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## The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child

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# The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child

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## I. INTRODUCTION

The sexual misuse of children<sup>1</sup> is a vexing problem for all con-

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1. For several reasons, this Comment uses the term "sexual misuse" rather than "sexual abuse." First, in some jurisdictions the term child sexual abuse is defined by statute. The statutory definition may not correspond to the common conception that sexual abuse includes child rape, molestation, and other forms of sexual assault regardless of the relationship of the offender to the victim. See, e.g., FLA. STAT. § 827.071 (1986). An expert witness may be called in any situation in which a child was the object of an adult's sexual attention. The narrow delineation of the term "sexual abuse," therefore, may not correspond to the scope of situations in which experts are called regarding sexual activity involving an adult and a child. Second, "sexual misuse," unlike "sexual abuse," does not imply that the child must be harmed by the adult's sexual attention. Children do not always suffer psychological or physical injury as a result of sexual misconduct by an adult. Yorukoglu & Kempf, *Children Not Severely Damaged by Incest with a Parent*, 5 J. AM. ACAD. CHILD PSYCHIATRY 111 (1966), reprinted in THE SEXUAL VICTIMOLOGY OF YOUTH 125 (L. Schultz ed. 1980). The term "sexual misuse" does not deny an appropriate role for a parent in the child's psychosexual development. Finally, the term "sexual misuse" impliedly places the responsibility for any actual adult-child sexual contact onto the adult regardless of the degree of the child's participation in the initiation of the contact. A child is not capable of consenting to sexual activity with an adult. Finkelhor, *What's Wrong with Sex Between Adults and Children?*, 49 AM. J. ORTHOPSYCHIATRY 692 (1979). The term does not imply condemnation of age-appropriate sexual activity between peers. See generally Brant & Tisza, *The Sexually Misused Child*, 47 AM. J. ORTHOPSYCHIATRY 80 (1977) (Mental health professionals prefer the term "sexual misuse" over "sexual abuse.").

cerned.<sup>2</sup> The subject brings forth strong and unpleasant emotions.<sup>3</sup> These emotions may have contributed to the cursory treatment meted out to the issue of admissibility of expert witness testimony in child sexual misuse cases. The legal issues in determining whether the testimony of an expert witness should be admitted into a court proceeding require detached and neutral analysis. When dealing with a case that involves an adult using a child for sexual purposes, however, such analysis becomes difficult.<sup>4</sup> The goal of this Comment is to facilitate the objective application of standard evidentiary principles to the issue of the admissibility of expert witness testimony in child sexual misuse cases. This goal will be reached, in part, by focusing upon the role of the expert psychologist in criminal prosecutions for child sexual misuse. Particular emphasis will be placed upon the nature and limits of the expertise that the psychologist can bring to the process.

The testimony of psychological experts<sup>5</sup> in child sexual misuse

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2. For a general discussion of the difficulties in the professional management of an event that includes allegations of the sexual misuse of a child, see Sgroi, *A National Needs Assessment for Protecting Child Victims of Sexual Assault*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978); see also AMERICAN HUMANE ASSOCIATION, CHILDREN'S DIVISION, *SEXUAL ABUSE OF CHILDREN* (V. DeFrancis ed. 1981) (implications of the sexual misuse of children for the practice of social casework); D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, *WHEN THE VICTIM IS A CHILD* (1985) (a survey of issues that relate to judging and prosecuting cases of child sexual misuse); Boekelheide, *Incest and the Family Physician*, 6 J. FAMILY PRACTICE 87 (1978) (the family physician's role in helping the incest victim); Brassard, Tyler & Kehle, *Sexually Abused Children*, 12 SCH. PSYCHOLOGY REV. 93 (1983) (the complexity associated with the discovery of the sexual misuse of a child in an educational setting, and the appropriate responses of school officials); Denham, *Toward an Understanding of Child Rape*, 36 J. PASTORAL CARE 235 (1982) (the role of the chaplain and religious professionals in the management of child sexual assault among their parishioners); Eaton & Vastbinder, *The Sexually-Molested Child*, 8 CLINICAL PEDIATRICS 438 (1969) (aspects of the medical profession's role in cases involving the sexual misuse of children).

3. The emotions raised by the subject of child sexual misuse are best described by the personal accounts of the adult survivors of childhood sexual misuse. See, e.g., L. ARMSTRONG, *KISS DADDY GOODNIGHT* (1978); S. FORWARD & C. BUCK, *BETRAYAL OF INNOCENCE* (1978).

4. Clinicians have recognized the need for objectivity in dealing with cases involving the sexual misuse of children, but the legal literature has not emphasized this need. Gentry, *Incestuous Abuse of Children*, 57 CHILD WELFARE 355 (1978). A degree of passion may make one interested in the issue at hand, but too much passion can make one blind. See generally D. KAHNEMAN, *ATTENTION AND EFFORT* (1973) (summarizing the field of activation and arousal with respect to cognitive functioning and discussing the impact of anxiety on performance).

5. This comment uses the term "psychology" and its derivatives to encompass the scientific study and clinical treatment of the behavior, thoughts, and feelings of individuals. Besides the obvious area of psychology, the term includes the disciplines of psychiatry, social work, and counseling. These fields are bordered on one side by a study of the physical subcomponents of an individual (i.e., anatomy, neurochemistry), and on the other by the study of groups of individuals larger than the family unit (i.e., sociology, anthropology).

cases differs from the testimony of traditional scientific and technical experts on the one hand, and the testimony of medical experts on the other.<sup>6</sup> Psychologists, when called as experts, do not talk about things or objects; they talk about people.<sup>7</sup> They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems.<sup>8</sup> Rather, they speak of the whole person.<sup>9</sup> Psychologists do not focus upon broad groups of people, as do sociologists; rather, they discuss the behavior, thoughts, and motivations of single individuals.

A psychological expert is likely to be both a clinician and a scientist. Both of these sources of expertise are applied to a subject with which nonexperts have a vague familiarity: the motivations, thoughts, feelings, and behavior of people.<sup>10</sup> The nonexpert's familiarity decreases as the expert testifies to the reaction of individuals to increasingly less common events. Section II of this Comment will therefore explore both the bases of the psychological expert's expertise and the application of this expertise to child sexual misuse cases.

Three separate issues pertaining to the admissibility of expert testimony are intertwined within the concept of the trier of fact's independence: First, whether the proffered expert testimony is within the common understanding of the trier of fact;<sup>11</sup> second, whether the testimony of the expert is likely to be overvalued by the trier of fact;<sup>12</sup> and third, whether the testimony is likely to usurp the trier of fact's roles of evaluating the credibility of witnesses and deciding ultimate issues.<sup>13</sup> Because the lay jury has only the common experience of everyday life to apply to the fact pattern before it, there is a risk that it

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6. J. ZISKIN, 1 *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 330-47 (3d ed. 1981) (discussing the similarities and differences between psychiatry and both science and medicine).

7. See generally M. MARX & W. HILLIX, *SYSTEMS AND THEORIES IN PSYCHOLOGY* 167-202 (1979) (The "gestalt" and "humanistic" branches of psychology have obtained universal acceptance, and are today incorporated within all schools of psychological thought.).

8. Psychologists have criticized the "medical model" of client treatment. See, e.g., L'Abate, *Skill Training Programs for Couples and Families*, in *HANDBOOK OF FAMILY THERAPY* 631, 633 (A. Gurman & D. Kniskern eds. 1981).

9. *Id.* at 633-34.

10. "Psychology is a nasty little science that elaborates the obvious." Lecture by J. Plas, Professor of Psychology, Vanderbilt University (July, 1979) (attributed to William James, one of the pioneers of psychology). This corresponds to the common feeling that psychology does not really teach us anything new, but simply verifies with scientific methods that which we already know.

11. See *infra* note 179-82 and accompanying text.

12. See *infra* note 178 and accompanying text.

13. See *infra* note 182 and accompanying text.

will defer to the judgment of an expert.<sup>14</sup> The variables that factor into the court's application of discretion to all of these issues are discussed in Section II of this Comment.

Section III of this Comment explores a proposed new application of expert witness testimony: the preservation of the child's perishable testimony by the expert witness. Because a child's memory is known to degenerate more rapidly than the memory of an adult,<sup>15</sup> courts and commentators have questioned the competence of a child as a witness.<sup>16</sup> This Comment suggests, therefore, that experts assume a new role involving the elicitation and preservation of the testimony of children to compensate for this limitation on their ability to testify competently.<sup>17</sup>

The testimony of psychological experts is generally solicited by prosecutors in criminal cases that involve the sexual misuse of children. Prosecutors tend to rely upon the evaluation of psychologists in order to assist them in determining whether they should proceed with the prosecution. The prosecution of cases involving the sexual misuse of children is stressful for the prosecutor. The prosecutor must struggle with a victim who may not make a credible witness, and must grapple with the emotionally unpleasant issues of a child who has been sexually used by an adult. The tendency has been to place as much of this burden as possible upon the psychologist. The psychological expert usually knows how to handle the stress of operating within the field of child sexual misuse, and is willing to accept a major role in the litigation process. The consequence is that the role of the expert witness in child sexual misuse prosecutions has been determined by the experts themselves—by their willingness to participate—rather than by the legal system.

## II. EXPERT PSYCHOLOGICAL TESTIMONY

Legal literature discusses the sexual misuse of children as being similar in nearly all cases insofar as both the facts surrounding the

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14. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974); *State v. Middleton*, 294 Or. 427, 657 P.2d 1221 (1983).

15. Memory is a complex process involving encoding, storage, and recall. In some ways a child's memory is superior to that of an adult. With respect to the kind of information generally deemed relevant in legal proceedings, however, the child's memory is inferior. See generally A. GLASS, K. HOLYOAK & J. SANTA, *COGNITION* (1979) (discussing the structure of thought and the processes involved in memory).

16. *E.g.*, *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985).

17. This role for the expert is similar to that proposed by Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 J. MARSHALL L. REV. 1 (1984).

abusive event and the effect upon the child victim are concerned.<sup>18</sup> Therefore, commentators present factors that impact upon the admissibility of expert testimony as applicable to all cases.<sup>19</sup> In sharp contrast, the sexual misuse of children by adults includes such divergent acts as rape,<sup>20</sup> the incestuous abuse of a female child,<sup>21</sup> the sexual exploitation of a young male,<sup>22</sup> and the calculated seduction of a prepubescent female.<sup>23</sup> The impact of the sexual misuse upon the child will vary depending upon several factors, including dynamics internal to the child, characteristics of the offender and the offense, and the child's perception of the social environment's response to the disclosure of the abuse.<sup>24</sup> The expert may be a clinician, a scientist, an advocate, or a person engaged to facilitate criminal prosecutions.<sup>25</sup> The prosecutor or defendant may present expert testimony for various purposes at differing stages of the litigation.<sup>26</sup> The above distinctions,

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18. See, e.g., McCord, *Syndromes, Profiles, and other Mental Exotica*, 66 OR. L. REV. 19 (1987).

19. See, e.g., Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985).

20. The aggressive sexual misuse of a child is generally associated with psychopathic or psychotic individuals. See B. JUSTICE & R. JUSTICE, *THE ABUSING FAMILY* 84-108 (1976).

21. The most common form of incest is termed symbiotic. It refers to the seductive pattern that incestuous fathers typically employ in the long-term sexual misuse of female children. This pattern involves gradually escalating, sexually inappropriate behavior by the father over a period of numerous years. During the same time, the father will also lavish the child with attention and gifts that are more appropriate for a spouse or lover. *Id.* at 31-34. Psychologists have called this pattern the "Father-Daughter affair." See K. MEISELMAN, *INCEST* 140 (1978).

22. R. GEISER, *HIDDEN VICTIMS* 73-106 (1979); Dixon, Arnold & Calestro, *Father-Son Incest*, 135 AM. J. PSYCHIATRY 835 (1978); see also *In re Marriage of P.K.A.*, 725 S.W.2d 78 (Mo. Ct. App. 1987) (abuse of a son by his father).

23. Members of the Rene Guyon Society advocate the early sexual awakening of children, particularly females. This society is based upon the writings of Guyon. See R. GUYON, *SEX LIFE AND SEX ETHICS* (1933).

24. See *infra* note 94 and accompanying text.

25. See, e.g., *Rodriguez v. State*, 741 P.2d 1200, 1205 (Ala. Ct. App. 1987) (The expert was qualified on the basis of his five-year research program on exploited children and related publication.); *Wheat v. State*, 527 A.2d 269 (Del. Super. Ct. 1987) (A social worker with demonstrated knowledge about sexual misuse qualified as an expert.); *State v. LeBron*, 37 Or. App. 411, 587 P.2d 1044 (1978) (Expert testimony by an advocate for rape victims was held admissible.); *Garcia v. State*, 712 S.W.2d 249 (Tex. Ct. App. 1986) (A state agency social worker obligated to work with law enforcement testifies as an expert.).

26. Compare *State v. Hall*, 406 N.W.2d 503, 504-05 (Minn. 1987) (in the prosecution's case in chief to establish a fact of consequence) with *People v. Beckley*, 161 Mich. App. 120, 123-25, 409 N.W.2d 759, 761-63 (1987) (Testimony of a rape counselor is admissible to rehabilitate a victim who was impeached by the defendant's allegation that the victim's post-incident behavior was inconsistent with that of a child subjected to sexual misuse.) and *Scadden v. State*, 732 P.2d 1036, 1044-48 (Wyo. 1987) (A police officer, admitted as an expert in the field of sexual abuse, may rebut defendant's allegation that a delay in disclosing an incident of alleged sexual misuse is inconsistent with a sexual assault.).

among many, have an impact upon both the nature and admissibility of the testimony.

