavior.[95] Conversely, some jurisdictions do not allow an expert to compare the complainant's behaviors to those of sexual abuse victims. This type of testimony implies that because the child's behavior is consistent with abuse having occurred, the crime charged must have been committed, even though the child's behavior is only one factor in determining the defendant's guilt.[96] Also, such testimony permits the expert to indicate how he or

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(1) efforts to avoid thoughts or feelings associated with the trauma
(2) efforts to avoid activities or situations that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma (psychogenic amnesia)
(4) markedly diminished interest in significant activities
(5) feeling of detachment or estrangement from others
(6) restricted range of affect, e.g., unable to have loving feelings
(7) sense of a foreshortened future, e.g., does not expect to have a career, marriage, or children, or a long life.

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by at least two of the following:
(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response
(6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event.

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month).

Id.

93. Research indicates that some victims of child sexual abuse exhibit no symptoms or symptoms common to nonabused children suffering from other stressors. *See supra* text accompanying notes 46-48.

94. See *supra* notes 55-68 and accompanying text for a discussion of the ability of mental health professionals to formulate reliable clinical judgments of whether a child has been sexually abused.

95. *See, e.g.*, Ward v. State, 519 So. 2d 1082 (Fla. 1st D.C.A. 1988).

96. *See, e.g.*, Nelson v. State, 782 P.2d 290, 297-99 (Alaska Ct. App. 1989); State v. Moran, 728 P.2d 248, 255 (Ariz. 1986); State v. Jensen, 415 N.W.2d 519, 522 (Wis. Ct. App. 1987). This same concern was expressed by Judge Zehmer of the *Ward* court. *See Ward*, 519 So. 2d at 1087. Judge Zehmer emphasized that expert testimony comparing the child's behavior to that of sexually abused children is only one factor in determining the defendant's guilt:

> The use of expert opinion testimony of the nature presented in this case must be carefully controlled to prevent its misuse by the prosecution, thus becoming the main feature of the trial, and eventually its misinterpretation by the jury during

she views the credibility of the child.[97] Although Federal Rule of Evidence 704 permits expert testimony embracing an ultimate issue to be decided by the trier of fact, the Rules do not permit an expert to offer an opinion as to whether another witness is telling the truth.[98] Furthermore, if Type 3 testimony is equivalent to an expert opinion that the witness is credible, and if the jury alone should determine credibility, then this type of testimony does not assist the jury.[99] Courts relying on this reasoning often say that the testimony "invade[s] the province of the jury" in determining credibility or impermissibly bolsters the witness' credibility.[100]

The overwhelming majority of jurisdictions allow testimony based on the child sexual abuse accommodation syndrome (CSAAS) (Type 4).[101] In many of the reported child sexual abuse cases, the child complainant has either delayed reporting the alleged abuse, related inconsistent versions of the allegations, recanted the allegations, or acted in some manner that would seem unusual for a sexual abuse victim. In 1983, Dr. Roland Summit devised CSAAS as a therapeutic tool to explain the origins of these seemingly bizarre behaviors in order to negate the inference that these behaviors disprove the occurrence of abuse.[102] According to Summit, the sexually abused

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> deliberations. Such opinion testimony is competent to prove only that the victim is exhibiting or suffering from symptoms that have been found by experts in the field of psychology to be consistent with the child having undergone an experience of sexual battery or abuse. As such, the expert opinion constitutes circumstantial evidence from which it may be inferred that the child has suffered episodes of abuse at the hands of someone at some time. Such testimony, however, may not be received as corroborating evidence that the defendant committed the criminal act charged on the specified occasion.

Id.

97. *See, e.g., Moran*, 728 P.2d at 254-55; *see also supra* note 84.

98. MICHAEL GRAHAM, *supra* note 21 at 278.

99. *See, e.g., Moran*, 728 P.2d at 255 ("[W]e do not believe the jury needs an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred."); Russell v. State, 712 S.W.2d 916, 917 (Ark. 1986) ("[L]ay jurors are fully competent to determine whether the history given by the victim was consistent with sexual abuse.").

100. *See, e.g.,* Commonwealth v. Garcia, 502 A.2d 253, 257 (Pa. Super. Ct. 1985).

101. *See supra* note 35.

102. *See* Summit, *supra* note 7. Summit explained that sexually abused children learn to "accommodate" the abuse, which allows for immediate survival within the family but contradicts the common assumptions about sexual abuse. *Id.* at 179, 181. He classified the reactions of the sexually abused child into five categories: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. *Id.* at 181.

Stage 1 is secrecy, an element inherent in the adult-child relationship. The offender makes it clear to the child that it would be bad or dangerous for the child to tell anyone about the abuse. *Id.* Contrary to the general expectation that the child would seek help, sexually abused children often do not report the abuse out of fear of being blamed for the incident or fear that

child often is "fearful, tentative, and confused about the nature of the continuing sexual experience and the outcome of disclosure."[103] Many victims of child sexual abuse do not seek help, make no protest or outcry, delay disclosure, and then retract the accusation.[104] This coping behavior of the child contradicts society's expectations of how a sexual abuse victim should react to the abuse.[105]

Defense counsel may attempt to impeach the child's credibility by raising this behavior on cross-examination and then using the presence of such behavior to argue that the alleged abuse did not occur. This behavior seemingly impeaches the child regardless of whether it comes out on direct or cross-examination or through the testimony of the child or another witness. The prosecutor then offers one or more expert witnesses to rehabilitate the child's credibility by explaining CSAAS — sometimes explicitly by name, but often only by concept.

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no one will be able to protect them from retaliation by the abuser. *Id.* Stage 2 is helplessness, the absence of power a child has in a relationship with a parent or trusted adult. A victim whose compliance was not achieved through overwhelming force or threat of violence is not necessarily a willing accomplice. Summit argues that the actions or gestures of a parent are compelling forces for a dependent child. *Id.* at 183.

Stages 3 through 5 occur as a direct result of the abuse. In stage 3, the child, faced with continuing helpless victimization, learns to achieve a sense of power and control by believing that she has provoked the abuse and by hoping that if she learns to be good she can earn love and acceptance. *Id.* at 184. This desperate assumption of responsibility may lead the child to develop accommodation mechanisms including multiple personalities, self-mutilation, promiscuous sexual activity, and substance abuse. *Id.* at 185. Stage 4 is disclosure of the abuse. Children never disclose most incidents of sexual abuse. *Id.* at 186. However, if the child does disclose the abuse, the child usually does so after years of continuing sexual abuse and an eventual breakdown of accommodation mechanisms. *Id.* A child "faces an unbelievable audience when she complains of ongoing sexual abuse." *Id.* Finally, stage 5 is retraction of the accusation. A child likely will reverse her accusation because the abuser and other family members convince her that she is responsible for destroying the family. *Id.* at 188.

103. *Id.* at 178.

104. *Id.* at 181, 183, 186, 188.

105. *Id.* at 178. In one of the earliest reported child sexual abuse cases, the Supreme Court of Oregon explained this phenomenon:

> If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been a victim of sexual abuse by a member of her family. The expert testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility.

State v. Middleton, 657 P.2d 1215, 1219-20 (Or. 1983).

