APPENDIX - C

APPENDIX - C

1. Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 11-12

68 NELR 1
68 Neb. L. Rev. 1

©Nebraska Law Review
1989

*1 EXPERT TESTIMONY IN CHILD SEXUAL ABUSE LITIGATION

John E. B. Myers [FNa], Jan Bays, Judith Becker, Lucy Berliner, Davi d L. Corwin and Karen J. Saywitz

*3 I. INTRODUCTION

Child sexual abuse is often exceedingly difficult to prove. Molestation occurs in secret, and the child is usually the only eyewitness. [FN1] While many children are capable witnesses, some cannot take the *4 stand. [FN2] Most children find the courtroom a foreboding place, and when a child is asked to testify against a familiar person, even a parent, the experience can be overwhelming. Consequently, children's testimony is sometimes ineffective. The problems engendered by ineffective testimony and lack of eyewitnesses are compounded by the paucity of physical evidence in many child sexual abuse cases. [FN3] Faced with a vacuum of evidence, attorneys increasingly turn to physicians, psychiatrists, social workers, and psychologists to provide expert testimony regarding child sexual abuse. [FN4]

Allegations of child sexual abuse arise in eight types of legal proceedings: criminal prosecutions; juvenile delinquency litigation; juvenile court proceedings to protect abused children; child custody and visitation litigation incident to divorce; proceedings to terminate parental rights; civil suits brought by victims against perpetrators for monetary damages; civil litigation against child protective service agencies and professionals for failing to protect children from sexual abuse; and administrative proceedings to suspend or revoke professional or facility licenses. While the form of expert testimony may vary slightly with the type of proceeding involved, expert testimony on child sexual abuse plays an important role in each forum.

Beginning in approximately 1980, a substantial body of case law emerged on expert testimony in child sexual abuse litigation. An explosion of decisions occurred in the years following 1985. The ink is barely dry on one opinion before the next is added. It is difficult to keep abreast of the burgeoning decisional law in this area.

When complex new subjects are introduced in the law of evidence, it takes a number of years for courts to achieve consensus regarding *5 basic principles and applications. This is certainly true regarding expert testimony on child sexual abuse. The law in this area is in a formative stage of development, and a coherent theoretical framework for decisionmaking has yet to emerge. The purpose of this Article is to contribute to the ongoing effort to ar-

ticulate the proper scope and limits of expert testimony in child sexual abuse litigation.

This Article is divided into five sections. Following this introductory material, section II provides background information on the admissibility of expert testimony. Section III analyzes special rules pertaining to evidence based on novel scientific principles. Section IV describes nine categories of expert testimony. Each category of expert testimony is divided into two subsections. Subsection 1 provides clinical and scientific information regarding the type of expert testimony discussed in the category. [FN5] With the clinical and scientific information as a base, subsection 2 shifts the focus of discussion to theories of admissibility and applicable case law.

In addition to analyzing categories of expert testimony, this Article has a second and equally important purpose. The phenomenon of child sexual abuse is exceedingly complex. Expert testimony regarding such abuse is equally complicated. In order to comprehend the dynamics of sexual abuse, and to appreciate the utility of expert testimony, judges and attorneys must be familiar with current psychological and medical literature on the subject. Yet, few members of the bench and bar are in a position to read and digest the rapidly expanding nonlegal literature on child sexual abuse. The second goal of this Article is to provide the judiciary and the legal profession with up-to-date clinical and scientific information that is relevant to child sexual abuse. This goal could not be achieved through the pen of a lawyer. An interdisciplinary group of authors is required. The authors of this Article are a social worker, two psychologists, a pediatrician, a child psychiatrist, and an attorney.

*6 II. ADMISSIBILITY OF EXPERT TESTIMONY

Rules of evidence governing expert testimony vary slightly from state to state. In the main, however, the uses and limits of expert testimony are similar across the country. What is more, similarity is growing under the influence of the Federal Rules of Evidence, now in force in many jurisdictions. [FN6] Because of the pervasive influence of the Federal Rules, the following discussion is based on these Rules.

A. General Rule of Admissibility

Rule 702 of the Federal Rules of Evidence establishes the basic principle governing admission of expert testimony. The rule states:

> 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.

The trial judge determines whether proffered testimony meets the requirements of Rule 702. [FN7] In doing so, the judge is guided by the policy of the Federal Rules favoring admission of expert testimony. [FN8] In evaluating admissibility, the most important question is whether the testimony will assist the jury. [FN9] As Dean Wigmore put it, "On this subject can a jury receive from this person appreciable help?" [FN10] When does expert testimony assist the jury? There are no easy answers to *7 this question. Testimony that assists in one circumstance is unilluminating in another. Assistance to the jury must be evaluated on a case-by-case basis. [FN11] The Advisory Committee note on Rule 702 alludes to the case-by-case approach:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the commonsense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. . . . [FN12]

Prior to widespread adoption of the Federal Rules, a number of courts held that expert testimony was proper only when the subject of the testimony was completely beyond the ken of the average juror. This standard continues to find occasional judicial expression. Certainly, expert testimony is appropriate to explain highly technical or scientific information which is beyond the understanding of jurors, but the jury can also benefit from expert testimony on subjects with which it has a degree of familiarity. Under the Federal Rules, it is clear that the subject on which expert testimony is offered need not be completely beyond the understanding of the jury. In some cases, the expert can add insight and depth to the jury's understanding of familiar subjects. In others, expert testimony may disabuse jurors of commonly held misconceptions about relatively common events. In sum, Rule 702's requirement of assistance to the jury envisions admissibility of expert testimony on a broad spectrum of subjects, ranging from the arcane to the mundane. The question is not whether the subject is beyond common understanding, but whether the expert can assist the jury "to understand the evidence or to determine a fact in issue. . . ." [FN13]

B. Permissible Bases for Expert Testimony

Rule 703 of the Federal Rules articulates the permissible bases for expert testimony. The Rule states:

> The facts or data in the particular case upon which an expert bases an *8 opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The facts on which experts on child sexual abuse base opinions come from a wide variety of sources. In many cases the expert has firsthand knowledge of the child because the expert is personally involved in interviewing or treating the child. For example, a child's therapist might opine that the child probably experienced age-inappropriate sexual contact. Firsthand knowledge is not always required for expert testimony about a particular child, however. In an appropriate case, an expert who has not met a child may testify about the child. In such a case, the expert might base the opinion on study of videotaped interviews of the child and reports prepared by other professionals. Some forms of expert testimony do not require any knowledge of a particular child. This is so, for example, when an expert limits testimony to a description of behaviors commonly observed in sexually abused children as a class.

Under the Federal Rules of Evidence, an expert may base an opinion on information that would not be independently admissible in evidence if such information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." [FN14] Permitting experts on child sexual abuse to formulate *admissible* opinions on the basis of *inadmissible* evidence requires judges to determine what types of facts and data are "reasonably relied upon" by experts in the field of child sexual abuse.

The potentially inadmissible evidence that is most frequently relied on is written and verbal hearsay. Writings include medical records, psychological reports, police records, social agency reports, and the child's written statements. Verbal hearsay statements of the child are often critical. Indeed, such statements are frequently the most telling evidence of abuse. A child's assertive nonverbal conduct amounting to hearsay can also be important. Verbal statements of other persons, such as parents, also play a role. Even though some of the documents, verbal statements, and nonverbal conduct just described would be excluded by the hearsay rule, the Federal Rules permit experts to rely on such information if reliance is reasonable. [FN15]

Is it reasonable for experts on child sexual abuse to rely on hearsay? In many cases the answer is yes. American law has long recognized that some forms of hearsay are reliable. Furthermore, the law expressly acknowledges that physicians and other helping professionals constantly and necessarily rely on hearsay to make the most momentous*9 medical decisions. [FN16] Thus, it is clear that experts justifiably rely on hearsay.

The question remains, however, may an expert rely on any hearsay, no matter how unreliable? In their influential treatise on the Federal Rules of Evidence, Judge Weinstein and Professor Berger grapple with this difficult question. [FN17] They identify two views. Courts adopting the restrictive view hold that it is unreasonable for experts to rely on hearsay that is inadmissible in evidence. Courts following the expansive view permit experts to rely on inadmissible hearsay. Weinstein and Berger write:

> It is apparent from the reported decisions that the courts are loosely divided into two camps in interpreting the second sentence of Rule 703 [which permits reasonable reliance on inadmissible evidence]. . . . Those favoring the admissibility of expert testimony and those taking a far more restrictive view. Those courts which endorse a restrictive approach do so not only in criminal cases, . . .but in civil cases as well. The difference between the restrictive and more liberal approach to Rule 703 is one of emphasis. Both groups agree that the trial judge must decide whether the data on which the expert relied is of a type reasonably relied upon in his field of expertise. But the restrictive camp imposes a further requirement: it reassesses the underlying material to determine whether it would have been excluded as hearsay for reasons bearing on reliability, and if so finds that the expert could not reasonably have relied on it, even though he shows that this is the type of material on which he relies in his non-testifying, working life.
>
> . . . .
>
> The difficulty with [the restrictive approach] lies not in the actual results but in the court's apparent assumption that trustworthiness of the underlying data is an independent factor which Rule 703 requires the judge to verify in order for the expert's testimony to pass the threshold of admissibility. Were that so, Rule 703 would be redundant since the hearsay rules would be determinative and the second sentence of Rule 703 would be meaningless, except for saving the proponent of the expert the inconvenience of having to offer the underlying data into evidence.
>
> The authors have found that the more liberal view works quite well in practice. In non-jury cases the judge is fully capable of discounting the probative force of the expert's opinion by considering the source of his data. And, in jury cases, when the matter is brought to the jurors' attention by a proper instruction, they show a full sensitivity to the problem--in fact often discounting the expert's opinion too much when it is based on hearsay or secondary evidence of documents or the like. . . . [FN18]

The expansive view is in line with what experts on child sexual abuse do in practice, and with the spirit of the Federal Rules, favoring admission of evidence. In the run of cases, experts should be permitted to base opinions regarding sexual abuse on hearsay and other evidence*10 that cannot be admitted in evidence. The reliability of inadmissible evidence normally goes to the weight accorded an expert's opinion, not its admissibility.

It must be acknowledged, however, that in some cases inadmissible evidence is so unreliable that a court should exclude testimony based thereon. Exclusion could rest on a finding that an expert could not reasonably rely on such evidence. Alternatively, a court might rule that any probative value of the evidence is substantially outweighed by the potential for unfair prejudice. [FN19]

Rather than attack the evidence supporting an expert's opinion in the hope of excluding the opinion altogether, a party may acquiesce in the expert's testimony but seek to blunt its sting by convincing the judge to preclude the expert from divulging one or more of the bases underlying the opinion. Such an argument proceeds on the theory that disclosure of the bases of the opinion would cause unfair prejudice, confusion of the issues, or the misleading of the jury. [FN20] The argument has merit in some cases.

C. Qualifications of Expert Witnesses

Before a person may testify as an expert, the judge must be convinced that the person possesses sufficient "knowledge, skill, experience, training, or education" to qualify as an expert on the subject at hand. [FN21] The party offering expert testimony carries the burden of establishing the witness's qualifications.

The normal procedure is to call the witness to the stand and ask questions about the person's educational accomplishments, specialized training, and relevant experience. [FN22] An expert on child sexual abuse might be asked questions in the following areas:

1. Educational attainments and degrees.
2. Specialization in a particular area of practice.
3. Specialized training in child sexual abuse.
4. Extent of experience with sexually abused and non-sexually abused children.
5. Familiarity with relevant professional literature.
6. Membership in professional societies and organizations focused on child abuse.
7. Publications regarding child sexual abuse.
8. Whether the person has been qualified as an expert on child sexual abuse in prior court proceedings.

*11 A party opposing expert testimony may voir dire a witness in an effort to show that the witness is not qualified as an expert. Unless a witness is clearly unqualified, however, deficiencies in qualifications normally go to the weight accorded the witness's testimony rather than its admissibility. [FN23] A witness need not be the foremost authority on child sexual abuse, nor must the expert understand every nuance of the subject.

While highly specialized expertise in the field of child sexual abuse is not always necessary, such expertise is certainly desirable from the proponent's perspective. The qualifications of an expert serve two purposes. The first is to surmount the foundational hurdle of convincing the judge that the witness is qualified as an expert. For this purpose, varying degrees of education and experience are sufficient. The second purpose, however, is to impress the jury, and to convince it to accord great weight to the expert's opinion. On this score the proponent desires an eminently qualified expert--the more impressive the better.

In the area of child sexual abuse, professionals from several disciplines lay claim to expertise. [FN24] In determining who is qualified to testify as an expert on child sexual abuse, it is important to emphasize that simply because a person holds a particular degree does not mean the person is qualified to testify as an expert on child sexual abuse. In the field of child sexual abuse, the critical factors relating to qualification as an expert are: (1) extensive firsthand experience with sexually abused and non-sexually abused children, [FN25] (2) thorough and up-to-date knowledge of the *12 professional literature on child sexual abuse; and (3) objectivity and neutrality about individual cases.

With the foregoing principles in mind, it is clear that not all physicians, psychiatrists, psychologists, and social workers are qualified in the highly specialized field of child sexual abuse. In actuality, only a small fraction of professionals in these disciplines possess sufficient knowledge and experience to qualify as experts. Courts should insist on a thorough showing of expertise before ruling that an individual is qualified to testify as an expert on child sexual abuse. [FN26]

D. Form of Expert Testimony

Once a witness is qualified as an expert, attention turns to the expert's testimony. Rule 702 states that an expert may testify "in the form of an opinion or otherwise." [FN27] Expert testimony usually takes one of three forms; the most common is an opinion. For example, in a criminal case involving distribution of cocaine, an expert might render an opinion that a white, powdery substance is indeed cocaine. In a medical malpractice case, an expert witness might opine that the defendant doctor failed to conform to the standard of care required of physicians. In child sexual abuse litigation, expert testimony takes a number of forms. For example, an expert might testify that a child demonstrates age-inappropriate sexual knowledge or awareness.

Under the Federal Rules of Evidence, an expert may state an opinion without specifying the bases supporting the opinion. [FN28] As a practical matter, however, the expert is nearly always asked to provide the factual data on which the opinion is premised. This information may precede or follow the opinion itself. Asking the expert to elaborate on the bases supporting the opinion aids the trier of fact in understanding the opinion. The explanation also provides the expert an opportunity to build rapport with the jury and to educate jurors about the subject at hand. The net effect is to strengthen the impact of the expert's testimony.

An expert opinion must be premised on a reasonable degree of certainty. [FN29] The expert cannot speculate or guess. [FN30] It is clear, however, *13 that an expert need not be absolutely certain about a subject before offering an opinion. [FN31] All that is required is reasonable clinical certainty. Louisell and Mueller write:

> The fact that an expert cannot be categorical, and admits of some uncertainty in his conclusions, does not mean that his testimony should be excluded or that it fails the helpfulness requirement. Ordinary witnesses routinely testify to their recollection of events while admitting to uncertainty, and at least as much latitude should be extended to experts. Thus, assuming that a witness qualifies as an expert and has an adequate basis upon which to base his opinion, his inability to be definitive should not stand in the way of receiving his testimony, and in cases where the reasons for his reservations can be made intelligible to a lay jury it is entirely appropriate to permit the expert to lay them out, so that the jury may better evaluate his testimony and reach its own conclusions as to its worth. [FN32]

The flexibility inherent in the requirement of reasonable clinical certainty is important in the context of child sexual abuse, where absolute certainty is rare. As Louisell and Mueller point out, uncertainties in an expert's opinion can be pointed out to the jury, and inquired into during cross-examination. An expert may refrain from offering an opinion, and may testify in the form of "a dissertation or exposition of scientific or other principles relevant to the case, leaving to the trier of fact to apply them to the facts." [FN33] For example, in a child sexual abuse case, an expert may limit testimony to a description of behaviors commonly observed in sexually abused children as a class, without providing an opinion about the alleged victim.

Finally, expert testimony may take the form of an answer to a hypothetical question propounded by counsel. The hypothetical question was once ubiquitous. In recent years, however, the hypothetical has declined in popularity. This technique for eliciting expert testimony often confuses the jury and frustrates the expert.

