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Child Sexual Abuse Accommodation Syndrome: Curing the Effects of a Misdiagnosis in the Law of Evidence

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CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME: CURING THE EFFECTS OF A MISDIAGNOSIS IN THE LAW OF EVIDENCE

I. INTRODUCTION

The Supreme Court has described the prevention of child abuse as a "government objective of surpassing importance."[1] The prevention of child abuse is also an objective of surpassing complexity and one the legal community has found perplexing. The sexual abuse of children has compounded the problem because it is a multifaceted concept which authorities define in many ways.[2] Child sexual abuse has been defined as "[c]ontacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another person."[3] Under this definition sexual abuse may include anything from rape to the use of children in pornographic pictures. The complexity of this definition is indicative of the breadth of this problem, which the lay community has only recently accepted.

Although the sexual abuse of children is not a modern phenomenon,[4] society is currently emerging from a period in which the prevalence

1. New York v. Ferber, 458 U.S. 747, 757 (1982).

2. One commentator has used the term to describe five separate offenses:

> (1) forcible rape in which physical force, threats or drugs are used to achieve sexual intercourse; (2) nonforcible rape, commonly called statutory rape, involving sexual intercourse between a legal adult and a child who does not resist; (3) sodomy, referring to oral or anal intercourse; (4) incest, involving sexual intercourse with someone of close kinship; and (5) indecent liberties, including a wide variety of acts such as exhibition, rectal stimulation, masturbation, physical advances, and the use of obscene language.

Sarafino, *An Estimate of Nationwide Incidence of Sexual Offences Against Children*, in CHILD WELFARE 127, 128 (1979). *See also* Abright, *Psychiatric Aspects of Sexual Abuse*, 4 BULL. AM. ACAD. PSYCHIATRY L. 331, 332 (1986); McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Scientific Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 6 (1986) (noting that behavioral scientists have had difficulty in developing a definition of child sexual abuse).

3. Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 177 (1986) [hereinafter *Intrafamily Abuse*]; PROTECTION OF ABUSED VICTIMS 6 (I. Sloan ed. 1983).

4. *See* Abright, *supra* note 2, at 332 (documentation of child sexual abuse began as early as the 15th century). In fifteenth century Venice, sex between adult men and young girls was commonplace. Brothels of young boys were once common in Greece and Rome. Even Louis XIII was included in the sexual acts of his parents. J. CREWDSON, BY SILENCE BETRAYED 35 (1988).

of such abuse was denied.[5] Recent concern over the issue has prompted research in the area and the results from these studies vary.[6] Recent studies are not merely concerned with the prevalence of abuse. Researchers have also attempted to delve into the heart of child abuse by exposing everything from the motivation of perpetrators to the behavior of the victim.[7] However, cases are grossly underreported[8] and, therefore, many statistics are extremely conservative.

Sigmund Freud was reportedly the first to note that sexual experiences between adults and children might result in long-term psychological effects.[9] Freud, however, erroneously concluded that the abuse reported by his female patients was mere fantasy and discounted the reports as hysteria.[10] More recent studies indicate that most children actually are psychologically harmed by sexual abuse and that this harm is

5. *See e.g.*, Thoennes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 1 (B. Nicholson ed. 1988) (sexual abuse was not specifically recognized by statute to be a reportable offense until the late 1960's); Wells, *Expert Testimony: To Admit or Not to Admit*, FLA. B.J. 673 (1983) (many child abuse cases are missed or discounted because society has refused to recognize the existence of intrafamily child sexual abuse in the past); Abright, *supra* note 2, at 332 (over the last 10 to 15 years the public has exhibited a high level of interest in sexual abuse); Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 48 (B. Nicholson ed. 1988).

6. Dr. Diana Russel reportedly began the first truly random sexual abuse survey in 1979 and found that 30% of the women she questioned had been sexually abused before the age of 18 and that 28% of those who had been seriously abused had been abused before the age of 14. As experts debated over the validity of these results, Bud Lewis conducted a random national survey in 1985 which included both genders. Lewis found that 27% of the women and 16% of the men questioned had been sexually abused as children. One-third of the victims said that they never disclosed the abuse to anyone and of those who exposed the truth, only 3% reported the abuse to the police. J. CREWDSON, *supra* note 4, at 25-29. In 1973, one commentator estimated that there were as many as 500,000 child sexual abuse cases per year whereas the Department of Health and Human Services National Center on Child Abuse and Neglect estimated the annual occurrence to be 100,000 in 1981. Estimating the incidence of abuse is difficult because it can be determined by criminal statistics, child abuse reports, and epidimological studies. Each method has inherent problems. Criminal statistics are underestimated because few child sexual abuse cases end in conviction, and under-reporting causes child abuse reports to be inaccurate and epidimological studies to be biased. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?* 24 J. FAM. L. 149, 170 n.64 (1985-86).

7. *See e.g.*, Blumberg, *Treatment of the Abused Child and the Child Abuser*, 31 AM. PSYCHOTHERAPY 204 (1976); Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 31 AM. J. PSYCHOTHERAPY 204 (1977).

8. Prettyman, *What Happened When Jenny Cried*, DEL. LAW., Winter 1986-87, at 20 (no one knows how many children are actually suffering from unreported abuse). Although every state has mandatory child abuse reporting laws, many cases go unreported because the subject is still considered to be taboo. Furthermore, many families are reluctant to inform the authorities when the abuser is a close family member. Blumberg, *Child Sexual Abuse*, N.Y. ST. J. MED. 612 (1978).

9. Abright, *supra* note 2, at 332.

10. Abright, *supra* note 2, at 332. *See also* McCord, *supra* note 2, at 2.

manifested in one way or another.[11]

Evidence of sexual abuse may manifest itself in many ways. It is common for the child to exhibit sexual knowledge that is inappropriate for the child's age and maturity level or to engage in inappropriate sexual play and aggressive sexual behavior.[12] Seductiveness, submissiveness, unwarranted fears, self-destructiveness, sleep disturbance, regressive behavior, depression, rage, embarrassment, and other uncharacteristic behavior have also been attributed to sexual abuse.[13] Although the presence or absence of such behavior is not conclusive evidence that a child has been abused, authorities seem to recognize that it is at least indicative of abuse.[14]

Recent studies also expose aspects of child sexual abuse which contradict beliefs commonly held by laymen. First, in the majority of cases, the abuser is a person with authority whom the victim knows, such as a relative or close family friend.[15] Second, although the age of victims ranges from infancy to adolescence,[16] an alarming number of cases involve very young children[17] who are usually female.[18] Furthermore, the abuse is often repetitive[19] and may continue for years before it is discovered. Finally, studies reveal that the crime is not strictly a lower class

11. *See e.g.*, Blumberg, *supra* note 8, at 612 (the consequences of child sexual abuse are more often psychological than physical).

12. AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE, I-5 to I-8 (1987). *See also* Berlinger, *supra* note 5, at 55; Heger, *Child Sexual Abuse: The Medical Evaluation*, in SEXUAL ALLEGATION IN CUSTODY AND VISITATION CASES 106 (B. Nicholson ed. 1988); Sgroi, Porter & Blick, *Validation of Child Sexual Abuse*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 71 (B. Nicholson ed. 1988).

13. AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE at I-5 to I-8.

14. Heger, *supra* note 12, at 108; Sgroi, Porter & Blick, *supra* note 12, at 72.

15. One study revealed that the number of abuse cases involving a person known to the child is as high as 92%. Myers, *supra* note 6, at 171-72; *see also* Blumberg, *supra* note 8, at 612 (72% of child sexual abuse cases involve a parent or parent surrogate); Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 179 (1983) (stating that the majority of adults who molest children have a trusted or kinship relationship with that child); Wells, *supra* note 5, at 673 ("The greatest number of child sexual abuse cases involve intrafamily perpetrators—fathers, stepfathers, uncles, mothers boyfriends, and other formal or informal relatives—people who have ready access to the child in his or her home.").

16. Myers, *supra* note 6, at 171 n.64.

17. Dr. Summit reports that the average age of the sexually abused child is decreasing. In 1979 the average age was nine and by 1981 it had decreased to seven. Summit, *supra* note 15, at 182.

18. *See* Abright, *supra* note 2, at 333 (citing that 80% of the cases reported involved a female victim); Summit, *supra* note 15, at 180 (stating that "[i]n the current state of the art most of the victims available for study are young females"). Although a majority of cases involve females, males are also the subjects of abuse. *See e.g.*, Freeman-Longo, *Impact of Sexual Victimization on Males*, 10 CHILD ABUSE & NEGLECT 411 (1986).