This testimony is intended to rebut the inference that this behavior is inconsistent with the child having been abused. In theory, the expert will provide the jurors, who commonly lack experience with child sexual abuse victims, with alternative explanations for the child's behavior.[106]

III. THE APPROACH OF THE PENNSYLVANIA COURTS

A. *The Development of the Case Law*

The Superior Court of Pennsylvania first addressed the issue of the admissibility of expert testimony in a child sexual abuse prosecution in the 1985 case of *Commonwealth v. Baldwin*.[107] The *Baldwin* court permitted a social worker to explain the dynamics of intra-family sexual abuse and the behavior patterns of its victims, the psychological forces which cause the victim to keep sexual abuse a secret for a long time, and the reasons why victims often cannot recall exact dates or times or describe specific incidents in detail—testimony of the third and fourth types described in the introduction to this Comment.[108] The court noted that the emotional trauma of sexual abuse may cause the child to behave in a manner different from other crime victims; i.e., child sexual abuse victims often have difficulty remembering dates and times and describing details of sexual acts, appear as reluctant witnesses, and sometimes refuse to testify or recant prior allegations out of fear or coercion.[109] Based on the decisions of sev-

106. The expert testimony offered by the prosecution in *Middleton* illustrates typical testimony of this type. Approximately six weeks after reporting to a police officer and testifying before a grand jury that her father had raped her, the child complainant wrote a statement that she had lied about the rape so she could get "out on her own." *Id.* at 1216. Defense counsel attacked the child's credibility by introducing her retraction during cross-examination of the child. *Id.* Following this impeachment, the state offered expert testimony from a social worker to explain that the child's retraction was not inconsistent with sexual abuse:

> Q. [W]hat about retracting reports before a Grand Jury or made to police? What about that?
>
> A. That is . . . a very common kind of thing to happen. When a child does do that, . . . they realize this is my father . . . and I still care for this person. And look what I'm doing to them . . . [and] to my family. And the easiest thing to do, of course, is to say gee, I just made it all up and it isn't true after all.
>
> Q. Is any of the behavior that you have learned of [the child complainant], in supervising her case, different than other sexually abused children?
>
> A. No, . . . it's very typical for a teenage sex abuse victim.

Id. at 1218-19 n.6.

107. 502 A.2d 253 (Pa. Super. Ct. 1985).

108. *Id.* at 255.

109. *Id.* at 258.

eral other jurisdictions admitting this type of testimony,[110] the court allowed the testimony "so long as the expert [did] not render an opinion on the accuracy of the victim's recitation of the facts."[111] The court found that such testimony did not "invade the province of the jury" even though it indirectly tended to bolster the victim's credibility.[112]

The court also noted that, unlike the cases from other jurisdictions allowing an expert to testify that the victim's behavior fit the pattern of behaviors described, the expert in this case framed his testimony in general terms and did not testify specifically about the victim.[113] Therefore, the court concluded, it is "even clearer in the instant case that the expert did not invade the province of the jury because all the inferences were left for the jury to draw."[114] The court reserved decision on whether it would permit the expert to testify specifically that the victim's behavior fit the pattern described.[115]

A year later, the Supreme Court of Pennsylvania, in *Commonwealth v. Seese*,[116] found inadmissible expert testimony by a pediatrician that it was very unusual for children of an age similar to that of the child complainant to lie about sexual abuse.[117] Justice Flaherty, writing for the court, considered this testimony an "expert opinion as to the veracity of the class of potential witnesses of which the victim was a member," and, thus, an encroachment on the jury's credibility-determining function.[118] Admission of this testimony, the court argued, would encourage jurors to defer to the expert's assessment of the truthfulness of a class of people of which the particular witness is a member, rather than determining the credibility of the particular

110. *See* People v. Dunnahoo, 199 Cal. Rptr. 796 (Cal. Ct. App. 1984); State v. Kim, 645 P.2d 1330 (1982), *overruled on other grounds*, 799 P.2d 48 (Haw. 1990); State v. Middleton, 657 P.2d 1215 (Or. 1983); State v. Haseltine, 352 N.W.2d 673 (Wis. App. 1984).

111. *Baldwin*, 502 A.2d 253, 257 (Pa. Super. Ct. 1985).

112. *Id.* ("It is a commonplace fact that the testimony of one witness may tend to corroborate another. Far from being improper, this is normal and is good trial strategy.").

113. *Id.* at 257 n.4.

114. *Id.*

115. *Id.*

116. 517 A.2d 920 (Pa. 1986).

117. *Id.* at 922. This is Type 1 testimony.

118. *Id.* at 921.

witness who testified.[119] In *Commonwealth v. Pearsall*,[120] the superior court interpreted *Seese* as prohibiting only expert testimony that presumes to pass directly upon the veracity of a particular witness, while permitting expert testimony that supports the credibility of a witness inferentially by establishing that a witness' testimony is consistent with the acts and responses evidenced in known child sexual abuse cases.[121] Whether the testimony in question falls into the permissible category would be determined on a case-by-case basis.[122]

The Pennsylvania Supreme Court squarely addressed *Baldwin* in *Commonwealth v. Davis*.[123] Again writing for the court, Justice Flaherty held that testimony by a clinical child psychologist that "children who have not been involved in sexual experiences typically do not fantasize about sexual experiences" was inadmissible.[124] The superior court had affirmed the defendant's sentence, reasoning that the expert's testimony should be admitted under *Baldwin* because the expert did not expressly comment on the victim's credibility.[125] The state supreme court reversed the order of the superior court, holding that the *Seese* decision unequivocally prohibited such testimony, and "disapprove[d] [*Baldwin*] insofar as it conflicts with [*Seese*] and this decision."[126]

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119. *Id.* The court expressed concern about the consequences of admitting such testimony: "[I]f testimony as to the veracity of various classes of people on particular subjects were to be permitted as evidence, one could image 'experts' testifying as to the veracity of the elderly, of various ethnic groups, of members of different religious faiths, of persons employed in various trades and professions, etc." *Id.* at 922.

Justice Larsen concurred in the result only, advocating the rationale set forth by the Eighth Circuit in United States v. Azure, 801 F.2d 336 (8th Cir. 1986). *See Seese*, 517 A.2d at 923 (Larsen, J., concurring). The *Azure* court excluded expert testimony that the complainant was believable as "putting an impressively qualified stamp of truthfulness on [the complainant's] story," but indicated that an expert would be permitted to generally testify about a child's ability to separate truth from fantasy, express an opinion as to whether sexual abuse is consistent with the complainant's story, or compare patterns of consistency in stories of child sexual abuse victims with the complainant's story. *Azure*, 801 F.2d at 340.

120. 534 A.2d 106 (Pa. Super. Ct. 1987), *appeal denied*, 568 A.2d 1246 (Pa. 1989), *overruled by* Commonwealth v. Garcia, 588 A.2d 951 (Pa. Super. Ct. 1991).

121. *Id.* at 108-09 n.1.

122. *Id.*

123. 541 A.2d 315 (Pa. 1988).

124. *Id.* at 316-17.