E. The Ultimate Issue Rule

Through a long and somewhat tortured course of development, the rule emerged that lay witnesses could not testify in the form of opinion. [FN34] What the court needed was facts based on personal knowledge, not opinion or inference. [FN35] The opinion rule has never been followed *14 strictly in practice. Courts realize that lay witnesses are sometimes able to formulate opinions that assist the jury. Furthermore, it is often impractical or impossible to avoid opinion or inference. [FN36] Lay witnesses have been permitted to resort to opinion to describe the "appearance of persons or things, identity, the manner of conduct, competency of a person, feeling, degrees of light or darkness, sound, size, weight, distance and an endless number of things that cannot be described factually in words apart from inferences." [FN37]

Rule 701 of the Federal Rules of Evidence expressly authorizes lay witnesses to testify in the form of opinion or inference. [FN38] However, the Rule limits such testimony to opinions or inferences which are rationally based on the perception of the witness and which are helpful to the jury. McCormick describes the modern approach to lay opinion testimony as follows: "It is believed that the standard actually applied by many of the trial judges of today includes the principle espoused by Wigmore, namely that opinions of laymen should be rejected only when they are

superfluous in the sense that they will be of no value to the jury." [FN39]

While restrictions are placed on opinion testimony from lay witnesses, experts have long been permitted to testify in the form of opinion or inference. Rule 702 reflects this tradition, stating that experts may testify "in the form of an opinion or otherwise." [FN40]

Prior to the Federal Rules of Evidence, then, opinion testimony was permitted from lay witnesses occasionally, and from experts generally. When opinions were offered, however, pre-Federal Rules law placed an important limitation on the testimony. Neither type of witness could express an opinion on "the very issue before the jury". [FN41] In other words, witnesses were not to usurp or invade the function of the jury by testifying to ultimate facts. [FN42] This limitation on opinion testimony--known*15 as the ultimate issue rule--was widely followed. The rule had little to support it, however, and the commentators were most unkind. [FN43] Wigmore wrote:

> Another erroneous test, prevalent in some regions. . .is that an opinion can never be received when it touches "the very issue before the jury". . . .
>
> The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle. . . . [FN44]
>
> A phrase, often put forward as explaining why the testimony we are concerned with is excluded, declares that the witness, if allowed to express his "opinion," would be "usurping the functions of the jury. . . ."
>
> In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function; nor could he if he desired. He *is not* attempting it, because his error (if it were one) consists merely in offering to the jury a piece of testimony which ought not to go there; and he *could not* usurp it if he would, because the jury may still reject his opinion and accept some other view. . . . [FN45]

The ultimate issue rule is rejected in the Federal Rules of Evidence. Rule 704(a) states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Advisory Committee's note to Rule 704 reflects Wigmore's low opinion of the ultimate issue rule:

> The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues. . . . The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. . . . The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury", is aptly characterized as "empty rhetoric." [FN46]

***16** Thus, it is clear under the Federal Rules that witnesses may offer opinions on ultimate factual issues. [FN47] The court may limit or exclude such testimony if the dangers of jury confusion or unfair prejudice outweigh the helpfulness of the opinion. [FN48] In particular, courts are careful to ensure that jurors do not abdicate their independent factfinding responsibility, and unthinkingly adopt a witness's version of critical facts.

While opinions are not objectionable because they embrace issues of ultimate fact, courts generally do not permit witnesses--lay or expert--to offer opinions on questions of law. [FN49] Scholars writing in the psychological literature agree that experts should not provide opinions on legal questions. Melton and his colleagues write: " O n one point there is near-unanimity among scholarly commentators. . . . *M ental health professionals should refrain from giving opinions as to ultimate legal issues.* [FN50]. . . Ultimate legal issues are issues of social and moral policy, and they properly lie outside the province of scientific ***17** inquiry." [FN51]

Closely related to opinions on legal issues are opinions which are little more than thinly veiled advice on how the jury should decide the case. McCormick observes that "[u]ndoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided. . . . It is believed all courts would exclude such extreme expressions." [FN52]

The line separating ultimate facts from questions of law is illusive. [FN53] Adding to the difficulty is the fact that some questions are mixtures of law and fact. Perhaps the most helpful way to illustrate the distinction between permissible and impermissible opinions is with examples.

To make a will, a person must possess testamentary capacity, which is generally defined as sufficient decision-making capacity to understand the nature and extent of one's property, and to formulate a rational plan of distribution. In a will contest, Rule 704 permits the following question of an expert, "Did [the testator] have sufficient mental capacity to know the nature and extent of her property and the natural objects of her bounty and to formulate a rational scheme of distribution?" The fact that this question touches upon the ultimate factual inquiry before the court does not render it objectionable. However, the question, "Did [the testator] have the capacity to make a will?" is improper because it is cast in terms of legal conclusion rather than ultimate fact. [FN54]

In a medical malpractice case, an expert should not express an opinion on whether the defendant doctor was negligent. This ultimate legal conclusion is reserved for the jury. The expert may, however, respond to the question, "Did the defendant doctor adhere to the standard of care exercised by medical practitioners in the local community?" This is a fact question.

In litigation where mental health professionals testify, Melton and his colleagues observe that "[q]uestions as to criminal responsibility, commitability, and so forth are legal and moral judgments outside the expertise of mental health professionals. . . ." [FN55] While such ultimate legal conclusions are not a proper subject for expert testimony, medical and mental health professionals can provide valuable factual data ***18** in the form of clinical and scientific information which the jury can utilize to reach legal conclusions.

In the context of child sexual abuse litigation, the ultimate facts are whether abuse occurred, and, if so, who committed the abuse. The ultimate legal issue in criminal litigation is whether the defendant is guilty. In juvenile court protective proceedings, the ultimate legal issue is whether the court has jurisdiction over the child. Expert witnesses should not express opinions regarding legal issues such as criminal responsibility or juvenile court jurisdiction. When experts possess helpful information on factual matters, however, they may be permitted to testify despite the fact that their testimony embraces ultimate facts.

The conclusion that experts should not testify in the form of legal conclusions raises an issue in child sexual abuse litigation. In some cases, an expert may be prepared to testify that a particular child probably was sexually abused. [FN56] Is such an opinion one of fact or law? [FN57] An argument can be made that an opinion that a child was sexually abused is a statement of ultimate fact. The child either was or was not sexually abused. At the same time, however, an opinion that a child was sexually abused comes close to the legal issue before the court for decision. That is, was the child sexually abused as that term is defined by statute? Testimony cast in the form of a direct opinion that sexual abuse occurred is similar to an opinion that a testator had testamentary capacity. For that reason, it may be appropriate, especially in jury trials, to prohibit experts from offering opinions which state, in so many words, that a particular child was sexually abused.

There are a number of alternatives to a direct opinion that a child was sexually abused. Testimony in an alternative form avoids the concern that the opinion will cross the sometimes elusive line separating fact from law. An ex-

pert might testify that a particular child experienced age-inappropriate sexual contact. This opinion is cast in terms of ultimate fact. It is akin to an opinion that the testator possessed sufficient mental capacity to know the nature and extent of her property and the natural objects of her bounty. Alternatively, an expert ***19** might testify that a child's symptoms and behaviors are consistent with child sexual abuse. This opinion is cast in factual terms, and is safely removed from the ultimate legal issues in the case. Finally, an expert might testify that a child demonstrates age-inappropriate sexual knowledge or awareness. This opinion does not tread close to legal issues, and is cast in terms that are uniquely within the expertise of experts on child sexual abuse. The various forms of expert testimony relating to whether sexual abuse occurred are discussed further in subsection IV (C).

III. EXPERT TESTIMONY BASED ON NOVEL SCIENTIFIC PRINCIPLES

One of the most complex issues raised by expert testimony on child sexual abuse is the application to such testimony of special rules governing admissibility of novel scientific evidence. This section explores this important issue.

A. Why Special Admissibility Rules for Novel Scientific Evidence?

For purposes of the present subsection, it is useful to distinguish medical evidence of sexual abuse from behavioral science evidence. Medical testimony is provided by physicians. Behavioral science testimony is provided by social workers, psychologists, and psychiatrists. [FN58]

Medical evidence is based on physical examination, medical history, and laboratory findings. In some instances, medical proof is relatively straightforward. For example, when a child tests positive for gonorrhea, sexual abuse is usually the only plausible explanation. Other aspects of medical proof are more controversial. For instance, the medical profession has not achieved complete consensus regarding the appearance of normal female genitalia. Thus, it is sometimes difficult to determine whether a child's anatomy departs from the norm in a manner indicative of abuse.

As is true with medical evidence, behavioral science evidence of sexual abuse contains areas of uncertainty and controversy. Professional consensus exists on some aspects of the subject, but not others. Fortunately, literature is emerging which supports the utility of behavioral science testimony in child sexual abuse litigation. Yet, like medicine, much remains to be learned.

Medical and behavioral science evidence of sexual abuse share the fate of all developing technical specialties: myriad unanswered questions. While medical and behavioral science evidence have much in common, it is important to point out a significant distinction. Behavioral***20** science evidence carries a handicap that does not apply to medical evidence. In the minds of some judges, behavioral science evidence is under a cloud of suspicion that does not darken medical evidence. Judges are relatively comfortable with medical evidence because it is based on data that are verifiable by physical examination, laboratory tests, and other *objective* techniques. In addition, medical evidence has long been admissible in a broad range of civil and criminal matters. Behavioral science evidence, by contrast, has always been controversial. [FN59] Furthermore, the categories of behavioral science testimony offered in child sexual abuse litigation are of recent development. The relative novelty of such evidence raises questions about reliability. Many judges are leery of psychiatric and psychological evidence because it is based in part on "soft science" and *subjective* interpretation of inherently ambiguous behavior. [FN60] The proponent of behavioral science testimony must come to grips with the likelihood that some courts entertain deep-seated doubts regarding such proof.

Bearing in mind the degree of uncertainty and novelty surrounding some aspects of medical and behavioral sci-

ence evidence, it is important to ensure that expert testimony based on such evidence is sufficiently reliable to assist the jury. [FN61] To ensure reliability, the proponent of testimony based on novel scientific principles is required to establish the reliability of the evidence. In other words, the law imposes a special admissibility test on novel scientific evidence. Why is this so? Is there something unique about novel scientific evidence which calls for admissibility requirements that are not applied to other evidence? It can be argued that standing alone, the novel nature of a scientific principle is not sufficient reason to require the proponent to shoulder a special burden of proof. The reliability of many kinds of evidence is open to question. Generally, however, the law does not subject potentially unreliable evidence to special admissibility tests. We leave it to cross-examination and the jury's common sense to ferret out unreliable evidence.

There must be something unusual about novel scientific evidence to justify a special test, and indeed there is. Novel scientific evidence is sometimes less accessible to lay analysis than more traditional forms of evidence. Lacking the scientific or technical knowledge required to assess the reliability of such evidence, jurors may be over-awed by the evidence, or may defer too quickly to the expert's opinion. The jury is ***21** not alone in its relative inability to evaluate scientific evidence. The cross-examining attorney (usually a layman) may be impaired in the ability to cross-examine scientific witnesses. Thus, the jury is further handicapped. Finally, there is the danger the jury will be confused by testimony based on scientific principles it does not fully comprehend. Thus, novel scientific evidence has unique attributes justifying special admissibility requirements.

Agreeing that a special admissibility test should apply to novel scientific evidence is only the first step. The more difficult questions are what test to apply and when. As to when to apply an admissibility test, the question becomes: How does a court know it is faced with novel scientific evidence? That is, when is evidence scientific, and when it is novel?

The concept of science has more than one meaning. For present purposes, science may be defined as the acquisition of knowledge through systematic application of principles designed to yield accurate data. [FN62] Are medicine, psychiatry, social work, and psychology scientific disciplines? As this question applies to each discipline, there is room for discussion and disagreement. Within disciplines, some research is conducted in strict compliance with the scientific method. Other valuable work is pursued without resort to the scientific method. In the final analysis, most observers agree that each discipline combines art and science.

In the context of child sexual abuse litigation--where the concern is reliability of novel forms of evidence--it is appropriate to characterize all of the relevant disciplines as scientific. This characterization has several advantages. First, such a characterization acknowledges the scientific element of expert medical and behavioral science testimony. Second, characterizing the disciplines as scientific recognizes that medical and behavioral science testimony based on novel principles raise the concerns discussed above regarding novel scientific evidence. That is, such evidence may over-awe or confuse the jury and may be less accessible to lay analysis than more traditional forms of evidence. Finally, characterizing the disciplines as scientific makes it possible to avoid a hopeless analytical morass. If some forms of medical and behavioral science testimony are scientific and others are not, it is necessary to decide which is which. Drawing this distinction is always difficult, sometimes impossible. The dilemma is avoided by characterizing all the disciplines as scientific.

Conceding that expert testimony on child sexual abuse can be premised on scientific principles leads to the conclusion that the special ***22** admissibility requirement is sometimes applicable to such testimony. However, this conclusion does not determine when the requirement applies. The answer to that question depends on whether expert testimony is based on novel principles.

Arguably, the special admissibility test should apply whenever scientific evidence is offered, but this is not done

in practice. The test is only applied when a novel principle underlies expert testimony. Testimony based on a non-novel, or accepted, principle is not subjected to the test. In such a case, the court takes judicial notice of the reliability of the principle. [FN63] The key question then becomes: When is a scientific principle novel? There are no easy answers to this question. Novelty is a matter of degree. One principle may remain novel for years, while another passes from novelty to acceptance very quickly. Clearly, novelty does not mean longevity. Perhaps the most useful approach is to link novelty with reliability. [FN64] A scientific principle should be considered novel when substantial questions exist regarding its reliability. It may be profitable to dispense with the word novel altogether. The real issue is reliability. Taking the reliability approach, the special admissibility test applies when expert testimony is based on scientific principles of questionable reliability.

An example from physical child abuse illustrates this approach. In 1962, Dr. C. Henry Kempe and his colleagues published their seminal article describing battered child syndrome. [FN65] Presence of the syndrome is strong evidence that a child's injuries are nonaccidental. [FN66] When prosecutors began using expert testimony on battered child syndrome, the reliability of the syndrome was open to question. At that early stage of development, battered child syndrome was properly considered a novel application of established scientific principles. The syndrome quickly gained acceptance as a reliable method of establishing nonaccidental injury, however, and courts uniformly approved admission of battered child syndrome testimony. [FN67] Today, it is clear that the syndrome is accepted by medical science. [FN68] The novelty (i.e., questionable*23 reliability) of the syndrome faded with experience.

The reliability of scientific evidence may be questioned for a number of reasons. When a new scientific principle or theory is discovered, its reliability is in doubt until it is subjected to testing and research sufficient to establish reliability. Reliability is also in doubt when a new application is made of an accepted principle or theory.

B. Objecting to Novel Scientific Evidence

Someone must direct the court's attention to the fact that proffered expert testimony may be based on novel scientific principles. This responsibility falls to the party opposing the testimony. In the case of a court appointed expert, either side may raise the issue. The court may act on its own to require a showing of reliability. When an objection is made, the proponent may attempt to persuade the court that novel principles are not involved. If the court is convinced that novel principles may be at work, a hearing is conducted to evaluate the admissibility of the evidence. The question then becomes, what test should be applied to evaluate reliability? A number of tests are available. [FN69] This Article focuses on two: the *Frye* test, and relevance analysis.

C. The *Frye* Test

In a 1923 decision, *Frye v. United States*, [FN70] the United States Court of Appeals for the District of Columbia ruled on the admissibility of a precursor of the polygraph. In doing so, the court established a test to determine the admissibility of expert testimony premised on novel scientific principles. In now famous language the court wrote:

> 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. [FN71]

The *Frye* test is commonly known as the general acceptance test. [FN72] The proponent of novel scientific evidence must establish that the evidence has gained general acceptance in the relevant scientific community. *Frye* was

adopted by numerous federal and state courts. [FN73] In *24 recent years, however, *Frye* has come under increasing criticism from courts and commentators alike. [FN74] Nevertheless, *Frye* is still the law in a number of jurisdictions.

Frye raises several difficult questions. When is evidence scientific? What is the "particular field" to which a scientific principle or application belongs? What is meant by "general acceptance" within the relevant field? How does one prove general acceptance? Finally, when an expert's testimony is based on the novel application of a scientific principle, must the proponent establish the reliability of the underlying principle as well as the application?

The first question--when is evidence scientific--is addressed in subsection III (A), above. For present purposes, medical and behavioral science testimony are considered scientific.

Selecting the particular field of expertise is slightly complicated. For *Frye* purposes, it is useful to distinguish medical evidence from behavioral science evidence. The field of expertise for medical evidence is relatively straightforward. The field is probably limited to physicians, although an argument can be made to include other professionals, such as nurses. It is clear that the relevant field does not embrace all, or even a majority, of physicians. A small percentage of physicians possess expertise on medical evidence of child sexual abuse.

Expert behavioral science testimony is provided by social workers, psychiatrists, and psychologists. What is the particular field of expertise*25 for behavioral science testimony? Clearly, the field does not consist of all mental health professionals. As in the case of physicians, only a small fraction of mental health professionals are experts on child sexual abuse. To further complicate matters, some physicians possess expertise on the behavioral aspects of child sexual abuse.

The particular field of expertise on child sexual abuse consists of professionals from a number of medical and mental health disciplines. Each professional in the field shares the common characteristic of specialized knowledge about child sexual abuse. For *Frye* purposes, the particular field of expertise is not the domain of a single professional group or specialty, but of a diverse group of professionals sharing common knowledge and experience. [FN75]

The particular field of expertise called for by *Frye* should not be confused with the requirement that individual expert witnesses possess certain qualifications. The field envisioned by *Frye* is a relatively large group of individuals. *Frye* looks for general acceptance by this group. The credentials of individual witnesses is a different matter. Individual expert witnesses are usually members of the field of expertise on child sexual abuse, and a particular witness may be able to testify about general acceptance in the field, but one witness, no matter how highly qualified, cannot constitute the field.