A. *The Peculiar Nature of the Sexual Misuse of Children*

Unique and peculiar issues arise in a civil or criminal case stemming from an allegation of the sexual misuse of a child by an adult. The child victim may not make a credible witness.<sup>27</sup> Children confuse fantasy and truth.<sup>28</sup> Courts and commentators have thus questioned the competence of a child witness to present testimony.<sup>29</sup> Further, a child may be pressured to modify or retract complaints that implicate family members. A retraction or significant modification of the original allegation may be admissible to impeach.<sup>30</sup> Similarly, a child's testimony may be impeached by showing a significant delay between the alleged occurrence of the criminal act and the child's first report of such an occurrence.<sup>31</sup>

Often the outcome of a case will turn upon the testimony of the "alleged"<sup>32</sup> victim versus that of the alleged offender.<sup>33</sup> The offender is an adult, and may be a professional, an active member of a prominent social or religious organization, or an otherwise respected member of the community.<sup>34</sup> The victim may be shy and withdrawn, or

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27. See generally Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 MIL. L. REV. 121 (1987) (discussing the credibility of child witnesses, and the role of expert witnesses with regard to credibility issues).

28. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of the Offenders*, 30 AM. J. PSYCHOTHERAPY 398 (1976).

29. See Comment, *The Competency Requirement for the Child Victim of Sexual Abuse*, 40 U. MIAMI L. REV. 245 (1985); see also *People v. Draper*, 150 Mich. App. 481, 487-88, 389 N.W.2d 89, 92-93 (1986) (Testimony of a three-year-old victim was admitted as competent.); *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987) (A four-year-old child may be competent to testify under certain circumstances.).

30. See FED. R. EVID. 613.

31. Both a lengthy delay by the child victim in disclosing an incident of sexual misuse and a retraction of an allegation are frequently encountered in cases involving intrafamilial sexual abuse. See MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sex Abuse Cases*, 40 U. MIAMI L. REV. 135, 136-42 (1985).

32. The issue in many cases is whether the child fabricated or experienced the sexual misuse.

33. If the court does not allow the psychological expert to testify and if there is no medical evidence to be presented, which is more often the case than not, then the child's uncorroborated testimony would likely constitute the prosecution's only evidence. See, e.g., *In re Nicole V.*, 123 A.D.2d 97, 106, 510 N.Y.S.2d 567, 573 (N.Y. App. Div.), aff'd, 71 N.Y.2d 112, 518 N.E.2d 914 (1987) (In many cases there is either nonexistent or inconclusive medical evidence.).

34. Psychological research established that sex offenders do not fit any demographic profile other than being predominantly male. Giarretto, *A Comprehensive Child Sexual Abuse Treatment Program*, 6 CHILD ABUSE & NEGLECT 263 (1982). The prison population of child sex offenders, however, is composed of a disproportionate number of mentally disordered,

brassy and aggressive.<sup>35</sup> Moreover, the victim is likely to present testimony that is inconsistent with earlier statements made to investigators,<sup>36</sup> and may in some cases retract the accusation.<sup>37</sup> A lay jury, presented with conflicting testimony, is likely to attribute the child's complaints to fantasy.<sup>38</sup> One possible explanation for this attribution is the use of the classical psychological defense mechanism of denial.<sup>39</sup> The prosecutor or the investigator may deny the validity of the child's allegation by attributing the accusation to fantasy. Under such circumstances no criminal charges will be brought.<sup>40</sup>

Involvement with the criminal justice system is frequently psychologically traumatic for the child.<sup>41</sup> This may be a factor contributing to the tendency for the families of such children not to bring criminal charges in cases involving the sexual misuse of children. In an attempt to mitigate this concern, standard courtroom procedures have been modified in most jurisdictions to make the courtroom more

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poor, and minority inmates. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, 18 J. HUMANISTIC PSYCHOLOGY 59, 64-66 (1976). This disproportionate representation may be caused by the willingness of juries to believe the child victim when the defendant fits a stereotype of an offender.

35. Children react to traumatic events differently depending upon several factors, including age, the type of trauma experienced, the environment, and genetic or experiential predispositions. See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987) (Particularly relevant are diagnoses of traumatic origin, including post-traumatic stress disorder and the adjustment disorders.) [hereinafter DSM-III-R]. Many of the behavioral characteristics that have been associated with a sexually misused child have features in common with psychiatric diagnoses. B. JAMES & M. NASILETI, *TREATING SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* 3-11 (1983).

36. Children tell increasingly more complete reports of the misuse they suffered as they grow more comfortable with the interviewers and adapt psychologically to the misuse. See, e.g., *Oklahoma v. Roubideaux*, No. CRF-79492 (Okla. Cir. Ct. 1982), *aff'd*, 707 P.2d 35 (Okla. Ct. Crim. App. 1985); see also Goodman & Helgeson, *Child Sexual Assault*, 40 U. MIAMI L. REV. 181 (1985) (discussion of the trial transcript of *Roubideaux*, and analysis of the memory functions of a child witness as they relate to the court process). The court must consider, however, the countervailing factors of a child's comparatively short memory and tendency to fabricate. *Id.* at 203-04.

37. Children frequently retract the accusation of sexual abuse, especially in cases in which the child has accused a member of the child's immediate household. *People v. Grady*, 133 Misc.2d 211, 215-16, 506 N.Y.S.2d 922, 925 (N.Y. Sup. Ct. 1986).

38. See, e.g., *Butler v. State*, 178 Ga. Ct. App. 110, 115, 342 S.E.2d 338, 342 (Benham, J., dissenting) ("[T]he lay perception is that children have vivid imaginations and conjure up weird tales."), *rev'd*, 256 Ga. 448, 349 S.E.2d 684 (1986).

39. See generally F. RUSH, *THE BEST KEPT SECRET* (1980) (Feminist theory explains the discrepancy between the incidence of child sexual misuse and the criminal arrest rate in terms of denial.).

40. *Id.* at 150-57.

41. The trauma resulting from a child's involvement with the legal system may be more debilitating than the sexual misuse itself. L. SCHULTZ, *THE SEXUAL VICTIMOLOGY OF YOUTH* 163-67, 248 (1980).



"child victim friendly."<sup>42</sup> These changes include the creation of statutory hearsay exceptions,<sup>43</sup> the exclusion of spectators from the courtroom,<sup>44</sup> and the admissibility of closed circuit<sup>45</sup> or videotaped<sup>46</sup> testimony. These innovations have allayed some of the concerns regarding the psychological impact on the child from involvement with the legal system.<sup>47</sup>

### B. *Expert Witness Roles*

The role assumed by the expert witness in the litigation is a factor in determining admissibility. Yet commentators and cases generally do not address the expert's role,<sup>48</sup> nor is it clearly understood by most experts. Five possible roles for an expert witness, derived from legal and psychological practice, are introduced below. The legal merit of each is addressed in Section II(H).

One jurisdiction permits the psychologist to testify as to the credibility of the child's testimony regarding the occurrence of the misuse and the identity of the offender.<sup>49</sup> Because the child is likely to be a witness, the expert, in effect, is employed to testify as to the credibility of another witness, the expert assuming the role of adviser to the jury on the weight that they should place upon the testimony before them. Commentators have identified this role as the liberal view, and one that has not been widely adopted.<sup>50</sup>

Another approach permits the expert to testify regarding the results of a psychological evaluation of the child and to determine whether the psychological status of the child is consistent with having been subjected to sexual misuse by an adult.<sup>51</sup> The evaluation itself may include a determination as to whether the child's behavior pat-

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42. D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD 27-29 (1985); Bulkley, *Introduction: Background and Overview of Child Sexual Abuse*, 40 U. MIAMI L. REV. 5, 7-10 (1985).

43. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1416 (1987).

44. *E.g.*, FLA. STAT. § 918.16 (1977).

45. *E.g.*, KY. REV. STAT. ANN. § 421.350(3) (Baldwin 1986).

46. *E.g.*, FLA. STAT. § 42.53 (1987); *see also* MacFarlane, *supra* note 31, at 143-54 (exploration of the legal implications of the use of videotaped testimony in child sexual misuse cases).

47. These innovations, however, have created other problems, the most notable being the conflict with the constitutional right of a criminal defendant to confront his accuser. U.S. CONST. amend. VI; *see* Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 534-54 (1988).

48. *But see* Roe, *supra* note 19.

49. *See* State v. Kim, 64 Haw. 598, 608-10, 645 P.2d 1330, 1338-39 (1982).

50. *See, e.g.*, Roe, *supra* note 19, at 104 (discussing Kim, 64 Haw. 598, 645 P.2d 1330 (1982)).

51. State v. Maule, 35 Wash. App. 287, 667 P.2d 96 (1983).

terns are consistent with a syndrome<sup>52</sup> or a diagnosis.<sup>53</sup> This role is directly analogous to the approach taken by most courts with regard to the admission of testimony by a treating physician.<sup>54</sup> The expert will identify symptoms of psychological injury and will report the behavior patterns observed during the examination of the child. Further, the expert will present a professional opinion as to whether these observations are indicative of a diagnosis or are consistent with the occurrence of a particular event. The expert thereby indirectly supports or impeaches the veracity of other witnesses.

A third approach calls upon the expert to present the behavior patterns and psychological symptoms associated with sexual misuse, without having evaluated the victim. The expert may respond to a hypothetical question that incorporates specific facts of the case.<sup>55</sup> This role for psychological experts in child sexual misuse cases is a variation of the approach that many jurisdictions take with regard to traditional medical expert testimony. Rather than serve as a gatherer of facts, as in the second role discussed above, the expert applies scientific knowledge to either the hypothetical facts presented or to the facts admitted into evidence.

The fourth approach is similar to the third in that the expert does not evaluate the child. Under this scheme, the expert's testimony is restricted to a discussion of general principles, leaving the application of these principles to the trier of fact.<sup>56</sup> This approach is essentially an educational model, in which the expert's testimony educates the trier of fact.<sup>57</sup>

The fifth and final approach allows the expert to present the child's testimony, which was elicited by the expert under reasonably controlled conditions and preserved.<sup>58</sup> The expert may assist the court in the interpretation of the preserved testimony when its meaning is not self-evident.<sup>59</sup> The expert thus assumes the role of preserver of perishable testimony—a role that has been assumed by the experts

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52. Note, *The Syndrome Syndrome*, 37 U. FLA. L. REV. 1035, 1036-37 (1985).

53. The American Psychiatric Association publishes the authoritative reference manual for the diagnosis of mental disorders. DSM-III-R, *supra* note 35.

54. Commentators generally discuss this approach with reference to the admissibility of testimony involving the child sex abuse syndrome. See, e.g., Roe, *supra* note 19, at 108-11; see also *infra* notes 79-116 and accompanying text.

55. E.g., *Allewalt v. State*, 61 Md. App. 503, \_\_\_, 487 A.2d 664, 669 (Md. Ct. Spec. App. 1985), *vacated on other grounds*, 308 Md. 89, 517 A.2d 741 (1986).

56. *State v. Hall*, 406 N.W.2d 503 (Minn. 1987).

57. One commentator has labeled this approach the "middle approach." See Roe, *supra* note 19, at 106-07.

58. Expert's may preserve testimony by videotaping all the contacts between the child and the therapist. See *infra* note 220.

59. See *infra* text accompanying notes 220-22.

and accepted by the courts *sub silentio*. This is a necessary subcomponent of the second role identified above. The clinical expert must elicit the child's verbal and nonverbal behavior in order to evaluate the child. For this evaluation to be meaningful, the methods and conditions must be reasonably controlled. As presently conducted, however, this testimony is most often preserved in a haphazard fashion, subject to the need of the evaluator to support the evaluation. This Comment, as further discussed in Section III, suggests that this role be recognized explicitly as a role for the expert psychological witness and that the expert testimony be substantively admissible as an exception to the rule against hearsay.

C. *Issues in the Admissibility of Expert Psychological Testimony in Sexual Misuse Cases*

Many factors affect the court's decision as to whether to allow the psychological expert to testify, regardless of which role the expert assumes. These factors encompass the expert's qualifications, the reliability and relevance of the expert's testimony, and the province of the trier of fact.

The testimony of experts is admissible if it will aid the trier of fact in its consideration of a fact of consequence.<sup>60</sup> The court must determine whether the expert's proffered testimony will either aid or hinder the trier of fact in its fulfillment of the assigned task.<sup>61</sup> The standard for admissibility of expert witness testimony provided by the Federal Rules of Evidence allows judicial discretion in this determination.<sup>62</sup> Therefore, absent an abuse of discretion, the court's ruling on the admissibility of the testimony of an expert witness will stand. The

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60. FED. R. EVID. 702. The rule provides: "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." See *United States v. St. Pierre*, 812 F.2d 417, 419 (8th Cir. 1987) ("A fundamental test for the admission of expert testimony is whether it will assist the jury in resolving the factual issues before it."). "Three prerequisites must be satisfied before the [expert] witness may testify: (1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to expert analysis; and (3) the knowledge of the expert must be in a field where knowledge belongs more to experts than to the common man." *People v. Beckley*, 161 Mich. App. 120, 124-25, 409 N.W. 2d 759, 761 (1987) (citing *People v. Barr*, 156 Mich. App. 450, 456, 402 N.W.2d 489, 492 (1986)).

61. See FED. R. EVID. 104(a). This rule provides: "Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court . . ." *Id.*

62. *Commonwealth v. Gallagher*, 353 Pa. Super. 426, 435, 510 A.2d 735, 739 (1986), *appeal granted*, 515 Pa. 574, 527 A.2d 535 (Pa. 1987); *Johnson v. State*, 393 So. 2d 1069, 1072 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981); see also *Massaro, Experts, Psychology, Credibility and Rape*, 69 MINN. L. REV. 395, 433 (1985).

first action by the court in the process of deciding whether to admit the testimony of an expert is to examine the expert's qualifications.