125. *Id.*

126. *Id.* at 317 n.1. In another case, the superior court found that the *Davis* decision "supports and clarifies the distinction suggested in *Pearsall*." *See* Commonwealth v. Thek, 546 A.2d 83, 87 (Pa. Super. Ct. 1988), *overruled by* Commonwealth v. Garcia, 588 A.2d 951 (Pa. Super. Ct. 1991). The *Thek* court excluded the testimony of the Commonwealth's expert that "[w]ithout reservation [the complainant's] account of ongoing sexual abuse . . . is credible" and four statements relating to the credibility of the victim in his written report. *Id.* at 88. Consistent with the *Pearsall* distinction, the court reasoned:

> While there is nothing objectionable per se about statements that the physical

The Pennsylvania Supreme Court expanded the category of impermissible expert testimony by a 4-3 decision in *Commonwealth v. Gallagher*.[127] In this rape prosecution, the court excluded expert testimony on rape trauma syndrome because "[i]t is clear that [its] only purpose . . . was to *enhance the credibility* of the victim."[128] The victim's positive identification of the defendant at trial was seriously undermined by the fact that she had been unable to identify him two weeks after the crime. The Commonwealth's expert, Ann Burgess,[129] explained how the symptoms experienced by a rape victim following the attack could affect the victim's ability to identify the rapist.[130] Burgess further testified that the victim in this case had experienced a "flashback" which enabled her to identify her rapist five years later in court.[131] The court determined that the prosecution introduced this testimony "for the sole purpose of shoring up the credibility of the victim on the crucial issue of identification."[132]

The superior court then used the *Gallagher* decision to further restrict the admissibility of expert testimony in child sexual abuse cases. First, in *Commonwealth v. Emge*,[133] the court concluded that testimony describing the complainant's change in behavior after the alleged incidents and explaining how this behavior may be consistent with having been sexually abused can serve no purpose other than to bolster the credibility of the alleged victim.[134] Although *Davis* and *Seese* prohibited only testimony regarding the alleged victim's ability to verbally communicate the truth, the *Emge* court found that behav-

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> evidence and the victim's statements were consistent with physical evidence and statements in known child abuse cases, the expert in this case exceeded the permissible bounds of such testimony when he went on to specifically state that the victim 'was credible.'

Id.

127. 547 A.2d 355 (Pa. 1988).

128. *Id.* at 358.

129. Burgess co-authored an article in the American Journal of Psychiatry which is credited with being the first study of rape victims to use the term "rape trauma syndrome." *See* Ann Wolbert Burgess, D.N.SC. & Lynda Lytle Holmstrom, PH.D., *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

130. *Gallagher*, 547 A.2d at 357.

131. *Id.* at 358.

132. *Id.* at 357. In his dissent, Justice Larsen argued that, although he agreed that an expert witness may not testify as to the truthfulness of a witness without impermissibly invading the province of the jury, the expert in this case did not testify about the truthfulness of the victim. *Id.* at 360 (Larsen, J., dissenting). Justice Papadakos, also in dissent, asserted that profile evidence of this type should be admitted for the limited purpose of helping the jury understand the "seemingly unexplainable reactions of crime victims." *Id.* at 361 (Papadakos, J., dissenting). He concluded that the testimony in this case was more like that permitted in *Baldwin* rather than that excluded in *Seese*. *Id.* at 362.

133. 553 A.2d 74 (Pa. Super. Ct. 1988).

134. *Id.* at 75-76. This is Type 3 testimony.

ioral testimony equally invades the province of the jury.[135] The court found that here, as in *Gallagher*, the testimony "would invest the opinions of experts with an unwarranted appearance of authority on the subject of credibility, which is within the facility of the ordinary juror to assess."[136] However, the court expressly reserved decision on whether all expert psychological testimony comparing the general behavioral patterns of sexually abused children to a specific allegedly abused child is admissible.[137]

A few months later, in *Commonwealth v. Gibbons*,[138] the Pennsylvania Superior Court expanded the prohibition it announced in *Emge*. The Commonwealth's expert testified concerning the general dynamics of child sexual abuse and the behavior patterns of its victims.[139] Although the expert did not testify that the complainant's behavior matched the behavior of known victims of child sexual abuse, the court nonetheless concluded that the testimony impermissibly invaded the province of the jury.[140]

The superior court went even further in *Commonwealth v. Dunkle*,[141] excluding testimony based on CSAAS. In *Dunkle*, the victim's credibility was undermined by the fact that she had delayed reporting the incident and failed to recall certain details.[142] The Commonwealth offered expert testimony to explain these behaviors.[143] Although the expert had examined the child complainant,[144] she did not relate any of her testimony to the child in question. The court concluded:

> In offering this testimony, the Commonwealth clearly hoped to legitimize the victim's lengthy delay in reporting the incident and her failure to recall certain details of the incident, thereby allowing the jury to accept her version of the facts. In essence, this only serves to bolster the credibility of the victim.[145]

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135. *Id.*

136. *Id.* at 77. The court added that it was "not convinced that a child clinical psychologist is in a better position to make a judgment on the reliability of a child's testimony than a jury of twelve." *Id.*

137. *Id.* The dissenting judge found that while the *Gallagher* testimony was similar to that given in *Davis* and *Seese*, the testimony here fell far short of that forbidden testimony. *Id.* at 78 (Brosky, J., dissenting). Here, the expert never affirmatively stated that the child was a victim of abuse. *Id.*

138. 556 A.2d 915 (Pa. Super. Ct. 1989), *appeal denied*, 567 A.2d 651 (Pa. 1989).

139. *Id.* at 916.

140. *Id.*

141. 561 A.2d 5 (Pa. Super. Ct. 1989), *aff'd in part, rev'd in part*, 602 A.2d 830 (Pa. 1992).

142. *Id.* at 9.

143. *Id.* This is Type 4 testimony.

144. *Id.* at 9 n.5.

145. *Id.*

Oddly, the superior court in *Commonwealth v. Cepull*[146] seemed to come full circle back to the *Baldwin* distinction.[147] The Commonwealth offered expert testimony regarding the generalized symptoms of rape trauma syndrome.[148] The expert had never examined the victim, never diagnosed her as suffering from the syndrome, and never directly opined that the victim was or was not telling the truth.[149] The court distinguished *Gallagher* on this basis, concluding that "the expert's testimony did not improperly enhance the victim's credibility because the jury still had to pass on the credibility of the expert witness and whether the victim suffered from rape trauma syndrome. . . ."[150] However, the expert's testimony concerning studies which established that only three percent of rape victims lie was inadmissible under *Baldwin*.[151]

Thus, in a line of decisions prior to *Commonwealth v. Garcia*,[152] the superior court eliminated each of the types of expert testimony discussed earlier in this Comment. In each case, the court slowly drove the mental health professional from the courtroom with an unsubstantiated assertion that the expert's testimony impermissibly bolstered the credibility of the victim and therefore invaded the province of the jury.

B. *The Case of* Commonwealth v. Garcia

1. THE FACTS

The case of *Commonwealth v. Garcia*[153] arose out of alleged incidents of child sexual abuse[154] perpetrated by Jose Garcia during 1985 and 1986.[155] During Garcia's jury trial, the Commonwealth presented the testimony of two children, aged nine and eight,

146. 568 A.2d 247 (Pa. Super. Ct. 1990), *appeal denied*, 578 A.2d 411 (Pa. 1990), *overruled by* Commonwealth v. Garcia, 588 A.2d 951 (Pa. Super. Ct. 1991).

147. "[S]o long as the expert does not render an opinion on the accuracy of the victim's recitation of facts, his or her general testimony on the dynamics of sexual abuse does not prejudice the jury." *Baldwin*, 502 A.2d at 257.

148. *Id.* at 248. The complainant in this case was 10 years old at the time of the rape. *Id.* at 247. Thus, this case falls within the scope of the other child sexual abuse cases discussed throughout this Comment.

149. *Id.* at 248-49.

150. *Id.* at 249.

151. *Id.*

152. 588 A.2d 951 (Pa. Super. Ct. 1991).