The third dilemma under *Frye* is what constitutes general acceptance by the field of experts on child sexual abuse? *Frye* contemplates gradual acceptance of novel scientific principles. Over time, "a scientific principle or discovery crosses the line between the experimental and demonstrable stages." [FN76] Once the "demonstrable" stage is achieved, courts take judicial notice of the reliability of the principle. However, when is the line crossed? How much acceptance is enough? What sort of evidence is required to pass the test? *Frye* offers very little guidance on these important questions.

It is clear that general acceptance does not mean universal acceptance. Unanimity is seldom achieved in science, particularly in the behavioral sciences. [FN77] Beyond the fact that unanimity is not required, however, *Frye* provides little help. Does acceptance by a majority in the field suffice? [FN78] If opposing schools of thought exist, does the view of the larger school constitute general acceptance? The view of either school? Neither school?

Cases applying *Frye* do not answer these questions satisfactorily. ***26** In the end, it is impossible to reduce *Frye*'s requirement of general acceptance to a precise formula. Perhaps the most satisfactory approach is to define general acceptance as widespread, though less than universal, acceptance, premised on convincing documentation in the relevant professional literature.

A fourth question raised by *Frye* is whether the proponent of testimony based on a novel application of an underlying scientific principle must establish general acceptance of the underlying principle as well as the application. Professor Giannelli dissects the intricacies of this matter in his article on the admissibility of scientific evidence. He concludes that "[i]t is unresolved whether the *Frye* standard requires general acceptance of the scientific technique or of both the underlying principle and the technique applying it." [FN79] In the context of expert testimony about child sexual abuse, it seems possible to avoid this conundrum. The foundational principles underpinning medicine, psychiatry, psychology, and social work are generally accepted. [FN80] Courts take judicial notice of these principles. *Frye* should be triggered only when expert testimony is based on novel applications of these accepted principles.

The final question raised by *Frye* concerns proof of general acceptance. Once *Frye* is triggered, how does the proponent establish general acceptance? [FN81] Four sources of evidence are available. The proponent relies on as many as possible:

1. *Informed Testimony.* The proponent may call witnesses to testify regarding general acceptance. [FN82] A number of decisions express doubt that a single witness could suffice for this purpose. [FN83] This doubt seems ill-founded, however. What is important is the quality of testimony, not the number of speakers.

The proponent should establish that the witness is genuinely informed. The witness should possess significant expertise regarding the scientific principle at issue. Personal expertise, however, no matter how impressive, is not sufficient to establish general acceptance. More important than personal qualifications is the witness's knowledge of the status of the principle among a broad spectrum of *other* qualified professionals.

An informed witness possesses in-depth and comprehensive ***27** knowledge of the published literature on the subject. In the rapidly developing field of child sexual abuse, however, awareness of published literature is not sufficient. The results of psychological experiments and other research findings are often presented at conferences long before they appear in print. It often takes one to two years for research to be published. Thus, it is vital that witnesses testifying about general acceptance be aware of conference materials and unpublished data. Material at the cutting edge of science is circulated informally among researchers and clinicians. The well-informed witness on general acceptance is privy to such information. In addition to knowledge of the literature and unpublished research, the ideal witness is aware of the views of leading authorities.

In the area of child sexual abuse, most physicians and mental health professionals lack the breadth of knowledge required to testify about general acceptance. As a consequence, the proponent is well advised to seek an eminently qualified individual. Perhaps two or more witnesses should testify, each providing a unique perspective on acceptance of the scientific principle.

Finally, witnesses testifying about general acceptance should not be advocates for the principle in issue. The ability of such witnesses to "fairly and impartially . . . assess the position of the scientific community" [FN84] is open to doubt. Neutral experts are preferred.

2. *Relevant Literature.* General acceptance may be evidenced in the professional literature. [FN85] The litera-

ture pertaining to child sexual abuse is substantial and growing, ranging from journals on obstetrics and gynecology to publications on developmental psychology. The first task is to locate the relevant literature. The proponent may be fortunate enough to locate recent reviews of the literature. Absent such good fortune, a literature search must be conducted. Lawyers are usually ill-equipped to perform such research, and, in most cases, the witness who testifies regarding general acceptance performs this task.

3. *Guidelines from Professional Organizations*. Professional organizations occasionally promulgate guidelines or protocols for practice. [FN86] Such documents evidence the consensus of the organization. Depending on the status of the sponsoring organization, such guidelines or protocols may help establish general acceptance.

4. *Court Decisions*. When evaluating the acceptance of scientific evidence, courts sometimes rely on decisions in earlier cases. [FN87] Eventually, the weight of judicial opinion holding that a principle is generally accepted becomes conclusive. It is impossible to say at what point ***28** this threshold is achieved. Prior to the stage of certainty, the proponent is wise to rely on more than judicial decisions.

The *Frye* test has never been short of critics. [FN88] One of the recurring criticisms is that the test is unworkably vague. [FN89] Previous discussion highlights the uncertainty surrounding *Frye*'s elements. When is evidence scientific? [FN90] What is the appropriate field of expertise? [FN91] What is general acceptance? [FN92] Courts and commentators have struggled mightily with these questions with less than satisfying results.

The inherent vagueness of the test leads to inconsistent and unpredictable results. California is a notable example. [FN93] In California, *Frye* applies to rape trauma syndrome, [FN94] but not Munchausen's syndrome by proxy [FN95] or expert testimony on the accuracy of eyewitness identification. [FN96] One panel of the First District Court of Appeal held that *Frye* applies to a psychiatric diagnosis of child sexual abuse, [FN97] while ***29** another panel of the same court reached the opposite conclusion. [FN98] When a sophisticated judiciary has difficulty applying *Frye* consistently, criticism of the test is understandable.

Perhaps the most telling criticism of *Frye* is that it excludes evidence which could assist the jury. [FN99] This exclusion occurs for at least two reasons. First, *Frye* is a conservative test which excludes evidence until it passes from the "experimental" to the "demonstrable" stage. [FN100] However, evidence which has not achieved general acceptance may nevertheless be relevant and helpful. Under *Frye*, the proponent is precluded from establishing the reliability of evidence in the "twilight zone" prior to general acceptance. Second, *Frye* is inadequate because it looks to only one aspect of reliability: general acceptance. [FN101] The degree to which a principle is accepted in the scientific community is important. However, general acceptance is only one of several factors that indicate reliability. By precluding consideration of other factors, *Frye* excludes valuable evidence.

D. Relevance Analysis

The most promising alternative to *Frye* is a two-step process called relevance analysis. [FN102] Under relevance analysis, inquiry into reliability***30** is not limited to general acceptance. Rather, the court considers a broad range of factors to determine the reliability of novel scientific evidence. Once reliability is assessed, the court balances the reliability and probative value of evidence against the possibility the evidence will cause unfair prejudice to the opposing party, or will confuse or mislead the jury.

Under the relevance approach, the court first evaluates the reliability of the novel technique. [FN103] Courts consider the following factors:

1. Accuracy of the technique.

a. How often the technique yields accurate results or, put another way, the potential error rate.

b. Existence of standards governing use of the technique to ensure accurate results. For example, clear diagnostic criteria. [FN104]

c. Degree to which expert testimony is based on a subjective analysis, as opposed to an objective analysis. An opinion based on subjective analysis may be less reliable because it is difficult to evaluate the expert's subjective decisionmaking process. [FN105]

d. Degree to which the technique is relied on outside the context of litigation. For example, is a diagnostic technique relied on by mental health professionals to make treatment decisions?

2. Whether the scientific principle has been generally accepted by experts in the field. (The *Frye* test.)

3. Degree of novelty of the technique. A technique that has yet to gain general acceptance may be well on the way to acceptance. The closer a technique is to general acceptance, the greater the reliability.

4. Whether the technique is related to or analogous to established and reliable modes of analysis.

5. Whether proffered expert testimony relies entirely, or only partially, on novel principles. The more an expert relies on principles which are established and reliable, the greater the reliability of the proffered evidence.

6. Degree to which expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. [FN106]

*31 7. Qualifications and stature of the expert.

8. Degree of care with which a technique was used by a qualified expert.

Once the court evaluates the reliability of proffered evidence, it proceeds with the second stage of relevance analysis. In this stage, the judge balances the probative value and reliability of the evidence against factors militating against admission. The judge considers the following factors:

1. Availability of other experts to evaluate the technique, and existence of specialized literature describing the technique.

a. Degree to which a pool of experts is available so the opponent of proffered testimony can retain an expert to present opposing views.

b. Degree to which the opponent can conduct research on the technique.

c. Degree to which the technique's shortcomings can be discovered and exposed to the jury.

2. Degree to which proffered testimony relates directly to disputed issues. [FN107]

a. The more directly the testimony relates to a contested issue, the greater the need for the evidence, but the greater the potential harm if the testimony is unreliable or misused.

b. Importance of the issue on which novel scientific evidence is offered. If novel scientific evidence is offered on an issue of central importance to the litigation, confidence in the reliability of the evidence should be high. [FN108]

3. Degree to which evidence may over-awe the jury.

a. Degree to which jurors may be over-impressed by an aura of reliability surrounding a technique, caus-

ing them to abdicate their responsibility to critically and independently evaluate the evidence.

b. Clarity and simplicity with which a technique can be explained.

c. Ability of jurors to understand the merits and demerits of a technique. [FN109]

d. Extent to which jurors can verify data presented by an expert.

e. Degree to which jurors may be over-impressed with a particular*32 expert witness, causing them to abdicate their responsibility to critically and independently evaluate testimony.

4. Degree to which testimony may confuse or mislead the jury.

5. Degree to which testimony will entail undue delay, waste of time, or needless presentation of cumulative evidence.

6. Availability to the proponent of the expert testimony of alternative forms of evidence which may not carry the same degree of potential prejudice to the party opposing the testimony.

7. Degree to which limiting instructions to the jury may reduce potential prejudice to the party opposing proffered testimony.

8. Degree to which the opponent's actions at trial make expert testimony necessary. For example, in a criminal prosecution against the father of a six-year-old victim, the defendant's attorney focuses the jury's attention on the facts that the child delayed disclosure of the abuse and recanted prior to trial. By this tactic the defendant hopes to convince the jury the abuse did not occur. The defendant's actions increase the need for expert testimony to help the jury understand that delay and recantation are common in intrafamilial child sexual abuse.

With relevance analysis, the judge considers all factors which relate to the ultimate inquiry--reliability. When the balancing process is complete, the judge has several options. The expert can be permitted to testify in full. The judge can order the expert to limit testimony to selected topics. Or, the judge can exclude the expert's testimony as unreliable.

Relevance analysis is particularly well-suited to expert behavioral science testimony on child sexual abuse. A host of factors must be considered in determining the reliability and helpfulness of such testimony. By balancing all competing factors, the judge reaches a reasoned and fully informed decision.

IV. CATEGORIES OF EXPERT TESTIMONY ON CHILD SEXUAL ABUSE

This section describes nine categories of expert testimony. Each category begins with pertinent clinical and scientific information. The clinical and scientific information provides a foundation on which to predicate discussion of various forms of expert testimony. Before turning to analysis of expert testimony, however, it is important to recognize the potential for miscommunication and misunderstanding between lawyers on the one hand and medical and mental health professionals on the other. Three illustrations highlight the need for clear communication.

Lawyers and medical professionals often have a different understanding of the term penetration. *Taber's Cyclopedic Medical Dictionary [FN110] *33 defines penetrate as "to enter or force into the interior." [FN111] Many physicians assume penetration means forcing an object into the outer vagina, through the hymen, and into the inner vagina. Penetration of this sort in a child often, although not always, causes injury to the hymen. The legal definition of penetration is quite different.* Black's Law Dictionary *[FN112] defines penetration as "the insertion of the male part into the female parts to however slight an extent; and by which insertion the offense is complete without proof of emission." [FN113] In law, penetration is complete if the penis enters the labia majora, the fleshy lips which protect the vagina. Penetration does not require entry into the vagina or damage to the hymen. The legal*

definition of penetration would surprise many physicians.

Lawyers and mental health professionals sometimes have different perspectives on various forms of child abuse and neglect. Consider the following example drawn from the writing of James Garbarino: "Each morning a mother threatens her four-year-old son with abandonment: 'Maybe today is the day I go away and leave you alone. You'd better be good today, boy, or you'll never see me again.'" [FN114] Garbarino concludes that this mother is psychologically maltreating her child. [FN115] The great majority of mental health professionals would agree. But does the mother's conduct amount to maltreatment as that term is defined in law? Would a juvenile court judge be justified in ruling that the child was neglected? From the psychological perspective, the danger to the child is apparent. [FN116] From the legal perspective, however, questions exist as to whether this unfortunate youngster is "abused."

Another area of potential misunderstanding concerns the degree of certainty which physicians and mental health professionals require to make clinical decisions, as contrasted with the level of proof required in legal proceedings. Physicians and mental health professionals do not think in terms of proof beyond a reasonable doubt or by a preponderance of the evidence. Rather, these professionals are taught to gather subjective and objective data, and, on the basis of that data, to form clinical impressions. [FN117]

How does one compare clinical impressions regarding sexual abuse (which are sufficient for diagnostic and treatment purposes) with the *34 standards of proof at work in child abuse litigation? The solution does not lie in forcing medical and psychological terminology and decisionmaking into legal pigeonholes. The professional should not be asked whether a clinical impression is certain beyond a reasonable doubt or by a preponderance of the evidence. [FN118] Rather, experts should state opinions in terms of reasonable clinical certainty. [FN119] Reasonable clinical certainty may be defined as the degree of certainty required to make diagnostic and treatment decisions. The concept of reasonable clinical certainty does not have a direct counterpart in legal standards of proof. Lawyers should accept the methodology and terminology of medicine and the behavioral sciences. Confusion arises when lawyers ask experts on child sexual abuse to translate their vocabulary into the language of the law.

The phenomenon of child sexual abuse is exceedingly complex, and the possibilities for misunderstanding and miscommunication between experts and the attorneys who offer their testimony are legion. The members of each professional group must work to increase their awareness and understanding of the others.

A. Medical Evidence of Child Sexual Abuse

Expert medical testimony plays an important role in child sexual abuse litigation. While medical evidence of abuse is present in a relatively small percentage of cases, [FN120] when such evidence exists, it is *35 generally admissible. [FN121] Furthermore, in some cases where there is no physical evidence, a physician may nevertheless assist the jury by informing it that lack of medical evidence does not mean a child was not abused. [FN122]

*36 *1. Clinical and Scientific Information*

Among physicians, child sexual abuse is a recognized medical diagnosis. [FN123] The diagnosis is seldom arrived at easily, but in many cases it can be made. To reach a diagnosis of sexual abuse, a complete medical evaluation is required. The evaluation consists of a patient history, a physical examination, and, when appropriate, laboratory tests.

a. The Medical History

A complete medical history consists of data identifying the patient, the source of referral to the doctor, the name of the person providing the medical history, the chief complaint, a history of the present illness, past medical history,

family history, psychosocial history, and a review of body systems. [FN124] In the case of children, much of the historical information is gathered from adults. [FN125]

A complete medical history may reveal important signs and symptoms which the child or parents have not considered as relevant to a diagnosis of sexual abuse. Examples include genital discharge, genital pain, change in bowel or bladder habits, urinary tract infections, genital trauma or bleeding, nightmares, symptoms of suicide or depression, school problems, developmental or behavioral problems, rashes, and a history of drug or alcohol use. [FN126]

The child's medical history is relevant to diagnosis and treatment in several ways. The history aids the physician in excluding or confirming the diagnosis of child sexual abuse. The history helps ascertain if the child is at risk of further abuse. For example, the history may reveal that the perpetrator is still in the home, or still has access to the child, or that there are other unknown perpetrators. The history is vital to the physician's decisions about further testing or referral*37 to specialists. The history may reveal the need for x-rays, ultrasound, or tests for sexually transmitted diseases or pregnancy. The history may determine the physician's recommendations for medical or psychological therapy. Finally, the history assists in determining a prognosis.

There is often no physical evidence of child sexual abuse. [FN127] There are several reasons for lack of physical findings in sexually abused children. Many abusive acts, such as fondling, kissing, fellatio, cunnilingus, or the use of the child in pornography leave no marks. [FN128] Even full penile penetration may not damage the hymen. [FN129] Some sexual offenders suffer from erectile and/or ejaculatory dysfunction. [FN130] Severe injuries to the genitalia of sexually abused children are rare. [FN131] Healing of injuries in the genital area may be complete and rapid, so that no physical evidence remains when the child comes to the medical examination. [FN132]

*38 When the physical examination of a child discloses no medical evidence of sexual abuse, the child's history becomes extraordinarily important. [FN133] In this respect, sexual abuse is similar to a number of diseases which cannot be detected by physical examination. In such cases the medical history is the only tool available to arrive at a diagnosis and to recommend treatment. Angina pectoris is a common example of a disease that is not apparent on physical examination. [FN134] The angina patient is likely to have a normal physical examination. It is the medical history, and in particular, a description of certain symptoms, which establish the diagnosis and guide further testing and treatment. Like the angina victim, sexual abuse victims are likely to have a normal physical examination. The history is often the most important evidence available to the physician.

b. The Physical Examination

A complete physical examination should be performed when sexual abuse is suspected. The examination is not limited to the genitalia. The entire body is examined because signs relevant to sexual abuse and use of force may be present in areas other than the genitalia. [FN135] *39 As far as the genital examination is concerned, a number of signs may indicate sexual abuse.