#### D. *Psychological Expertise*

The Federal Rules of Evidence define an expert only in general terms. Rule 702 provides that "a witness [be] qualified as an expert by knowledge, skill, experience, training, or education."<sup>63</sup> Expert testimony of the types identified above<sup>64</sup> has been presented by physicians,<sup>65</sup> crisis counselors,<sup>66</sup> social workers,<sup>67</sup> police officers,<sup>68</sup> psychologists<sup>69</sup> and others<sup>70</sup> in cases involving the sexual misuse of children. The expert is qualified through experience with victims of sexual misuse,<sup>71</sup> professional training and experience not specific to sexual misuse,<sup>72</sup> familiarity with the professional literature,<sup>73</sup> and scientific expertise developed through research.<sup>74</sup> The expert is qualified by possession of at least one of these attributes.<sup>75</sup>

Published opinions rarely, if ever, contain discussions about the relevance of the expert's qualifications to the proffered testimony. Yet the connection between an expert's testimony and the expert's qualifications is an important logical nexus. To illustrate, although the range of expertise possessed by psychologists does not include expertise in the judgment of the truthfulness of a witness, the testimony of psychologists has been proffered to establish the truthfulness of the testimony of a sexual assault victim.<sup>76</sup>

The field to which psychological experts apply their specialized skills is defined broadly. If one begins with the major premise that the

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63. FED. R. EVID. 702.

64. See *supra* notes 49-59 and accompanying text.

65. *E.g.*, *Commonwealth v. Seese*, 512 Pa. 439, 517 A.2d 920 (1986).

66. *People v. Matlock*, 153 Mich. App. 171, 172-73, 395 N.W.2d 274, 275 (Mich. Ct. App. 1986).

67. *Wheat v. State*, 527 A.2d 269, 272 (Del. Super. Ct. 1987).

68. *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577-78, 199 Cal. Rptr. 796, 804-05 (1984); *Scadden v. State*, 732 P.2d 1036, 1044-46 (Wyo. 1987).

69. *Hall v. State*, 15 Ark. App. 309, 311-12, 692 S.W.2d 769, 770-71 (1985).

70. *E.g.*, *Commonwealth v. Gallagher*, 353 Pa. Super. 426, 510 A.2d 735 (1986) (A nurse with a doctorate, clinical experience, and relevant research experience is qualified to diagnose rape trauma syndrome.).

71. See, *e.g.*, *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577-78, 199 Cal. Rptr. 796, 804-05 (1984).

72. *Kruse v. State*, 483 So. 2d 1383, 1386 (Fla. 4th DCA 1986).

73. *State v. Hazeltine*, 120 Wis. 2d 92, 96-97, 352 N.W.2d 673, 675 (Ct. App. 1984).

74. *Rodriguez v. State*, 741 P.2d 1200, 1204-05 (Alaska Ct. App. 1987).

75. *State v. Teeter*, 85 N.C. App. 624, \_\_\_, 355 S.E.2d 804, 808 (1987).

76. A basic premise for forming the therapeutic relationship is to accept the genuineness of the patient's complaint. *People v. Roscoe*, 168 Cal. App. 3d 1093, 1097, 215 Cal. Rptr. 45, 48 (1985).

psychologist is an expert in human behavior and with the minor premise that the decision whether to tell a lie or whether to tell the truth is a behavioral choice that is uniquely human, then one must deduce that the psychologist is an expert in truthfulness.

The error in this deduction lies in ascribing expertise to the psychologist in the entire field of human behavior. The psychologist, rather, has two distinct areas of expertise within the broad field of human behavior. One of these is the clinical study of the individual.<sup>77</sup> The other is the scientific study of behavior.<sup>78</sup> These two distinct areas of expertise have different legal consequences in a case involving the sexual misuse of a child.

### 1. THE CLINICAL EXPERT

The intuitive basis for the qualification of a mental health expert is his or her clinical skill and training. A treating clinician will note the presence or absence of various symptoms and will diagnose the existence of a mental disorder. The clinician will observe particular psychological injuries, and may form a hypothesis about their origin. The hypothesis will be based upon the correspondence of the statements to the expert for the purpose of diagnosis and manifest symptoms of the injury noted. In this regard, the mental health expert is not different from a treating medical expert.<sup>79</sup> The Federal Rules of Evidence provide a hearsay exception for statements made to a health care professional for the purpose of medical diagnosis or treatment.<sup>80</sup> Such statements may also be admitted when the diagnosis or treatment is conducted by a properly qualified psychological expert.<sup>81</sup> The

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77. Psychology has a Janus face. One face looks to psychotherapeutic practice, while the other looks to empirical research. These two "faces" of the discipline interact but do not overlap. See generally Forsyth & Strong, *The Scientific Study of Counseling and Psychotherapy*, 41 AM. PSYCHOLOGIST 113 (1986) (proposes a theoretical structure to increase the level of interaction between practicing clinicians and the empirical study of their practice).

78. *Id.*

79. Courts generally admit hearsay statements made to someone other than a physician if made for the purpose of diagnosis or treatment of a physical or psychological ailment. See, e.g., *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527 (N.C. Ct. App. 1987) (Hearsay testimony of a psychologist was admitted.); *Commonwealth v. Gallagher*, 353 Pa. Super. 426, 510 A.2d 735 (Pa. Super. Ct. 1986) (Hearsay testimony of a nurse was admitted.).

80. FED. R. EVID. 803(4). See, e.g., *State v. Butler*, 256 Ga. 448, 452, 349 S.E.2d 684, 685-86 (1986), *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986); see also *People v. Draper*, 150 Mich. App. 481, 486, 389 N.W.2d 89, 91-92 (1986) (A young child's out-of-court assertion uttered to physician one week after alleged incident of sexual misuse was admitted as an excited utterance hearsay exception rather than as a medical diagnosis hearsay exception.). It ought to be noted, however, that courts have not addressed whether the rationale which underlies the medical diagnosis hearsay exception is applicable to a young child.

81. See *State v. Oliver*, 85 N.C. App. 1, —, 354 S.E.2d 527, 536 (1987). But see *State v. Stafford*, 77 N.C. App. 19, 334 S.E.2d 799 (1985), *aff'd*, 317 N.C. 568, 342 S.E.2d 338 (1986)

issue that is posed by the admission of expert testimony by a treating clinician is whether such a clinician may present conclusions based upon a combination of hearsay, personal knowledge that resulted from diagnosis and treatment, and scientific knowledge obtained through the study of psychology.<sup>82</sup>

The issue is analogous to the admissibility of expert medical testimony by a treating physician in a stabbing case. The expert may testify as to the diagnosis and existence of a wound, what the victim said were the circumstances that led to the injury, and whether these hearsay statements are, in the expert's opinion, consistent with the injuries noted during the diagnosis or treatment. The expert may also discuss aspects of the wound in a way that may serve to limit the class of potential assailants.<sup>83</sup> Expert psychological testimony in a case involving the sexual misuse of a child should be admissible by analogy.

A clinically qualified expert may describe the child's psychological injury because such testimony is based on the expert's personal knowledge.<sup>84</sup> This description may include a recitation of hearsay statements made by the victim to the clinician for the purpose of formulating a diagnosis or initiating treatment.<sup>85</sup> The clinician may testify as to whether symptoms of a psychological injury were detected in the process of evaluation.<sup>86</sup> Further, the expert may comment as to whether the symptoms detected are consistent with the explanation of the events that allegedly caused the injury.<sup>87</sup>

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(medical diagnosis hearsay exception not admissible if the examination was conducted for the purpose of going to trial).

82. The court must exclude the testimony by a treating medical expert if the testimony is offered pursuant to a medical diagnosis hearsay exception and neither the medical diagnosis nor treatment is affected by the content of the hearsay statement. *Compare* State v. Aguallo, 318 N.C. 590, 597, 350 S.E.2d 76, 80-81 (1986) (A child's identification of the alleged sexual offender during psychological diagnosis and treatment was admissible as a hearsay exception because the treatment of the child will differ if the offender and the child are related.) *with* State v. Bellotti, 383 N.W.2d 308, 312 (Minn. Ct. App. 1986) (A child's identification of the alleged defendant during medical evaluation was not admissible because it was not relevant to the physician's diagnosis or treatment.).

83. Although evidence that excludes a class of individuals may be admitted, evidence that attributes blame on the basis of membership may not be admitted. *Sloan v. State*, 70 Md. App. 630, 522 A.2d 1364 (1987).

84. Assuming that relevance can be established, a witness may testify as to matters of which they have personal knowledge. *State v. Kennedy*, 320 N.C. 20, \_\_\_, 357 S.E.2d 359, 366 (1987); *FED. R. EVID.* 602.

85. *State v. Oliver*, 85 N.C. App. 1, \_\_\_, 354 S.E.2d 527, 535 (1987); *FED. R. EVID.* 803(4).

86. *See Allison v. State*, 256 Ga. 851, 852, 353 S.E.2d 805, 807 (1987); *Kennedy*, 320 N.C. at \_\_\_, 357 S.E.2d at 366.

87. A treating expert, when questioned as to whether the injury noted is consistent with a particular cause, is responding to a variant of the classical hypothetical question in which the basis of the expert's judgment need not be made explicit to the trier of fact. The court will

The expert clinician may also comment on whether a medical diagnosis was formulated.<sup>88</sup> Yet the case law concerning the sexual misuse of children does not specify what constitutes a diagnosis.<sup>89</sup> In general, diagnosis is the identification of the underlying cause and the pathological process, through an examination of symptoms.<sup>90</sup> In determining what constitutes a diagnosis the medical community relies upon formal manuals issued by official bodies<sup>91</sup> in accordance with standards pronounced by the World Health Organization.<sup>92</sup> In the field of psychology, in particular, the medical community has created standard objective criteria to determine whether a pattern of symptoms constitutes a diagnosis.<sup>93</sup> Thus, lawyers, when relying upon the presentation of a medical expert witness, are justified in assuming that the expert will apply the standard of the medical profession in making a medical diagnosis. An evaluation that purports to be a diagnosis but does not meet the standard set by the medical community should not be admissible.

Some jurisdictions have admitted into evidence a diagnosis of "child sex abuse syndrome."<sup>94</sup> A syndrome, however, is not consid-

grant opposing counsel the opportunity to explore the expert's basis and may challenge the expert's foundation. See *Kennedy*, 320 N.C. at \_\_\_, 357 S.E.2d at 366; *State v. Teeter*, 85 N.C. App. 624, \_\_\_, 355 S.E.2d 804, 808 (1987) (The trial court overruled an objection that the expert exceeded the bounds of psychological expertise when the expert opined that the behavioral characteristics exhibited by the victim were consistent with sexual abuse.); *FED. R. EVID.* 703, 705.

88. See 2 J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 60-145 (3d ed. 1981) (addressing the method of entering a diagnosis into evidence as a component of the deposition and cross-examination of a psychological expert).

89. The literature on diagnosis and classification in general is voluminous and complex. See e.g., V. RAKOFF, H. STANCER, & H. KEDWARD, *PSYCHIATRIC DIAGNOSIS* (1977) (collection of essays on the issues involved in diagnosis).

90. See, e.g., *State v. Willoughby*, 507 A.2d 1060, 1063-64 (Me.), cert. denied, 107 S. Ct. 199 (1986) (Diagnosis of a "puffing syndrome," a behavior pattern in which an individual self-aggrandizes and is therefore unreliable, should have been admitted.).

91. E.g., *DSM-III-R*, *supra* note 35.

92. WORLD HEALTH ORGANIZATION: *MANUAL OF THE INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES, INJURIES, AND CAUSES OF DEATH* (9th rev. 1977); see also *DSM-III-R* *supra* note 91, at app. D (discussion of the interrelationship between the psychiatric classification manual and the international standard).

93. See *DSM-III-R*, *supra* note 35.

94. Courts discuss the behavior patterns typically exhibited by a sexually misused child under various labels, such as child sexual abuse syndrome, child abuse accommodation syndrome, post abuse sexual syndrome, and child molest syndrome. These labels all appear to represent the same phenomenon: Children who have been sexually misused behave differently from children who have not been misused. Typical of the formulation of the child sexual abuse syndrome found in the legal practice is that reported at length by the court in *People v. Grady*:

[T]he "Syndrome" has five distinct phases that are associated with it, as well as symptoms or behavioral manifestations and coping mechanisms that have been observed in sexually abused children.

The first phase, the "engagement phase," is when the offender seeks out

friendly contact with the child, which can include various kinds of "affectional behavior" such as allowing the child to sit in the offender's lap. It is during the second phase, the "sexual interaction phase," that the sexual abuse actually occurs. This "sexual interaction phase", [sic] often overlaps in part, the third, or "secrecy" phase, in which the offender seeks to prevent the child from disclosing the sexual abuse. During this phase the level of threats against the child begins to increase. Such threats may include threats against a member of the child's family, or a threat that the child will get in "trouble", [sic] or actual violence directed against the child. Following the "secrecy" phase is the "disclosure" phase. It is characterized either as "purposeful disclosure," which is relatively rare and which occurs when the child intentionally relates the sexual offense to someone else, or "accidental disclosure" which usually occurs when someone notices a change in the child's behavior, leading to questions which prompt the child to disclose the sexual offense. Apparently, "accidental disclosure" is the most common revelation of child sexual abuse.

Finally, after the disclosure, the child enters the "suppression" phase. It is at this time that the psychological defenses become operative. In this regard, as [the expert witness] testified in explaining that children often suppress information about sexual abuse: "one needs to understand that once a child sex abuse case is disclosed, all of a sudden, all kinds of adults are marching into the life of a child. You have the police, you have the District Attorney, you have the Family Court personnel, you have family members who are very upset, you have school people, you have a whole bunch of folks now asking this youngster what happened. . . . Families are usually under a great deal of strife when this secret has been broken, so that in a suppression phase, very often you will see a child holding back, the child will decide I am not going to talk about this, this is too much pressure . . . or you sometimes get recantation . . . [.] Sometimes that is an intellectual strategy on the part of the child, to send all these people away . . . it is too much stress for them to have to deal with all these people now in their lives." This phase is often characterized by denial, or in other words, "suppression basically means shutting down, trying to keep things back". [sic] Sexually abused children also undergo a wide variety of symptoms: regressive behavior; bed wetting; bowel movements in their pants, although previously toilet trained; regression to infantile separation anxieties; a new inability to cope with previously achieved self-help skills, with the result that the child requires the mother's help again. These children also begin displaying other previously unexperienced behavior: temper tantrums beyond what had been normal; hyperactivity or withdrawal; exaggerated fear levels, such as fear of men or fear of locations where the sexual offense took place; inappropriate sexual play with peers, toys, or dolls, including touching themselves in an inappropriate manner; sexually oriented conversation; detailed and inappropriate—for their age—sexual knowledge; eating disorders; sleeping disorders, or a fear of sleeping alone; nightmares; flashbacks, crying spells, resulting from lowered frustration thresholds. Furthermore, since a child of young age is unlikely to possess detailed sexual knowledge, his or her description of sexual intercourse, or oral or anal sodomy, is usually evidence that the child had, somehow, viewed explicit sexual activity or materials, or, more likely, was sexually abused.