153. *Id.*

154. "Child sexual abuse" is used here to encompass all of the charges against Garcia: involuntary deviate sexual intercourse (18 PA. CONS. STAT. ANN. § 3123); corruption of minors (18 PA. CONS. STAT. ANN. § 6301); rape (18 PA. CONS. STAT. ANN. § 3121); and criminal attempt, rape (18 PA. CONS. STAT. ANN. § 901). *Id.*

155. *Garcia*, 588 A.2d at 952.

revealing that Garcia had subjected them to multiple acts of sexual abuse during the period in question.[156] The children's testimony indicated that they had delayed reporting the incidents of abuse.[157]

The trial court allowed the Commonwealth to introduce the expert testimony of Dr. DeJong, a pediatrician and co-director of the Pediatric Sexual Assault Follow-up Program.[158] DeJong testified that one-third of child sexual abuse victims who report the incident do so within twenty-four hours; another third of the victims do so within twenty-four to seventy-two hours; and the remainder of the victims may take years to report the incident.[159] DeJong also testified regarding the reasons why children delay reporting sexual abuse—Type 4 testimony.[160] DeJong did not attempt to compare the alleged victims in the case with known sexual abuse victims he had interviewed,[161] nor did he render an opinion as to whether delayed reporting was normal or abnormal in child sexual abuse cases.[162]

On cross-examination of the victims and in closing argument, defense counsel highlighted the victims' delay in reporting the abuse as a central element of Garcia's defense.[163] Accordingly, the trial court instructed the jury on how the issue of delayed reporting should enter into their deliberations: "[D]elay or failure to make prompt complaint are factors bearing upon the believability of [the witnesses'] testimony and must be considered by you in light of all the evidence in the case."[164]

Garcia was convicted and sentenced to a term of seven to fifteen years.[165] Garcia appealed, and in a split panel decision, the Superior Court of Pennsylvania reversed the convictions and ordered a new trial.[166] The court granted the Commonwealth's petition for reargu-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* DeJong also discussed physical trauma in child sexual abuse cases and the usual time frame for resolution of such trauma, the typical abuser profile, the methods abusers use to cover their tracks, the percentage of abusers who are family members, friends of the family, and strangers, and the enormity of the sexual abuse problem. *Id.* at n.3. The court's holding rendered its consideration of this portion of the testimony unnecessary, but the court noted that this testimony was not relevant to any issue to be proven in the case, and that the prejudicial impact of this testimony clearly outweighed any probative value it may have had. *Id.* Discussion of DeJong's testimony for the remainder of this Comment focuses only on the portion related to delayed reporting because the court based its holding on this portion.
161. *Id.* at 954.
162. *Id.* at 962 (Ford Elliott, J., dissenting).
163. *Id.* at 961-62.
164. *Id.* at 962.
165. *Id.* at 951.
166. *Id.*

ment before the court *en banc*.[167] The Commonwealth argued that DeJong's testimony was a permissible explanation of behavior that is beyond the experience of ordinary jurors.[168] Garcia argued that the trial court erred in allowing the expert testimony of Dr. DeJong. He characterized DeJong's testimony as an "inadmissible attempt by the Commonwealth to bolster the credibility of the child witness/victims who testified against him."[169] The superior court vacated the judgment of sentence and remanded the matter for a new trial.[170] The court held that expert testimony concerning behavior patterns of child sexual abuse victims is inadmissible when offered to explain the conduct of the complainant in a child sexual abuse prosecution because it bolsters the child's testimony and therefore withdraws the issue of witness credibility from the jury.[171]

2. THE COURT'S ANALYSIS

At Garcia's trial, the judge allowed Dr. DeJong's testimony based on *Commonwealth v. Baldwin*,[172] which permitted expert testimony regarding the behavior patterns of child sexual abuse victims so long as the expert did not opine as to the veracity of the child's testimony.[173] The superior court in *Garcia* based its analysis of the testimony's admissibility on the premise that the Pennsylvania Supreme Court had expressly overruled *Baldwin* inasmuch as it conflicted with *Commonwealth v. Seese*[174] and *Commonwealth v. Davis*.[175] The court began by examining what was left of the *Baldwin* holding in light of its progeny.

According to the *Garcia* court, *Baldwin* prohibited only expert testimony directly concerning the veracity of the child victim/witness.[176] *Seese* and *Davis* "expanded this prohibition to include expert testimony which commented on the veracity of a class of potential witnesses of which the victim was a member,"[177] based on the established proposition of law that the determination of the veracity of a witness is reserved exclusively for the jury.[178] The *Garcia* court anal-

167. *Id.*
168. *Id.*
169. *Id.* at 952.
170. *Id.* at 956.
171. *Id.*
172. 502 A.2d 253 (Pa. Super. Ct. 1985).
173. *Id.*
174. 517 A.2d 920 (Pa. 1986).
175. 541 A.2d 315 (Pa. 1988).
176. *Garcia*, 588 A.2d at 953.
177. *Id.*
178. *Id.*

ogized the rape case of *Commonwealth v. Gallagher*[179] to the child sexual abuse context, and concluded that *Gallagher* further eroded the *Baldwin* holding.[180] The *Garcia* court reasoned: "If evidence outlining the behavior profiles of rape victims is inadmissible, we fail to understand why behavior profiles of child sexual abuse victims should be admissible."[181]

The court interpreted *Commonwealth v. Emge*[182] and *Commonwealth v. Gibbons*[183] as further extending the prohibition on expert testimony that originated in *Baldwin*.[184] These decisions excluded, respectively, testimony that matched the behavior of the alleged victim to that of known victims of child sexual abuse, and testimony regarding the general behavioral characteristics of child sexual abuse victims that did not particularly refer to the child in the case.[185] The court found that *Commonwealth v. Dunkle*[186] completed the erosion of *Baldwin* by excluding testimony explaining a victim's delay in reporting the offense.[187]

In reviewing Dr. DeJong's testimony, the court concluded that his explanation for the percentage of victims who delay reporting was an attempt by the Commonwealth to legitimate the complainants' delay in reporting the incidents.[188] In the court's view, the prosecution offered this testimony to persuade the jury to "adopt an expert's opinion that delay was a normal occurrence in two-thirds of all child sexual abuse cases, thus eviscerating the prompt complaint instruction."[189] Thus, this testimony impermissibly bolstered the credibility of the victims and invaded the province of the jury. The court expressed concern that jurors would be "unduly impressed by an expert" and would accept his opinion "even though, upon reflection, they would realize that in the particular field under discussion they are as much at home as the expert."[190]

The court rejected the Commonwealth's attempt to distinguish between testimony that focuses upon the psychological processes of the victim and that which centers upon the behavior patterns of vic-

179. 547 A.2d 355 (Pa. 1988).
180. 588 A.2d at 953-54.
181. *Id.* at 954 n.6.
182. 553 A.2d 74 (Pa. Super. Ct. 1988).
183. 556 A.2d 915 (Pa. Super. Ct. 1989).
184. *Id.* at 954.
185. *Id.*
186. 561 A.2d 5 (Pa. Super. Ct. 1989).
187. *Id.*
188. *Id.* at 955.
189. *Id.*
190. *Id.*

tims.[191] The Commonwealth cited *Commonwealth v. Pearsall*, *Commonwealth v. Thek*, and *Commonwealth v. Cepull* for the distinction between expert testimony that directly and inferentially passes on the victim's credibility. The Commonwealth argued that while an expert may not directly opine as to the veracity of a witness, the expert may describe the general behavior and psychological characteristics of child sexual abuse victims.[192] The court noted that this distinction had been advanced in the dissenting opinions in *Gallagher*, and thus was implicitly rejected by the *Gallagher* majority.[193]