The examination may reveal generalized erythema (redness) or hyperemia of the skin in the genital area. This is a non-specific finding which may have a variety of causes including diaper rash, use of bubble bath, and poor hygiene. Localized patterns of redness or irritation may point to the diagnosis of sexual abuse. [FN136] With intercrural or "external" intercourse, rubbing on the external genitalia or between the thighs may produce erythema (acute sign) or chafe marks with lichenification of the skin (chronic rubbing). Ejaculate or acid phosphatase also may be found in these areas after a recent assault. [FN137]

Excoriations in the genital area are sometimes found. Such signs may be due to sexual molestation or to common entities such as pinworms, poor hygiene, and infections with Monilia. [FN138]

Bruises of the genital area may be due to sexual abuse or to accidental trauma, such as a "straddle injury" caused by falling onto the horizontal bar of a bicycle or a "picket fence injury" incurred by a fall onto a pointed object. [FN139]

The physician examines the hymenal opening for signs of enlargement. The size of the normal hymenal opening increases gradually with age. Data on hymenal opening size in normal girls has been compiled. [FN140] Sexual assault may increase the size of the opening with or ***40** without damage to the hymen itself. [FN141] It is a common lay misconception that the hymen is a rigid, drumhead-like structure which always "ruptures" and bleeds if penetration occurs. Hymenal tissue is flexible and somewhat elastic. [FN142] If a sexually abused child is protected from further abuse, the hymenal orifice may change in size as healing and scarring occur. [FN143] It is possible the appearance of the hymen and ***41** genital structures may return to normal if there is a delay of weeks, months, or years before the child is examined. [FN144]

Nonphysicians often question how a small hymenal opening could accommodate an object as large as a finger or an adult erect penis. "The average diameter of the adult male penis is 3.5 cm. at the glans penis." [FN145] The normal size of the vaginal opening at puberty is 0.7 cm to 1 cm. [FN146] The vaginal opening and adjacent tissues are not rigid. Rather, they are flexible, compressible and distensible. [FN147] During the vaginal examination, the size of the hymenal opening can be seen to change, at times markedly, with the degree of relaxation of the child. [FN148] Thus, penetration may occur without injury to the hymen.

Disruption of the hymen is a significant finding. A variety of hymenal changes can be caused by sexual abuse, including: decreased amount of hymen tissue ("attenuation" of the hymen); absence of the hymen; [FN149] abrasions and contusions of the hymen; rounding or thickening of the hymen edge; distortion or deformation of the hymen rim; transection or notching of the hymen; scars on the hymen; loss of symmetry; adhesions between the hymen and adjacent structures; the presence of hymenal remnants (fimbriae or carunculae myriformes); [FN150] decreased vascularity; and neovascularity. [FN151]

***42** The most common site of hymenal injury, with the child examined in the supine position, is from three to nine o'clock, because the force of a penetrating object is deflected downward by the small size of the pelvic outlet and the resistance of the pubic bone. With digital penetration of the vagina, if the finger is thrust upward, injuries may occur on the upper rim, from nine to three o'clock. A child who is always abused from one side (e.g., if her bed is against the wall and the perpetrator always approaches from the same side) may show corresponding asymmetry of injuries.

Injuries to the posterior fossa and posterior fourchette may be caused by sexual abuse. Such injuries include: edema, abrasions, contusions, lacerations, scarring, decreased vascularity, and neovascularity. [FN152]

In addition to the foregoing signs of possible sexual abuse, the physician looks for such signs as adhesions or synechiae from labia to hymen; increased friability of the posterior fourchette as the labia are spread; [FN153] circumferential superficial tears of the vestibular mucosa; [FN154] and thick labial adhesions, [FN155] particularly in the child who is long out of diapers.

In boys, findings of sexual abuse outside the anal area are rare. Genital injuries which have been described include bruises of the penis or perineum [FN156] and tears of the foreskin frenulum. [FN157]

Anal signs which may be found after sexual assault include: [FN158]

***43** 1. *Perianal Erythema (Redness).* Erythema is a non-specific sign which may have a variety of causes in-

cluding poor hygiene, diaper dermatitis, and yeast infection, as well as sexual abuse.

2. *Edema of the Perianal Tissues.* This sign is called the "tyre sign" in England, and represents swelling of tissues after acute trauma. Aside from molestation, only an unusual accident causing damage directly to the anus could cause this finding.

3. *Increased (with acute injury) or Decreased (with chronic penetration) Anal Sphincter Tone.* With acute penetration of the anus by a large object, the circular sphincter muscle at first relaxes, but after a few hours, the muscle may go into spasm. Repeated, chronic episodes of penetration may cause the anal sphincter to lose tone and become lax. [FN159]

4. *Abnormal Reflex Anal Dilation.* Normally, the anal sphincter relaxes slightly and then tightens reflexively (the "anal wink") [FN160] if the examiner gently separates the buttocks. After repeated anal sodomy, the internal and external anal sphincter muscles relax and dilate widely when the examiner separates the child's buttocks. The examiner is able to see the inside of the anal canal and the lower rectum. To be significant, wide gaping should be seen with no stool in the ampulla, and should be reproducible in several positions or on several attempts. [FN161]

*44 5. *Shortening or Eversion of the Anal Canal.* This sign has been described in children under three years of age following repeated anal intercourse. The anorectal junction, which is usually found one-half to one inch inside the anal verge, prolapses down to the anal opening. [FN162]

6. *Fissures.* Anal sodomy may produce fissures or tears at the anal verge. A sudden change in bowel habits may be observed. Because of pain subsequent to anal sodomy, the child may withhold bowel movements which then become dry and large, initiating a cycle of pain with defecation, cracking of healing fissures, stool holding, and further constipation. Severe constipation in nonabused children occasionally causes superficial anal fissures, but children commonly pass very large bowel movements with no injury to the anus at all.

7. *Venous Congestion.* Venous congestion is swelling of the veins around the anal opening. Such congestion has been described in forty percent of normal children if they are kept in the knee chest position for an extended period of time.

8. *Changes of the Perianal Skin.* Changes in the perianal skin can include hyperpigmentation and thickening of perianal skin, and "ironing out" or decrease in prominence of the anal skin folds. [FN163]

9. *Scars at the Anal Verge.* Such scars may be linear or triangular [FN164].

10. *Skin Tags and Hemorrhoids.* A hemorrhoid is a dilated, protruding anal vein. Skin tags are small outgrowths of skin at the anal verge. Skin tags may form after healing of hemorrhoids or hematomas. These two signs are also found in nonabused children. [FN165]

11. *Bruising or Hematomas.* Bruises and hematomas are caused by trauma to the blood vessels around the anal opening. Forceful spanking produces bruises on the outside of the buttocks only.

12. *Anal Warts.* Both condyloma acuminata (venereal warts) and condyloma lata (syphilitic warts) can be transmitted through sexual abuse.

13. *Loss of Perianal Fat.* With repeated impact and injury to the perianal tissues, there may be loss of perianal

fat and an appearance variously described as coving, cupping, funnelling, or saucering of the *45 tissues around the anus. [FN166]

A variety of conditions are considered by physicians evaluating children for possible sexual abuse. These include surgery or instrumentation of the genital openings; lichen sclerosis et atrophicus; [FN167] varicella; [FN168] severe constipation or megacolon; [FN169] Crohn's disease; [FN170] hemolytic uremic syndrome; [FN171] and a variety of skin conditions such as lichen planus, seborrheic dermatitis, atopic dermatitis, contact dermatitis, and neurodermatitis. [FN172] Use of tampons does not cause injury to the hymen. [FN173]

Various types of accidental injury must be considered, including seat belt injury. [FN174] "Straddle injuries" and other accidental injuries are usually easily distinguished from injuries caused by sexual abuse. It would be extremely rare for accidental injuries or masturbation to cause injury to the hymen. [FN175]

A number of laboratory tests are helpful in diagnosing or clarifying child sexual abuse. The occurrence of sexual contact can be confirmed by the presence of spermatozoa, acid phosphatase (a chemical *46 found in ejaculate), or a foreign blood group substance if ejaculation occurred. The absence of laboratory evidence of ejaculation does not disprove sexual abuse. If the time interval between sexual abuse and examination is longer than forty-eight hours (as is most often the case in child sexual abuse), evidence of sperm or acid phosphatase is unlikely to be present. Sperm persist longer in vaginal fluid than dried on skin surfaces. In child sexual abuse, however, ejaculation is likely to occur outside the vagina. [FN176]

Toluidine blue and Lugol's solution are dyes which may be applied to the posterior fourchette and perineum to penetrate into small fissures or acute lacerations such as those caused by sexual abuse. [FN177] Acetic acid can be applied to the genitalia to reveal venereal warts. [FN178]

Among sexually transmitted diseases, some are more likely to be sexually transmitted than others, Infection with syphilis, gonorrhea, condyloma lata, Trichomonas, herpes type 2, and Chlamydia are considered virtual proof of sexual contact in a child, provided perinatal transmission has been excluded. Condyloma acuminata and Gardnerella vaginalis are also sexually transmitted diseases. Controversy exists, however, regarding whether or how often these diseases may be acquired by non-sexual means.

A laboratory technique that promises to find increasing use in sexual abuse litigation involves so-called "genetic fingerprint" evidence. This technique is employed to identify the perpetrator. Genetic fingerprinting involves a laboratory comparison of DNA coding material found at the scene of a crime with a sample of DNA taken from the defendant. For example, DNA contained in sperm found on a sexually abused child could be compared with DNA found in a sample of defendant's blood. The test is highly probative of identity.

In the recent case of *Andrews v. State*, [FN179] the Florida Court of Appeal*47 found "genetic fingerprinting" sufficiently reliable to gain admission in evidence in a criminal proceeding. In *Andrews*, defendant was charged with sexual battery of an adult. The victim could not identify her assailant. DNA material contained in sperm found in the victim's vagina was compared to DNA in defendant's blood. At trial, the state's expert described the comparison: " T he percentage of the population which would have the DNA bands indicated by the samples would be 0.0000012%. In other words, the chance that the DNA strands found in appellant's blood would be duplicated in some other person's cells was 1 in 839,914,540." [FN180] The expert "concluded that to a reasonable degree of scientific certainty, appellant's DNA was present in the vaginal smear taken from the victim." [FN181]

A colposcope is a medical instrument which allows a physician to inspect the genitalia with a strong light source and magnification of five to thirty times actual size. The colposcope is binocular, allowing depth perception. A

green filter may reveal abnormalities in the blood vessels. [FN182] A camera is often attached to the colposcope so that physical findings may be photographed for better documentation. The colposcope has long been used with women patients to study the vagina and cervix, as in diagnosis of early cancer or venereal warts. In 1981, Teixeira first reported "the benefits of the use of colposcopy in the examination of sexual assaults." [FN183] Teixeira examined 500 females age four to fifty-one years. Twenty percent were under age fourteen. Ninety-one percent were under age eighteen. In 11.8 percent of cases, colposcopy provided additional information about physical findings not seen during the normal examination. The colposcope made it possible to detect evidence of ongoing healing which, on normal examination, appeared to be complete. A subsequent article reported on the value of the colposcope in documenting microtrauma to the genitalia in adult women after consensual sexual intercourse. [FN184] The trauma was not visible with the unaided eye. In 1986, Woodling and Heger reported on four year's experience with the colposcope in examining children for possible sexual abuse. In ten percent of the cases colposcopy identified lesions which would have been missed without the aid of the device. [FN185] The colposcope is an accepted and useful aid to the physician in conducting a genital examination.

*48 *2. Admissibility of Expert Medical Testimony Regarding Sexual Abuse.*

Expert testimony regarding medical evidence of sexual abuse is generally admissible. [FN186] A physician's testimony may take several forms. First, some courts permit an expert to state that a child was sexually abused. [FN187] Such testimony goes directly to an ultimate factual inquiry before the court. [FN188] Under the Federal Rules of Evidence, however, the fact that expert testimony embraces an issue of ultimate fact does not render the testimony inadmissible. [FN189]

In an earlier subsection [FN190] the so-called ultimate issue rule was discussed, and it was concluded that it may be appropriate to prohibit experts from stating that sexual abuse occurred, and to require instead that expert testimony be limited to statements of fact that are clearly within the realm of professional expertise. Applying this limitation to physicians, the court might permit a physician to express an opinion that a child experienced sexual contact, forced sexual contact, or penetration. The physician should be permitted to fully describe the type of contact or penetration, and any findings discovered during physical examination. To the extent the physician's opinion is based on the child's history or on results of laboratory tests, the physician should be at liberty to describe the history and the test results, and to explain how these factors influenced the opinion.

The second form of medical testimony is similar to the first, except that in the second the physician adds that a child has a "diagnosis" of sexual abuse or sexual contact. The second type of opinion enhances the expert's opinion with the aura of scientific certainty connoted to nonphysicians by the word diagnosis.

Third, an expert may testify that a child's condition is consistent with sexual abuse. Stating that a child's condition is consistent with sexual abuse is less certain than the first two forms of opinion, and is one step removed from the ultimate issue.

Finally, a physician may testify that a child demonstrates no physical or medical evidence of sexual abuse, but that absence of such evidence*49 does not rule out abuse. This type of testimony should not be permitted in all cases. For example, if the charged offense is fondling, the jury does not need an expert to tell it the child will not be physically injured. If, on the other hand, the charge is anal penetration, jurors may well benefit from expert testimony which informs them that anal penetration does not always cause physical injury. Such expert testimony is particularly appropriate if the defense asserts or implies that if abuse had occurred, there would be injury.

Courts permit expert medical witnesses to describe injuries and offer opinions as to their cause. [FN191] Courts generally permit physicians to respond to questions asking whether injuries could have happened in a particular way.

[FN192] Furthermore, experts may be asked whether a caretaker's explanation for injuries is reasonable. [FN193] Finally, penetration may be established on the basis of expert testimony. [FN194]

As discussed earlier, the physician sometimes employs a colposcope to aid in detecting subtle signs of abuse. In a few cases, defendants argued that the colposcope is a novel scientific technique, and that findings gleaned with aid of the colposcope should not be admitted unless the state proves that the colposcope has gained general acceptance in the scientific community. This argument has received a deservedly cool reception from the courts. The California Court of Appeal's decision in *People v. Mendibles* [FN195] is illustrative. The court wrote:

> In forming an opinion whether the victims had suffered injuries consistent with sexual abuse, Dr. Heger relied primarily on patterns of scarring, deformities and other non-normal changes in the hymens of these children. For part of her examination, she used a colposcope, a binocular device which permits 15 power magnification, thereby allowing microscopic examination of the area. A camera is attached to the colposcope and will take stereoscopic slides to preserve the results of the examination. Defendant characterizes all of the ***50** foregoing as the use of a new scientific technique subject to the stringent requirements of [the *Frye* test].
>
> ....
>
> It is clear there was no novel device involved. The colposcope is an instrument in general use in the medical community which has value in detecting sexual abuse or rape....Even if the colposcope were not in general use, it does nothing more than provide binocular magnification of 15 power. In this sense, it is nothing more than a weak microscope--an instrument long accepted as scientifically reliable. [FN196]

In *Mendibles*, the defendant did not limit his assertions about novel scientific evidence to the colposcope. He also argued that the process of forming medical judgments about sexual abuse on the basis of physical evidence constitutes a novel scientific technique. The court rejected this argument as well, writing:

> Neither did Dr. Heger's methodology involve the application of any new scientific technique. Her opinion was based entirely upon visual examination and the observations she made therein. She established there is a body of literature reporting medical studies upon which she could base the conclusions she drew from her observations. Moreover, the diagnosis of sexual abuse or rape from the observation of certain marks or scarring is nothing new.... The sole "novelty" apparent here is the analysis of injury to a specific portion of the external genitalia of prepubescent females; that in itself cannot remove the subject matter from the realm of legitimate scientific expertise. In sum, the testimony here is no different qualitatively from the analysis of any other wound or injury. Hence, the People were not required to prove the reliability and general acceptance of a "new scientific technique" in the relevant medical community. [FN197]

In the *Mendibles* case, the physician based her testimony largely on the results of her physical examination of the children. In some cases, the physician's opinion is based more heavily on the child's medical history, with secondary importance attached to the results of the physical examination. [FN198] In such cases the doctor's inquiry is not limited to medical evidence disclosed during physical examination. The doctor considers the results of the physical examination. The doctor considers the results of the physical examination in light of a wide array of additional information. For example, the child's description of abuse is vitally important. [FN199] The doctor also relies on statements by relevant adults. The fact that some of these out-of-court statements***51** may constitute inadmissible hearsay does not render the physician's reliance on them unreasonable. [FN200]

In addition to considering verbal descriptions from the child and others, physicians elicit information about behaviors and emotional reactions that are indicative of sexual abuse. For example, the physician may inquire whether the child demonstrates age-inappropriate sexual knowledge or preoccupation. The doctor may ask whether the child demonstrates behavior consistent with stress.