19. *See* Summit, *supra* note 15, at 184 ("a compulsive, addictive pattern tends to develop which

phenomenon.[20] These studies contradict perceptions about child sexual abuse that are harbored by many adults. Consequently, the legal system must address possible jury misconceptions about child sexual abuse to ensure the correctness of jury decisions.[21]

II. THE ELEMENTS OF CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Dr. Roland C. Summit coined the phrase "Child Sexual Abuse Accommodation Syndrome" (CSAAS) in a paper written to sensitize the criminal system to the legitimate victim of child abuse.[22] The syndrome is separated into five categories[23] that supposedly epitomize the behavior of sexually abused children. Each element of the syndrome describes behavior which a child exhibits while adapting to an abusive situation.

The first element, secrecy, indicates that the child will keep the abuse a secret and thereby allow it to continue. Since the average adult expects the child to immediately relate the abuse, delayed allegations are often discounted.[24] In fact, upon the discovery of sexual abuse, most parents demand an explanation as to why they were not informed earlier.[25] The child is rarely able to articulate a rational explanation to these demands, which damages the credibility of the allegation. The adult may feel that such secrecy is contrary to common sense and therefore discount the allegation as a misunderstanding, fantasy, or lie.[26] Furthermore, most children are emotionally dependent on the abuser, who is

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continues either until the child reaches autonomy or until discovery and forcible prohibition overpower the secret."); Berliner, *The Child Witness: The Progress and Emerging Limitations*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES [hereinafter PAPERS] 95 (1985) ("child victims are usually persuaded and tricked by known, often trusted or depended-on adults into going along with repeated sexual acitivity over extended periods of time.").

20. *See* J. CREWDSON, *supra* note 4, at 29; Abright, *supra* note 2, at 334 ("the profile of families of sexual abuse victims is much . . . like that of the average U.S. family."); Berliner, *supra* note 5, at 54 ("there is . . . no demographic profile of children who have been sexually assaulted"); Prettyman, *supra* note 8, at 20 ("sexual abuse cases can be as varied as the men, women, and children who are participants").

21. These studies indicate that both sexual abuse and children's reactions to such abuse are beyond the experience of most jurors and therefore psychological testimony is, at the very least, required to assist juries.

22. Summit, *supra* note 15, at 179-80.

23. The five categories are secrecy, helplessness, entrapment and accommodation, delayed disclosure, and retraction. Summit, *supra* note 15, at 181.

24. Summit, *supra* note 15, at 182. The cross-examiner often uses the child's secrecy to convince the jury that the child would have said something sooner if the abuse had actually occurred. J. MYERS, CHILD WITNESS LAW AND PRACTICE 146 (1987).

25. Summit, *supra* note 15, at 182.

26. Summit, *supra* note 15, at 182. It is common for defense attorneys to assert that the child is

often a trusted authority figure[27] who uses authority to distort the child's perception of reality.[28] The distortion takes the form of varying degrees of intimidation that coerce the child into secrecy.[29] Such intimidation is possible because the perpetrator convinces the child that disclosure would have negative, if not disastrous, effects.[30] This distortion is then collaborated by "an adult conspiracy of silence and disbelief" that often accompanies any attempt to disclose the abuse.[31]

The authoritarian relationship between the abuser and the child also results in helplessness, the second element of CSAAS, which is exhibited by the child's continued tolerance of the abuse.[32] Helpless consent is misunderstood by adults who believe that a child's instinct of self-preservation should compel the child to strike out or attempt to escape the perpetrator.[33] When presented with the fact that the child failed to react in this way, an adult may feel that the event was the product of a childhood fantasy.

Dr. Summit rebuts these misguided assumptions by asserting that the child's typical reaction is to "play possum" and cope silently with the abuse.[34] The child has no choice but to submit to the abuse.[35] The simple fact that the child lacks the physical strength to resist, coupled with

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fabricating the story. *See e.g.*, State v. Catsam, 534 A.2d 184, 186 (Vt. 1987) (defense attorney responded to delayed disclosure by asserting that the child was fabricating the story). It is less common for defense attorneys to claim that the child is fantasizing the event. However, many adults feel that children are unable to distinguish fact from fantasy. Goodman, *The Child Witness: Conclusions and Future Directions for Research and Legal Practice*, in PAPERS, *supra* note 19, at 65 (1983). Most children who are preoccupied with Oedipal fantasies are age three to six. An Oedipal fantasy consists of the child's ideas of getting close to and being loved by one parent and excluding the other. However, these fantasies usually do not consist of any explicit sexual material. Therefore, when the child is able to provide explicit sexual details about an event, it is likely that the event is not a fantasy. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 473, 476 (1984).

27. Summit, *supra* note 15, at 180.

28. Summit, *supra* note 15, at 181.

29. Dr. Summit lists a series of common lines used by the abuser to intimidate the victim which include: "Don't tell your mother: (a) she will hate you, (b) she will hate me, (c) she will kill you, (d) she will kill me, (e) it will kill her, (f) she will send you away, (g) she will send me away, or (h) it will break up the family and you'll all end up in an orphanage," and "[i]f you tell anyone (a) I won't love you anymore, (b) I'll spank you, (c) I'll kill your dog, or (d) I'll kill you." Summit, *supra* note 15, at 181.

30. Summit, *supra* note 15, at 181.

31. Summit, *supra* note 15, at 181. Dr. Summit states that the adult will commonly react with disbelief and state something to the effect of "[w]hy did you wait until now if it really happened so long ago?" Summit, *supra* note 15, at 182.

32. Summit, *supra* note 15, at 182.

33. Summit, *supra* note 15, at 182.

34. Summit, *supra* note 15, at 183. One writer quoted a victim as saying:

> "I saw and heard him beat up my mother so many times that I was in constant fear that he would kill her. I knew that I was no match for him, and I guess I believed that his sexual

the perpetrator's psychological hold over the child, leaves the child no alternative.

Sexual abuse is often a "compulsive, addictive pattern" which will continue over a long period of time.[36] As a result, the child must learn to accept the situation and thus accommodate the abuse in order to survive.[37] The accommodation fosters yet another distortion of reality in which the child exhibits adaptive behavior in an attempt to control the situation.[38] The child may channel the blame inward and readily accept subsequent abuse in an attempt to receive some sort of award.[39] Accommodation may also be exhibited through substance abuse, domestic martyrdom, distortion of reality, hysteria, sociopathy, and uncontrolled rage.[40] These behaviors are often used by defense attorneys and other adults to invalidate the child's allegations. Because many adults are simply not aware that these behaviors are indicative of the child's accommodation of sexual abuse, they often misdiagnose the behavior.

In many sexual abuse cases involving children, disclosure is accomplished under suspicious circumstances.[41] For example, in some cases disclosure may be exposed by family conflict. If a family conflict induces disclosure, adults may discount the allegation as mere retaliation or rebelliousness.[42] An adult may not believe that the abuse occurred over a period of many years.[43] Furthermore, when the child's father is the

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abuse was somehow better than the physical abuse my mother received. Total detachment became my way of dealing with what went on at night. I would roll into the wall when he came in, pretending to be asleep, trying to be a part of the wall."

J. FORTUNE, SEXUAL VIOLENCE: THE UNMENTIONABLE SIN 163 (1983).

35. Summit, *supra* note 15, at 183.

36. Summit, *supra* note 15, at 184.

37. Summit, *supra* note 15, at 184.

38. Summit, *supra* note 15, at 184.

39. Summit, *supra* note 15, at 185. The reward can take the form of materialistic exploitation or it can represent the more intangible goal of protecting siblings. Summit, *supra* note 15, at 185.

40. Summit, *supra* note 15, at 186.

41. Summit, *supra* note 15, at 186.

42. Summit, *supra* note 15, at 186. *See also* Prettyman, *supra* note 8, at 23 (defense attorney asserted that the child was fabricating the story because she was mad that her father did not buy her a pony for her birthday). Family discord is blamed for a majority of false accusations because the child is either manipulated by the disgruntled parent or exhibits behavior in reaction to family stress which is mistaken for sexual abuse. Sink, *Studies of True and False Allegations: A Critical View,* in SEXUAL ALLEGATIONS IN CUSTODY AND VISITATION CASES 37 (B. Nicholson ed. 1988); *see also* Schuman, *False Accusations of Physical and Sexual Abuse,* 14 BULL. AM. ACAD. PSYCHIATRY L. 5 (1986).

43. Summit, *supra* note 15, at 186; *see generally* Myers, *supra* note 6, at 149.

abuser, the child's mother may disbelieve the allegation because she cannot accept the fact that one of the parties involved has lied to her.[44] Therefore, the father may easily persuade the mother that the allegation is groundless.