133 Misc. 2d 211, 214-16, 506 N.Y.S.2d 922, 924-25 (Sup. Ct. 1986) (ellipsis in original).

A psychologist may testify as to the components of a child sexual abuse syndrome as long as he does not rely upon an analysis of the facts of the particular case, nor venture an opinion as to the validity of the child's accusation of inappropriate sexual contact. *People v. Gray*, 187 Cal. App. 3d 213, 218-20, 231 Cal. Rptr. 658, 660-61 (1986). The *Grady* court equated the child sex abuse syndrome and other syndrome testimony ruled admissible in New York:

The 'Child Sexual Abuse Syndrome' should be considered with other syndromes,



ered a diagnosis by the medical community;<sup>95</sup> rather, it is a collection of related symptoms.<sup>96</sup> Whether the pattern of symptoms can constitute a diagnosis is determined in part by whether a common underlying pathological process can be identified as the causal agent of the pattern of symptoms.<sup>97</sup> Further, the underlying pathological process must be recognized as a disorder within a standard diagnostic manual.<sup>98</sup> The symptom pattern is not assigned the label of a diagnosis, but rather, the symptom pattern is evidence of the underlying pathological process to which it is causally connected. For these reasons, it is not medically proper to diagnose the existence of a syndrome.

## 2. THE CHILD SEX ABUSE SYNDROME

The sexual abuse syndrome embodies the notion that a traumatic event results in detectable behavior changes and assumes that the behavior patterns so caused are both meaningful and consistent. The testimony of an expert on the existence of child sex abuse syndrome assumes the existence of a single set of symptoms and behaviors that are associated with sexual misuse.<sup>99</sup> This latter assumption is not valid. The psychological symptoms associated with a child who was attacked and raped by a stranger, for example, are different from the symptoms of a child who was the victim of an exhibitionist. Both of these symptoms are in turn different from the symptoms of a child

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such as . . . 'Rape Trauma Syndrome,' 'Battered Child Syndrome,' and 'Battered Wife Syndrome' that explain the behavior of a crime victim, which does not appear ordinary or normative. Expert evidence concerning these syndromes, which are analogous to the Child Sexual Abuse Syndrome, generally has been admitted as reliable and helpful to the factfinder.

*Grady*, 133 Misc. 2d at 216, 506 N.Y.S.2d at 924.

95. The syndrome with which lay persons are most familiar is Acquired Immune Deficiency Syndrome (AIDS). Medical and lay persons alike speak of individuals with a "diagnosis of AIDS." Yet, when accuracy and formality is important, physicians will present the diagnosis as Human Immunodeficiency Virus (HIV), and may separately diagnose the individual opportunistic infections that are components of the AIDS syndrome. The collection of symptoms, known as a syndrome, is not accepted as a diagnosis. The medical community originally used the label AIDS because the common underlying pathological process had not been identified. *See also* *Commonwealth v. Rodgers*, 364 Pa. Super. 477, 484-85, 528 A.2d 610, 614 (1987) (Battered child syndrome has become an accepted medical diagnosis and serves to diagnose the underlying pathological agent that causes the child's multiple injuries.).

96. J. CHAPLIN, *DICTIONARY OF PSYCHOLOGY* 529 (1975).

97. *See supra* note 92 and accompanying text.

98. Psychologists have criticized the medical community for being overly protective of access to the power to create "official" diagnoses. *See, e.g.,* McLemore & Benjamin, *What Ever Happened to Interpersonal Diagnosis?*, 34 AM. PSYCHOLOGIST 17, 17-19 (1979); Schacht & Nathan, *But Is It Good for the Psychologist?*, 32 AM. PSYCHOLOGIST 1017, 1017-21 (1977).

99. The definition of a syndrome specifies that the symptoms or personality traits that make up the syndrome must be related. J. CHAPLIN, *DICTIONARY OF PSYCHOLOGY* 529 (1975).

who was the victim of incest.<sup>100</sup> Further, depending upon a multiplicity of factors, the impact upon the child could be quite different even within a single category. In a case of father-daughter incest, for example, such factors as the number of episodes and the time period over which the incestuous relationship took place affect the nature and extent of psychological impact upon the child.<sup>101</sup> In addition, the impact upon the child will vary depending upon the nature of the sexual misuse to which the child was subjected, ranging from voyeuristic perversions to fondling, masturbation, and intercourse.<sup>102</sup> Further, because the adult who misuses a child typically will employ some method to encourage the child not to communicate with others about the sexual contact,<sup>103</sup> the impact will vary depending upon whether the offender threatened the child with physical harm, bribed the child with attention or material possessions, or threatened to hurt other members of the child's family.<sup>104</sup> The effect of public disclosure of an incident of sexual misuse upon both the child and the child's family will also produce psychological symptoms in the child

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100. The syndrome is based on clinical experience with victims of intrafamilial sexual misuse. Factors such as delay in disclosure and the psychological sequel to the breach of trust play an important role in the syndrome. Nonetheless, experts have "diagnosed" the existence of the syndrome to children who were not misused within a family setting. *E.g.*, *People v. Grady*, 133 Misc. 2d at 212, 506 N.Y.S.2d at 923 (offender was a minister).

101. The syndrome was designed for circumstances in which the child was unable to discontinue the adult's inappropriate sexual behavior after the first incident. Twenty-five percent of daughters who are sexually misused by their fathers, however, are able to stop the inappropriate behavior after one incident. K. MEISELMAN, *INCEST* 165 (1979). If single-event cases are excluded from analysis, the average length of a sexually inappropriate relationship between a father and his daughter is three and one half years. It is this pattern upon which the syndrome data was originally based. *Id.*; see also *In re Sara M.*, 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987). See generally Rofsky, *Effects of Father-Daughter Incest on the Personality of Daughters*, 40 DISSERTATION ABSTRACTS INT'L 2386 (1979) (empirical study of factors that impact the effect of incest upon the daughter).

102. The precise nature of the abuse has an effect on the psychological defense mechanisms that the child may employ to protect his or her psychological self worth and identity. See MEISELMAN, *supra* note 101, at 140-261, *passim*.

103. See *infra* notes 104-11 and accompanying text.

104. The child who was threatened with severe physical harm may experience more of the trauma reactions associated with the diagnosis of post-traumatic stress disorder. Guilt and depressive reactions, however, would be less likely in this child. In contrast, the child who was reinforced for the child's silence by gifts will tend to develop a brazen facade in order to hide a profound sense of worthlessness. Children who have been manipulated in this way are at significant risk of drug and alcohol abuse, as well as prostitution.

One method of encouraging the child to maintain secrecy is to convince the child to "go along quietly" in order to avoid harm to family members. This occurs with surprising frequency. The child is told that the offender will "leave her younger sister alone if she would just . . . ." These children are predisposed to develop narcissistic, dependent and passive-aggressive personality disorders. B. JAMES & M. NASILETI, *TREATING SEXUALLY ABUSED CHILDREN* 33-69 (1983).

victim.<sup>105</sup>

The child's age, level of intellectual and emotional functioning, and other developmental characteristics also have an impact.<sup>106</sup> Each potential combination of factors will produce a unique constellation of symptoms. The number of possible symptom constellations is virtually infinite. This renders the concept of a single child sexual abuse syndrome meaningless. Creation of a different child sex abuse syndrome to correspond with each symptom constellation would approach the level of specificity of a hypothetical question.<sup>107</sup>

The behavior patterns, or symptoms, associated with children being misused are extremely diverse. They include, for example, the polar opposites of behaving in an infantile or supermature fashion, and displaying a slovenly disregard for outward appearance or dressing precociously. The symptoms of sexual misuse are causally related to both the pattern of misuse to which the child was subjected and the personal characteristics of the child.<sup>108</sup>

A psychological evaluation of behavior provides insight into its causes.<sup>109</sup> Behavior patterns may evidence the existence of an underlying pathological process to which a diagnosis may be validly affixed.<sup>110</sup> The diagnosis, however, is more generic and less inflam-

105. Disclosure of father-daughter incest to the mother creates a crisis in the family, whether the mother believes or denies her daughter's accusation. Burgess, Holmstrom & McCausland, *Divided Loyalty in Incest Cases*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 115 (1978). When the disclosure is made to authorities, the behavior of the mother will be a significant determinant of the child's psychological well-being. *Id.*

106. Researchers have not systematically explored the impact of developmental factors in creating variations in the behavior of sexually misused children. Clinicians, of course, recognize that treatment must be tailored to the developmental level of the victims of sexual misuse. B. JAMES & M. NASILETI, *supra* note 104, at 49-69. "Although there are patterns that have been observed, the ongoing studies reveal that a host of variables contribute to the effect of rape on its victims . . ." *People v. Bledsoe*, 36 Cal. 3d 236, 250-51, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 459-60 (1984). "[E]ach rape victim responds to and integrates the experience differently depending upon her age, life situation, the circumstances of the rape, her specific personal style, and the responses of those from whom she seeks support." *Bledsoe*, 36 Cal. 3d at 251 n.13, 681 P.2d at 301 n.13, 203 Cal. Rptr. at 460 n.13 (quoting Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations* 133 AM. J. PSYCHIATRY 408, 409 (1976)).

107. *See Kruse v. State*, 483 So. 2d 1383, 1385 (Fla. 4th DCA 1986) (The expert's response to questions was premised upon the validity of a particular set of facts.); *People v. Grady*, 133 Misc. 2d 211, 215-16, 506 N.Y.S.2d 922, 925-26 (Sup. Ct. 1986) (A psychiatrist "acknowledged, in response to a hypothetical question, that when called to the witness stand in the courtroom, the conduct of a child in initially denying that a defendant, also present in the courtroom, was the molester, could be consistent with the Syndrome.").

108. B. JAMES & M. NASILETI, *supra* note 104.

109. Behaviors and symptoms are meaningful. S. FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* (1951).

110. Stressors are factors in the initiation or exacerbation of a majority of the psychiatric diagnoses. DSM-III-R, *supra* note 35.

matory than a diagnosis labeled "child sex abuse syndrome."<sup>111</sup> These diagnoses include post-traumatic stress disorder (PTSD),<sup>112</sup> simple phobia,<sup>113</sup> and the eight adjustment disorders,<sup>114</sup> depending upon the pathological process that the sexual misuse initiated or exacerbated. Such a diagnosis is consistent with the occurrence of a traumatic event, but cannot distinguish between differing traumatic causes.

The expertise of a clinician, through both formal training and clinical practice, is limited to the treatment and diagnosis of a patient. The clinician may form an opinion as to whether the patient has been truthful based upon the patient's statements and symptoms. Although the clinician may testify as to whether the symptoms are consistent with the patient's described incidence of sexual misuse,<sup>115</sup>

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111. See *Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (The term "rape trauma syndrome" is likely to mislead the jury into believing that the classification indicates a scientific judgment that the victim was raped.); *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984) ("There are inherent implications from the use of the term 'rape trauma syndrome,' for it suggests that the syndrome may only be caused by 'rape' . . ."); *Townsend v. State*, — Nev. —, 734 P.2d 705, 708-09 (1987) (Diagnosis of post-traumatic stress disorder for a child victim of sexual assault is admissible.); *State v. Bowman*, 104 N.M. 19, 22, 715 P.2d 467, 470 (Ct. App. 1986) (Evidence was properly excluded when the prosecutor insisted upon the term "rape trauma syndrome" even though the psychologist repeatedly stated a preference for the less emotionally charged term "post-traumatic stress disorder."); see also *State v. Gallegos*, 104 N.M. 247, 253, 719 P.2d 1268, 1274 (Ct. App. 1986) (Referring to the term "battered wife syndrome," the court concluded that it saw "no reason for excluding use of a recognized term to describe the phenomenon.").

112. Post-traumatic stress disorder (PTSD) requires the existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone: a reexperiencing of the trauma, a reduction of involvement with the external world, and certain other specific symptoms. DSM-III-R, *supra* note 35, at 247-51. Note that the diagnostic requirement of PTSD requires the existence of a significant stressor, such as rape or sexual misuse. It is circular to assert the diagnosis of PTSD as evidence of the occurrence of the stressor (the rape or the sexual misuse) when the diagnosis requires an assumption of the occurrence of the stressful event. See *Kruse v. State*, 483 So. 2d 1383, 1385 (Fla. 4th DCA 1986) (The diagnosis of PTSD was admissible in a child sexual misuse case to explain the victim's change of behavior.).

113. The predominant feature of simple phobia is a persistent and irrational fear. It is recognized as being a learned condition, usually as a result of the pairing of a traumatic event with the feared object. DSM-III-R, *supra* note 35, at 243.

114. A common requirement among all of the adjustment disorders is the existence of an identifiable social stressor in the life of the patient within three months of the onset of the symptoms. The patient must be impaired as a consequence of the adjustment disorder. The particular symptom pattern of the patient determines the proper diagnosis. *Id.* at 329.