It is apparent that in formulating diagnostic impressions, physicians often consider information that is not strictly medical in nature. The psychological and social effects of sexual abuse are frequently as important as the

results of laboratory tests and physical examination. Insofar as physicians consider nonmedical indicators of abuse, they depart the realm reserved exclusively for physicians, and enter the arena of expertise shared by mental health professionals. When a physician operates in the arena of shared expertise, the numerous considerations discussed in subsequent sections of this Article come into play. For example, can a diagnosis of child sexual abuse be predicated in whole or in part on behavioral indicators of abuse? If so, is such a diagnosis based on novel scientific principles? Do experts possess special knowledge that enables them to assess the credibility of children's allegations of abuse? When a physician has one foot in the medical camp and the other in the behavioral, the resulting opinion is scrutinized from both perspectives.

Medical evidence plays an important role in child sexual abuse litigation. While physical evidence exists in only a minority of abused children, when such evidence is present, it may weigh heavily with jurors.

B. Behavioral Science Testimony Describing Behaviors Commonly Observed in Sexually Abused Children

Many sexually abused children demonstrate behavioral, cognitive, and emotional reactions to their abuse. Expert testimony describing such behaviors serves several purposes. In some cases, expert testimony describing behaviors commonly observed in sexually abused children constitutes substantive evidence of abuse. The use of expert testimony as substantive evidence of abuse is discussed in the present subsection. In addition to use as substantive evidence, expert testimony describing behaviors observed in sexually abused children is admissible for nonsubstantive purposes. The most important nonsubstantive purpose of such testimony is to rehabilitate children's credibility following certain types of impeachment. Expert testimony *52 designed to rehabilitate credibility is discussed in subsections IV (D) and (E).

1. Clinical and Scientific Information

It has long been known that sexual abuse might have a negative psychological impact on children. Case reports in professional literature have appeared for decades. However, only recently has there been recognition among mental health professionals that sexual abuse might be an important correlate for a variety of medical and mental health conditions. Changes in societal attitudes about sexual assault, and improved knowledge about the extent and nature of the phenomenon, have led to a more complete understanding of the effects of sexual abuse. There now exists a body of knowledge describing the emotional, behavioral, and cognitive impacts of abuse. Increasingly, this knowledge base includes scientifically sound data from which conclusions can validly be drawn. While there is much yet to learn, a number of well-established findings exist.

It is now clearly established that sexual abuse of children is widespread. [FN201] Studies of the general population revealed significant rates of victimization for women, and somewhat lower rates for men. [FN202] These studies disclose that most child sexual abuse is not reported at the time. Many cases are never disclosed. Only a small fraction of cases are known to police. [FN203]

The prevalence of child sexual abuse in adults who are receiving mental health services is high. Over eighty percent of psychiatric inpatients have some kind of abuse history. [FN204] The tendency of some *53 professionals to minimize the consequences of child sexual abuse has hampered understanding of the psychological impact of abuse. Kinsey, who was one of the first researchers to uncover the significant extent of abuse, took the position that trauma to children came primarily from parents, and did not derive from the abuse experience itself. [FN205] Kinsey could see no reason why sexual molestation would be inherently traumatic. Other commentators have promulgated a similar view. Early reports in the clinical literature tended to dismiss negative effects of sexual abuse. [FN206] One continues to find occasional suggestions in the literature that abuse is not harmful. Some papers discuss a small sample of children who seem relatively unscathed by sexual abuse, and draw the conclusion that abuse is not neces-

sarily harmful. [FN207] Ideology as much as evidence appears to drive some of those who attack the premise that sexual abuse causes psychological damage. Constantine notes that many studies find some proportion of children who show no evidence of harm. [FN208] He goes on to state that children should have a right to choose to have sex with adults. Similarly, Henderson proposes that psychopathology seen in sex abuse victims probably preexisted abuse, and that children's disturbances may cause them to seek out sexual experiences. [FN209]

At the present time, it cannot be denied that child sexual abuse often has devastating long-term consequences. The terrible damage caused by sexual abuse has been described most eloquently by the adult survivors of child sexual abuse. [FN210] Over the last decade there has been a tremendous accumulation of knowledge about the long-term effects of abuse. The earliest systematic reports focused on incest victims who were receiving psychotherapy, and found that incest victims have more severe symptoms than patients who have not been sexually abused. [FN211] Since then, a number of studies of women in the general population have confirmed that abuse survivors experience *54 higher levels of symptomatic distress. [FN212] Adult survivors are more depressed, more anxious, have more dissociative and somatic symptoms, and have lower self-esteem. Survivors are also at significantly higher risk of developing depression, various anxiety disorders, including post-traumatic stress disorder (PTSD), substance abuse disorders, and sexual dysfunction. [FN213] High rates of sexual abuse are found in the histories of patients with conversion reactions, [FN214] suicidality, [FN215] selfmutilation, [FN216] multiple personality disorder, [FN217] chronic pelvic pain, [FN218] and in women with eating disorders. [FN219] Childhood sexual abuse is found in a large percentage of adolescent prostitutes [FN220] and runaways. [FN221]

Since the late 1970s, numerous publications have described the negative effects of sexual abuse on children. [FN222] These publications described*55 certain general patterns of reaction found in clinical samples of sexually abused children. For the most part, children described in these studies were victims of incest. Numerous negative effects are described, including fears and anxieties, feelings of guilt, shame and anger, self-destructiveness, and inappropriate sexual or aggressive behavior.

A number of studies systematically describe symptoms among sexually abused children who were receiving mental health treatment. [FN223] These studies documented a range of symptoms in such children. One of the earliest reports on the effects of sexual abuse on a large sample of children noted that over two-thirds of the children showed evidence of psychological disturbance. [FN224]

Based on the foregoing research, a clinical picture of the sexually abused child began to emerge. A constellation of similar reactions was observed repeatedly. Eventually, a clinical consensus developed about the way children who have been sexually abused react emotionally and behaviorally. [FN225] Several authors have described behavioral and emotional reactions commonly observed in sexually abused children. [FN226]

Two recent literature reviews examine existing research on the impact of child sexual abuse. [FN227] The reviews confirm that many sexually abused children demonstrate reactions to their abuse. The reviews also point out that there is great variability in the type and severity of children's reactions. The reviews go on to note that the *56 literature contains few scientifically rigorous studies of the effects of child sexual abuse.

The literature reviews note a number of weaknesses in methodology and design in much of the available literature on effects of sexual abuse. For example, many of the sexually abused children who were studied were receiving psychological services. Children in therapy may not be representative of all sexually abused children.

Another methodological concern is that many of the studies did not use standardized measures of psychological disturbance, and did not employ comparison groups. Without comparison data it is not possible to conclude that observed effects significantly discriminate abused from nonabused children. This shortcoming reduces the gener-

alizability of results.

Recent empirical investigations attempt to avoid some of the methodological problems discussed above. Achieving sounder methodology is accomplished by using control groups, and by employing standardized measures which have established values for normal and clinical findings. These studies are beginning to provide a more complete picture of the effects of child sexual abuse.

At this writing, data is available from almost a dozen major investigations. Since some of the studies are ongoing, sample sizes may increase, and additional analyses may be conducted. The investigations reveal a number of consistent findings which lay the groundwork for understanding the general parameters of the short-term effects of child sexual abuse.

The first important study was conducted by a team of researchers at Tufts New England Medical Center. [FN228] These researchers collected extensive data on 122 sexually abused children and their families. A follow-up study was conducted approximately one and one-half years later. Conte and Berliner reported on 369 sexually abused children. A one-year follow-up study was completed. [FN229] Cohen and Mannarino have initial information on sixty abused girls, and are following up on these cases. [FN230] Friedrich and colleagues have published several papers *57 on investigations of behavior problems in sexually abused children. [FN231] Einbender and Friedrich reported on forty-six sexually abused girls. [FN232] Tong and colleagues evaluated forty-nine girls. [FN233] Saunders and colleagues have data available on ninety girls who were sexually abused by father figures. [FN234] A study led by Runyon was designed to evaluate the effects of intervention on sexually abused children. The study provides information on seventy-five children. [FN235] White and Halpin have compared young sexually abused children with children who are not sexually abused, and with neglected children. [FN236] Wolfe and Wolfe are studying seventy sexually abused girls. [FN237]

All of these studies gathered data through a checklist completed by parents. In two studies the checklist was designed specifically for the study, [FN238] while in the remainder, standardized instruments were used. In most of the studies one or more comparison groups were used. Some of the studies employed both psychiatric outpatient and nonclinical comparison groups. Three investigations used matched comparison*58 groups. In two studies, teachers completed a behavior checklist on some of the children.

Similar results were found across all of these recent studies. Sexually abused children are consistently found to be more behaviorally distressed than nonabused children. However, the levels of behavioral disturbance in sexually abused children are not as significant as the levels of disturbance in psychiatric populations of children.

Sexually abused children as a group clearly differ behaviorally from nonabused children. Within the group of sexually abused children, however, there is significant variation. Furthermore, a substantial subgroup of sexually abused children do not exhibit a level of behavioral distubance which is considered clinically significant.

The studies also employed self-report measures of depression, anxiety, and self-esteem to examine emotional and behavioral disturbance. On general mental health and behavioral measures, sexually abused children could not be differentiated from nonabused children. However, Wolfe and colleagues have preliminary data suggesting that a device which measures sex-abuse-specific reactions discriminates between abused and nonabused children. [FN239] When abuse-specific measures were employed, there were statistically significant differences between abused and nonabused children. Sexually abused children had elevations in intrusive thoughts related to the event. They also demonstrated abuse-specific fears like fear of revictimization.

A number of conclusions can be drawn from these investigations. Sexually abused children as a group differ

behaviorally from nonabused children. Overall, sexually abused children have less pathology than psychiatrically disturbed children. Within the group of sexually abused children there is a broad range and degree of disturbance. Some children do not appear to be behaviorally distressed. In one study, twenty-one percent of the children were rated asymptomatic by therapists. [FN240] In most studies, however, more than sixty percent of sexually abused children score in the clinically significant range on some measures. This finding indicates a level of acute distress requiring immediate clinical intervention.

Investigators have studied factors that appear to be related to the most serious negative impact of sexual abuse. The closer the relationship between the offender and the child, the more serious the consequences for some children. More intrusive forms of sexual behavior, such as intercourse, may cause more serious effects. The longer the duration of abuse, and the more frequent the episodes, the greater the impact on many children. Use of violence seems to be related to a ***59** negative outcome. [FN241]

Several studies have found that there is a relationship between the amount of support available to sexually abused children and post-abuse functioning. Conte and Schuerman found that a supportive relationship with a nonoffending parent and with a sibling was important. [FN242] The support available to a child may be associated with several factors. One study found that mothers tended to be less supportive when the offender was a stepfather than when he was a biological parent. [FN243] Characteristics of family functioning also seems to be related to outcome. When there are many negative qualities to family relations, or when families have more conflict and less cohesion, abused children fare poorly. [FN244]

Of the many reactions observed in sexually abused children, sexual reactions have the closest logical association with sexual abuse. Sexual involvement with adults, or with significantly older children, is developmentally abnormal. Through the process of learning, or accommodation to sexual abuse, a child may demonstrate unusual or age-inappropriate sexual behaviors. Some children react in a sexualized way to the experience of abuse. [FN245] The drawings of some sexually abused children contain sexual detail. [FN246] An empirical investigation of this phenomenon found that abused children were significantly more likely to put genitalia on human figure drawings, although only a small percent of abused children did so. [FN247] Studies indicate that sexually abused children demonstrate more sexualized play with anatomically detailed dolls than nonabused children. [FN248]

Differences between sexually abused and nonabused children regarding sexual behavior have consistently been observed with standardized behavior measures. [FN249] A major limitation of this data is that the information is derived from a few questions about sexual behavior ***60** contained in lengthy measures. The small number of questions does not permit an adequate description of the range of possibly affected behaviors. What is needed is an instrument that focuses on sexual behavior. Fredrich has developed such an instrument. [FN250] Preliminary findings on data comparing five geographically different abuse samples confirm statistically significant differences in sexual behavior between sexually abused and nonabused children. The differences appear to be most pronounced in younger children.

Clinical literature on adolescent victims discloses evidence of sexualized reactions. Abused girls are frequently described as engaging in sexual acting out. [FN251] Prostitution is itself a form of sexual acting out, and a very large proportion of youth involved in prostitution were sexually abused before they entered prostitution. [FN252]

Symptoms of anxiety are commonly reported in sexually abused children. [FN253] Clinical studies describe various anxiety reactions such as fear, sleep disturbance and nightmares, flash backs, startle reactions and hypervigilance, regression, phobic behavior, withdrawal from usual activities, nervousness, and clingyness. These symptoms are consistent with symptoms observed in children who have suffered trauma such as witnessing the death of a parent [FN254] or being kidnapped. [FN255] ***61** Children who have experienced disruptive events such as divorce

also have elevations in anxiety symptoms. [FN256]

Sexual abuse occurs in the context of a relationship with another person. Because of the distorted nature of the relationship, some abused children learn inappropriate relationship skills. Some abused children are excessively afraid and shy, while others are overly aggressive and intrusive. It has been noted that sexually abused children have problems respecting interpersonal boundaries. [FN257]

The foregoing clinical and empirical investigations reveal that the effects of sexual abuse vary among children. There is no single effect that has been observed in all children. Whether there is some unique and specific effect of sexual abuse is unknown. Part of the problem may be that no instrument has been developed to measure the effects of sexual trauma. Another issue is that many effects are internal, and may not be observable or describable even by the children. Considering that sexual abuse comprises a very broad range of conduct, it is not likely that all children would be effected similarly. Variables relating to the child's pre-abuse status, the experience itself, and the aftermath are thought to interact in some complex fashion to produce the reactions observed in a particular child.

From a mental health perspective, a professional opinion regarding sexual abuse is supported when there is affirmative psychological evidence of abuse. Certain behaviors are more specifically associated with sexual abuse than others. When age-inappropriate sexualized responses are reported or observed in children, sexual abuse must be considered. When such responses are coupled with a credible description of abuse from the child, sexual abuse should be considered the most likely, although not the only, explanation.

Children who are suffering symptoms of fear, anxiety, or avoidance are probably suffering the effects of some traumatic experience. Sexual abuse is only one of many potentially upsetting or disturbing experiences for children. Given the prevalence of sexual abuse, and its documented association with anxiety symptoms, however, abuse should be considered and evaluated through direct inquiry. When symptoms of fear, anxiety, or avoidance accompany a credible report of sexual abuse, sexual abuse must be seriously considered.

While no symptom or set of symptoms is conclusive proof of sexual abuse, when symptoms evidencing abuse are present in conjunction ***62** with a report that bears indicia of reliability, the clinician is justified in forming a clinical opinion that a child has been sexually abused.

2. Expert Testimony on Behaviors Commonly Observed in Sexually Abused Children

The expert testimony discussed in this subsection is offered as substantive evidence of abuse. Such testimony is offered during the state's case in chief. Impeachment of the child is not a prerequisite to such testimony because the testimony is not offered to rehabilitate the child's credibility. This subsection begins with discussion of the logical relevance of expert testimony describing behaviors commonly observed in sexually abused children. Attention then shifts to cases discussing such expert testimony as substantive evidence. The section concludes with discussion of the child sexual abuse accommodation syndrome.

a. Logical Relevance of Expert Testimony on Behaviors Commonly Observed in Sexually Abused Children

The clinical and scientific section discloses that many sexually abused children demonstrate behavioral, emotional, or cognitive reactions following their abuse. While there is no single reaction observed in all sexually abused children, and while reactions vary considerably, the presence of commonly observed behaviors provides important data for clinical decisionmaking on whether abuse occurred, and on the propriety of treatment. The present subsection draws on information in the clinical and scientific section to discuss the forensic implications of behaviors commonly observed in sexually abused children.

Many reactions have been observed in sexually abused children, including anxiety, regression, sleep disturbance, acting out, depression, nightmares, and enuresis, to name just a few. [FN258] An examination of these behaviors quickly reveals that they are also associated with a wide range of psychological problems that have nothing to do with sexual abuse. For example, the fact that a child suffers nightmares, regression, and depression says little about sexual abuse. Myriad other circumstances cause such behaviors.

While some of the behaviors observed in sexually abused children are consistent with a number of problems, others are more strongly associated with personal or vicarious sexual experience. Examples of behaviors that have greater specificity for sexual abuse include ageinappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically*63 detailed dolls. [FN259]

The presence in a young child of behaviors commonly observed in sexually abused children can be probative of abuse. [FN260] Evidence of the *64 behaviors is relevant because it has a tendency to prove that abuse occurred. [FN261] Children with behaviors associated with sexual abuse-- particularly sexual reactions--are more likely to have been abused than children without such behaviors. This conclusion does not ignore the fact that approximately twenty percent of sexually abused children demonstrate no observable behavioral reactions. Absence of behaviors does not disprove abuse, but presence of behaviors increases the likelihood of abuse. [FN262] Evidence of behaviors is seldom dispositive, but evidence need not be dispositive to be logically relevant and admissible.