The court concluded that it was "constrained to hold that expert testimony regarding the behavior patterns of victims of child sexual abuse is inadmissible when offered to explain the conduct of the witness/victim in a case."[194] The court declared that it must balance society's interest in prosecuting criminals with a defendant's constitutional right to trial by jury in order to "do justice."[195] The court concluded that the Pennsylvania Supreme Court had achieved this balance by prohibiting expert testimony which passes on or enhances the victim's credibility, and that Dr. DeJong's testimony clearly fell within this prohibited category.[196]

IV. PENNSYLVANIA HAS GONE TOO FAR

A. *Critique of* Garcia

1. USE OF PRECEDENT

Of course, Pennsylvania is not the only state to recognize the problems associated with admitting expert testimony in child sexual abuse prosecutions. The overwhelming majority of jurisdictions have limited the admissibility of such testimony in some fashion, usually by allowing only testimony based on CSAAS or testimony that the child's behavior is consistent with abuse.[197] The Superior Court of Pennsylvania, however, has eliminated expert testimony when offered

191. *Id.*

192. *Id.* n.9.

193. *Id.* The court overruled the cases cited by the Commonwealth to the extent that they were inconsistent with its reading of the Pennsylvania supreme court precedents. *Id.* n.9. On the purported basis that it was bound by Pennsylvania precedent, the court declined to follow its sister states that allow the type of expert testimony at issue, as urged by the Commonwealth. *Id.* The court also disagreed that DeJong's testimony centered only on the behavior patterns of the victims and not on their thought processes. *Id.* n.10. According to the court, his testimony examined why the victims behaved as they did, not merely how they acted, and thus addressed the victims' thought processes. *Id.*

194. *Id.* at 956.

195. *Id.*

196. *Id.*

197. *See supra* notes 28-35 and accompanying text.

for any purpose. The main analytical weakness of the line of decisions culminating in *Garcia* is that the court has ignored the distinctions between the various types of possible testimony, concluding instead that any expert testimony regarding child sexual abuse victims can serve no purpose other than to impermissibly bolster the credibility of the victim/witness. In each case, the court used the previous decision as precedent to summarily conclude that the testimony invaded the province of the jury without considering any possible distinctions in the testimony.

Garcia is the only case in the line of decisions since *Baldwin* to be heard by the full superior court and to fully reveal the conflicting views of the judges in the dialogue between the majority and dissenting opinions. The majority and dissenting opinions reflect widely divergent interpretations of precedent. The majority concluded that it was "constrained to hold" that the expert testimony in this case was inadmissible because it tended to bolster the victim's testimony and thereby took the issue of witness credibility away from the jury.[198] The limited holdings of the supreme court in *Seese*, *Davis*, and *Gallagher*, however, do not require the blanket prohibition on all forms of expert testimony in child sexual abuse prosecutions effected by the line of decisions culminating in *Garcia*.[199] Rather, the superior court, on its own initiative, "obliterated the fine lines drawn by . . . [the supreme court],"[200] step-by-step, "driv[ing] the expert from the courtroom in cases involving the sexual abuse of children."[201]

Clearly *Seese* and *Davis* specifically disapproved the use of expert testimony that comments *directly* on the veracity of a particular witness or a class to which the witness purportedly belongs. In *Commonwealth v. Pearsall* and *Commonwealth v. Thek*, the superior court interpreted *Seese* and *Davis* as continuing to permit the type of testimony allowed in *Baldwin*—expert testimony that supports the credibility of the child complainant inferentially by establishing that the

198. *See Garcia*, 588 A.2d at 956.

199. Unfortunately, about a year after the *Garcia* decision, the Supreme Court of Pennsylvania confirmed the *Garcia* majority's reading of *Seese*, *Davis*, and *Gallagher*. On the appeal of *Dunkle*, the supreme court affirmed the superior court's holding that an expert is not permitted to explain why sexually abused children may not recall certain details and why they may delay reporting the incident. Commonwealth v. Dunkle, 602 A.2d 830 (Pa. 1992). The supreme court reasoned that expert testimony was unnecessary to explain these behaviors because they are "easily understood by lay people." *Id.* at 836. It appears that the *Garcia* majority just barely jumped the gun. *See* Commonwealth v. Evans, 603 A.2d 608, 611 (Pa. Super. Ct. 1992) (superior court relied on *Dunkle II* and *Garcia* in holding that trial court improperly allowed expert testimony describing CSAAS).

200. *Id.* at 958.

201. *Id.* at 956.

child's behavior is consistent with the acts and responses characteristic of known sexual abuse victims.[202] In fact, as recently as 1990, in *Commonwealth v. Cepull*, the superior court relied on this distinction and admitted expert testimony concerning a generalized description of the behavior patterns of rape victims, while excluding testimony establishing that rape victims lie in only three per cent of cases.[203]

The Commonwealth relied on *Pearsall*, *Thek*, and *Cepull* in its argument before the *Garcia* court. The court, however, summarily overruled its prior decisions in these cases as inconsistent with its reading of the supreme court precedents of *Seese*, *Davis*, and *Gallagher*.[204] Thus, it appears that the majority interpreted the *Gallagher* rape case as extending the holdings of *Seese* and *Davis* to prohibit expert testimony on the behavioral patterns of sexual abuse victims as well.[205] In doing so, the court ignored its own limitation of the *Gallagher* holding in *Cepull*. While in *Gallagher*, the expert testified that she examined the victim, diagnosed the victim as suffering from rape trauma syndrome, and believed the syndrome affected the victim's ability to identify her assailant, the expert in *Cepull* merely testified as to the generalized symptoms of rape trauma syndrome without diagnosing the victim as suffering from the syndrome. The *Cepull* court concluded that this testimony did not improperly enhance the victim's credibility. Thus, the *Gallagher* decision merely prohibited an expert from diagnosing the victim as suffering from rape trauma syndrome; the court did not specifically reach the issue of admissibility of generalized testimony on rape trauma syndrome.[206]

With *Emge*, *Gibbons*, and *Dunkle*, the superior court completely ignored *Baldwin* and the distinctions it had carved out in *Pearsall* and *Thek*. The court finally re-examined *Baldwin* in *Garcia*. The premise that the authority of *Baldwin* had so eroded that it no longer had any precedential value underscored the court's opinion. Significantly, the court rejected the dissent's argument that expert testimony regarding the behavioral and psychological characteristics of child sexual abuse victims is admissible so long as the expert's opinion does not assess or evaluate the credibility of the particular victim.[207]

The *Garcia* court also slighted the dissent's detailed description of five basic roles that an expert may assume when testifying in a child sexual abuse prosecution. The dissent explained these roles in order

202. *See Pearsall*, 534 A.2d at 108-09 n.1; *Thek*, 546 A.2d at 87-88.
203. *See Cepull*, 568 A.2d at 248-50.
204. *Garcia*, 588 A.2d at 955 n.9.
205. *See id.* at 960 (Ford Elliott, J., dissenting).
206. *Id.* at 961.
207. *See id.* at 956.

to illustrate the varied purposes for which the testimony might be offered.[208] The dissent described the testimony offered by Dr. DeJong as "one of the purest examples of the proper use of expert testimony in an abuse case."[209] The court, however, characterized the testimony solely as "an attempt by the Commonwealth to legitimize the victims' delay in reporting the incidents."[210]

2. UNDERLYING ASSUMPTIONS

In eliminating the last vestige of expert testimony in child sexual abuse prosecutions, the *Garcia* majority reasoned that all forms of such testimony bolster the credibility of the victim and tempt the jury to overvalue the expert's opinion. This reasoning embodies two basic assumptions: (1) that the average juror possesses as much knowledge as an expert on the dynamics of child sexual abuse and the behavior patterns of its victims; and (2) that jurors will be unduly influenced by the aura of prestige of the expert and defer their own opinions to that of the expert.[211]

The dissent called into question both of these assumptions. First, the dissent argued that the use of expert testimony in child sexual abuse cases meets the criteria for admission of expert testimony in

208. *See id.* at 958-59. The dissent described five basic roles as proposed by a legal commentator. *See* Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1040-42 (1988).