115. A majority of jurisdictions have ruled that evidence regarding the consistency of a child's behavior with the behavior pattern typically displayed by victims of sexual misuse is admissible under certain circumstances. See *United States v. St. Pierre*, 812 F.2d 417, 419-20 (8th Cir. 1987) (A clinical psychologist can testify as to the traits and characteristics of sexually abused children generally, and may compare these to the alleged victim in the case.); *Rodriguez v. State*, 741 P.2d 1200, 1205 (Alaska Ct. App. 1987) (An expert may testify that the victims were "no different" from the exploited children who the expert had interviewed in

the expert may not present an opinion regarding the truthfulness of the victim or anyone else.<sup>116</sup>

his studies of victims.); *State v. Moran*, 151 Ariz. 378, 384, 728 P.2d 248, 254 (1986) (A psychological expert may testify regarding factors impacting recantation and may provide an explanation for the victim's anger.); *People v. Koon*, 724 P.2d 1367, 1369-70, (Colo. Ct. App. 1986) (An expert may testify as to the consistency of an alleged victim's behavior with a pattern typically displayed by a child incest victim for the purpose of rebuttal.); *Kruse v. State*, 483 So. 2d 1383, 1387 (Fla. 4th DCA 1986) ("[T]he gist of . . . [the] testimony was that the victim's reported behavioral changes were consistent with her report of sex abuse."); *Allison v. State*, 256 Ga. 851, 853-54, 353 S.E.2d 805, 807 (1987) (The expert may present the components of child sex abuse syndrome, and testify as to the consistency of the child's behavior with the syndrome.); *State v. Lawrence*, 112 Idaho 149, 154-55, 730 P.2d 1069, 1074-75 (Ct. App. 1986) (An expert may testify as to the tendency of children to delay disclosure of an incident of sexual misuse.); *People v. Stull*, 127 Mich. App. 14, 19, 338 N.W.2d 403, 406 (1983) (A rape counselor was not acting as a "human lie detector" when she gave her opinion as to whether a complainant's behavior was consistent with having been raped.); *State v. Myers*, 359 N.W.2d 604, 608-09 (Minn. 1984) (A psychologist was permitted to testify as to both the traits and characteristics typically found in sexually abused children, and those that were similar in the complainant.); *State v. Shackelford*, 719 S.W.2d 943, 945 (Mo. Ct. App. 1986) ("Properly qualified, an expert in the psychological testing field may testify that the patient, client, or victim does possess and exhibit the characteristics consistent with those resulting from a traumatic stress reaction such as rape.") (quoting *State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984)); *Townsend v. State*, \_\_\_ Nev. \_\_\_, 734 P.2d 705, 708 (1987) (An expert may express an opinion as to whether a child was sexually abused.); *People v. Keindl*, 68 N.Y.2d 410, 422, 502 N.E.2d 577, 583, 509 N.Y.S.2d 790, 796 (1986) ("[T]he range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents is not a subject matter within the ken of the typical juror . . ."); *State v. Teeter*, 85 N.C. App. 624, \_\_\_, 355 S.E.2d 804, 808 (1987) (The expert may testify as to the consistency of a mentally retarded victim's behavioral characteristics and symptoms of sexual misuse, and may present the trier of fact with the basis of his judgment.); *State v. Kennedy*, 320 N.C. 20, \_\_\_, 357 S.E.2d 359, 365-66 (1987) (An expert may testify concerning the symptoms and characteristics of sexually abused children, and may state an opinion that the symptoms are consistent with sexual or physical abuse.); *State v. LeBrun*, 37 Or. App. 411, 415-16, 587 P.2d 1044, 1047 (1978) (An expert may testify that the victim's behavior comported with the behavior of most women that come to the hospital alleging sexual assault.); *State v. Middleton*, 294 Or. 427, 435-38, 657 P.2d 1215, 1220-21 (1983) (A qualified expert may testify as to whether the reaction of one child is similar to the reaction of most victims of familial child abuse.); *Brown v. State*, 736 P.2d 1110, 1114-15, 1125-28 (Wyo. 1987) (A clinical psychologist was allowed to describe the typical pattern of behavior of participants in father-daughter incest, and venture her opinion as to whether the child was a victim of sexual molestation.); *Scadden v. State*, 732 P.2d 1036, 1044-48 (Wyo. 1987) (Behavioral characteristics of sexual assault victims are admissible to rebut defenses that delay was inconsistent with nonconsensual sexual assault.). *But see* *Lantrip v. Commonwealth*, 713 S.W.2d 816, 817 (Ky. 1986) (Testimony that the victim fit the pattern of sexual abuse accommodation syndrome should not have been admitted because it did not meet the *Frye* standard of reliability.); *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982) (It was fundamental error to admit testimony that behavior of rape victim was consistent with rape trauma syndrome for purpose of rebutting a defendant's claim of consent.).

116. Testimony as to a witness' character for truthfulness is permitted. FED. R. EVID. 608. An expert, however, is generally considered to be incapable of testifying as to someone else's character for truthfulness. *United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986); *State v. Chul Yun Kim*, 318 N.C. 614, 619-22, 350 S.E.2d 347, 351 (1987).

### 3. THE SCIENTIFIC STUDY OF BEHAVIOR

The second area of expertise for psychologists within the field of human behavior is the scientific study of behavior. Both parties in a sexual misuse case can call an expert witnesses to testify about sexual misuse in general.<sup>117</sup> The expert, never having seen the alleged victim,<sup>118</sup> does not testify as to whether the child fits the behavior pattern associated with the sexual misuse of children, but rather describes the behavior patterns associated with sexual misuse.<sup>119</sup> Such an expert is qualified through mastery of a specialized field of knowledge about a group of either children who have been sexually misused,<sup>120</sup> or adults who have sexually misused children.<sup>121</sup>

Although the expert testifies to symptoms in general, the information that the expert divulges can vary widely. The expert may discuss the tendency of victims to postpone disclosure of the inappropriate and illegal activity for a period of days, weeks, or years.<sup>122</sup> The expert may explain that a child's pattern of retracting<sup>123</sup> or changing the complaint does not correlate with fabrication.<sup>124</sup> Further, the expert can explain the psychological dynamics that contribute to such behavior in children.<sup>125</sup> Experts have been asked to testify about the personal, demographic, or behavioral attributes associated with sexual offenders of children, although such testimony generally has not been admitted.<sup>126</sup> Whether expert testimony is admitted depends in part on the reason for which the testimony is offered.

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117. *E.g.*, *California v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

118. *E.g.*, *Eastman v. Commonwealth*, 720 S.W.2d 348, 351-52 (Ky. Ct. App. 1986); *People v. Grady*, 133 Misc. 2d 211, 506 N.Y.S.2d 922 (Sup. Ct. 1986).

119. *State v. Hall*, 406 N.W.2d 503, 504-05 (Minn. 1987) (Expert testimony on direct examination as to behavioral characteristics generally associated with sexually misused adolescents is admissible.); *Grady*, 133 Misc. 2d at 213, 506 N.Y.S.2d at 924 ("The evidence is . . . admissible . . . to understand the psychological aftermath occasioned by the trauma, such as false recantations and feelings of guilt and apprehension about the trial.").

120. *E.g.*, *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 373-74, 502 A.2d 253, 255 (1985); *see also* *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (comparing the situation in which the expert testifies as to the credibility of a particular witness to one in which the expert testifies about behavior patterns of victims as a class).

121. *Sloan v. State*, 70 Md. App. 630, 522 A.2d 1364 (1987); *State v. Friedrich*, 135 Wis. 2d 1, 398 N.W.2d 763 (1987).

122. *E.g.*, *People v. Foreman*, 161 Mich. App. 14, 23-24, 410 N.W.2d 289, 294 (1987) (A social worker may testify that delays of more than a month between an incidence of abuse and the disclosure thereof are not uncommon.); *People v. Matlock*, 153 Mich. App. 171, 395 N.W.2d 274 (1986).

123. *See* *Potter v. State*, 410 N.W.2d 364, 368 (Minn. Ct. App. 1987) (discussing family pressure that may lead a child to recant an accusation of incest).

124. *Oregon v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983).

125. *Eastman v. Commonwealth*, 720 S.W.2d 348, 351 (Ky. Ct. App. 1986).

126. *Sloan v. State*, 70 Md. App. 630, —, 522 A.2d 1364, 1368-69 (1987) (Comparison of offender to a profile of typical offenders is not admissible to show guilt by association.).

Scientific experts derive their specialized knowledge from behavioral group studies.<sup>127</sup> A properly conducted study yields data that will allow an expert to predict confidently how a similarly constituted group would behave under similar circumstances.<sup>128</sup> With this information, the expert can formulate an opinion as to the probability that an individual will behave in a specific manner given a particular set of events.<sup>129</sup>

Statistical information generally is not admissible to establish an ultimate fact if the fact to be established is the occurrence or nonoccurrence of a discrete event.<sup>130</sup> The occurrence of an event must be determined by evidence of the event.<sup>131</sup> It is a logical error to reach a conclusion about the existence of a thing based upon the probability of its occurrence. All that may be determined by the introduction of probability data is the likelihood of an event occurring. Knowledge, for example, that the probability of a negligently discharged gun causing a particular death is extremely low does not change the fact that the victim may indeed have died in this very manner. Similarly, knowledge that the probability of a household possessing at least one television is extremely high does not change the fact that an individual does not have one.

Statistical information that is inadmissible to establish the occur-

127. See generally J. MYERS, *FUNDAMENTALS OF EXPERIMENTAL DESIGN* (3d ed. 1979); see also *In re Sara M.*, 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987); *People v. Bledsoe*, 36 Cal. 3d 236, 247 n.8, 203 Cal. Rptr. 450, 457 n.8, 681 P.2d 291, 298 n.8 (1984) (regarding the origin of the term "rape trauma syndrome").

128. The ability to generalize from an experimental group depends upon the experimental design. See T. COOK & D. CAMPBELL, *QUASI-EXPERIMENTATION* 37-91 (1979).

129. Predictive validity depends upon the experiment's statistical model, the error coefficient, and the accuracy of the embedded assumptions. J. WARD & E. JENNINGS, *INTRODUCTION TO LINEAR MODELS* 66-68 (1979).

130. See, e.g., *State v. Buell*, 22 Ohio St. 3d 124, 131, 489 N.E.2d 795, 803 (1986).

131. The Court of Appeals of Arkansas, when confronted with expert testimony comparing the characteristics of a typical case involving sexual misuse to the facts in the case before it, ruled the expert testimony inadmissible, stating:

It is our conclusion from the record in the case before us that the evidence of the expert, . . . tended to focus the attention of the jury upon whether the evidence against the defendant matched the evidence in the usual case involving sexual abuse of a young child. Much of the expert's testimony highlighted details that were parallel to the details in the case at hand. . . . [W]e feel this type of evidence was not of proper benefit to the jury in this case . . . . [I]t was not introduced to rebut a misconception about the presumed behavior of a rape victim but to prove . . . [that] the circumstances and details in this case match the circumstances and details usually found in child abuse cases.

*Hall v. State*, 15 Ark. App. 309, 316-17, 692 S.W.2d 769, 773 (1985); see also *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986) (When the maxims of logic indicate the expert's opinion is inherently unhelpful, then it is the court's responsibility to forbid its admissibility.). See generally K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1968) (particularly the chapters on probability and the problem of an empirical basis).

rence of a fact of consequence, however, may be admissible to assist the trier of fact in determining the probative value of a circumstantial fact.<sup>132</sup> A statement by a psychologist that 70 percent of all sexually misused children are sexually abused by their fathers, when offered to provide incremental support for the conviction of the child's father, or to support the exoneration of an alleged nonfamilial perpetrator, is inadmissible. The testimony is irrelevant because it does not assist the trier of fact in establishing whether this defendant committed the act with which he is charged. Even if the proffered statistic was 99 percent, the logical analysis would not change.<sup>133</sup> Nevertheless, such evidence may be admissible for the purpose of modifying the commonly understood probative value of a circumstantial fact. That is, for example, if it is commonly believed that the typical sexual offender is a nonfamily member and if that common belief is clearly erroneous, then the testimony is nevertheless admissible to aid the trier of fact in evaluating the impact of the relationship of the alleged offender and victim as circumstantial evidence of guilt.

The purpose of an expert's testimony with respect to scientific information is to provide information that is beyond the common experience of the trier of fact and that will assist it in the determination of the probative value to be assigned to a circumstantial fact that bears upon a fact of consequence. An example is a child's postponing disclosure of the sexual misuse for a period of months or years.<sup>134</sup> A

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132. Probability analysis does not assist in efforts to establish the existence or nonexistence of an event. The existence of a discrete event has a probability of either zero or one (the event either exists completely or does not exist completely). Although the statistician may be able to comment on the likelihood of an event occurring, the statistician cannot determine whether the event did occur. Any attempt to do so would only be a statistically supported guess. See R. WINKLER & W. HAYS, *STATISTICS* 420 (2d ed. 1975). Psychologists have also addressed the role of probability data in litigation. For example, Professors Loftus and Monahan stated:

The response, it seems to us, is straightforward. The expert must agree that one cannot be sure whether any particular witness is influenced by this factor or not. The expert can only argue that a certain percentage of people are affected in a particular way. The jury is then free, as it should be, to use whatever other information it has available to make the final decision about whether the particular witness or defendant is to be classified with the majority or the minority on this particular characteristic. Put another way, *probabilistic evidence can be presented as such, with its application to a particular person left for the jury to decide.*

Loftus & Monahan, *Trial by Data*, 35 AM. PSYCHOLOGIST 270, 280 (1980).

133. A similar analysis applies to an expert's response to the question of whether children lie or fantasize about sexual abuse, or whether the expert, in the expert's experience in treating victims of sexual assault, has ever encountered a child that lied. Such testimony is generally not admissible if offered in a party's case in chief for the purpose of supporting the credibility of a witness.