The probative value of expert testimony describing behaviors observed in young sexually abused children is highest when there is a coalescence of three types of behaviors: (1) a central core of sexual behaviors which are strongly associated with sexual abuse; (2) nonsexual behaviors which are commonly observed in sexually abused children; and (3) medical evidence of sexual abuse.

Probative value declines as sexual behaviors and medical evidence decrease in proportion to nonsexual behaviors. When the only evidence consists of a number of ambiguous, nonsexual behaviors, the evidence may lack any probative value, or probative worth may be outweighed by the potential for unfair prejudice or jury confusion. [FN263]

When a child demonstrates no sexual behaviors, but does evidence signs of serious anxiety or post-traumatic stress disorder, expert testimony may still be relevant. In this scenario, however, testimony serves only to establish that the child may have experienced some type of traumatic event. Such testimony is not specific to sexual abuse.

In some cases, testimony describing behaviors observed in sexually abused children is a combination of expert and lay testimony. The testimony takes the following form: (1) expert testimony describing behaviors observed in sexually abused children as a class, coupled with (2) lay testimony establishing that the child in the case at hand demonstrates such behaviors. The lay testimony is usually provided by individuals who are familiar with the child's behavior, such as parents. Expert testimony of this type is limited to a description of sexually abused children as a class, and does not focus on the child in the case at hand. Indeed, the expert need have no knowledge of the particular *65 child. [FN264] The sole purpose of the expert testimony is to inform the fact finder of behaviors commonly seen in abused children. The testimony of lay witnesses is adduced to acquaint the jury with the behavior of the alleged victim. [FN265] It is up to the jury to put two and two together, and to conclude that because the alleged victim demonstrates behaviors commonly seen in sexually abused children, the victim probably was abused.

In a proper case, an expert could step beyond a description of sexually abused children as a class, to describe behaviors observed in a particular child. Expert testimony that a particular child displays behaviors similar to those

seen in sexually abused children as a class approaches an opinion that the child was sexually abused. Nevertheless, there is a meaningful distinction between expert testimony that a particular child was sexually abused, and expert testimony that a child demonstrates behaviors commonly observed in the class of sexually abused children. In the latter case, the expert does not offer a direct opinion on the ultimate question of whether abuse occurred.

b. Case law Regarding Expert Testimony on Behaviors Commonly Observed in Sexually Abused Children

In a substantial number of cases, courts approve expert testimony describing behaviors observed in sexually abused children. On first reading, a number of decisions appear to approve the theory of logical relevance discussed above in subsection IV(B)(2)(a). [FN266] On closer examination, however, it seems most courts do not approve such testimony as substantive evidence of abuse. [FN267] Rather, the testimony is permitted to rehabilitate children's credibility. Confusion arises because some decisions are less than clear on whether testimony is received as evidence of abuse, or is limited to rehabilitation. [FN268]

Of the few decisions commenting directly on the theory of proof discussed above, several disapprove it. In *State v. Moran*, [FN269] for example, the Arizona Supreme Court approved expert testimony designed to rehabilitate a child, [FN270] but held that an expert should not state whether a child's behavior is consistent or inconsistent with sexual abuse. [FN271] In *State v. Hudnall*, [FN272] the South Carolina Supreme Court disapproved testimony that was designed to prove that abuse occurred. The court wrote:

> Courts that have admitted the type of syndrome evidence at issue here have typically allowed it only to explain a child victim's post-trauma behavior as a common reaction to sexual abuse where it would otherwise appear impeaching, for instance if there is a retraction of the allegations or a delay reporting the abuse....
>
> In this case, the evidence was admitted to bolster the child's testimony that the crime had in fact occurred and was not offered to explain any seemingly inconsistent response to the trauma. We find admission of this irrelevant and prejudicial expert testimony was error.... [FN273]

A few decisions hold that when expert testimony describing behaviors commonly observed in sexually abused children is offered to prove abuse, the proponent must establish that the relevant scientific community accepts the ability to detect abuse in this fashion. [FN274] When the clinical and scientific information discussed above in subsection B(l), is considered along with the clinical and scientific information discussed in other subsections of this Article, the proponent of expert testimony describing behaviors observed in sexually abused children should be in a position to persuade a court that the evidence is sufficiently probative and reliable to gain admission as proof of abuse. This is so whether the jurisdiction follows the *Frye* test, relevance analysis, or some other threshold requirement for scientific evidence.

c. Child Sexual Abuse Accommodation Syndrome

In 1983, Dr. Roland Summit published an article titled "The Child Sexual Abuse Accommodation Syndrome" [FN275] (CSAAS). Summit described five characteristics commonly observed in sexually abused children: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, and unconvincing disclosure, and (5) retraction. [FN276] ***67** Summit's purpose in describing the accommodation syndrome was to provide a "common language" for the professionals working to protect sexually abused children. [FN277]

Summit did not intend the accommodation syndrome as a diagnostic device. [FN278] The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. [FN279] Thus, child sexual abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. With battered child syndrome, one reasons from type of injury to cause of injury. Thus, battered child syndrome is probative of physical abuse. With child sexual abuse accommodation syndrome, by contrast, one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse.

Unfortunately, a number of mental health professionals, lawyers, and commentators drew unwarranted comparisons between battered child syndrome and child sexual abuse accommodation syndrome. [FN280] This error led to considerable confusion. First, some professionals misinterpreted Summit's article, believing Summit had discovered a "syndrome" that could diagnose sexual abuse. This mistake is understandable, if not forgivable. Mental health and legal professionals working in the child abuse area had long been accustomed to thinking in terms of syndrome evidence to prove physical abuse. Battered child syndrome was an accepted diagnosis by the time Summit's accommodation syndrome came along in 1983. It was natural for professionals to transfer their understanding of battered child syndrome to this new syndrome, and to conclude that the accommodation syndrome, like battered child syndrome, could be used to detect abuse.

If the first error was erroneously equating child sexual abuse accommodation syndrome with a diagnostic device, the second mistake was hardly less serious. Some professionals conflated the reactions described by Summit, which are not probative of abuse, with behaviors that are probative of abuse. This combination of behaviors was then denominated a syndrome, the presence of which was supposedly probative of abuse. The defect of this "syndrome" is that some of its components ***68** are probative of abuse and others are not. Opinions based on such a "syndrome" are of dubious reliability.

Widespread misunderstanding of child sexual abuse accommodation syndrome had unfortunate consequences. Expert testimony based in whole or in part on the syndrome led some courts to believe the accommodation syndrome was designed to diagnose child sexual abuse. So viewed, the syndrome is doomed to fail because it simply does not diagnose. Little wonder courts became suspicious of professional ability to detect sexual abuse. Unlike battered child syndrome, which is highly probative of nonaccidental injury, the accommodation syndrome appeared anything but reliable. Courts were not informed that the accommodation syndrome was being asked to perform a task it could not accomplish.

The accommodation syndrome has a place in the courtroom. The syndrome helps explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred. If use of the syndrome is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function.

A number of cases discuss Summit's accommodation syndrome. The decisions are usefully classified as: (1) cases where testimony was limited to CSAAS ("pure" CSAAS cases), and (2) cases where CSAAS was combined with factors that are probative of abuse.

Most courts reject expert testimony limited exclusively to presence or absence of CSAAS, when such testimony is offered to prove that abuse occurred. [FN281] In *People v. Bowker*, [FN282] the California Court of Appeal rejected such testimony because there was no showing that CSAAS was generally accepted in the relevant scientific community as a means of detecting abuse. [FN283] In *Lantrip v. Commonwealth*, [FN284] the Kentucky Supreme Court expressed similar concern about the scientific acceptance of the syndrome. [FN285] The court went on to note that even if the syndrome gains general acceptance, presence of the syndrome "would not suffice, per se, to prove the fact of sexual abuse." [FN286] These decisions correctly reject "pure" CSAAS testimony offered to prove that abuse occurred. CSAAS does not diagnose.

In a few cases, courts approved "pure" CSAAS testimony to explain such things as delay in reporting and recantation. [FN287] These cases ***69** demonstrate proper use of the syndrome, and are discussed in subsection IV (D) of this Article.

Finally, a number of decisions grapple with expert testimony that combines CSAAS and behaviors that are probative of abuse. [FN288] Generally speaking, such testimony is rejected when offered to prove abuse.

When expert testimony on behaviors observed in abused children is offered to prove that abuse occurred, it is important to ensure that the expert's testimony is based on behaviors that are probative of abuse. The expert should not base the opinion on the accommodation syndrome because the syndrome is not probative of abuse. Nor should the expert's testimony describe a combination of behaviors, some of which are probative of abuse and some of which are not.

d. Conclusion

Presence in a young child of behaviors observed in sexually abused children is sometimes probative of abuse. Expert testimony explaining such behaviors can assist the jury in understanding the evidence and determining facts in issue. Such evidence should be admitted unless its probative value is substantially outweighed by the potential for unfair prejudice or confusion of the jury. Such testimony should rarely be prejudicial, and the evidence is not so arcane or ambiguous as to confuse the fact finder.

When considering the theory of expert testimony discussed in this subsection, it is vitally important to avoid the confusion engendered by reference to syndromes. When expert testimony describing behaviors seen in sexually abused children is offered as substantive evidence of abuse, the expert is *not* describing a syndrome. The expert is certainly not describing Summit's child sexual abuse accommodation syndrome. At the present time, experts have not achieved consensus on the existence of a psychological syndrome that can detect child sexual abuse. Use of the word syndrome leads only to confusion, and to unwarranted and unworkable comparisons to battered child syndrome. The best course is to avoid any mention of syndromes.

C. Behavioral Science Testimony on Whether a Child Was Sexually Aused

This subsection discusses expert behavioral science testimony on whether a child was sexually abused. Among behavioral scientists, ***70** there is considerable controversy concerning whether professionals should testify that sexual abuse occurred. An opinion that a child was sexually abused is controversial for two reasons. Some experts believe that an opinion that abuse occurred constitutes impermissible testimony on legal issues. This aspect of the question was discussed earlier in subsection II (E), which analyzed the ultimate issue rule. The issue is taken up again in this subsection. The second area of disagreement concerns the ability of professionals to determine whether abuse occurred. Some writers believe professionals cannot reliably make this determination. [FN289] Other experts believe it is possible to determine with reasonable clinical certainty whether sexual abuse occurred. [FN290] Those who believe it possible to "know" whether a child was acknowledge that it is not possible to "know" whether a child was abused. After all, the expert was not present to observe the abuse. Rather, expert testimony on whether abuse occurred rests on assessment of a wide range of information leading to a clinical judgment that sexual abuse is the most likely explanation in particular cases.

Expert testimony which states in so many words that a child was sexually abused is not the only form of testimony relating to abuse. Expert testimony relating to sexual abuse occurs along a continuum. At one end of the continuum is a direct opinion that a child was sexually abused; that is, that a specific event happened in the past. At the other end of the continuum is an opinion that a child demonstrates age-inappropriate sexual knowledge or awareness. It is the direct opinion that abuse occurred which raises the most concern and disagreement among professionals. By contrast, there is considerable consensus that experts on child sexual abuse can determine whether children demonstrate age-inappropriate sexual knowledge or awareness, and that testimony to that effect is within the ambit of professional competence. Between the extremes of a direct opinion that abuse occurred, and testimony relating to age-inappropriate knowledge or awareness, other opinions are possible. For example, behavioral science experts on

child sexual abuse are trained and experienced in diagnosing the symptoms and behaviors that are consistent with sexual abuse, and in ferreting out alternative explanations for such symptoms and behaviors. An expert could be permitted to testify that a child demonstrates symptoms and behaviors consistent with sexual abuse, and that, in the expert's opinion, no explanation other than sexual abuse seems plausible. Alternatively, and expert *71 might testify that a child probably experienced age-inappropriate sexual contact. The latter opinion approaches a direct opinion that abuse occurred, however, and to the extent a direct opinion raises concern, so too might an opinion regarding age-inappropriate sexual contact. Because testimony cast in the form of a direct opinion that a child was sexually abused remains controversial, the present subsection focuses on the form of testimony in which the expert states that a child's symptoms and behavior are consistent with sexual abuse. This form of opinion lies near the middle of the continuum, and would win the endorsement of many experts on child sexual abuse.

While professionals disagree on the form which expert testimony relating to sexual abuse should take, there is one point on which everyone agrees. Decisions about child sexual abuse are vitally important. [FN291] Berliner makes the point as follows:

> Determining whether a child has been sexually abused is a matter of great importance. If this judgment is wrong, a child's physical and emotional health may be permanently jeopardized, additional children needlessly abused and their families and communities traumatized. Just as important, an individual's reputation, access to and custody of children, and even liberty, may be lost over a false accusation. Children's recovery from the effects of abuse, the protection of the community and the protection of innocent persons depends on accurate decision making. [FN292]

An understanding of behavioral science testimony relating to whether sexual abuse occurred requires a brief historical sojourn; therefore, the clinical and scientific subsection begins with historical material. From there, the subsection provides further detail on the debate surrounding expert testimony relating to whether abuse occurred.

1. Clinical and Scientific Information

The contemporary child protection movement traces its origins to the early 1960s. [FN293] As discussed earlier, in 1962, Kempe and his colleagues*72 described the battered child syndrome. [FN294] The syndrome quickly found its way into court, where it serves as a basis for expert testimony that a child's injuries were not accidental. [FN295] Beginning in 1963, states rapidly enacted statutes requiring professionals to report suspected child abuse to designated authorities. [FN296] By the middle of the decade, every state had a reporting law. [FN297]

In the area of physical child abuse, primary responsibility for diagnosis lies with physicians. Social workers, nurses, psychologists, and psychiatrists become involved in treating the emotional sequelae of abuse, serving families, and preventing maltreatment. Regardless of professional affiliation, however, most professionals working with physically abused children employ the medical model as the medium through which they understand and explain physical abuse. Thus, the logic and vocabulary of medicine, including the term diagnosis, is firmly implanted with regard to physical abuse.

It is apparent that a diagnosis of battered child syndrome has important forensic as well as medical implications. Indeed, when it comes to physical abuse, physicians often assume forensic responsibilities. [FN298] Detection and interpretation of admissible evidence of physical abuse is largely the responsibility of the medical profession.

This brief historical examination of the professional response to physical abuse reveals two factors that have influenced the response to sexual abuse. First, the dominant role of the medical model, with its emphasis on diagnosis, found its way into thinking about sexual abuse. Thus, as in physical abuse, some professionals apply the term diagnosis to clinical determinations about sexual abuse. Other professionals disagree with this practice, and assert

that the term diagnosis is misapplied when describing sexual abuse.Adherents of the latter view suggest that sexual abuse is an event, not a diagnosable disorder. It may be possible to diagnose the effects of sexual abuse, but not the cause. One does not diagnose an act of sexual abuse any more than a physician diagnoses a car accident that results in a broken leg.

It would be a mistake to make too much of disagreement over application*73 of diagnostic terminology to child sexual abuse. The concept of diagnosis is sufficiently broad to embrace clinical determinations regarding sexual abuse. By way of analogy, battered child syndrome is an accepted medical diagnosis despite the fact that an abusive assault is an event rather than a disorder. In a jury trial, a judge might decide against permitting an expert to use the word diagnosis when offering an opinion regarding abuse. A lay jury might be confused or unduly impressed by the term.

The second parallel between physical abuse and sexual abuse relates to the combination of therapeutic and forensic responsibilities. As is true with physical abuse, a therapist threating a sexually abused child may be asked to document evidence that can be admitted at trial. The therapist may also be asked to provide expert testimony. To some professionals, the overlap between clinical and forensic responsibilities raises concerns about role conflict and confusion. [FN299] For instance, some believe that a therapist's ability to provide effective therapy may be jeopardized if the therapist assumes a forensic role. [FN300] Other experts believe that in many cases, therapeutic and forensic roles can coexist without harm to the child. The mental health community has yet to achieve consensus on these issues.

Turning now to the primary inquiry of this subsection: Are professionals trained in the patterns, effects, and dynamics of child sexual abuse capable of determining whether a child's behavior and symptoms are consistent with sexual abuse? As recently as ten years ago, a persuasive argument could be made that the answer was no. Today, however, many experts believe that enough is known about child sexual abuse to permit qualified professionals to formulate reliable clinical judgments about sexual abuse.