The golden rule in most child sexual abuse cases is that "[w]hatever a child says about sexual abuse, she is likely to reverse it."[45] This reaction is often a direct result of the pressure that the child must endure upon disclosure. Disclosure forces the child to face both the disruption of the family unit[46] and a legal system which often lacks sensitivity.[47] The child may be blamed or placed into custody and is always interrogated and examined, both physically and mentally, by strangers.[48] Viewed in this light, the motivation behind a retraction[49] is understandable. However, without explanatory guidance, jurors may place more credibility in the retraction than in the initial allegation.

III. STANDARDS FOR ADMISSIBILITY OF CSAAS

Courts have broad discretion in deciding whether to admit expert testimony and the decision normally will not be reversed absent an abuse of discretion.[50] The standard of admissibility is a process through which the concerns of the legal system are applied to scientific knowledge.[51] The standard therefore functions as an evidentiary valve which determines at which point scientific evidence may be used as legal evidence. Psychological evidence, especially when addressed in the context of a

44. Summit, *supra* note 15, at 187. *But see* Blumberg, *supra* note 7, at 613 (in some cases the mother may secretly approve of the abuse because it frees her from what she perceives to be a burdensome sex role).

45. Summit, *supra* note 15, at 188.

46. Summit, *supra* note 15, at 188.

47. Many authorities agree that legal intervention may cause more harm than the abuse itself. U.S. DEP'T OF HEALTH EDUCATION AND WELFARE, RESOURCE MATERIALS: A CURRICULUM ON CHILD ABUSE 63 (1979).

48. When the legal process begins authorities ask the child to describe the abuse to countless adults. If the victim is female, she must undergo her first gynecological exam, an experience which many adult women dislike. Finally, the child faces trial, and of course, cross-examination. The child is repeatedly traumatized and may eventually be placed in a foster home. *Id.* at 63-65.

49. One article gave four reasons for retractions: "1) pressure from the Mother because the family has lost the Father's income after the disclosure; 2) fear of retaliation from the offender; 3) conflicting feelings of love for the offender and hate for what he did; and 4) embarrassment concerning the details and discussion of the sexual abuse." Prettyman, *supra* note 8, at 26 n.14.

50. G. WEISSENBERGER, FEDERAL EVIDENCE § 702.3, at 299 (1987). State v. DeJoinville, 145 Vt. 603, 496 A.2d 173 (1985) (upheld conviction based on expert testimony concerning the capability of children to lie because the error did not strike at the heart of the defendant's Constitutional rights and did not result in a miscarriage of justice).

51. McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879 (1982).

syndrome, may be considered "novel scientific evidence"[52] and as such courts have often required that this type of evidence pass a threshold test for admissibility.[53] Unfortunately, courts and commentators have not decided what test is most appropriate for syndrome-type evidence. This conflict has resulted in inconsistent decisions.

A. *The* Frye *Standard*

The controversy over the admissibility of scientific evidence began with the use of a standard set forth in *Frye v. United States*.[54] The *Frye* court held that admissibility of scientific evidence hinges on whether the evidence has "gained general acceptance in the particular field in which it belongs."[55] The *Frye* court made this standard a requirement to admissibility because it decided that novel scientific methods are not trustworthy until the method is accepted by other scientists in the field.[56] The *Frye* standard is used to determine the admissibility of novel scientific evidence via expert testimony.[57] As a result, general acceptance of the technique about which an expert is testifying becomes a prerequisite to admissibility.

The most often cited criticisms of the *Frye* standard[58] are that it is too conservative, that it is vague and difficult to apply, and that courts apply the standard selectively.[59] The principle justification for the implementation of the *Frye* standard is that it excludes unreliable scientific evidence from the courtroom.[60] One court said the *Frye* standard forms

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52. Novel scientific evidence refers to "evidence whose scientific fundaments are not suitable candidates for judicial notice." United States v. Downing, 753 F.2d 1224, 1237 (3d. Cir. 1985).

53. United States v. Gould, 741 F.2d 45, 48 (4th Cir. 1984) (stating that a threshold test must be satisfied when dealing with novel scientific evidence).

54. 293 F. 1013 (D.C. Cir. 1923).

55. *Id.* at 1014. The passage most often quoted from *Frye* states:

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

Id.

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

57. *Id.*

58. *Frye* has been heavily criticized. *See e.g.*, Coppolino v. State, 223 So. 2d 68, 75, 76 (Fla. Dist. Ct. App. 1968) (Mann, J., specially concurring), *cert. denied*, 399 U.S. 927 (1970); Reed v. State, 283 Md. 374, 400-09, 391 A.2d 364, 377-82 (1978) (Smith J., dissenting); People v. Williams, 6 N.Y.2d 18, 32, 159 N.E.2d 549, 557, 187 N.Y.S.2d 750, 761 (Desmond, J., dissenting), *cert. denied.*, 361 U.S. 920 (1959); McCormick, *supra* note 51, at 886-905.

59. Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence,* 48 GEO. WASH. L. REV. 774, 779-80 (1980).

60. Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 191 (1983) [hereinafter

a "technical jury" of scientists who must determine the scientific status of a technique before a lay jury may rely on the technique to resolve factual issues.[61]

The criticism that the *Frye* standard is too conservative and thus thwarts progress by excluding relevant evidence from the courtroom[62] is persuasive, especially when applied to psychological evidence and CSAAS. The *Frye* standard is simply too rigid for the psychological profession. If courts use this standard the divergence within the profession itself[63] will prevent any legal determination of a theory's scientific status.

The second criticism, the difficulty of applying the *Frye* standard, is also magnified when *Frye* is applied to evidence within the field of psychology. *Frye* requires the court to determine what evidence is subject to the test. Scholars continue to debate whether psychological evidence deserves the status of scientific evidence.[64] Since psychology is a behavioral science, psychological evidence cannot be quantifiably proven in the same way as other scientific evidence.[65] The distinction between psychological evidence and other scientific evidence has been referred to as the difference between "hard" and "soft" scientific evidence.[66]

The application of *Frye* to CSAAS testimony is also difficult because CSAAS may not fall within the bounds of a specific professional field.[67] Although this complaint is not restricted to the field of psychology, it is especially important in the CSAAS context because the behavioral sciences are characterized by many different disciplines which often overlap.[68] An understanding of CSAAS may arguably require a knowledge

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Symposium] (background paper prepared for the National Conference of Lawyers and Scientists by P. Giannelli).

61. People v. Barbara, 400 Mich. 352, 405, 255 N.W.2d 171, 194 (1977).

62. Symposium, *supra* note 60, at 192; *Cf.* People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976) (the court stated that "[t]he primary advantage . . . of the *Frye* test lies in its essentially conservative nature.").

63. *See e.g.*, J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 123-27 (1970) (two psychologists working on the same study agree only 60% of the time); D. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE 178 (1986) (the profession as a whole operates without any general consensus among members of the profession).

64. *See e.g.*, Borgida & Frazier, *Rape Trauma Syndrome Evidence in Court*, AM. PSYCHOLOGIST 984 (Sept. 1985); McCord, *supra* note 2, at 29-30; Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445, 452 (1984) ("historical contributions of the behavioral sciences to . . . law have been *clinical*, not *scientific* in the strict sense.").

65. *See infra* notes 118-36 and accompanying text.

66. McCord, *supra* note 2, at 27. ("Hard" evidence is the result of an objective analysis, while "soft" evidence is the result of a subjective analysis.).

67. *See* United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974), *aff'd*, 809 F.2d 54 (D.C. Cir.), *cert. denied*, 439 U.S. 1117 (1979).

68. *See e.g.*, B. HAMISON & M. ELFENBEIN, EXPERIMENTAL METHODS IN PSYCHOLOGY 15

of child development and psychiatry.[69] Since *Frye* requires a knowledge of "the particular field"[70] it will require that either one field be selected to represent general acceptance or that general acceptance be obtained in all the fields involved. Such a mandate is not only unrealistic, it is impossible.

Finally, critics argue that courts have failed to apply the *Frye* standard consistently. Many courts have refused to apply the standard,[71] others have adhered to it vehemently,[72] and some courts have used the standard in conjunction with other criteria for admissibility.[73] Courts have also imposed the requirements of *Frye* to different aspects of novel scientific evidence. The *Frye* standard has been applied to the technique

(1985) (the field of psychology has at least twelve different sub areas which it shares with the field of psychiatry).

69. Courts have allowed psychologists, psychiatrists, social workers, and even policemen to testify in child sexual abuse cases. *See e.g.*, Bussey v. Commonwealth, 697 S.W.2d 139 (Ky. 1985) (psychiatrist's testimony on CSAAS); State v. Myers, 359 N.W.2d 604 (Minn. 1984) (clinical psychologist's testimony on the sexual abuse of children).