134. See, e.g., *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984); *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 372-73, 502 A.2d 253, 255 (1985);



juror is likely to be incredulous upon hearing a defense attorney elicit from the prosecution's chief witness, the child victim of misuse, that the child delayed for an extended period of time before reporting the abuse to anyone. Common experience teaches us that when a child suffers an injury the child will tell an adult almost immediately. Therefore, testimony of delay in reporting an abusive event would serve as an indirect impeachment of the child's veracity. The prosecutor may call an expert to address this perception. The expert will testify that a delay in reporting an incident of sexual misuse is a common occurrence among victims of sexual assault.<sup>135</sup> The defendant, through his elicitation of testimony regarding delay in the reporting of the incident of sexual misuse opened the door to the admission of the prosecution's expert testimony.<sup>136</sup> The defendant placed in issue the proper interpretation of the elicited circumstantial fact: Whether there exists a stronger correlation between delay in reporting and fabrication than between delay in reporting and telling the truth. The expert's role in such a case is to provide an opinion, based upon both the statistical studies and their own clinical experience with patients other than the victim, as to which correlation has more merit.<sup>137</sup>

### E. *The Reliability of the Testimony*

If the testimony of an expert does not meet the *Frye v. United States*<sup>138</sup> standard of "concordance with a reliable body of scientific knowledge," then it is likely to be inadmissible.<sup>139</sup> Concordance with a reliable body of knowledge requires the existence of a reliable body of explanatory principles, and reliable methods of gaining access to these principles, as well as the proper application of these methods by qualified individuals in the particular case.<sup>140</sup> The court must make

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Smith v. State, 100 Nev. 570, 571-72, 688 P.2d 326, 326-27 (1984); State v. Petrich, 101 Wash. 2d 566, 575-76, 683 P.2d 173, 179-80 (1984).

135. People v. Matlock, 153 Mich. App. 171, 177-78, 395 N.W.2d 274, 277 (1986).

136. Some courts will allow the prosecutor to question the expert as a rehabilitative witness without requiring the defendant to first impeach the victim. The apparent rationale for this practice is that the testimony of the child was self-impeaching through no fault of the prosecutor.

137. The prohibition of direct consideration by the expert of the facts of the case at bar is essential. The expert is called to educate the trier of fact as to general behavior patterns in children who have been sexually misused. The expert should not state a personal opinion as to the veracity of the child victim, but rather should present the trier of fact with sufficient information to properly evaluate the child's veracity. See State v. Snapp, 110 Idaho 269, 271, 715 P.2d 939, 941 (1986).

138. Frye v. United States, 293 F. 1013, 1013-14 (D.C. Cir. 1923).

139. *Id.*; see also Giannelli, *The Admissibility of Novel Scientific Evidence*, 80 COLUM. L. REV. 1197, 1201 (1980). But see *infra* notes 147-49 and accompanying text.

140. Giannelli, *supra* note 138, at 1201.

the preliminary examination of the expert's testimony to ascertain whether it is in concordance with a sufficiently reliable body of scientific or technical knowledge.<sup>141</sup>

The *Frye* standard is employed in order to protect the trier of fact from being confused or misled by the admission of expert witness evidence that lacks a reliable scientific basis.<sup>142</sup> The trier of fact is believed to place a great deal of reliance upon the testimony of experts.<sup>143</sup> The trier of fact is likely to believe that a clinical evaluation technique employed by an expert, such as the use of anatomically correct dolls to evaluate a child for an incident of sexual abuse, is valid.<sup>144</sup> The defendant's introduction of experts to dispute the scientific validity of the evaluation technique will not fully counter the impact of the prosecution's witness, regardless of the actual validity of either the underlying scientific principle or the method of implementing it in practice. For these reasons, a foundation consisting of evidence to support a finding of concordance with a reliable body of scientific knowledge must be established before the expert may testify.<sup>145</sup>

The court will determine whether the foundation has been properly laid with reference to the *Frye* test,<sup>146</sup> as modified by interpretations within the particular jurisdiction.<sup>147</sup> A judge does not have expertise in the evaluation of the scientific merit of either theory or technique.<sup>148</sup> Further, it is not a wise policy for the court to become a forum for the debate between competing scientific theories or methods. The forum for such debates is more appropriately left to the professional journals and conferences that cater to the particular scientific community. For these reasons, the *Frye* standard allows the admission of expert testimony that relies upon a new scientific theory

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141. "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ." FED. R. EVID. 104(a). It is reasonable to consider the issue of reliability of the testimony as a foundational test of relevance. See *United States v. Gould*, 741 F.2d 45, 49 (4th Cir. 1984).

142. *Giannelli*, *supra* note 138, at 1201.

143. *Id.* at 1240 n.318.

144. See Jampole & Weber, *An Assessment of the Behavior of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls*, 11 J. CHILD ABUSE & NEGLECT 187-88 (1987); see also *State v. Chul Yun Kim*, 318 N.C. 614, 618-19, 350 S.E.2d 347, 350 (1986) (Testimony regarding evaluation with anatomically correct dolls was admissible.); *In re Christine C.*, 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1987) (Expert's testimony that relied upon the use of anatomically correct dolls is not admissible unless the proponent establishes the scientific reliability of the procedure.).

145. *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977).

146. 293 F. 1013 (D.C. Cir. 1923).

147. *United States v. Downing*, 753 F.2d 1224, 1228-41 (3d Cir. 1985); *People v. Kelly*, 17 Cal. 3d 24, 30-32, 130 Cal. Rptr. 144, 148-49, 549 P.2d 1240, 1244-45 (1976).

148. *Giannelli*, *supra* note 138, at 1208-23.

or technique only if the theory or technique has received general acceptance within the appropriate scientific community.<sup>149</sup>

Courts and commentators have criticized the *Frye* test as being less than satisfactory.<sup>150</sup> It tends to delay the introduction of new scientific principles, and therefore may exclude reliable, relevant, and probative expert testimony.<sup>151</sup> The reliance upon the "general acceptance in the applicable scientific community" standard appears to condition the admissibility of evidence upon a popularity vote within the scientific community.<sup>152</sup> Although this approach may accurately reflect the sociology of the growth of scientific knowledge,<sup>153</sup> it is unseemly to determine the admissibility of evidence based upon what could be characterized as an unscientific poll of scientists. A further complaint about the *Frye* test is the difficulty of determining which scientific community is the appropriate base for comparison.<sup>154</sup> Naturally, the selection of the reference group may determine the outcome. As a result of these criticisms, some courts have relaxed the *Frye* standard of "general acceptance" to a standard of "substantial acceptance" of the scientific hypothesis or technique in the relevant discipline.<sup>155</sup>

The results of a clinical expert's evaluation may be admitted if the techniques relied upon were validly administered and have obtained substantial acceptance in the psychological community. Whether the use of the child sex abuse syndrome as a tool for the evaluation of a child is sufficiently accepted is not clear.<sup>156</sup> Psychological evaluations, however, generally consist of the application of well-accepted clinical techniques to reach feelings, behaviors, and thought

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149. *Frye*, 293 F. at 1014.

150. *Brown v. State*, 426 So. 2d 76, 85-90 (Fla. 1st DCA 1983); *Giannelli*, *supra* note 138, at 1204-28.

151. *Giannelli*, *supra* note 138, at 1223-24.

152. *Id.* at 1208-23.

153. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

154. See, e.g., *United States v. Addison*, 498 F.2d 741, 741 (D.C. Cir. 1974); *United States v. Shorter*, 618 F. Supp. 255, 257 n.4 (D.D.C. 1985), *aff'd*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 108 S. Ct. 71 (1987).

155. The court, in *United States v. Gould*, consciously deviated from the standard of general acceptance in the relevant scientific discipline, and adopted the more liberal standard of substantial acceptance. 741 F.2d 45, 49-50 (4th Cir. 1984). The latter standard requires the court to determine that a substantial body of support exists behind the proffered scientific proposition within the relevant discipline. *Id.* at 49-50; *accord* *United States v. Torniero*, 735 F.2d 725, 731 n.9 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985). *But see* *United States v. McDaniel*, 538 F.2d 408, 413 (D.C. Cir. 1976); *cf.* *United States v. Shorter*, 618 F. Supp. 255, 257 (D.D.C. 1985), *aff'd*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 108 S. Ct. 71 (1987) (expressly declining to follow the *Gould* test).

156. See McCord, *Syndromes, Profiles and other Mental Exotica*, 66 OR. L. REV. 19, 41-44 (1987); Note, *supra* note 52, at 1046-57.

processes. A substantial portion of the psychological community has accepted these general clinical evaluation methods for a very long time. The *Frye* test, although applicable, does not impose a significant obstacle to the admission of such testimony.

Some courts have given the *Frye* standard cursory treatment in cases involving the testimony of clinical experts. In *People v. Beckley*,<sup>157</sup> for example, the Michigan Court of Appeals held that the testimony of a clinician as to whether the behavior of the child was consistent with having been sexually misused was not an application of a child sex abuse syndrome. The evaluation was considered an application of generally accepted psychological methods, and therefore the scientific merit of the child sex abuse syndrome was not at issue. The *Frye* test does not hinder the admissibility of a clinical evaluation based upon common and well-accepted psychological principles.<sup>158</sup>

Courts have held that the American Psychiatric Association's diagnostic system is substantially accepted in response to a *Frye* challenge to the reliability of a diagnostic evaluation. For example, Florida courts have admitted as reliable the clinical diagnosis of a child victim in accordance with the diagnostic category of post-traumatic stress disorder, when offered circumstantially to support an allegation of sexual misconduct by the defendant.<sup>159</sup>

The California Court of Appeal has held that presentation of general facts regarding a child sex abuse syndrome did not need to be subjected to the standard of general acceptance in the relevant scientific community.<sup>160</sup> In *People v. Gray* the court indicated that the *Frye* standard did not apply to cases in which testimony did not purport to prove the occurrence of molestation.<sup>161</sup> The expert in that case did not seek to apply a new scientific process, but rather sought to give the jury information with which to properly evaluate the probative value of behavior patterns already in evidence.

The distinction drawn by the court in *Gray*<sup>162</sup> may be understood by reference to the principle that distinguishes the fourth role for

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157. 161 Mich. App. 120, 409 N.W.2d 759, 763 (1987).

158. Testimony regarding emotional and psychological trauma of a complaining witness is admissible. *People v. Skinner*, 153 Mich. App. 815, 821-23, 396 N.W.2d 548, 551-52 (1986). The *Frye* test is applicable if the evidence is presented with an aura of scientific reliability. *Id.* In *Skinner*, the expert did not testify that the characteristics exhibited by the victim conclusively established that she had been sexually abused, and therefore the *Frye* test did not hinder admission. *Id.*

159. *Kruse v. State*, 483 So. 2d 1383, 1385 (Fla. 4th DCA 1986).

160. *People v. Gray*, 187 Cal. App. 3d 213, 218-21, 231 Cal. Rptr. 658, 661-62 (1986).

161. *Id.*

162. *Id.*

expert witnesses addressed above from the first three roles.<sup>163</sup> In the first three roles, the expert applies clinical skills to the facts of the case and delivers an opinion to the court. In the fourth role, however, the expert does not apply his or her clinical expertise, but rather serves as an educator. An expert testifying as to general facts obtained through the application of traditional research methods is not applying new scientific techniques. The expert, instead, is testifying as to facts within either personal knowledge or contained in learned treatises reasonably relied upon by experts in the field. Therefore, the *Frye* test is inapplicable in such a situation.

#### F. *The Relevance of the Testimony*

Reliable expert testimony may nevertheless be inadmissible unless it is proffered for a relevant purpose.<sup>164</sup> The Federal Rules of Evidence define as relevant evidence any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>165</sup> An expert witness may testify if the testimony is relevant and within the expert's area of competence.<sup>166</sup> The expert may not testify if the purpose for which the testimony is relevant does not relate to the expertise by which the expert is qualified.<sup>167</sup>

The testimony of an expert regarding behavior patterns typically displayed by children who have been sexually misused will not be excluded for lack of relevance if certain criteria are met. The testimony must be offered for a relevant purpose. Typically, this is to counter an express or implied accusation that the particular behavior pattern is associated with fabrication.<sup>168</sup> The expert testimony is relevant in such a case to establish the probative value of a circumstantial fact—the child's behavior pattern—as it relates to the occurrence of

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163. See *supra* notes 49-63 and accompanying text.

164. E.g., FED. R. EVID. 402; see also *United States v. Shorter*, 618 F. Supp. 255, 257 (D.D.C. 1985), *aff'd*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 108 S. Ct. 71 (1987) (The relevance of expert testimony is a preliminary question of law that the court must decide within its discretionary powers.). See generally *Kruse*, 483 So. 2d at 1384-85 (collapsing reliability analysis into a relevancy analysis).

165. FED. R. EVID. 401.

166. "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).

167. *State v. Logue*, 372 N.W.2d 151, 157 (S.D. 1985).

168. An example of such a behavior pattern is the tendency of children to retract accusations of sexual misconduct that they alleged against family members. See, e.g., *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 502 A.2d 253 (1985).

sexual misuse, which is the fact of consequence.<sup>169</sup> Common knowledge of this probative value must be either absent or mistaken.<sup>170</sup> Finally, the expert must be qualified as possessing expertise in the determination of the probative value of this circumstantial fact.<sup>171</sup> Under such circumstances the expert should be permitted to testify regarding the psychological significance of the child's behavior pattern as it relates to the occurrence of sexual misuse.

A party may wish to introduce expert testimony for many purposes. The same testimony may be admissible as relevant for one purpose, but not for another.<sup>172</sup> For example, a party may wish to introduce testimony by an expert as to the veracity of a child during a psychological evaluation. Such testimony is relevant to the trier of fact's determination of the weight it should place upon the psychologist's evaluation.<sup>173</sup> The expert's statement concerning the veracity of the child, however, is not admissible if offered to prove the child's credibility. Both offerings rely upon the clinician's evaluation of the appropriateness of the child's sexual knowledge, emotional reactivity,

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169. It is not clear whether the opposing party needs to elicit the testimony. Logically, the party wishing to admit the expert testimony should have to show the admission of testimony by the opposing party raising the issue of the probative value of the circumstantial fact. Some jurisdictions, however, have allowed the admission of the prosecution's expert testimony after the prosecution itself caused facts to be entered into evidence that circumstantially impeached the credibility of the child. This may be explained by the constructive fiction of allowing the rehabilitation of self-impeaching testimony. *But see* Hall v. State, 15 Ark. App. 309, 312-16, 692 S.W.2d 769, 770-73 (1985) (Evidence that child's behavior and allegations matched a "typical case of abuse" was not properly admitted because it was not introduced to rebut a misconception about behavior of the alleged victim.).