209. *See id.* at 961.

210. *Id.* at 955.

211. These assumptions reflect a common theme echoed by many courts when faced with expert psychological testimony. Courts generally hesitate to accept participation by mental health professionals in the criminal process. Most of the time, the fields of law and psychology operate in an atmosphere of "mutual disdain." *See* McCord, *Syndromes*, *supra* note 25, at 23; *see also supra* note 63.

The Texas Court of Appeals embraced similar assumptions in Dunnington v. State, 740 S.W.2d 896 (Tex. Ct. App. 1987). The state offered expert testimony to rebut defense counsel's contention that the child complainants were falsely pursuing the allegations under the influence of the defendant's estranged wife and to explain the delayed reporting by the children and their mother. *Id.* at 897. The expert explained that delayed reporting may result from fear for the safety of the victim or a threatened loved one, and fear of loss of attachment (removal of child or parent). *Id.* at 898. The expert also explained that the mother was suffering from "spousal denial"—the nonoffending spouse's desire not to believe a loved one capable of such heinous conduct. *Id.* at 899.

The *Dunnington* court reversed the defendant's conviction, concluding that "[t]hese are not such complicated motivations as necessitate expert explanation. . . . Such elementary and commonplace sentiments fill our daily lives even outside the criminal justice process." *Id.* at 898-99. The court also expressed concern that "[t]he disparate expertise of the witness and the average juror tends to produce a natural inclination to accept the expert testimony as gospel." *Id.* at 898. The court harshly added: "Expert testimony is not justified by the expert's need to publish his work or the prosecutor's need to preclude the jury from making up its own mind." *Id.* at 899.

Pennsylvania.[212] The dissent explained:

> There is a growing body of reliable scientific data to support the fact that the sexual abuse of children embodies psychological and societal components that are not generally within the common understanding and experience of lay observers. The nature of this abuse is often subject to myths and stereotypes. While a juror easily might comprehend that sexual abuse can have an impact on a child psychologically, a juror without some type of expert analysis, would not be able to understand the behavioral and psychological manifestations of this impact.[213]

The majority refuted this argument on the grounds that rape is as abhorrent as child sexual abuse and the behavior of rape victims is just as unusual as the behavior exhibited by victims of child sexual abuse. Nonetheless, the court continued, the supreme court decided in *Gallagher* that the average juror was competent to assess the credibility of rape victims.[214]

The majority's view that the dynamics of child sexual abuse are not beyond the ordinary experience or knowledge of the average juror finds some support. In 1981, David Finkelhor conducted the only research to date on the public's exposure to child sexual abuse and on the prevalence of myths and misconceptions regarding child sexual abuse.[215] The study consisted of interviews with 521 parents of children between the ages of six and fourteen in the Boston metropolitan area.[216] The findings indicated that "the public is relatively knowledgeable and concerned about the problem of sexual abuse."[217] Finkelhor found:

> Some of the classic myths about sexual abuse cited by professionals

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212. Under this standard, a court may admit expert testimony "when it involves explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience." *Seese*, 517 A.2d at 921 (citations omitted). This standard differs from the federal standard, which permits the testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702.

213. *Garcia*, 588 A.2d at 957 (Ford Elliott, J., dissenting). One of the dissenters in *Dunkle II* argued that, in eliminating expert testimony on the seemingly self-impeaching behaviors of child sexual abuse victims, the *Dunkle II* majority was "ascribing to the average juror incredible sophistication regarding the effect of sexual abuse on the workings of a young mind." Commonwealth v. Dunkle, 602 A.2d 830, 839 (Pa. Super. Ct. 1992)(McDermott, J., dissenting in part). Furthermore, he argued, the majority "basically trivialize[d] an entire field of child psychology . . . ." *Id.* at 840.

Other courts have reasoned that expert testimony is necessary to explain the behavior of child sexual abuse victims. *See, e.g.*, Duckett v. State, 797 S.W.2d 906 (Tex. Crim. App. 1990); State v. Myers, 359 N.W.2d 604 (Minn. 1984).

214. *Garcia*, 588 A.2d at 955 n.8.

215. *See* FINKELHOR, *supra* note 13, at 69-70.

216. *Id.* at 70.

217. *Id.* at 98.

> do not seem highly prevalent. It is perhaps possible that people never had these misconceptions . . . . Our preferred explanation, however, is that people have learned a great deal about the problem in just the last few years. Whatever myths were prevalent in the population a few years ago have probably been greatly reduced by a wave of media attention to the problem.[218]

Although research has been conducted regarding the public's knowledge in related areas, such as battered woman syndrome, rape trauma syndrome, and eyewitness reliability,[219] a desperate need remains for additional research regarding the public's knowledge of child sexual abuse.[220]

The dissent in *Garcia* also attacked the majority's conclusion that "jurors . . . may be unduly impressed by an expert, his credentials, and ultimately his opinion. . . ." The dissent argued that the use of expert testimony in any case will either bolster or impeach the testimony of other witnesses.[221] The dissent also quoted from *Baldwin*: "Expert testimony cannot 'invade the province of the jury' unless the jury is instructed that it must agree with the expert's assessment."[222]

Like the majority, other courts and legal commentators have expressed concern that jurors will be unduly influenced by expert tes-

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218. *Id.* at 99. Bulkley notes that Finkelhor published his study eight years ago. *See* Bulkley, *Social Science*, *supra* note 40, at 80. She argues that it is possible that many of the myths or misconceptions that gave rise to the need for expert testimony in the early 1980s may have been reduced even further or disappeared altogether, as Finkelhor suggests, in large part due to media attention. *Id.*

219. *See generally* Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133 (1989).

220. Legal and mental health commentators express conflicting views regarding whether the public can understand these behaviors without expert assistance. Melton and Limber write that "little is known about the degree that laypersons possess . . . knowledge about sexually abused children." *See* Melton & Limber, *supra* note 40, at 1229. Bulkley agrees that little is known about the public's knowledge in this area, but argues that "so-called 'typical' behaviors of sexually abused children, or a determination that, based on such behaviors, a child was sexually abused, are arguably within the average person's common knowledge." *See* Bulkley, *Social Science*, *supra* note 40, at 78. Another commentator takes the opposite view: "Generally, the dynamics of child abuse are so foreign to the average person that some expert explanation is warranted." *See* Karla O. Boresi, *Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?*, 8 ST. LOUIS U. PUB. L. REV. 207, 208-09 (1989).

221. *See Garcia*, 588 A.2d at 957 (Ford Elliott, J., dissenting). The dissent quoted the superior court's previous language in *Baldwin*:

> It is a commonplace fact that the testimony of one witness may tend to corroborate another. Far from being improper, this is normal and is good trial strategy. (Much expert testimony will tend to show that another witness either is or is not telling the truth . . . . This, by itself, will not render evidence inadmissible).