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

71. Whalen v. State, 434 A.2d 1346, 1354 (Del. 1980) (master semen test), *cert. denied*, 455 U.S. 910 (1982); Harper v. State, 249 Ga. 519, __, 292 S.E.2d 389, 395 (1982) (sodium amytol); State v. Hall, 297 N.W.2d 80, 83-85 (Iowa 1980) (blood type characteristics), *cert. denied*, 450 U.S. 927 (1981); Brown v. Commonwealth, 639 S.W.2d 758, 760 (Ky. 1982) (GM antigen blood analysis), *cert. denied*, 460 U.S. 1037 (1983); State v. Cantanese, 368 So. 2d 975, 980-81 (La. 1979) (polygraph); State v. Dorsey, 88 N.M. 184, __, 539 P.2d 204, 205 (1975) (polygraph); State v. Williams, 4 Ohio St. 3d 53, 446 N.E.2d 444 (1983) (voiceprints); State v. Kersting, 50 Or. App. 461, 470-71, 623 P.2d 1095, 1101-02 (1981) (microscopic hair analysis); Phillips ex. rel. Utah Dep't of Social Servs. v. Jackson, 615 P.2d 1228, 1234-35 (Utah 1980) (HLA blood test); Cullin v. State, 565 P.2d 445, 458 (Wyo. 1977) (polygraph).

72. *See e.g.*, United States v. Tranowski, 659 F.2d 750, 757 (7th Cir. 1981) (astronomical calculations); United States v. Brown, 557 F.2d 541, 556-58 (6th Cir. 1977) (ion microphobic analysis); United States v. Addison, 498 F.2d 741, 743 (D.C. Cir. 1974) (voiceprints), *cert. denied*, 439 U.S. 1117 (1979); United States v. Stifel, 433 F.2d 431, 436, 438, 441 (6th Cir. 1970) (neutron activation analysis), *cert. denied*, 401 U.S. 994 (1971); Lindsey v. United States, 237 F.2d 893, 896 (9th Cir. 1956) (sodium pentothal); Medley v. United States, 155 F.2d 857, 860 (D.C. Cir.) (spectroscopic analysis), *cert. denied*, 328 U.S. 873 (1946); United States v. Hearst, 412 F.Supp. 893, 895 (N.D. Cal. 1976) (psycholinguistics); Rivers v. Black, 259 Ala. 528, 531, 68 So. 2d 2, 4 (1953) (drunkometer); People v. Palmer, 80 Cal. App. 3d 239, 252, 145 Cal. Rptr. 466, 472 (1978) (scanning electron microscopic analysis); People v. Sloan, 76 Cal. App. 3d 611, 623, 143 Cal. Rptr. 61, 68 (1978) (bitemark comparisons); Huntington v. Crowley, 64 Cal. 2d 647, 653, 656, 414 P.2d 382, 388, 390, 51 Cal. Rptr. 254, 260-262 (1966) (Kell-Cellano blood grouping test); State v. Washington, 229 Kan. 47, 54, 622 P.2d 986, 991 (1981) (multi-system enzyme blood testing), *modified*, 239 Kan. 443, 720 P.2d 1049 (1986); People v. Wesley, 103 Mich. App. 240, 245-47, 303 N.W.2d 194, 196 (1981) (fingernail comparisons), *aff'd* 421 Mich. 375, 365 N.W.2d 692 (1984); People v. Lauro, 91 Misc. 2d 706, 712, 398 N.Y.S.2d 503, 507 (N.Y. Sup. Ct. 1977) (trace metal detection); State v. Smith, 50 Ohio App. 2d 183, 193, 362 N.E.2d 1239, 1246 (1976) (gunshot residue tests).

73. *See e.g.*, United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (The court combined the general acceptance test with three other requirements for admissibility. The court required that there be a qualified expert, that the subject be proper for expert testimony, and that the testimony's probative value outweigh its prejudicial impact.); United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978); United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977).

itself,[74] the scientific premise which serves as the basis of the technique,[75] and to the availability of experts to testify concerning the technique.[76] Such an ad hoc application of the standard reflects the state of discontent surrounding admissibility standards in this area and is indicative of the need for specific guidelines.

B. *The Relevance Analysis*

The relevance analysis emerged as an alternative to the *Frye* standard as the deficiencies of that standard became apparent.[77] The relevance analysis is similar to that advocated by the Federal Rules of Evidence.[78]

Essentially, the relevance analysis dictates that the probative value of the testimony be weighed against the risk that the testimony could cause unfair prejudice and confusion. One of the considerations of probative value is the reliability of the evidence. Commentators have proposed many other factors also to be considered in determining the probative value of a piece of evidence.[79] These factors should adhere to

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74. *See e.g.*, United States v. Stifel, 433 F.2d 431, 436 (6th Cir. 1970), *cert. denied*, 401 U.S. 944 (1971); Ibn-Tamas v. United States, 407 A.2d 626, 638 (D.C. 1979).

75. *See e.g.*, United States v. Alexander, 526 F.2d 161, 164 n.6 (8th Cir. 1975); Reed v. State, 283 Md. 374, 399, 391 A.2d 364, 377 (1978).

76. *See e.g.*, United States v. Ridling, 350 F.Supp. 90, 96 (E.D. Mich. 1972); *see generally* Note, *Changing the Standard for the Admissibility of Novel Scientific Evidence: State v. Williams*, 40 OHIO ST. L.J. 757, 765 (1979).

77. The traditional legal standard of relevancy has even been applied to polygraph evidence. *See* United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976).

78. Federal Rule of Evidence 401 states: " 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Federal Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These are the standards which must be weighed against each other under the Federal Rules. One commentator has even gone as far as to advocate that Federal Rule of Evidence 702 be expanded to read:

> 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 opinion or otherwise. When the witness seeks to testify about a scientific principle or technique that has not previously been accorded judicial recognition, the testimony shall be admitted if the court determines that its probative value outweighs the dangers specified in rule 403.

Burger, *A Relevancy Approach to Novel Scientific Evidence*, 26 JURIMETRICS J. 245 (1986). *See generally* McCord, *supra* note 2, at 27; *see also* Symposium, *supra* note 60, at 194.

79. Weinstein and Berger cite seven factors:

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

the Federal Rules requirement that to be relevant the evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[80] Therefore, under this approach, the court must undergo a three-step analysis. The court must ascertain the probative value of the evidence, identify the countervailing dangers, and finally, balance the probative value against these countervailing dangers.[81]

The relevance analysis has not escaped criticism. One common criticism is that the court must rely on the testimony of the expert to ascertain the probative value of the evidence.[82] This criticism has special significance in the child abuse arena because it is felt that most experts in child abuse cases are child advocates who are unable to be objective.[83] Furthermore, reliance on the expert to supply the information essential to this determination is naive because few experts will admit or even consciously believe that the scientific theory or technique they advocate is unreliable.

Another criticism of the relevancy approach is that it does not assure the reliability of a technique prior to its admission.[84] The relevancy approach relies on the adversary process to expose deficiencies and therefore allows the jury to make the final determination of reliability. Courts that apply the relevancy approach have expressed the belief that the risk

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Symposium, *supra* note 60, at 194.

McCormick has advocated the use of eleven different factors:

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

McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879, 911-12 (1982).

80. FED. R. EVID. 401.

81. Symposium, *supra* note 60, at 194.

82. Symposium, *supra* note 60, at 194-95 (quoting Strong, *Questions Affecting the Admissibility of Scientific Evidence*, U. ILL. L. REV. 14 (1970)); *See also* Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1250 (1980).

83. *See generally* Comment, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033 (1988).

84. Giannelli, *supra* note 82, at 1239.

of confusion and jury misguidance is reduced by the opponent's opportunity for cross-examination and rebuttal of the expert's evidence.[85] However, it is suggested that the judge's determination is only concerned with the admissibility of the evidence and that the weight assigned to the evidence is a jury determination.[86]

David McCord refined the relevancy test by proposing a four-factor balancing test.[87] His framework for analyzing the admissibility of evidence involves the balancing of four areas of judicial inquiry: necessity, reliability, understandability, and importance.

The necessity element involves an inquiry into whether the testimony involves a subject about which an expert can assist the ordinary juror, and whether that testimony is necessary to counterbalance jury prejudice caused by either the nature of the case or the nature of the witness.[88] CSAAS type testimony is necessary because the ordinary juror needs the testimony to prevent erroneous conclusions that the juror may reach as a result of misconceptions concerning victim behavior. CSAAS testimony will also counterbalance jury prejudice resulting from misconceptions about child sexual abuse in general.[89]

Another "necessity" inquiry is whether the opponent's trial tactics compel such testimony.[90] Since the majority of defenses in child sexual abuse cases seek to discredit the child as a witness, the government definitely needs CSAAS testimony to explain the child's behavior.