170. If the knowledge of probative value is not outside the common experience or knowledge of the trier of fact, then the trier of fact will not be assisted by the testimony of the expert. Under such circumstances, the testimony will not be admitted in order to prevent a usurpation of the province of the trier of fact. *See* McCord, *supra* note 156, at 71-82.

171. *Logue*, 372 N.W.2d at 157.

172. The court may admit the testimony upon instructing the trier of fact to consider the evidence for one purpose, but not for another. *People v. Beckley*, 161 Mich. App. 120, 125-26, 409 N.W.2d 759, 761-62 (1987) (The court admitted testimony to explain that the behaviors displayed by the sexually misused child were not inconsistent with the profile of an incest victim and cautioned the jury to consider the testimony as bearing neither upon the credibility of the child nor upon whether the child was in fact an incest victim.).

173. *See* State v. Kennedy, 320 N.C. 20, \_\_\_, 357 S.E.2d 359, 366 (1987) (A psychologist's testimony went to the reliability of the test itself and was not a comment on the credibility of the witness.); *Brown v. State*, 736 P.2d 1110, 1114-15 (Wyo. 1987) (A psychologist may testify on the truthfulness of a child's responses to a psychological test that has internally constructed validity scales because the testimony is relevant for the purpose of assisting the trier of fact in evaluating the probative value of the expert's evaluation.). *But see* *People v. Izzo*, 90 Mich. App. 727, 730, 282 N.W.2d 10, 10-11 (1979) (Admission of a psychiatrist's affirmative response to a question about whether the psychological inventory would detect fabrication and his followup response that the victim was answering quite honestly was reversible error.).

and other factors.<sup>174</sup> Further, they rely upon the same basis of substantially accepted scientific knowledge.<sup>175</sup> Courts will exclude the latter testimony for lack of relevance, as well as usurpation of the province of the trier of fact.

### G. *The Province of the Trier of Fact*

The role of the jury would be compromised if the testimony of experts on matters that are within common knowledge is admissible. The trier of fact is charged with bringing common experience and understanding to bear upon the issue of fact in dispute.<sup>176</sup> If this task is conducted for them by the expert, then the independent judgment of the jury would be compromised.<sup>177</sup> Rational jurors, when presented with the testimony of a scientific expert, will likely subordinate their independent judgment to the judgment of the expert.<sup>178</sup> To preserve the jury system, it is necessary that the expert testimony of the psychologist be admissible only if it presents information that is beyond the common understanding of the trier of fact.

An expert may testify to matters that will assist the trier of fact in resolving the factual question presented.<sup>179</sup> While this assistance includes provision of information that is beyond the common understanding of the trier of fact,<sup>180</sup> the expert may not instruct the trier of fact on how to decide.<sup>181</sup> The expert, more precisely, may not usurp the role of the trier of fact,<sup>182</sup> which includes the evaluation of the credibility of witnesses, the weighing of conflicting testimony, and the

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174. For a discussion on the factors involved, see *People v. Grady*, 133 Misc. 2d 211, 213-15, 506 N.Y.S.2d 922, 924 (Sup. Ct. 1986).

175. See B. JAMES & M. NASJLETI, *TREATING SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* 45-148 (1983); see, e.g., *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986).

176. *State v. Kim*, 64 Haw. 598, 606-07, 645 P.2d 1330, 1337 (1982).

177. *Commonwealth v. O'Searo*, 466 Pa. 224, 228-29, 352 A.2d 30, 32 (1976).

178. See *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (Expert testimony creates a substantial risk of undue prejudice, confusion of the issues, or misleading the jury because of its aura of reliability and trustworthiness.).

179. FED. R. EVID. 702; see *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) ("Expert testimony should not be permitted if it concerns a subject improper for expert testimony, for example, one that invades the province of the jury.").

180. See *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (Because the practice of incest is prohibited in nearly all cultures, the common experience of the trier of fact is not likely to include knowledge of the behavior patterns of sexually misused children.).

181. *O'Searo*, 466 Pa. at 229, 352 A.2d at 32 (1976) (Permitting an expert to testify as to the credibility of a witness "would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment.").

182. The jury may place undue emphasis upon the testimony because of the special gloss of the witness' status as an expert. *Kruse v. State*, 483 So. 2d 1383, 1386 (Fla. 4th DCA 1986).

determination of ultimate issues of fact.<sup>183</sup> Rule 704 of the Federal Rules of Evidence, however, expressly grants the expert witness permission to testify in a manner that embraces ultimate issues.<sup>184</sup> This is the only area in which the Rules expressly provide an overlap between the province of the trier of fact and that of the expert witness.

Psychologists have made a concerted effort to disseminate the results of their psychological research to the public.<sup>185</sup> Therefore, a great deal of expert psychological testimony may be excluded because it does not communicate new information to the trier of fact. The subject matter of psychological research and psychotherapeutic practice—individual people—is within the realm of common experience. Psychological evaluations generally rely upon either written or spoken communication between the psychologist and the subject. Frequently, psychologists do not employ technical devices in the evaluation process. Therefore, there is no clear distinction between the methods of clinicians and the methods of other interviewers.

Information with regard to the evaluation of the credibility of a witness is within the province of the trier of fact.<sup>186</sup> Courts condemn the practice of psychologists testifying as to the credibility of an alleged victim of sexual misuse.<sup>187</sup> Courts reject both expert testimony regarding the credibility of a particular victim<sup>188</sup> and testimony regarding the tendency of victims as a group to fabricate allegations of sexual misuse.<sup>189</sup> The expert has skills that bear upon the issue of whether a client has been truthful in allegations of sexual misconduct.

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183. *Garcia v. State*, 712 S.W.2d 249, 251-52 (Tex. Ct. App. 1986).

184. FED. R. EVID. 704.

185. N. HOBBS, *MENTAL HEALTH'S THIRD REVOLUTION* (1968).

186. *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986) ("It is hornbook law that the credibility of a witness and the weight to be given his testimony rests exclusively with the jury."); *State v. Moran*, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986) ("With proper information, the jury can evaluate credibility as well as an expert.").

187. *Azure*, 801 F.2d at 339; *State v. Lindzey*, 149 Ariz. 472, 474, 720 P.2d 73, 75 (1986).

188. *But see State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982) (allowing psychological experts to testify as to the veracity of a child victim of sexual misuse); *cf. State v. Middleton*, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983) (admitting expert testimony to bolster the testimony of a child victim of sexual misuse).

189. *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986) (It was improper to admit expert testimony that children rarely lie about sexual abuse.); *State v. Petrich*, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984) (A statement about the percentage of children who are molested by someone that they already know should not have been admitted.). *But see State v. Oliver*, 85 N.C. App. 1, \_\_\_, 354 S.E.2d 527, 533-35 (1987) (admitting testimony that mentally retarded children do not lie about sexual abuse and that they are unable to fantasize about sexual matters because it is not considered to be within the common understanding of the jury); *cf. Commonwealth v. Seese*, 512 Pa. 439, 444, 517 A.2d 920, 922 (1987) ("[O]ne could imagine '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.").



Clinicians are trained in the detection of concordance or discordance of affect, mannerisms, and verbal content.<sup>190</sup> A clinician cannot ascertain whether the child was in fact sexually misused by the defendant, but can determine whether the child victim actually believed that the defendant committed an act of sexual abuse.<sup>191</sup> The expert, in testifying on this point, would usurp a significant portion of the role of the trier of fact. Generally, courts do not allow such testimony.

Courts' handling of expert testimony on veracity issues in sexual misuse cases may be understood by analogy to the manner in which courts have treated the admissibility of expert testimony on the reliability of eyewitness testimony. The expert may testify about factors that have an impact on the reliability of eyewitness testimony,<sup>192</sup> but may not venture an opinion on the reliability of the eyewitness in a particular case.<sup>193</sup> Courts in some jurisdictions have expressly undertaken to address the unreliability of eyewitness testimony by instructing the jury with regard to the risk that the eyewitness testimony may be in error.<sup>194</sup> This alerts the jurors to factors that may be relevant in evaluating the credibility of eyewitness identification.<sup>195</sup> The expert may then testify only if there are particular facts that will serve to modify the general notion that eyewitness testimony may be erroneous. The testimony may not include statistics that serve to inform the trier of fact of percentages of correct eyewitness identifications under specified circumstances because they would not be relevant to the issue of whether the eyewitness identification in the particular case was correct.<sup>196</sup>

Courts generally prefer to admit the testimony of experts in child

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190. For example, a California court commented regarding the testimony of a psychological expert as follows:

[The expert's] conclusion was based primarily on 'what the children told me' and 'the way in which they told me.' Specifically, he relied on the consistency of their reports of abuse and the manner in which they reported the abuse, their demonstrations of emotion during the interview, the absence of any depreciation of their father, their demonstrated ability to discriminate between events that did or did not occur, their behavior with anatomically correct dolls, and the general 'air of realism' in their assertions.

*In re Christine C.*, 191 Cal. App. 3d 676, 678, 236 Cal. Rptr. 630, 631 (1987).

191. *Eastman v. Commonwealth*, 720 S.W.2d 348, 352 (Ky. Ct. App. 1986) (An expert may testify to his findings that in the child's mind, the sexual behavior actually happened.).

192. *People v. McDonald*, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).

193. *People v. Gray*, 187 Cal. App. 3d 213, 218-21, 231 Cal. Rptr. 658, 661-62 (1986).

194. *People v. Palmer*, 154 Cal. App. 3d 79, 84-90, 203 Cal. Rptr. 474, 477-81 (1984).

195. *Palmer*, 154 Cal. App. 3d at 84-90, 203 Cal. Rptr. at 477-81.

196. *McDonald*, 37 Cal. 3d at 372, 208 Cal. Rptr. at 250, 690 P.2d at 723 (1984); *Gray*, 187 Cal. App. 3d at 218-21, 231 Cal. Rptr. at 661-62.

sexual misuse cases, even though it may overlap with the province of the trier of fact. The expert may testify about ultimate issues,<sup>197</sup> and may present circumstantial evidence based upon either personal knowledge or knowledge of the field.<sup>198</sup> Generally, any doubt as to whether the subject is within the common knowledge of the jury is resolved in favor of admissibility. Courts, however, carefully guard the province of the jury from the final onslaught by the expert witness: the presentation of an expert's evaluation of the credibility of a witness. A frequent basis for the reversal of convictions in cases that involve the sexual misuse of children is the expert's testimony on the credibility of the child witness.<sup>199</sup> Such testimony includes both testimony regarding the veracity of the child and the statistical probability that the child will be untruthful.

Similarly, expert testimony in child sexual misuse cases regarding behavioral signs that are related to the veracity of a victim may be admissible.<sup>200</sup> The trier of fact is given the benefit of the expert's knowledge of behavioral signs associated with veracity, but not the expert's skills in the application to the facts of the particular case. The latter is defined as being exclusively within the province of the trier of fact, and therefore, is not an appropriate subject for the testimony of experts.<sup>201</sup>

Courts are also concerned with considerations of unfair prejudice, confusion of issues, and judicial efficiency, all of which are embodied in Rule 403 of the Federal Rules of Evidence.<sup>202</sup> Rule 403 requires a balancing of probative value against both trial concerns and the risk of prejudicial effect. There is a special risk of undue prejudice associated with the admission of expert testimony. The trier of fact may believe the expert because of the expert's status. In addition, the trier of fact is likely to assume that the expert is vouching for the

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197. FED. R. EVID. 704. *But see* State v. Moran, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986) ("Rule 704 was not intended to permit experts to tell the jury what result to reach.").

198. State v. Laird, \_\_\_ Mont. \_\_\_, 732 P.2d 417, 420 (1987); *see* State v. Oliver, 85 N.C. App. 1, \_\_\_, 354 S.E.2d 527, 534 (1987) (An expert may testify as to statements contained in periodicals established as reliable authority when they were relied upon for the formulation of the expert's opinion.).

199. *See, e.g.,* State v. Holloway, 82 N.C. App. 586, 586-88, 347 S.E.2d 72, 73-74 (1986) (Testimony that in the expert's opinion the child had testified truthfully is inadmissible because credibility was determined by the trier of fact.).

200. United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985).

201. Commonwealth v. Shaver, 501 Pa. 167, 173, 460 A.2d 742, 745 (1983) ("It is solely the province of the trier of fact to pass upon the credibility of witnesses . . .").

202. FED. R. EVID. 403; *see also* United States v. Green, 548 F.2d 1261 (6th Cir. 1977) (The weighing of probative value against prejudicial effect was incorporated within the court's adoption of the reliability standard to determine the admissibility of expert evidence.).

veracity of the complaining child, even if the expert does not do so.<sup>203</sup> The court looks at the evidence in the light most favorable to the proponent, and evaluates whether the probative value of the evidence is substantially outweighed by the risk of prejudice.<sup>204</sup>

The risk that the expert will confuse the issues and mislead the trier of fact is largely addressed by the imposition of reliability and relevance standards.<sup>205</sup> The trier of fact is less likely to be misled if the testimony is in accordance with substantially accepted scientific principles and methods. The court, by requiring a rigorous showing of the relevance of the proffered testimony, will minimize the risk of the trier of fact being led astray.

#### H. *Expert Witness Roles Revisited*

Expert witnesses generally have been accorded one of four roles in cases involving the sexual misuse of children: Evaluating the truthfulness of the child's allegations; evaluating the consistency of the child's behavior patterns with the experience of a sexually abusive event; evaluating the correspondence between the child's behavioral attributes as admitted into evidence and the prior occurrence of a sexually abusive event; and educating the trier of fact with regard to the content of psychological knowledge of sexual misuse and its consequences.<sup>206</sup> In addition this Comment proposes a fifth role for the psychological expert, which will be examined in Section III.