Id. (quoting Commonwealth v. Baldwin, 502 A.2d 253, 257 (Pa. Super. Ct. 1985) (citing State v. Middleton, 657 P.2d 1215 (Or. 1983))).

222. *Id.* (quoting *Baldwin*, 502 A.2d at 257).

timony because of the "aura of science" or the prestige of the expert.[223] Little research has been done to evaluate the impact of expert testimony on juror decisionmaking in the child sexual abuse context. However, research on the impact of expert testimony regarding battered woman syndrome, rape trauma syndrome, and eyewitness reliability indicates that jurors do not accord expert testimony with an unwarranted aura of trustworthiness and reliability.[224] Rather, at least in these areas, jurors evaluate the expert's testimony in light of the jurors' own experiences, common sense, and recognition of the adversarial nature of the trial process.[225]

Some commentators have argued that expert testimony given by mental health professionals about human behavior patterns is probably the least overawing of the different types of expert testimony. This is because jurors have some innate knowledge of human behavior.[226] The research that has been conducted with cases involving child witnesses in general suggests that when the honesty of the child witness is considered critical, as in a sexual abuse case, the child's lack of cognitive abilities actually may enhance the child's credibility.[227] Jurors would not expect the child to have mature knowledge of sexual acts and behavior, and, therefore, they may suspect that a young child who testifies confidently about such matters has been coached.[228]

On the other hand, other research indicates that when the key witness is a child, jurors give more weight to the testimony of other witnesses.[229] When child witnesses appear shaky or uncertain on the stand, jurors also tend to accord greater weight to the testimony of experts.[230] Furthermore, there is greater potential for the jury to

223. *See, e.g.*, Vidmar & Schuller, *supra* note 219; *see also* Serrato, *supra* note 3, at 178.

224. *Id.* at 173.

225. *Id.*

226. *See, e.g.*, Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap"*, 32 S. TEX. L. REV. 37, 66 (1990). McCord argues that because the essence of psychological evidence is "not locked up in some mysterious nonhuman device or process," the shortcomings of psychological research can be brought out on cross-examination. McCord, *Syndromes*, *supra* note 25, at 85. Furthermore, most jurors do not conceive of psychological research as very, if at all, "scientific." *Id.* Thus, this type of research is not likely to elicit unquestioning juror acceptance. *Id.* at 85-86. In short, "the jury most likely has the ability to fairly and intelligently weigh the strengths and weaknesses of psychological evidence without being overwhelmed or overawed by it." *Id.* at 86.

227. NANCY WALKER PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 33 (1991).

228. *Id.*

229. WHITCOMB, *supra* note 41, at 111. *Cf.* Gail S. Goodman et al., *When a Child Takes the Stand: Jurors' Perceptions of Children's Eyewitness Testimony*, 11 LAW & HUM. BEH. 27, 37 (1987).

230. WHITCOMB, *supra* note 41, at 111.

overvalue the testimony when the expert has examined the child. The Supreme Court of Vermont explained this phenomenon:

> We permit mental health experts to help jurors understand "the emotional antecedents of the victim's conduct" so that they "may be better able to assess the credibility of the complaining witness." There is a danger, however, when this "help" in understanding the symptomology of abused children in general is offered by an expert who has examined the particular child victim. If the jury knows the psychologist has examined the victim, his or her comments are taken in a different light. . . . [T]he jury sees a concerned therapist who has examined the child, believed her, and is probably currently engaged in her recovery process. As a result, the jury may reach the unspoken but unmistakable conclusion that the expert's recounting of the assault is the way it happened.[231]

Thus, while the majority's assertion that the jury would overvalue the expert's opinion has some validity, the research does not provide conclusive results.

The underlying assumptions of the *Garcia* court appear to have some support. However, the available research results (coupled with the lack of research results in certain areas) do not support the superior court's sweeping conclusion that no form of expert testimony offered in a child sexual abuse prosecution is admissible. Arguably, expert testimony that the child's allegations are truthful (Type 1) or that the child has been abused (Type 2) presents serious reliability problems and should be excluded.[232]

A more difficult determination is involved when the expert testifies that the child's behavior is consistent with behavior patterns of known child sexual abuse victims (Type 3). The Superior Court of New Jersey recently addressed this issue in *State v. J.Q.*[233] The court found this type of testimony improper because reliable indicators of sexual abuse do not yet exist.[234] Mental health professionals should be responsible for affirmatively establishing professional competence to diagnose sexual abuse based on generally accepted indicators. Furthermore, research should be conducted into the public's knowledge about sexual abuse and the impact of expert testimony in the particular context of a child sexual abuse case. Until such a time when these

231. State v. Wetherbee, 594 A.2d 390, 394-95 (Vt. 1991) (citation omitted).

232. *See supra* part II.A.2-3.

233. 599 A.2d 172 (N.J. Super. Ct. App. Div. 1991).

234. *Id.* at 184, 187. In this regard, the court explained: "This is not to suggest that such evidence is intrinsically flawed. . . . Rather, we hold that as social science and jurisprudence are presently constituted, we can have no faith in its reliability."

goals are met, courts should continue to exclude this type of testimony.

Nonetheless, the Superior Court of Pennsylvania went too far in excluding the type of testimony offered in *Garcia*. Rather than being offered to bolster the children's credibility, the purpose of the expert's testimony was to rehabilitate the children's credibility. It provided the jury with an alternative explanation for the children's delayed reporting other than untrustworthiness. Whether elicited on direct or cross-examination of the child or another witness, testimony that the child did not report the incident immediately is inherently impeaching. Testimony such as Dr. DeJong's, based on CSAAS, merely indicates that such behavior may not necessarily indicate untrustworthiness. The ultimate determination of whether the child was abused by the defendant is, of course, for the jury to decide on the basis of all the evidence in the case.

B. *Alternative Approaches of Other Jurisdictions*

Several courts that allow testimony based on CSAAS have taken specific measures to insure that the testimony will be introduced properly in order to prevent the jury from mistakenly concluding that testimony on behavior such as delay in reporting is evidence that the child was abused.[235] For example, the California courts have held that the expert's testimony must be based on literature in the field and on general, professional experience without reference to the child complainant or the specific facts of the case.[236] In *People v. Bledsoe*,[237] the California Supreme Court held that expert testimony describing the complainant as suffering from rape trauma syndrome was inadmissible to prove that a rape actually had occurred since the syndrome was developed as a therapeutic tool and not as a scientifically reliable means of determining whether a rape had occurred.[238] The court, however, suggested that evidence related to rape trauma syndrome could be admitted to "disabus[e] the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths."[239] An appellate court subsequently applied *Bledsoe* to the child sexual abuse

235. *See* Cohen, *supra* note 15, at 446 ("There is something fundamentally strange about saying that since the child denies that the event occurred, it must have occurred.").

236. *See* People v. Stark, 261 Cal. Rptr. 479 (Cal. Ct. App. 1989); People v. Jeff, 251 Cal. Rptr. 135 (Cal. Ct. App. 1988); People v. Gray, 231 Cal. Rptr. 658 (Cal. Ct. App. 1986); People v. Roscoe, 215 Cal. Rptr. 45 (Cal. Ct. App. 1985).

237. 203 Cal. Rptr. 450 (Cal. 1984).