Prior to the 1970s, there was a trickle of research and writing on child sexual abuse. Since that time the trickle has become a flood. Clinicians experienced in interviewing and treating sexually abused children have published books, chapters, and articles discussing techniques that are helpful in determining whether children have been sexually abused. [FN301] A substantial portion of the contemporary clinical literature supports the conclusion that experts on child sexual abuse can sometimes determine with reasonable clinical certainty whether a *74 child's symptoms and behavior are consistent with sexual abuse, and are probably not the result of other events. [FN302]

In addition to increased writing on child sexual abuse, professionals began meeting on a regular basis to share clinical experience and research results. Many such meetings occur every year. In 1985, for example, a national invitational forum was convened to, *inter alia*, assess the degree of professional consensus on the ability to identify child sexual abuse. [FN303] Present at the forum were nearly 100 experts on child sexual abuse from the disciplines of medicine, nursing, psychiatry, psychology, social work, investigation, and law. A majority of participants agreed that enough was known about sexual abuse to merit creation of materials to inform clinicians about symptoms and behaviors commonly observed in sexually abused children.

Also in 1985, one of the first statements of professional consensus regarding clinical evaluation of sexual abuse appeared in the literature. The Council on Scientific Affairs of the American Medical Association published guidelines on diagnosis and treatment of physical abuse, sexual abuse, and neglect. [FN304]

In June of 1988, the Council of the American Academy of Child and Adolescent Psychiatry approved guidelines for clinical evaluation of child and adolescent sexual abuse. [FN305] Published in the September 1988 issue of the

Journal of the American Academy of Child and Adolescent Psychiatry, the guidelines state:

> The effects of child sexual abuse are diagnosable in the same sense that other medical conditions are diagnosable--on the basis of history, physical examination and the judicious use of various tests. Rarely is one finding alone diagnostic of sexual abuse; rather, findings must be interpreted within the total context of a thorough evaluation. [FN306]

The Academy guidelines support the position that experts can detect symptoms and behaviors that result from sexual abuse. The writing*75 of experts on child sexual abuse echoes the conclusion reflected in the guidelines. Sgroi, Porter, and Blick write:

> [M]ost cases can be validated by investigative interviewing and by assessing the credibility of the history of sexual abuse elicited from the child. In our experience this can be done with children in the age range of five years and older. A skilled interviewer can sometimes elicit helpful information from an unusually articulate younger child (age range three to five years). However, a child who is that young frequently lacks the verbal and conceptual skills required for investigative interviewing to have validity. [FN307]

Recent research lends empirical support to the clinical conclusion that properly qualified professionals can determine whether a child's symptoms and behaviors are consistent with sexual abuse. Conte and his colleagues conducted a nationwide survey of professionals with expertise in evaluating suspected child sexual abuse. [FN308] The researchers were interested in determining whether experts agree on factors that indicate sexual abuse. The survey revealed a high level of agreement that the following factors are indicative of sexual abuse: age-inappropriate sexual knowledge; sexualized play; precocious behavior; excessive masturbation; preoccupation with genitals; indications of pressure or coercion exerted on the child; the child's story remains consistent over time; the child's report indicates an escalating progression of sexual abuse over time; the child describes idiosyncratic details of the abuse; and physical evidence of abuse. [FN309]

The fact that a broad range of experts agree among themselves that certain factors are indicative of sexual abuse does not prove that the clinicians are correct. They could all be mistaken. Such collective error is unlikely, however, and Conte's survey provides support for the position that clinicians can make reliable clinical determinations regarding sexual abuse.

A recent study by Faller provides further support for this conclusion. [FN310] Faller describes three factors that are important in evaluating suspected abuse. The factors are: "information about the context of the sexual abuse; the description or demonstration of the sexual victimization; and the victim's emotional state." [FN311] Faller was interested *76 in determining how often these three factors appear in validated cases of child sexual abuse. She examined 103 cases of child sexual abuse in which perpetrators confessed or otherwise acknowledged their abuse. The research produced the following data:

> Both a description of the sexual behavior of the sort found in a true allegation, and an emotional reaction to the sexual abuse or describing it, which is characteristic of a true allegation, were found in over four-fifths of the accounts. Details of the context of the sexual abuse were found slightly less frequently, but nevertheless in over three-fourths of the cases. Seventy of the victims' descriptions (68%) contained all three of these characteristics; 16 (15.5%) contained two; 11 (10.7%) contained one; and six (5.8%) contained none. [FN312]

Based on these findings, Faller concludes that the "clinical criteria employed by evaluators of sexually abused children are indeed valid predictors of whether children have been sexually abused and should continue to be used." [FN313]

Faller's study provides empirical evidence that experts can determine whether a child's symptoms and behavior

are consistent with sexual abuse. Such empirical support is important because purely clinical decisionmaking is subject to criticism as potentially biased. As Faller remarks, "clinicians are in the position of asserting that certain characteristics of the child's statement indicate that it is true 'because characteristics of the child's statement indicate that it is true 'because I said so." [FN314] Studies like those of Faller and Conte bolster confidence*77 in clinical decisionmaking.

When the clinical and empirical data discussed in this subsection are considered along with information presented elsewhere in this Article, it is possible to argue credibly that in many cases qualified experts can determine with reasonable clinical certainty whether a child's symptoms and behaviors are consistent with sexual abuse, and not with other causes. [FN315] Before accepting this conclusion, however, it is important to examine arguments casting doubt on professional competence in this regard.

In a recent law review article, David McCord takes the position that the "behavioral scientific literature conclusively demonstrates that there is not general acceptance of the ability of experts in the field to diagnose a child as having been sexually abused." [FN316] Based on his reading of the literature, McCord concludes that courts should reject expert testimony on whether particular children have been abused. [FN317] As discussed above, there may be reason to exclude expert testimony in the form of a direct opinion that sexual abuse occurred. To the extent, however, that Professor McCord's article may be interpreted to rule out an opinion that a child's behavior and symptoms are consistent with sexual abuse, and not with other causes, a reply is in order.

Professor McCord argues that experts on child sexual abuse know very little about the behavioral reactions commonly observed in sexually abused children. [FN318] He writes that "researchers have never been able to pin down typical psychological symptoms of sexually abused children." [FN319] He states further that "there are no typical symptoms" of child sexual abuse. [FN320] It is quite true that sexually abused children display a wide range of reactions to sexual abuse. [FN321] However, experts are not as bereft of behavioral guideposts as McCord suggests. In fairness to him, at the time McCord was writing, which was probably 1985 or 1986, the literature provided more support for his position than it does now. In light of current knowledge, however, McCord's article paints an unduly bleak picture of expert knowledge. [FN322] Subsection IV (B)(1) indicates that at the present time, experts know a substantial amount about the reactions of children to sexual abuse.

Furthermore, contemporary research supports the opinion of *78 many experts that it is possible in some cases to detect the effects of child sexual abuse. [FN323] Thus, current knowledge casts considerable doubt on McCord's conclusion that experts cannot diagnose child sexual abuse.

Another influential commentator, Gary Melton, believes that mental health professionals should not offer expert testimony that a child has been sexually abused. [FN324] He writes:

> A somewhat more difficult but still rather straightforward question is whether experts should be permitted to give an opinion as to whether a child has in fact been abused. Most appellate courts that have considered the issue have held that such testimony is not based on specialized knowledge and invades the province of the fact finder....Such 'diagnoses' of sexual abuse are essentially legal conclusions based on common sense inferences. As a matter of law, they should not be admitted, and as a matter of ethics, they should not be proffered, because they exceed experts' competence as mental health professionals. [FN325]

Melton's position is troublesome for two reasons. First, he asserts that an opinion on whether sexual abuse occurred is essentially a legal conclusion. [FN326] If Melton is correct in this regard, then experts should not be permitted to offer such testimony because experts are not permitted to testify on questions of law. [FN327] As discussed in subsection II (E), an opinion that a child was sexually abused can be viewed as a question of ultimate fact rather than as a question of law. Experts are permitted to offer opinions on ultimate facts. Thus, if Melton's position

is that expert testimony on whether abuse occurred should be excluded because it necessarily constitutes a conclusion of law, it is not possible to agree with him.

To the extent Professor Melton asserts that experts should not offer testimony cast in the form of a direct opinion that sexual abuse occurred, he represents one school of thought on the subject. It is worth noting that his position does not appear to rule out an opinion that a child's behavior and symptoms are consistent with sexual abuse.

Second, we take issue with Melton's assertion that it is somehow unethical for qualified professionals to provide expert testimony on whether abuse occurred. Many competent and ethical professionals believe such testimony is proper in selected cases. A properly qualified expert does not act unethically in providing such testimony.

***79** *2. Admissibility of Expert Testimony on Whether Sexual Abuse Occurred*

The admissibility of expert testimony relating to whether a particular child was sexually abused is a divisive issue. The subject will be approached in three subsections. The first subsection describes a line of New York cases permitting expert testimony validating suspected sexual abuse. The second component discusses decisions permitting and rejecting expert testimony on whether abuse occurred. The third subsection articulates the position that expert testimony on whether abuse occurred should be admitted in certain proceedings.

a. Validation of Child Sexual Abuse in New York

Every state has a juvenile or family court charged with protecting abused and neglected children. In New York, protective proceedings are commenced under the Family Court Act. [FN328] In a series of recent decisions under the Act, New York courts approved testimony by experts that particular children were sexually abused. The courts refer to the process by which experts evaluate allegations of abuse as "validation." [FN329]

Expert validation testimony has been used for two purposes: first, as corroboration of a child's hearsay statements; [FN330] and second, as substantive evidence of abuse. [FN331] Because of the importance of validation testimony, New York courts quite properly require experts providing such testimony to be "highly qualified." [FN332] The civil nature of protective proceedings, coupled with the overriding need to protect children from abuse, justifies admission of validation evidence. [FN333]

***80** *b. Case Law Regarding Expert Testimony on Whether Abuse Occurred*

A number of appellate decisions reject expert testimony that a particular child was sexually abused. [FN334] The Wisconsin Court of Appeals is in this camp. [FN335] In *State v. Haseltine*, [FN336] the sixteen-year-old incest victim testified and described repeated sexual intercourse with her father. The trial court permitted a psychiatrist to provide two types of opinion testimony. First, the expert described "the pattern of behavior exhibited by incest victims." [FN337] Second, the expert was permitted to opine that there "was no doubt whatsoever" that the minor was an incest victim. [FN338] The Court of Appeals rejected both types of testimony. Directing most of its attention to the expert's direct opinion that the daughter was an incest victim, the court held that such testimony amounts to an inadmissible opinion that the minor was "telling the truth." [FN339]

The Court of Appeals was correct in rejecting the expert's assertion that the child was an incest victim. It is respectfully submitted, however, that the court was right for the wrong reason. The expert's opinion that there was "no doubt whatsoever" about sexual abuse was too certain and unequivocal. Such certainty is not warranted by current knowledge, and exaggerated confidence in clinical decisionmaking is likely to confuse jurors or cause unfair prejudice to defendants. [FN340] However, the court did not base its rejection of the expert's opinion on his unwarranted certainty. Rather, the court concluded that an opinion that a child was abused is the same thing as an impermissible opinion that the child told the truth when she described sexual abuse. This conclusion seems wrong. An opinion that

a child was sexually abused is not an opinion that the child was truthful when describing abuse. [FN341] It is true that professionals rely heavily on the child's description of abuse. But evaluation of suspected sexual abuse does not stop with the child's description. The child's statement is an important factor, but only one factor among many. Thus, an expert ***81** opinion that a child was sexually abused is not the same as an opinion on the child's truthfulness or credibility. It may be the case that expert testimony regarding abuse bolsters a child's credibility, but many permissible forms of expert testimony bolster credibility without becoming objectionable. [FN342]

In *State v. Jensen*, [FN343] the Wisconsin Court of Appeals focused more precisely on expert testimony describing behavioral characteristics commonly observed in sexual abuse victims. The court held that when such testimony is offered to prove that abuse occurred, it is inadmissible:

> [A]n expert is precluded from testifying that a complainant's behavior following an alleged sexual assault was proof that an assault occurred. The question of whether the conduct was consistent with that of a sexual assault victim is but another way of attempting to reach the impermissible conclusion that the conduct proves the assault. [FN344]

As in *Haseltine*, the *Jensen* court ruled that testimony describing behavioral effects of abuse amounts to improper bolstering of the child's credibility. It is submitted, however, that *Jensen* is incorrect for the same reason *Haseltine* is incorrect. Expert testimony describing behaviors commonly observed in sexually abused children is not the equivalent of testimony that a child is truthful. Perhaps the court was worried that jurors would depend too heavily on expert opinion when assessing the child's credibility. Jurors may think, "If the expert believed the child, why shouldn't we?" This is a legitimate concern, but it does not clarify matters to equate expert testimony on whether abuse occurred with testimony focused directly on credibility.

In two decisions, the Arkansas Supreme Court rejected expert testimony that sexual abuse occurred. [FN345] In *Johnson v. State*, [FN346] a physician***82** examined a nine-year-old victim of alleged anal intercourse. The doctor conducted a physical examination of the child, and obtained the boy's version of events. The doctor testified that there was no physical evidence of abuse, but that lack of such evidence did not rule out abuse. The trial court permitted the doctor to give an opinion on whether the child had been abused. The doctor testified that in his opinion "an act had occurred that was detrimental to this child's health." [FN347] The Arkansas Supreme Court reversed the ensuing conviction, holding that the trial court erred in permitting the expert to offer an opinion that abuse occurred. The Supreme Court held that the expert testimony was of no assistance to the jury because "lay jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse." [FN348]

The court was of the same mind in *Russell v. State*, [FN349] where a psychologist testified that what the child told her was consistent with sexual abuse. The court wrote:

> The appellant argues that the trial court erred in allowing the witness to answer whether the child's statements were consistent with sexual abuse because the subject matter was not beyond the common knowledge of the jury. The argument is meritorious.
>
> The general test for admissibility of expert testimony is whether the testimony will aid the trier of fact in understanding the evidence or in determining a fact in issue. . . . An important consideration in determining whether the testimony will aid the trier of fact is whether the situation is beyond the trier of fact's ability to understand and draw its own conclusions. . . . Here, lay jurors were fully competent to determine whether the history given by the victim was consistent with sexual abuse. [FN350]

The *Johnson* and *Russell* decisions underestimate the complexity and the degree of expertise required for evaluation of suspected child sexual abuse. [FN351] The evaluator must possess specialized knowledge of child development, individual and family dynamics, patterns of child sexual victimization, signs and symptoms of abuse, and the uses and limits of various psychological tests. The competent evaluator is familiar with the literature on child abuse, and understands the significance of age-inappropriate sexualization and preoccupation. Since ***83** sex-

ual behavior is learned, the experienced evaluator is in a position to observe, understand, and seek explanations for age-inappropriate sexual knowledge or interest. The evaluator is able to interpret the results of medical examinations and laboratory tests. The competent evaluator is trained in the complex art of interviewing children. Eliciting accurate and complete information from children who may have been subjected to traumatic or unusual experiences is a formidable task, requiring great skill and patience. Equal skill is required to evaluate a child's verbal statements and nonverbal behavior. Additionally, competent evaluators are aware of the specialized literature on detecting coached and fabricated allegations of abuse. Of tremendous importance is the evaluator's clinical experience with sexually abused and nonsexually abused children. Depth of clinical experience with sexually abused children provides the reference point against which new cases are assessed. The combination of these highly specialized skills allows evaluators to balance the multitude of factors involved in assessment of suspected abuse.

The specialized skill and knowledge required for competent evaluation of suspected child abuse is beyond the ken of most physicians and mental health professionals. It seems clear that lay jurors are in no position to evaluate suspected abuse. [FN352] Properly qualified experts can assist jurors in sifting through the mountain of complex and sometimes conflicting and counterintuitive information presented in many child sexual abuse cases.

Several decisions from the California Court of Appeal have erected temporary barriers to expert testimony that a particular child was sexually abused. [FN353] In *In re Amber B.*, [FN354] the Court of Appeals held ***84** that when an expert bases an opinion that a child was sexually abused on the child's statements during interviews and the child's play with anatomically detailed dolls, the proponent of the evidence must prove that such evaluative techniques have been generally accepted in the relevant scientific community. [FN355]

At the present time, sufficient clinical and scientific evidence is available to mount a persuasive argument that the relevant scientific community accepts the use of anatomically detailed dolls as a useful adjunct to interviewing children who may be sexually abused. [FN356] The dolls are not a test for sexual abuse, and it is not appropriate to base conclusions on doll play alone. However, it is proper to employ the dolls, and to consider the child's interaction with them as a small but relevant piece of the puzzle. Furthermore, the professional literature supports the view that in selected cases, it is possible to determine whether sexual abuse occurred. Thus, it should be possible to lower the barrier raised in *Amber B.*

A number of courts that have considered expert behavioral science testimony on whether child sexual abuse occurred have rejected the testimony. [FN357] The reasoning and conclusions of such decisions are open to challenge in light of current clinical and scientific knowledge.