The first role includes both the psychological evaluation of the child and the expert's testimony as to the child's veracity. This role, however, invades the province of the trier of fact. The expert operating within this role is not testifying as to matters that may serve to corroborate or impeach the testimony of another witness, but rather is determining which witness is worthy of belief. Such a determination is a task generally assigned to the trier of fact.

Further, it can be argued that the reliability of the evaluative skills of psychologists in determining the occurrence of a past event has not been established through the application of the *Frye* test or its modifications. The qualifications of psychologists as expert witnesses,

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203. *Kruse v. State*, 483 So. 2d 1383, 1386 (Fla. 4th DCA 1986).

204. *State v. Logue*, 372 N.W.2d 151, 157 (S.D. 1985) ("[E]ven helpful, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or of misleading the jury."); accord *United States v. Brady*, 595 F.2d 359 (6th Cir.), cert. denied, 444 U.S. 862 (1979).

205. See *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) ("Because of the peculiar risks of expert testimony, courts have imposed an additional test, i.e. that the testimony be in accordance with a generally accepted explanatory theory.").

206. See *supra* notes 49-63 and accompanying text.

in both clinical and scientific capacities, do not encompass the ability to detect lies. Therefore, the testimony of the expert as to the veracity of the child is beyond the expert's expertise. The expert's personal opinion as to the child's veracity is not relevant. For both of these reasons, the first role for expert witnesses is not acceptable, and such testimony should not be admitted.

The second role of the expert may be analogized to that of a treating physician. The expert conducts an evaluation, notes symptoms and behavior patterns, formulates a diagnostic opinion, and may formulate an opinion as to whether the behaviors and symptoms observed are consistent with the occurrence of a particular event, i.e., sexual misuse. These tasks are all within the expertise of the clinical expert. They generally are considered to be reliable by the psychological community and they are relevant to the task at hand. Therefore, this role for the expert witness is acceptable.

There is, however, an area of concern within this role. The expert will testify as to statements by the child or others for the purpose of medical diagnosis or treatment. It is possible, however, that the expert will not record or recollect statements that are not consistent with the expert's formulated opinion. Therefore, there exists a built-in bias.

The third role of expert witnesses in child sexual misuse cases involves the testimony of an expert who did not examine the child. This expert is a clinician. As such, the expert testifies as to general clinical patterns observed in sexually misused children, and responds to hypothetical questions incorporating the facts of the case at hand. The testimony is analogous to that in role two, except that it lacks the risks associated with possible selective recording and recollection of statements made for medical diagnosis or treatment.

The fourth role is an educational model. The expert is qualified based upon familiarity with the scientific study of behavior. The role of such an expert is to provide the trier of fact with information that will assist it in its evaluation of the child's behavior patterns. This role is also generally acceptable.

The fifth and final role for expert witnesses in child sexual misuse cases is that of preserving perishable and fragile testimony. This Comment proposes this role for three reasons. First, the expert is skilled in the elicitation of both verbal and nonverbal communication from a child. Second, it is desirable that a neutral party assume this role; no one other than an independent psychological expert is available to act in a neutral capacity. Third, it is a role required of the clinical expert when engaging in the diagnosis and treatment of the

child, and is a role the treating clinician assumes unconsciously. The rationale for this role is discussed below.

### III. THE EXPERT AS PRESERVER OF PERISHABLE AND FRAGILE TESTIMONY

The testimony of a child witness is perishable.<sup>207</sup> The time between an incident of sexual misuse and the date of the defendant's trial may be in excess of two years. For example, a child sexually misused at age four may be six before the case goes to trial. Life experiences for such a child will have been increased 50 percent. A large delay, measured as relative to the amount of life experiences, may result in errors in recall.

The testimony of a child witness is also fragile.<sup>208</sup> Children do not possess the linguistic structure of adults. Therefore, they are not readily able to communicate to others facts regarding the sexual misuse to which they have been subjected. Lacking the ability to communicate effectively through words, the child must communicate through other means.<sup>209</sup> These methods include reenactment,<sup>210</sup> projective expression,<sup>211</sup> and nonspecific indicators of discomfort.<sup>212</sup>

The clinical psychologist is an expert in the elicitation of information from a patient.<sup>213</sup> A clinician is trained to observe verbal and nonverbal behavior.<sup>214</sup> The child will not communicate effectively unless the child perceives that someone is actively listening, and that it is safe to communicate.<sup>215</sup> The particular skills involved in facilitating communication form a large component of the training of all mental health professionals.<sup>216</sup> A qualified clinician may elicit information that is not available to an individual without the special skills of the clinician.

Thus the clinician should be qualified as an expert in the elicitation of the child victim's testimony. The clinician's special skills in

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207. See, e.g., *State v. Brotherton*, 384 N.W.2d 375, 377-78 (Iowa 1986) (The child could not remember the alleged sexual abuse incident.).

208. *Id.* at 378.

209. J. PALMER, *THE PSYCHOLOGICAL ASSESSMENT OF CHILDREN* 7-37 (1970); see also *People v. Draper*, 150 Mich. App. 481, 484, 389 N.W.2d 89, 91 (1986) (Testimony by a psychologist admitted in a case that involved a three-year-old child included a description of the child's spontaneous play with Play-Doh.).

210. See generally V. AXLINE, *PLAY THERAPY* (1947).

211. *Id.*

212. See generally E. BEIER, *THE SILENT LANGUAGE OF PSYCHOTHERAPY* (1966).

213. H. SULLIVAN, *THE PSYCHIATRIC INTERVIEW* 82-129 (1954).

214. See generally V. COOK, *INTELLIGENT TESTING* (1984).

215. A. ANASTASI, *PSYCHOLOGICAL TESTING* 31-41 (5th ed. 1982).

216. G. EGAN, *THE SKILLED HELPER* 14-61 (1975).

this regard are analogous to the skills of a technician in gaining access to information contained within an automobile driver's blood. Both gain access to information that is probative but unavailable without the application of their special skills. Given proper preservation of this evidence in the most neutral manner possible, this testimony should be admissible.

The evidence elicited by the clinician may be preserved through the use of video recording of all contacts between the clinician and the child that are for diagnostic and evaluative purposes. Such a record is analogous to the report of the chemical analysis prepared by the technician in the evaluation of a blood sample for the existence of drugs or alcohol. Experts on both sides may dispute the interpretation of the evidence so preserved. This leaves the trier of fact's province intact.

Courts do not qualify the expert by documented expertise in the elicitation and preservation of the testimony of children. Yet, the expert is actually engaged in this activity under some circumstances.<sup>217</sup> When the expert testifies as to how the child behaved with anatomically correct dolls, or about some psychological sign of sexual misuse, the expert is repeating the communications of the child witness. The expert elicited the behavior of the child and preserved its relevant components for the purpose of the expert's in-court testimony.

An expert's testimony as to the out-of-court assertions of a sexually misused child, may be admissible through a specified hearsay exception.<sup>218</sup> Further, the testimony should be regularly admissible

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217. Psychological assessment is premised upon the controlled sampling of behavioral responses to known stimuli. J. PALMER, *supra* note 209, at 15-22. The clinician is required to record verbatim the child's reactions to such stimuli. *Id.* After the behavior is elicited and preserved, the clinician renders an interpretation. *Id.*

218. The testimony may be admitted as either an excited utterance or a statement for the purpose of medical diagnosis or treatment. *See* FED. R. EVID. 803(2), (4). Yet apparently the rationale of the medical diagnosis exception does not properly apply to the verbalizations of a child. In addition, the lengthy delay that frequently occurs between the sexual misuse and the child's disclosure serves to diminish the reasonable application of the excited utterance exception. If the credibility of the child is attacked, and if either the child is alleged to have recently fabricated the accusation, or is charged with improper motive or influence, then the trial judge may admit the evidence as a prior consistent statement. FED. R. EVID. 801(d)(1)(B). *See* State v. Brotherton, 384 N.W.2d 375, 380 (Iowa 1986). This Comment suggests that the admission of psychological expert testimony be permitted under the "other exceptions" category for unavailable testimony. *See* FED. R. EVID. 804(b)(5).

Of course, some jurisdictions permit the admission of psychological expert testimony under special hearsay exceptions for cases involving the sexual misuse of children. *See, e.g.*, FLA. STAT. § 90.803(23) (Supp. 1985); KAN. STAT. ANN. § 60.460(dd) (1983); WASH. REV. CODE § 9a44.120 (1974). *See generally* Graham, *Indicia of Reliability and Face to Face Confrontation*, 40 U. MIAMI L. REV. 19 (discussing the reliability of special and traditional hearsay exceptions in cases involving the sexual misuse of children).

through the application of the "other reliable hearsay" exception as pursuant to Rule 804(b)(5). This exception assumes that the child's testimony is not available.<sup>219</sup> Equivalent guarantees of trustworthiness are required by the Rule. This requirement can be met by videotaping all contacts between the expert and the child that are for the purpose of evaluation,<sup>220</sup> assuring the independence of the clinical expert,<sup>221</sup> and by providing the videotape to all parties for analysis by competing experts.<sup>222</sup>

Some courts have permitted experts to testify as to statements that were made to them by a sexually misused child. This may be permitted as a "statement made for medical diagnosis or treatment" hearsay exception,<sup>223</sup> or a hearsay exemption for prior consistent statements offered to rebut a charge of recent fabrication.<sup>224</sup> In still other jurisdictions statutes have established specific hearsay exceptions for cases that involve sexual misuse.<sup>225</sup> These exceptions, however, do not explicitly recognize the importance of the behavior of the expert in the elicitation of testimony, nor do they protect against the risk of the expert leading the child to respond in a particular direction. The suggested requirement of video recording would address these concerns.

All hearsay statements include the risk that the in-court witness will not accurately observe, record, recollect, or reiterate the out-of-

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219. The availability of the child's testimony—not the child—is relevant. *See* FED. R. EVID. 804(a). The child's testimony is perishable, and may therefore no longer be available at the time of trial. Further, the child's testimony may not be accessible in an adversarial proceeding.

220. In order to counter charges that the expert inappropriately led the child, all contacts between the expert and the child should be videotaped. This includes both the initial contact and all subsequent sessions, without any gaps or exceptions, until such time as the expert is assured that the child will not divulge new information. At that time, the expert may switch from an evaluative to a psychotherapeutic process.

221. An expert who is an employee of the prosecutorial sector has inherent biases. The bias should be minimized by requiring the expert to be independent. It is understood, of course, that an element of collaboration between the expert and the prosecutor must exist. There should, however, be no structural, administrative or supervisory overlap between the two.

222. It may not be necessary for the video to be shown to the trier of fact. The video should be made available for the opposing counsel's expert. The attorneys involved should make reasonable efforts to stipulate to a description of the contents of the video. The trier of fact may then be given an interpretation of the stipulated material by the prosecutor's expert, the defendant's expert, or both. If the description of the child's behavior is sufficiently unambiguous that an interpretation is not necessary, then it may be read into the record.

223. *See* cases cited *supra* notes 81 & 86.

224. *State v. Brotherton*, 384 N.W.2d 375, 380 (Iowa 1986).

225. ARIZ. REV. STAT. ANN. § 13-1416 (1984); COLO. REV. STAT. § 18-3-411(3); ILL. REV. STAT. ch. 38, para. 115-10 (1983); IND. CODE § 35-37-4-6 (1984); KAN. STAT. ANN. § 60-460(dd) (1982); MINN. STAT. § 595.02(3) (1984); S.D. CODIFIED LAWS ANN. § 19-16-38 (1984); UTAH CODE ANN. § 76-5-411 (1983); WASH. REV. CODE § 9A.44.120 (1982).

court declarant's assertion. The proposed exception takes this into account by requiring the recording of all contacts between the expert and the child. The court retains authority to exclude the testimony because of concerns relating to waste of time and unfair prejudice as provided in Rule 403.<sup>226</sup> Generally, the videotape should not be played in court. Instead, experts should testify as to the tape's content and may provide any appropriate interpretations. The tape itself is played in court only when there is a conflict about the content of the tape, or with advance leave of the court. The availability of the tape to both parties will minimize the hearsay risks associated with the admission of the out-of-court declaration.

The expert who conducts the evaluation of the child must be neutral. In order to address allegations of an absence of neutrality, it should be possible to admit portions of the videotape with the court's permission. The defendant may also request the court to admit portions of the tape that serve to indicate the unreliability of the child witness. The defendant, however, then risks the possibility that the prosecution will apply other portions of the tape to rebut this evidence.

These protections provide guarantees of reliability that are equivalent to those of the traditional hearsay exceptions. Such testimony, therefore, should be admissible under the "other reliable hearsay" exception. Although legislative enactment of a particular hearsay exception delineating the procedures mentioned above may be desirable in order to establish clearly whether hearsay testimony in child sexual misuse cases is admissible, the structure of the rules of evidence in some jurisdictions permits a judicial adoption of such a hearsay exception.

#### IV. CONCLUSION

The testimony of psychological experts may be of assistance to the trier of fact in cases involving the sexual misuse of children. It may provide the trier of fact with evidence of psychological injury that may corroborate allegations of sexual misuse. The expert may provide normative data that serve to assist the trier of fact in assigning probative value to circumstantial facts admitted into evidence. This Comment proposes that the expert may also preserve the testimony of a child victim whose testimony, as a consequence of the child's youth, may be unavailable at the time of trial.

The search for truth will be enhanced in child sexual misuse

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226. FED. R. EVID. 403.



cases by courts permitting expert psychological testimony as proposed in this Comment. Such expert testimony would maximize the trier of fact's access to reliable information without usurping its role. Although the likelihood of obtaining a conviction in a criminal prosecution may be enhanced, it does not unfairly prejudice the accused. The increased likelihood of conviction may encourage more offenders to volunteer for participation in a treatment program as an alternative to incarceration, thereby decreasing the overall cost to society in the management of sexual offenders. Thus, the interests of justice and society will be served.

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