238. *Id.* at 460.

239. *Id.* at 457.

setting.[240] It found that expert testimony based on specific facts of the case would subvert the protection against the misuse of expert testimony created in *Bledsoe*.[241]

In *People v. Bowker*,[242] a California appellate court adopted two additional requirements for the admissibility of expert testimony in child sexual abuse prosecutions that have since guided the decisions of the other courts in the state. In applying the *Bledsoe* exception, the court permitted testimony based on CSAAS, but only for the purpose of disabusing the jury of misconceptions as to how child victims react to abuse.[243] In order to insure this limited use, the court required: (1) that the expert's testimony be narrowly tailored to the purpose for which it is admissible; i.e., the prosecution must identify the specific "myth" or "misconception" the evidence is designed to rebut; and (2) that the court instruct the jury that the expert's testimony is not intended and should not be used to determine the veracity of the victim's molestation claim.[244]

Like the California approach, the Supreme Court of Michigan, in *People v. Beckley*,[245] allowed testimony regarding only those specific behaviors at issue in the case, and required that the expert limit his or her testimony to these behaviors.[246] Expert testimony is admissible only to explain the individual behaviors of the complainant; therefore, the expert must not render an opinion that a particular behavior or set of behaviors observed in the complainant indicates that sexual abuse in fact occurred.[247] Unlike the California courts, the *Beckley* court did not *require* a limiting instruction.[248] Rather, the court noted that effective cross-examination generally will prevent the jury from con-

240. *See* People v. Roscoe, 215 Cal. Rptr. 45 (Cal. Ct. App. 1985).

241. *Id.* at 50.

242. 249 Cal. Rptr. 886 (Cal. Ct. App. 1988).

243. *Id.* at 891.

244. *Id.* at 891-92. The next year, the same appellate court held that the prosecution need not wait for the rebuttal stage of trial to present CSAAS-based testimony. *See* People v. Sanchez, 256 Cal. Rptr. 446, 454 (Cal. Ct. App. 1989). In this case, the prosecution offered the expert testimony during its case-in-chief after defense counsel had attacked the child's credibility on cross-examination. *Id.*

245. 456 N.W.2d 391 (Mich. 1990).

246. *Id.* at 406. On cross-examination of the victim, defense counsel tried to discredit the complainant's allegations by suggesting that her behavior was inconsistent with that of a person who had been victimized. *Id.* at 394. The defense specifically noted four instances of behavior: (1) delayed disclosure; (2) disclosure to a third person outside the family; (3) the complainant's continued desire to see the alleged offender; and (4) the complainant's initial tendency to deny sexual intercourse. *Id.* The expert, who had counseled the complainant on three occasions, *id.* at n.7, commented on the four instances of behavior and explained that all were typical behavioral characteristics of a victim of sexual abuse. *Id.* at 394.

247. *Id.* at 406.

248. *Id.*

cluding that an expert opinion regarding the child's behavior indicates that the abuse in fact occurred.[249] Thus, the court should give a limiting instruction only on request.[250]

Justice Archer of the Michigan Supreme Court dissented from the *Beckley* majority because it permitted the expert to refer to the complainant rather than limiting the testimony to a discussion of the specific behavior characteristics at issue without reference to the complainant or to the specific facts of the case.[251] Justice Archer felt that, under the majority's rule, the danger was too great that the jury might improperly infer that the expert's testimony was, in effect, concluding that the complainant had been abused.[252] He argued that the majority "wholly fails to recognize that the marginal probative value of the expert's testimony with reference to the specific complainant before the court pales in comparison to the increased and substantial degree of prejudice a criminal defendant will face."[253] He concluded that the prosecution could have dispelled the misconceptions at issue in the case just as effectively without the repeated references to the child or the facts of the case.[254]

A Wisconsin appellate court has suggested that in order to properly distinguish between testimony based on CSAAS, which is admissible, and testimony used to prove that abuse has occurred, which is not admissible, the prosecutor in a child sexual abuse case should elicit expert testimony in the form of a hypothetical question coupled with a cautionary instruction to the jury.[255] The court posed the following hypothetical question: "Assuming that 'X' had been sexually assaulted, do you have an opinion as to why she denied the assault when first questioned by 'Y'?"[256]

V. CONCLUSION

These alternative approaches demonstrate that it is unnecessary to completely eliminate the expert from the courtroom in cases of child sexual abuse. Until the scientific community establishes reliable indicators of child sexual abuse and professional competence to detect child sexual abuse, courts are justified in adopting restrictive positions

249. *Id.*
250. *Id.*
251. *Id.* at 414 (Archer, J., dissenting).
252. *Id.* at 415.
253. *Id.* at 416.
254. *Id.* at 417.
255. *See* State v. Jensen, 415 N.W.2d 519 (Wis. Ct. App. 1987). On appeal, the Supreme Court of Wisconsin rejected this suggestion. *See* State v. Jensen, 432 N.W.2d 913 (Wis. 1988).
256. *See Jensen*, 415 N.W.2d at 522 n.1.

on the admissibility of expert testimony in child sexual abuse prosecutions. However, the Superior Court of Pennsylvania in *Garcia* has failed to recognize the limited use of such testimony. When used properly, expert testimony can serve the limited purpose of assisting the jury in understanding seemingly self-impeaching behaviors of the child, such as delayed reporting, without bringing into play the serious reliability problems associated with other forms of expert testimony.

Courts should permit prosecutors to introduce expert testimony based on the child sexual abuse accommodation syndrome as a rehabilitative tool in order to assist the jury in understanding possible explanations for behaviors seemingly inconsistent with abuse. As the California, Michigan, and Wisconsin courts have done, each jurisdiction can fashion its own safeguards to protect against the danger that the jury will confuse the testimony as affirmative proof of abuse. The best approach would be for the prosecutor to offer an expert who has never examined the child. This would help to eliminate potential bias of the expert[257] and to reduce potential overvaluing of the testimony by the jury because the expert has treated the child.[258] The prosecutor would provide the expert with the general facts of the case—possibly by asking a simple hypothetical question or by presenting the expert with a report from the examining professional—and ask him or her to apply the principles of CSAAS to the facts. For example, if the complainant had delayed reporting for two months after the alleged incident, the prosecutor might frame the question: "Assuming that a child has been sexually abused, can you explain why she might wait up to two months to report the incident?".

This Comment concludes, as did the dissenting judge in *Garcia,* that expert testimony has a limited but necessary role in child sexual abuse prosecutions:

> Without question, expert testimony on the behavior patterns and psychological dynamics of sexual abuse victims can be very prejudicial. While we have a grave responsibility to address the many legitimate concerns regarding the use of expert testimony in this area, we also must not ignore its tremendous benefits to the truth determining process. This responsibility becomes all the more critical when such expert testimony is offered to aid the trier of fact in cases involving society's most vulnerable victims, our children. If we can determine on sound evidentiary grounds, that expert testimony is reliable, relevant, material and probative, can we afford to keep it from the jury in a case of child sexual abuse. . . . Undenia-

257. *See supra* part II.A.2.

258. *See* text accompanying note 231.

> bly, there is presently a climate of hysteria in our society which makes the possibility of false accusation a matter of grave concern. Therefore, . . . the Commonwealth must be required to exercise its discretion with great caution when deciding whether to prosecute such cases. However, once the decision to prosecute is made, we must not abandon the child in the courtroom.[259]

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259. *Garcia*, 588 A.2d at 964-65 (Ford Elliott, J., dissenting).