The second element of judicial inquiry, reliability, involves an inquiry into the "general acceptance of the validity of the result by other experts in the field" and an inquiry into the error rate of conclusions.[91] Although McCord asserts that false accusations are rare,[92] he recognizes that the testimony in this area is probably not demonstrably reliable.[93] The scientific community does not have the ability to definitively diagnose a sexually abused child, and therefore testimony offered to prove that the abuse occurred or to vouch for the child's credibility should be inadmissible.[94]

85. McCord, *supra* note 2, at 40.
86. McCord, *supra* note 2, at 40.
87. McCord, *supra* note 2, at 24-25.
88. McCord, *supra* note 2, at 34.
89. *See* McCord, *supra* note 2, at 34.
90. McCord, *supra* note 2, at 36-37.
91. McCord, *supra* note 2, at 38.
92. McCord, *supra* note 2, at 38. *But see* Sink *supra* note 42; *contra* Schuman *supra* note 42, at 16-19.
93. McCord, *supra* note 2, at 39.
94. McCord, *supra* note 2, at 67.

Understandability is the factor of judicial inquiry which focuses on the jury. Since such testimony involves the behavioral sciences, it is easier to explain and is within the jury's grasp if it can be associated with common experiences.[95] This element also considers the availability of other experts and specialized literature which an opponent may use. Since experts are often social workers, few will testify for the defense.[96] Furthermore, such literature is obscure and hard for an attorney to find without great expense.[97] As a result, testimony in this area is problematic in this respect.

The final element to consider is "the importance of the issue on which the expert testimony is being offered."[98] There is little merit to the argument that expert testimony in this area is not important. Indeed, it is the importance of CSAAS testimony that has made its admissibility such an issue. The determination of this final step leads to the balancing of all four factors to determine admissibility. McCord determined that such testimony involves a high degree of importance and a low degree of reliability. He therefore concluded that such testimony should be allowed only to explain the child's unusual behavior, the child's capabilities, and the capabilities of children in general.[99]

C. *Reliability Standard*

Paul Giannelli expresses the opinion that the relevancy approach does not adequately protect against potential misuse of unreliable novel scientific evidence. He therefore attempts to strike middle ground by advocating the reliability standard.[100] Giannelli notes that deficiencies in the relevancy approach exist even when the procedural safeguards that supposedly underlie the approach are in place.[101] His criticism centers

95. McCord, *supra* note 2, at 39.
96. McCord, *supra* note 2, at 39.
97. McCord, *supra* note 2, at 39.
98. McCord, *supra* note 2, at 40.
99. McCord, *supra* note 2, at 67.
100. Giannelli, *supra* note 82, at 1245 (1980); *see also* State v. Hall, 297 N.W.2d 80 (Iowa 1980) (admitting a technique which was not widely accepted and requiring that the reliability of the evidence be established on an *ad hoc* basis), *cert. denied*, 450 U.S. 927 (1981); Lederer, *Resolving the Frye Dilemma—A Reliability Approach*, 26 JURIMETRICS J. 240 (1986). Lederer proposed that Federal Rule of Evidence 702 be modified to read:

> If *reliable* 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.

Id. at 241.
101. Giannelli, *supra* note 82, at 1245. The relevancy approach assumes that unreliable evidence

around *United States v. Wright*,[102] in which an appellate court upheld the admissibility of voiceprint evidence after the developer of the test testified that the method was valid.[103] Giannelli argues that even with the presence of procedural safeguards the technique was not properly validated and was therefore admitted erroneously.[104]

Giannelli argues that the burden of proof should be shifted onto the prosecution to prove that the technique is reliable.[105] Giannelli also asserts that novel scientific evidence requires a special burden of proof and that therefore the standard of proof required to show validity in criminal cases should be "beyond a reasonable doubt."[106] Although he recognizes that this is a heavy burden for the prosecution to bear, Giannelli states that this burden should apply only to the validity of a technique in initial cases.[107]

IV. DEVELOPING THE STANDARD FOR CSAAS

A. *CSAAS: A Misnomer*

Much of the legal controversy about CSAAS is a product of legal misuse and misunderstanding which is a direct result of the fact that CSAAS is a misnomer. The term "syndrome" may refer to two different things. In laymen's terms it is defined as either "a group of signs and symptoms that occur together and characterize a particular abnormality" or "a set of concurrent things (as emotions or actions) that usu[ally] form an identifiable pattern."[108] Medically, however, the term refers to the aggregation of symptoms associated with a morbid process which forms a disease.[109] CSAAS, as it is currently defined, is neither a disease nor a pattern of abnormality. However, it has erroneously been used to show that a victim suffers from a form of mental illness much like Post-

will be brought to light by the adversary process. The prosecutorial safeguards within the adversary process are notice, discovery of test results, and availability of defense council. Giannelli, *supra* note 82, at 1239-45.

102. Giannelli, *supra* note 82, at 1245 (citing 17 C.M.A. 183, 37 C.M.R. 447 (1967)).

103. Giannelli, *supra* note 82, at 1245 (citing 17 C.M.A. 183, 193, 37 C.M.R. 447, 457 (1967) (dissenting opinion)).

104. Giannelli, *supra* note 82, at 1246.

105. Giannelli, *supra* note 82, at 1246. Giannelli criticized the relevancy approach for placing the burden of establishing unreliability of a novel scientific technique on the defendant. Giannelli, *supra* note 84, at 1246.

106. Giannelli, *supra* note 82, at 1248.

107. Giannelli, *supra* note 82, at 1248-49.

108. WEBSTER'S NEW COLLEGIATE DICTIONARY 1174 (1981).

109. STEADMAN'S MEDICAL DICTIONARY 1382 (5th ed. 1982).

Traumatic Stress Disorder, which describes the human reaction to sudden traumatic events.[110]

One example of the legal community's misuse of CSAAS is its attempt to analyze admissibility of CSAAS through a comparison with Rape Trauma Syndrome (RTS).[111] Although evidence of RTS has been admitted, admissibility of CSAAS by analogy is inappropriate. RTS is a descendant of Post-Traumatic Stress Disorder and deals with a sudden traumatic event. The CSAAS elements, in contrast, are not always attributable to a single traumatic event. The CSAAS elements describe an accommodation process, used by the child's subconscious, to allow the child to coexist with continual abuse.

Accommodation in this context refers to a psychological attempt to control anxiety. However, the fact that a child has accommodated to some sort of anxiety does not mean that the child was *sexually* abused, because an accommodation process is not necessarily unique to sexual abuse. For example, a battered child can arguably undergo the same accommodation process and may be threatened or coerced into secrecy by the battering parent in the same way that the sexually abused child is coerced into secrecy. Psychologically, the abuse could affect the battered child in the same way as it affects a sexually abused child.

One must carefully scrutinize the language found in Dr. Summit's article to understand the distinction between CSAAS as it has been mistakenly defined by the legal profession and CSAAS as it is actually defined. The paper begins by stating that "[t]he normal *coping* behavior of the child contradicts the entrenched beliefs and expectations typically

110. A post-traumatic stress disorder is a form of neuropsychologic disorder which is characterized in adults by irritability, emotional liability, loss of initiative and sense of responsibility, and in children by hyperkinesis, emotional liability, and disobedient, impulsive, egocentric behavior. STEADMAN'S MEDICAL DICTIONARY 415 (5th ed. 1982).

111. Rape Trauma Syndrome (RTS) has been accepted for the diagnosis of rape victims. Before RTS may be diagnosed the following criteria, as set out by the American Psychiatric Association's Diagnostic-Statistical Manual (DSM-III), must be met: (1) there must be "an identifiable stimulus outside the range of the normal experience that would cause severe stress"; (2) the victim must "re-experience the event through thoughts, dreams or other disassociative behavior"; (3) the victim must exhibit a "diminished interest in people or activities;" and (4) the victim must exhibit two or more of a variety of symptoms such as "hyperalertness, sleep disturbance, abnormal startle response, guilt, diminished concentration, or avoidance of activities remindful of the incident." Comment, *The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?*, 21 WAKE FOREST L. REV. 93, 97 (1985); *see e.g.*, Comment, *The Admissibility of 'Child Sexual Abuse Accommodation Syndrome' in California Criminal Courts*, 17 PAC. L.J. 1361, 1379-82 (1986). Some commentators have also compared CSAAS to Battered Child Syndrome (BTS), but to do so is incorrect. BTS involves physical properties which can be more readily ascertained. *See e.g.*, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 448 (1985) ("unlike sexual abuse syndrome, battered child syndrome encompasses a brief set of narrow, specific, predominantly physical symptoms . . . .").

held by adults . . . ."[112] This immediately signifies that the syndrome seeks to define a coping process and not behavior that will identify the existence of sexual abuse. Dr. Summit argued that the mental health profession responded to misconceptions of child sexual abuse with an explanation of victim survival behavior based on clinical behavioral studies of proven sexual abuse cases.[113] The sole purpose of the syndrome was to provide a "counterprejudicial explanation" for the otherwise suspicious behavior of the victim in hopes of sensitizing the system to the plight of the victim.[114]

This "syndrome," as it relates to accommodation, is only a small component of a syndrome which encompasses the entirety of sexual abuse. Dr. Summit stated that "[a] syndrome should not be viewed as a procrustean bed which defines and dictates a narrow perception of something as complex as child sexual abuse."[115] After noting that many variables contribute to sexual abuse, Dr. Summit stated that the syndrome is merely a "common denominator of the most frequently observed victim behaviors."[116] This explains why courts have trouble accepting CSAAS as proof that abuse occurred. Since this "syndrome" is only a piece of the child sexual abuse machinery, testimony concerning CSAAS may only be offered for the purpose for which it was defined—to explain the child's irrational behavior.

B. *Unique Problems of Psychological Testimony*

Two common criticisms of psychological testimony are that it is scientifically invalid and diagnostically imprecise.[117] Although these criticisms are a basis for the argument that greater restrictions must be placed on testimony that has a psychological basis, they are also justifications for invalidating any admissibility standard that is not specifically tailored to CSAAS-type evidence.

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112. Summit, *supra* note 15, at 177.

113. Summit, *supra* note 15, at 178-79. Dr. Summit refers to the child as being "psychologically orphaned and almost defenseless against multiple harmful consequences." Dr. Summit felt that this type of situation compelled a response for the purpose of changing the system to meet the needs of a child in an abusive situation. Summit. *supra* note 15, at 178-79.

114. Summit, *supra* note 15, at 179.

115. Summit, *supra* note 15, at 180.

116. Summit, *supra* note 15, at 180.

117. D. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE 177 (1986).

1. Scientific Invalidity of CSAAS

The scientific invalidity argument focuses on the fact that psychology is a pseudo-science which does not involve the application of principles derived from scientific method.[118] Some experts have asserted that findings like CSAAS are merely theory[119] and not scientific method.[120] As a theory, CSAAS describes a general relationship involving sexual abuse and behavior which some professionals believe to be meaningful in the identification of sexual abuse.[121] The fact that a theory is meaningful, however, does not lend support for its empirical validity or reliability. The validity of a theory refers to whether it accurately predicts results, whereas reliability refers to whether the results are consistent.[122] CSAAS can never be considered valid or reliable in a strict sense because it is premised on behavior that is neither consistent nor accurate.

The causal connection between CSAAS elements and sexual abuse is not verifiable because it is impossible to manipulate the variables involved. Typical scientific experiments involve the manipulation of independent variables and control over other conditions which may influence the dependent variable.[123] Sexual abuse is not something that scientists can re-create or control for scientific experiment. As a result, a nonexperimental approach must be used to develop something like CSAAS. With this approach, the scientist observes and measures variables as they occur naturally and is limited to the development of theories concerning the causal connection between various observations.[124] There is a problem with the validation of this type of study. Since the

118. *Id.* at 178.

119. A theory is a concept which attempts to organize observation and data into a category or class. The theory is formulated to state the nature of the relationship between specific data and classes as well as the interrelationship between the classes themselves. J. ZISKIN, *supra* note 63, at 40; *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 1200 (1981) (defining a theory as "the analysis of a set of facts in their relation to one another").

120. A scientific method refers to relationships which have been adequately validated and can therefore be asserted as established principles or facts. J. ZISKIN, *supra* note 63, at 39; *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 1026-27 (1981) (defining a scientific method as principles involving the recognition of a problem, "collection of data through observation and experiment, and the formulation and testing of hypotheses").

121. J. ZISKIN, *supra* note 63, at 39.

122. IMWINKELRIED, GIANNELLI, GILLIGAN & LEDERER, CRIMINAL EVIDENCE 84 n.6 (1979).

123. B. HAIMSON & M. ELFENBEIN, *supra* note 68, at 28.

124. B. HAIMSON & M. ELFENBEIN, *supra* note 68, at 184. CSAAS is an example of a retrospective research non-experimental technique. It can be compared to early studies concerning the link between cigarette smoking and certain diseases such as lung cancer, which attempted to discover if the disease was related to the amount of smoking. Studies like CSAAS must start with children who have been abused and attempt to discover whether certain behavior is caused by abuse. CSAAS indicates there is a strong correlation between the sexual situation and the tendency for children to react in certain ways. However, it is not conclusive that these reactions were caused by the sexual

scientist is unable to create the variables involved in sexual abuse, it is possible that some unobserved or unnoticed variable that is related to the elements of CSAAS is the actual causal agent.[125] For example, it is difficult to tell whether delayed disclosure is a direct result of the abusive situation or whether it may be influenced by the child's age or natural aggressiveness. Another possibility is that delayed disclosure is more prevalent in a family in which physical abuse is also present or in families where the child is given little emotional support. CSAAS does not provide an answer to these possibilities.[126] However, CSAAS should not be discounted for this reason because it is simply impossible to use any other type of verification process to gain insight into the problem.

Part of the value of a nonexperimental method is that it may be used to inspire experimental studies in the area.[127] If this were possible, it might be a reason to reserve judicial use of CSAAS until experimental verification could be developed. However, experimental verification will never be obtained where sexual abuse is a variable because it cannot be re-created or controlled in the experimental setting. As a result, the legal community should recognize that this method of obtaining scientific knowledge in the area, though problematic, is the best method for gaining insight into the complexities of child sexual abuse. The legal community must therefore adapt its standards for admissibility to reap the benefits of this information while maintaining the appropriate safeguards necessary in the search for the truth.

2. Diagnostic Imprecision of CSAAS

The use of CSAAS as a diagnostic tool to prove that the child has accommodated to some sort of sexual abuse is potentially prejudicial because such a diagnosis is imprecise. Diagnostic imprecision refers to the inability of the profession to agree on any single diagnosis of a person allegedly suffering from a mental disability.[128] This criticism becomes

abuse. An unknown variable may be responsible for the abuse and for the child's reaction to that abuse.

125. B. HAIMSON & M. ELFENBEIN, *supra* note 68, at 31-32.

126. CSAAS fails to consider many factors such as different age groups, different degrees and variations of abuse, the quality of family life, the relation between the abuser and the abused, and the child's maturity level. To be a truly comprehensive study about the effects of abuse on children, these factors should be controlled by the observer and associated with the abuse that previously occurred.

127. B. HAIMSON & M. ELFENBEIN, *supra* note 68, at 202.

128. D. SHUMAN, *supra* note 117, at 179-80 (a group of psychiatrists diagnosing the same person disagree over the diagnosis 60-80% of the time); *see also* O'Connor v. Donaldson, 422 U.S. 563, 578 (1985) (Burger, C.J., concurring) (acknowledging the "uncertainties of psychiatric diagnosis").

persuasive when a mental health expert testifies that a child is suffering from CSAAS or has been sexually abused. Imprecision arises partly because the diagnosis of an individual involves a clinical examination[129] which is often attacked for its subjective nature. Critics argue that an individual's verbal or nonverbal responses to a subject are exposed to external factors and that the examiner's reports and interpretation of the data are subjective.[130] Because of the subjective nature of the examination, the diagnosis may vary from psychiatrist to psychiatrist.

When a psychologist or social worker clinically examines a child victim for abuse, all of these defects emerge. For example, the investigative process may intimidate the child. By the time the child is interviewed by a psychologist, he or she may have been poked and prodded physically by a physician and questioned rigorously by parents and the police. The ordeal has turned the world as the child once knew it upside down, which may result in an array of behavior, including behavior which experts have associated with sexual abuse.[131] Since this testimony is obviously wrought with problems, courts should not use it to indicate that a child has definitely been abused.

When an expert testifies that a child has accommodated to some sort of abuse, these criticisms of CSAAS become problematic in an additional way. Although the behavior associated with CSAAS is not as subjective as other behavior which experts have associated with sexual abuse, the underlying motivation behind the behavior may be very subjective. For example, a child may either delay disclosure of the abuse or immediately reveal the secret. The same is true with inconsistent statements. The child's story is either inconsistent with a previous story or it is not. However, the reasons for this behavior may be varied and extremely subjective. Since CSAAS does not account for all the possibilities for these types of reactions, it is possible that the child has another reason for

129. J. ZISKIN, *supra* note 63, at 83.

130. J. ZISKIN, *supra* note 63, at 83-84. As a result, when a psychiatrist reports that a person is hostile because that person has displayed a great deal of hostility in the clinical interview, one must question whether that person is really hostile or whether the psychiatrist or environment of the examiner elicited hostile behavior. J. ZISKIN, *supra* note 63, at 84.

131. Behavior which has been linked to sexual abuse includes: nightmares, sleep disturbance, loss of appetite, regressive behavior, pseudo-mature behavior, withdrawal, acting out, difficulty recalling details such as dates and times, fear of men and further abuse, depression, anxiety, embarrassment, negative view of sex, poor relationship between mother and daughter, running away, and low confidence in the nonabusing parent. It has also been suggested that serious psychiatric disorders such as multiple personalities and schizophrenia may be associated with childhood sexual abuse. However, there is no clear evidence to support the view that any one disorder is definitely linked to sexual abuse. Abright, *supra* note 2, at 339.

exhibiting an element of CSAAS. Furthermore, it is not clear whether all elements of CSAAS must be present to compel a diagnosis or whether a mere combination of the elements is sufficient.

Although these types of problems are present, they are not enough to totally eliminate this type of psychological testimony from the courtroom.[132] Substantive law currently applies psychology to legal concepts such as "competency" and to factual issues such as the insanity defense.[133] As one author noted, the legal community continues to use a model of behavior in which diagnostic labels are utilized in determining whether relevant acts are a product of mental disease or defect.[134] Consequently, juries are required to reach diagnostic decisions and therefore even flawed expert assistance is preferable to an unguided diagnosis.

The fact that psychology is not an exact science does not necessitate the conclusion that courts cannot recognize it as an expertise.[135] Courts continue to make widespread use of such testimony[136] and behavioral science has become a valuable tool in the legal arena. Law, like psychology, deals with the conduct of human individuals and their relationships with others. The very nature of a legal dispute involves the behavior or motivation of one person which is contrary to the expectations of another. Therefore, courts should be cognizant that psychology underlies many legal disputes.

The legal community will make a grave error if it attempts to condition admissibility of psychological testimony on the existence of imprecise, infallible, and noncontroversial theories. The exclusive use of such theories will stifle potential positive uses of many types of evidence.

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132. *But see* J. ZISKIN, *supra* note 63, at 81. Ziskin argues that psychiatry is at best a discipline in its infancy and amounts to "no more than conglomerations of highly disputed speculations and conjectures." J. ZISKIN, *supra* note 63, at 81. Ziskin also asserts that psychiatric and psychological evidence should not be used in a court of law and if admitted, should not be afforded much weight. J. ZISKIN, *supra* note 63, at 7. *See also* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

133. "Legal concepts such as 'amenability to treatment,' 'parenting capacity,' 'best interest of the child,' 'competency,' . . . are framed in psychological terms." Abner & Reppucci, *The Limits of Mental Health Expertise in Juvenile and Family Law*, 10 INT'L J. OF L. & PSYCHIATRY 167, 169-70 (1987).

134. D. SHUMAN, *supra* note 117, at 180.

135. Works that advocate such a view include J. ZISKIN, *supra* note 63; T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963); and B. ENNIS, PRISONERS OF PSYCHIATRY (1972).

136. The more law has condemned and criticized psychiatry, the greater its demand for these services has grown. A. STONE, LAW, PSYCHIATRY AND MORALITY 106 (1984); *see e.g.*, Estelle v. Smith, 451 U.S. 454, 472 (1981) (Justice Berger emphasized that the Supreme Court expressed no disapproval of using psychiatric testimony).

C. *Relevancy Analysis Tailored to CSAAS*

Since CSAAS testimony is not admissible to prove that abuse occurred, courts should evaluate testimony offered to explain general characteristics of abused children under the Federal Rules of Evidence.[137] The imposition of a standard which is more restrictive than the Federal Rules of Evidence is unrealistic and unnecessary. However, courts should judge the probative value of CSAAS in the context of the case as it is presented and in light of the psychological method used.

The course of the trial may influence the probative value of this type of evidence. If the defense makes an issue of a particular characteristic in an attempt to show that the child has acted inconsistently,[138] then the prosecution should introduce CSAAS to counter the assertion. Since an explanation of behavior often exhibited by abused children does not prove that the abuse occurred or that the defendant was the abuser, the introduction of CSAAS will not prejudice the defendant in any way.[139] In a sense, the defense opens the door for admissibility of CSAAS testimony by forcing the prosecution to rehabilitate the witness.

CSAAS evidence is also necessary if the child surprises the prosecutor by recanting the story while on the stand. In such a situation, even if the defense does not make an issue of the retraction, the court must afford the prosecution the chance to rehabilitate the witness because the retraction will not go unnoticed by the jury.

Courts should be sensitive to the fact that child sexual abuse cases are frustrating for the government because they are so difficult to prosecute. However, when medical evidence of sexual abuse is coupled with a competent and convincing child, the prosecution's case is easier and the need for CSAAS testimony is minimized. Unfortunately, in most sexual

137. The Federal Rules of Evidence which apply to expert testimony in this area are Rules 401, 402, 403, 702, and 703. Under Federal Rule of Evidence 702, expert testimony is admissible if it will assist the jury in understanding "the evidence or in determining a fact in issue." The expert testimony must also be relevant under Federal Rule of Evidence 401. *See supra* note 78. Since CSAAS testimony assists the jury in interpreting a sexually abused child's inconsistent behavior, and is also relevant in interpreting the child's behavior, it meets the standard of admissibility set by Federal Rules of Evidence 702 and 401.

138. The defense may raise the issues during cross-examination of the victim or other state witnesses. These factors are most effective when the prosecutor is unable to rehabilitate the witness. Gardner, *Prosecutors Should Think Twice—Before Using Experts in Child Sex Abuse Cases*, CRIM. JUST. 12, 15 (Fall 1988); *see e.g.*, People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (1984) (the defense made an issue of delayed reporting and the court held that testimony about the general characteristics of abused children was admissible); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (1984).

139. State v. Hudnall, 359 S.E.2d 59, 61-62 (S.C. 1987) (evidence that is not admitted to prove that the abuse occurred is not prejudicial).

abuse cases there is little, if any, medical evidence.[140] When a case lacks medical evidence and the child has exhibited elements of CSAAS, testimony regarding CSAAS becomes an essential corroborative element of the case.[141]

Courts also must be sensitive to the effects of the recent United States Supreme Court holding in *Coy v. Iowa*.[142] In this case the Court held that a screen placed in the courtroom to prevent the victims from seeing the defendant violated the defendant's right to confrontation.[143] If the holding in *Coy* is interpreted to mean that all trial techniques that prevent a child from viewing the accused are unconstitutional, then the prosecution of sexual abuse cases will become even more difficult and the

140. Lack of medical evidence is not uncommon. Although semen or sperm may be found in or near the child's vagina, rectum, or mouth, the finding is only conclusive of sexual abuse within twelve hours. AMERICAN PROSECUTORS RESEARCH INSTITUTE, NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE, V-36 to V-37. This type of medical evidence is rarely found. Furthermore, the presence or absence of sperm may have little evidentiary value because many sex offenders are sexually disfunctional during the act and are unable to ejaculate. Another reason there may be a lack of medical evidence is that the penis is withdrawn prior to ejaculation. B. Morosco, The Prosection and the Defense of Sex Crimes § 9.09 at 9-46 [hereinafter Sex Crimes]; *see also* Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 178-79 (1986). Acid phosphatase is other medical evidence which is difficult to obtain. Acid phosphatase is an enzyme found in significantly high concentrations in seminal fluid. Acid phosphatase will be present in semen even when the male has no sperm in the semen. It may be preserved on bedding and clothing but the evidence is usually washed away before it can be examined. AMERICAN PROSECUTORS RESEARCH INSTITUTE NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE, II-44, V-37.

Evidence of a torn hymen or a dilated gaping anal orifice can also be problematic. A gaping anal orifice may be explained by the defense if the child has a history of constipation or neuromuscular disease. When evidence of a torn hymen is presented, the defense may counter with an expert who will testify that some females are born without a hymen and that masturbation or other physical activities may have caused the tear. *Id.* at V-38 to V-39. Although it is a popular belief that sexual abuse has occurred when there is a torn hymen, this assumption is not always correct. Penetration can occur without touching the hymen. If penetration is not violent, the elasticity of the hymen may allow the hymen to adapt to the penetration without breaking. Finally, there is a problem when no medical evidence exists and the child has testified that there was attempted, partial, or completed penetration. In such a situation an expert may be needed to testify that placing a penis, finger, or object between the labia could be interpreted by the child as being penetration. The use of lubricants may reduce the chance of an injury that is conclusive of sexual abuse. *Id.* at II-38.4. Without medical evidence the child's testimony will become the "linchpin of the state's case." J. MYERS, CHILD WITNESS LAW AND PRACTICE 160 (1987). When this is the case, the trial becomes a contest in which the child's word is pitted against that of an adult.

141. The most common forms of corroborative evidence in child sexual abuse cases are medical testimony, the child's testimony, eyewitness testimony, and psychological testimony. If any of these modes of evidence are weak, admissibility of psychological testimony will be more crucial.

142. __ U.S. __, 108 S.Ct. 2798 (1988).

143. The Confrontation Clause of the Sixth Amendment guarantees the criminal defendant the right to unobstructed face-to-face confrontation of adverse witnesses. U.S. CONST. AMEND. VI. For a more detailed examination of the issues and for a synopsis of courts' positions in confrontation cases *see* Cukjati, *Right of Confrontation: Screen Used at Trial that Prevents Testifying Child Sex Abuse Victim from Viewing Accused Violates Accused's Sixth Amendment Right to Face-to-Face Confrontation*, 20 ST. MARY'S L.J. 219 (1988).

use of expert psychological testimony will become more important. The *Coy* decision can affect the need for expert testimony in three ways. It may make the child in any given case unavailable or incompetent. It may increase the occurrence of contradictory testimony offered by the child while on the stand. Finally, it may result in an increase in retractions on the stand.

A child may be unavailable to testify against the defendant for a variety of reasons. The child may refuse, or be unable, to testify.[144] The parents may refuse to allow the child to testify.[145] The court may find that the child will suffer severe mental harm if required to testify.[146] A judicial determination of unavailability or incompetency may result if the trauma of the courtroom so affects the child as to render the child unable to testify.[147] If the child is unable to testify, some courts may allow the defense to offer the child's hearsay statements as evidence.[148] If these statements are inconsistent or amount to retractions, the prosecution will have no choice but to offer expert testimony concerning CSAAS because the child will be unable to explain the statements on the stand.

The courtroom experience is traumatic to a child. Without protective trial devices such as the one used in *Coy*, many children may react unfavorably to the government's case while on the stand.[149] The child

144. One commentator noted that a child may shut down all communication on the subject and refuse to answer questions because the child is frustrated and angry with the legal system. MacFarlane, *Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases*, in PAPERS, *supra* note 19, at 122; *see also* Goldade v. State, 674 P.2d 721, 723 (Wyo. 1983) (a four year-old child was found to be incompetent because she was unable to respond to questions due to shyness and awe), *cert. denied*, 467 U.S. 1253 (1984); Comment, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 819 (1985) (If "the child proves too frightened or inarticulate to allow any meaningful examination [while on the stand], then a finding of unavailability would be justified."). For a review of cases in which courts have found children to be incapable to testify *see* McComb, *Unavailability and Admissibility: Are a Child's Out-of-Court Statements About Sexual Abuse Admissible if the Child Does Not Testify at Trial?*, 76 KY. L.J. 531, 532 n.3 (1987-88).

145. If the investigation or preliminary matters begin to traumatize the child, the parents may elect to discontinue the investigation.

146. *See e.g.*, Perez v. State, 500 So. 2d 725, 726 (Fla. Dist. Ct. App. 1987). One commentator who reviewed the subject stressed the fact that potential abuses warrant the court's strict adherence to a finding that the child will suffer severe psychological injury before the child can be deemed unavailable. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985).

147. *See generally* J. MYERS, CHILD WITNESS LAW AND PRACTICE 53 (1987).

148. *See generally* Graham, *supra* note 146; Whitcomb, *Assisting Child Victims in the Courts: The Practical Side of Legislative Reform*, in PAPERS, *supra* note 19, at 17. *See also* Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745 (1983).

149. Boerma, *How to Overcome Barriers and to Develop Creative and Innovative Approaches in the Prosecution of Child Sexual Abuse Cases*, in PAPERS, *supra* note 19, at 37 (stating that "[a]ll would agree that this [the trial] setting could only cause to inhibit the ability of the child victim to testify.").

may find face-to-face confrontation intimidating and may recant in an attempt to escape the situation. Cross-examination in an adversarial environment may confuse the child and therefore result in conflicting or vague versions of the abuse. Without expert testimony, the jury may see these reactions as indicative that the abuse did not occur.

Courts should not disregard CSAAS merely because it cannot be supported by experimental methods. If courts are reluctant to use CSAAS, they could consider other studies in the field that take into account, and explain, elements of CSAAS. These other studies help to validate CSAAS. Since the nonexperimental method used in these studies is the only method which the prosecution can use to obtain this type of information, courts should respect its credibility.

The major flaw of CSAAS testimony when it is used to explain the reactions of abused children is that the study lacks depth. Dr. Summit fails to focus on specific variables to discover whether elements of CSAAS are associated solely with sexual abuse or whether the elements operate in conjunction with the characteristics of the child, the family, or the abuser. For example, it is difficult to determine whether elements of CSAAS are present in abused children of all ages or whether there is an age at which a child may exhibit none or only a combination of the elements. The same is true for many other variables such as the frequency and intensity of the abuse, the family environment, the maturity level of the child, and the relationship of the child to the abuser. Without a more definitive causal connection CSAAS cannot be used to prove that the alleged sexual abuse actually occurred.

D. *Limited Admissibility Tailored to CSAAS*

Courts should limit testimony regarding CSAAS to the purpose for which it was developed: to explain behavioral inconsistencies of child sexual abuse victims. In addition, the court should give a limiting instruction to ensure that the use of the testimony will not confuse the legal community and juries. Federal Rule of Evidence 105 states that: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."[150] Without a limiting instruction, juries may be tempted to view CSAAS testimony as "scientific" support for the conclusion that the abuse occurred or that the child is telling the truth.

150. FED. R. EVID. 105.

An example of the application of this idea was set forth by the California Court of Appeals in *People v. Bowker.*[151] The *Bowker* court considered the general question of admissibility of CSAAS testimony within the limitations of the Rape Trauma Syndrome decision in *People v. Bledsoe.*[152] The *Bowker* court explained that the *Bledsoe* decision and the *Frye* test precluded the admission of such evidence to prove that an attacker had abused the alleged victim. The court reasoned that Rape Trauma Syndrome was developed to assist in the understanding and treatment of victims and therefore assumes as its premise that an attacker has raped the individual in question.[153] In reaching its decision, the court noted that the line separating testimony concerning the general characteristics of molested children and testimony concluding that where certain behavioral criteria are met, abuse has occurred, is strictly guarded.[154] The court stated that testimony concluding that abuse has occurred, and testimony about general characteristics of molested children which will allow the jury to conclude that a child is a victim of abuse, is inadmissible.[155] Furthermore, the court warned that testimony on general characteristics of molested children may be more dangerous because it allows jurors to draw predictive conclusions.[156]

To reduce the danger of the jury's predicting a conclusion, the *Bowker* court developed a two-pronged test for admissibility.[157] First, the testimony must be narrowly tailored for the purpose for which it is admissible.[158] Testimony which is narrowly tailored is, at a minimum, "targeted to a specific 'myth' or 'misconception' suggested by the evidence" and limited to exposing this misconception by explaining why the child's behavior is consistent with abuse.[159] Secondly, the court must admonish the jury that the expert's testimony is not intended to determine whether the victim's molestation claims are true and that it should therefore not use the testimony for that purpose.[160]

151. 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988).

152. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1987).

153. *Bowker*, 203 Cal. App. 3d at 389.

154. *Id.* at 391. The court also noted that testimony describing the syndrome itself is not necessary and that testimony on general characteristics is sufficient. *Id.* at 392 n.8.

155. *Id.* at 393.

156. *Id.*

157. *See e.g.*, People v. Bothuel, 205 Cal. App. 3d 581, 252 Cal. Rptr. 596 (1988); People v. Jeff, 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (1988).

158. *Bowker*, 203 Cal. App. 3d at 393.

159. *Id.* at 393-94.

160. *Id.* at 394.

V. CONCLUSION

Because the need for this type of testimony is compelling, courts should follow the solution posed by the *Bowker* court in all cases in which an offering of CSAAS is made. Courts should exclude the testimony if offered to prove that abuse occurred, because this type of offering is inconsistent with the definition of CSAAS. If CSAAS is offered to explain a child's inconsistent behavior, then courts should allow it. The confusion in the legal community as to the proper use of CSAAS testimony suggests that a jury may use the testimony improperly. Therefore, courts must place explicit limitations on CSAAS testimony in order to ensure that jury verdicts are untainted.

The legal community should not ignore the positive use of information derived from CSAAS testimony. The methods underlying CSAAS are imperfect, but are the only workable means of gaining insight into the child sexual abuse problem. The legal community must, therefore, accommodate its standards to the information, and its imperfections, in the best way possible. Because the jury is charged with the responsibility of determining whether the alleged abuse occurred, it must diagnose the child. Testimony concerning CSAAS may aid the jury in its diagnosis, and, therefore, further the discovery of the truth. Courts can accomplish this through limited admissibility without jeopardizing the credibility of the system.

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