Several decisions permit expert testimony on whether abuse occurred. In *Townsend v. State*, [FN358] for example, the Nevada Supreme Court approved such testimony, writing: " I t was proper for the State's expert to express an opinion on the issue of whether the child had, in fact, been sexually assaulted or abused. Such an opinion, although embracing an ultimate issue, represents both the peculiar expertise***85** and consummate purpose of an expert's analysis." [FN359] In *Seering v. Department of Social Services*, [FN360] the California Court of Appeal permitted an expert to testify in an administrative proceeding that, based on his clinical experience, he believed a child had been sexually abused. And in *Glendening v. State*, [FN361] the Florida Supreme Court wrote that " a qualified expert may express an opinion as to whether a child has been the victim of sexual abuse." [FN362]

c. Expert Testimony on Whether a Child Was Sexually Abused Should be Admissible in Appropriate Cases

The material in the clinical and scientific subsection indicates that expert behavioral science testimony relating to whether a child was sexually abused remains a controversial issue. Should such testimony be admitted in evidence? Based on present knowledge, expert behavioral science testimony on whether sexual abuse occurred raises

the most troubling concerns in criminal jury trials. Because of disagreement among experts on child sexual abuse, and because of the consequences of criminal conviction, it may be appropriate in criminal jury trials to eschew behavioral science testimony cast in terms of a direct opinion that sexual abuse occurred. However, it may be proper to permit one or more of the alternative forms of expert testimony discussed earlier. In particular, it may be appropriate to permit a properly qualified expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness. Furthermore, it may also be proper to permit an expert to state that a child's symptoms and behavior are consistent with sexual abuse.

In civil proceedings, it is appropriate to allow qualified experts on child sexual abuse to offer direct as well as alternative forms of expert testimony relating to whether sexual abuse occurred. Such testimony is particularly suitable and necessary in juvenile court proceedings to protect children. In this regard, the approach of the New York family courts has much to commend it. Protective proceedings are civil in nature, and are not designed to work a permanent disruption of the parent-child relationship. Quite the contrary, the goal of the court is to protect the child, support the family, and provide services and treatment designed to eliminate further abuse. It must be recalled that child sexual abuse is often very difficult to prove, especially when the victim is young. The juvenile court needs all the evidence that is available to enable it to protect abused children. In protective proceedings there is no jury, thus the concern that expert testimony may over-awe or confuse jurors is eliminated. The judge can evaluate the worth of ***86** expert testimony on whether a child was sexually abused. In juvenile court, the need for the evidence and the compelling interest in protecting children justify admission of expert behavioral science testimony on whether sexual abuse occurred. Such testimony is also helpful in child custody and visitation litigation incident to divorce, and in other civil proceedings.

D. Behavioral Science Testimony to Rehabilitate a Child's Credibility Following Impeachment in Which the Defendant Asserts that Behaviors such as Recantation and Delay in Reporting Are Inconsistent with Allegations of Sexual Abuse

Expert testimony in the preceding three categories is offered to prove that abuse occurred. In the present category, and the one following, attention shifts from expert testimony designed to prove abuse, to expert testimony intended to rehabilitate a child's impeached credibility.

Witnesses can be impeached in many ways. In child sexual abuse litigation, two forms of impeachment take on particular significance. First, the defendant may assert that a child should not be believed because the child did not report alleged abuse for a substantial period of time, or because the child retracted allegations of abuse. Such impeachment is legitimate. However, when the defense concentrates on delay and recantation, the question arises whether the state may offer expert rebuttal testimony to inform the jury that many sexually abused children delay reporting and recant. This type of rebuttal testimony is discussed in the present subsection.

In the second form of impeachment, the defense seeks to undermine a child's credibility by arguing that developmental differences between adults and children render children less credible than adults. This form of rehabilitation is taken up in the following subsection.

1. Clinical and Scientific Information

A substantial percentage of children are sexually abused at some point during their minority. [FN363] Most victims never disclose their abuse. [FN364] Of those who do, delay in reporting is very common. [FN365] ***87** Jones and McQuiston write that " p eople who have been sexually abused frequently delay reporting what has happened to them. All the major studies and case series consistently emphasize that delay is a major clinical feature of child sexual abuse cases." [FN366] The reasons for delay are not difficult to find. In intrafamilial abuse, where delay is par-

ticularly common, the child is relatively helpless, and must accommodate to ongoing maltreatment. [FN367] The abusing parent is often in a position to impose and enforce secrecy. [FN368]

When disclosure occurs, the child may refrain from telling the entire story, and may reveal a little at a time to "test the waters" and see how adults react. [FN369] For example, a young child who has been penetrated many times may begin by saying, "He only did it once." Or, "He never put it in me, he just touched me with it." Or, "He only did it to the other kids, not to me." Such disclosures are inaccurate, of course, but considering the child's uncertainty, and the common belief among children that adults will perceive them as bad because they were victimized, such behavior is understandable.

When abuse finally comes to light, the victim may disclose to parents, teachers, medical professionals, therapists, or others. Following disclosure, powerful forces may work to convince the child to change the facts or to recant altogether. [FN370] Such forces are particularly strong in intrafamilial abuse cases, where the perpetrator, with or without the cooperation of the nonabusing parent, seeks to persuade the child to change or deny prior allegations. There may be ample opportunity to instill fear, guilt, and ambivalence.

The pressure to recant is described by Summit in his article on the child sexual abuse accommodation syndrome. [FN371] Summit's description ***88** is not accurate in all intrafamilial abuse cases, but it assists in understanding the dynamics of recantation. He writes:

> *Whatever a child says about sexual abuse, she is likely to reverse it.* Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. Her mother does not believe her or decompensates into hysteria and rage. The family is fragmented, and all the children are placed in custody. The father is threatened with disgrace and imprisonment. The girl is blamed for causing the whole mess, and everyone seems to treat her like a freak. She is interrogated about all the tawdry details and encouraged to incriminate her father, yet the father remains unchallenged, remaining at home in the security of the family. She is held in custody with no apparent hope of returning home . . . .
>
> The message from the mother is very clear, often explicit, "Why do you insist on telling those awful stories about your father? If you send him to prison, we won't be a family anymore. We'll end up on welfare with no place to stay. Is that what *you* want to do to us?"
>
> Once again, the child bears the responsibility of either preserving or destroying the family. The role reversal continues with the "bad" choice being to tell the truth and the "good" choice being to capitulate and restore a lie for the sake of the family.
>
> *Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the "normal" course and retract her complaint.* [FN372]

Children who disclose sexual abuse are sometimes inconsistent in their descriptions of what happened. Inconsistency occurs for many reasons, three of which are particularly relevant to the present discussion. First, when a child is repeatedly abused for months or years, individual molestations blur together. If the child is asked to describe particular episodes, the child may become confused, and such confusion may lead to inconsistent versions of events. Second, the ambivalence experienced by many victims sometimes causes them to offer inconsistent accounts of abuse. Such inconsistency is found in children of all ages. Third, with young children, inconsistency in describing past events may be a product of developmental immaturity. Young children are particularly prone to inconsistency regarding the peripheral details of events they have experienced. Inconsistency born of ambivalence is the subject of the present subsection. The type of inconsistency found in young children is discussed in subsection IV (E).

The clinical literature discloses that in intrafamilial abuse cases, many abused children are ambivalent about the abuser, feeling warmth and anger at the same time. It is not uncommon for abused children to want to live with and

demonstrate affection toward the abusing parent.

*89 *2. Expert Testimony to Rehabilitate Credibility*

In many child sexual abuse cases, the child is the state's most important witness. If the defendant denies that abuse occurred, or claims mistaken identity, the child's credibility assumes decisive importance. Even if the child does not testify at trial, the defense may impugn the child's credibility.

As the clinical and scientific subsection makes clear, many sexually abused children delay reporting their abuse for weeks, months, or even years. Once abuse is disclosed, many children recant, denying that anything happened. Some recant their recantation. Sexually abused children are sometimes inconsistent in their descriptions of abuse, and in intrafamilial abuse cases, many victims are ambivalent.

To the untrained eye, such behaviors may appear inconsistent with allegations of sexual abuse. In an effort to undermine the child's credibility, the defense may focus the jury's attention on delay in reporting, recantation, inconsistency, and loyalty to the alleged perpetrator. In the face of such impeachment, the state has a need to rehabilitate the child's credibility. To this end, the state may offer expert rebuttal testimony designed to inform the jury that such behaviors are common in sexually abused children. Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior. [FN373]

The great majority of courts approve such expert rebuttal testimony. [FN374] Expert testimony is admitted to explain why sexually abused children delay reporting their abuse, [FN375] why children recant, [FN376] ***90** why children's descriptions of abuse are sometimes inconsistent, [FN377] why abused children are angry, [FN378] and why some children want to live with a person who abused them. [FN379]

While expert testimony is admissible to rehabilitate children's impeached credibility, courts circumscribe such testimony to be sure it is limited to rehabilitation, and is not used as substantive evidence of abuse. [FN380] For example, expert testimony regarding delay and recantation goes far toward rehabilitating credibility. It is important to ensure, however, that jurors apprehend the limits of such testimony. Delay itself does not prove abuse, nor does recantation. One commentator remarked about recantation, that " t here is something fundamentally***91** strange about saying that since the child denies that the event occurred, it must have occurred." [FN381] Yet, there is a danger jurors may misconstrue expert testimony on delay and recantation as substantive evidence of abuse. The approach of the California Court of Appeal protects against such confusion. In *People v. Bowker*, [FN382] the court held that the trial judge should instruct the jury that the expert testimony "is not intended and should not be used to determine whether the victim's molestation claim is true." [FN383]

Before expert rehabilitation testimony is admitted, the proponent should articulate the specific purpose of the testimony. [FN384] The *Bowker* decision is again instructive. In *Bowker* the state offered expert rehabiliation testimony describing Dr. Summit's child sexual abuse accommodation syndrome. The court approved limited use of such testimony, but went on to write:

> [California case law] does not make "general" testimony on CSAAS admissible in every, or for that matter any, child abuse case. . . . [A]t a minimum the evidence must be targeted to a specific "myth" or "misconception" suggested by the evidence. . . . For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such

behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings. In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony. [FN385]

Rehabilitation testimony is more readily admitted when it describes sexually abused children as a class, rather than a specific child. [FN386] Courts surmise that avoiding discussion of a particular child is less likely to confuse the jury. Several decisions expressly hold that an expert may not describe a particular child. [FN387]

***92** In a recent decision, *State v. Milbrandt*, [FN388] the Oregon Supreme Court stated that if the state offers evidence of a syndrome to rehabilitate a child's credibility, it would be appropriate to subject the syndrome to the *Frye* test for admissibility of novel scientific evidence.

Expert testimony to rehabilitate a child's credibility is usually offered on rebuttal, following impeaching cross-examination of the child. Until some form of impeachment has occurred, such expert testimony constitutes improper bolstering. It is not always necessary for the state to await cross-examination, however. In some cases the defense makes plain as early as opening statement that the child should not be believed. Regardless of the timing or method of the defendant's attack on credibility, and regardless of whether the attack is aimed directly or indirectly at the child, expert rehabilitation testimony is properly admitted as soon as the assault is underway. [FN389]

Courts are comfortable with expert testimony to rehabilitate a child's impeached credibility, [FN390] and for good reason. The defense invites such rebuttal testimony by its attack on the child's credibility. The state has a legitimate need to inform the jury about the dynamics of child sexual abuse so that jurors can fairly and accurately evaluate the child's credibility.

E. Behavioral Science Testimony to Rehabilitate a Child's Credibility Following Impeachment in Which the Defendant Argues that Developmental Differences Between Adults and Children Render Children Less Credible Witnesses than Adults

Expert testimony in the present category is designed to rehabilitate children's credibility in light of impeachment which asserts that children are less credible than adults. The thrust of such impeachment is that children's immaturity renders their testimony suspect. Recent psychological research indicates that many adults are disposed to regard children as less credible than adults. [FN391] However, other research indicates that children are not necessarily less reliable witnesses than ***93** adults. [FN392] When the defense seeks to capitalize on commonly held misconceptions about the testimonial competence and credibility of children, expert rebuttal testimony is sometimes appropriate to set the record straight.

The present category of expert testimony differs from testimony discussed in subsection IV(D) above. Subsection IV(D) focused on expert testimony describing effects of sexual abuse that appear to be inconsistent with abuse. The expert assists the jury by informing it that behaviors such as delay in reporting and recantation are common in sexually abused children. Expert testimony discussed in the present subsection does not focus on sexually abused children. Rather, the expert informs the jury about developmental characteristics shared by all children. In particular, the instant subsection presents information relating to children's memory, inconsistency, suggestibility, ability to differentiate fact from fantasy, and understanding of time.

1. Clinical and Scientific Information

Research on children in the courtroom dates back to the nineteenth century. [FN393] As is often the case in science, the early researchers approached their study laden with the cultural stereotypes of the day. The notion that

children were incompetent, undersized adults was widely held. This folk wisdom found expression in the research hypothesis that children were incompetent witnesses. Early studies documented numerous errors made by children in providing testimony. [FN394] However, such research was flawed because the testimonial performance of children was not systematically compared with that of adults. [FN395] More recent research suggests that testimony by adults is also replete with errors and distortions. [FN396] For example, suggestive questioning can alter adult testimony, just as it does that of children. One study found that adults will report seeing objects at the scene of a simulated crime which were not present, but which had been suggested during questioning by the interviewer. [FN397] Thus, methodological ***94** shortcomings render early studies condemning children's testimony of dubious worth.

A resurgence of research on children's testimony occurred in the 1980s. Current research may be described as a hybrid of developmental and forensic research. Contemporary researchers strive to control confounding variables, include appropriate control groups, and enhance ecological validity. [FN398] Modern studies focus on children's memory for real-life events, the effects of stress on children's performance, suggestibility in children, children's ability to distinguish fact from fantasy, and jurors' perceptions of child witnesses.

There is no question that there are significant developmental differences between children and adults in numerous areas relevant to testimony. In addition, children are far from a homogenous group. A preschooler's rendition of an event will differ markedly from an adolescent's version. Such children are at quite different stages of development regarding cognition, memory, social skills, communicative ability, and emotional maturity. While it is clear that young children differ from older children, and that children as a group differ from adults on some dimensions of testimonial capacity, differences alone do not undermine children's ability to testify. The real question is whether these differences render children of certain ages unreliable witnesses.

Taken as a whole, the research and theory in the field of child development suggest that children, like adults, bring both strengths and weaknesses to the task of testifying. Children can demonstrate adultlike reliability when testifying about certain kinds of information, under certain conditions. [FN399] In other situations, regarding other types of information, children perform less well than adults. [FN400] To further complicate matters, there are conditions under which children perform better than adults. For example, children sometimes remember ***95** details that adults overlook. [FN401] Thus, it would be quite wrong to suggest that children are uniformly less reliable witnesses than adults.

a. Memory

Do children have a general memory deficit that renders their testimony untrustworthy? Research suggests that children possess the memory skills required to testify. [FN402] Children's memories are particularly good for events that are personally meaningful and salient. Additionally, children tend to remember the familiar better than the unfamiliar. [FN403]

One of the most stable findings of memory research is that young children spontaneously recall less information than older children and adults. [FN404] This is not to say that young children necessarily remember less, but that their developing memories are not as proficient at the complex task of free recall. [FN405] Young children have not mastered the memory strategies that older children and adults use to trigger recollection. [FN406] Therefore, when young children are asked to "tell what happened," they often provide less information than older subjects. [FN407] ***96** For example, by age three, children are quite adept at narrating autobiographical events from memory, such as eating lunch at McDonald's. [FN408] However, a three-year-old's account of the McDonald's expedition may be little more than a skeletal outline, whereas the description provided by the preschooler's big sister might be rich in detail, including the fact that sister had a large order of "fries," a "vanilla shake," and a "cheese burger." The preschooler's description of lunch provides less detail, but this fact should not be interpreted as undermining the accuracy of what the child does remember. [FN409] Research indicates that young children remember core elements of simple events with acceptable accuracy. [FN410]

Because preschool children commonly provide less information on free recall than older children, it is often necessary to ask preschoolers more questions to elicit what they know. And yet, the children who are most likely to need extensive and directed questioning are the very ones who may be most susceptible to misleading suggestion. When this Catch-22 is combined with the fact that many victims of suspected sexual abuse are subjected to a series of interviews, some of which may be conducted by poorly trained people lacking objectivity, concerns arise. This is not to say that young children who have undergone multiple interviews do not tell the truth. It is simply a recognition that developmental differences between adults and young children are sometimes relevant when considering children's testimony.

Research indicates that if questioning takes the form of concrete, understandable, and objective questions, five-year-olds tend to respond*97 as accurately as adults. [FN411] Children, like adults, are better at remembering central details than they are at remembering peripheral details, such as room decor. There is some evidence children recall actions better than objects. [FN412] Children can generally recall simple, familiar events in correct chronological order. However, children have difficulty with the chronological order of complex, unfamiliar events.

Sometimes children's difficulty remembering peripheral details and chronological order of complex events makes their descriptions of events seem inconsistent. For example, when a child describes sexual abuse to a number of successive interviewers, the child may be inconsistent about certain peripheral details. The child may also be mistaken or inconsistent about chronological ordering of events. Such inconsistency is developmentally normal in young children. Thus, it would be a mistake to question the accuracy of the child's description of essential elements of sexual abuse simply because of inconsistencies regarding peripheral details or chronological order. [FN413] What is important is consistency regarding personally significant core events, not details and sequence.

When children make memory errors, they tend to make errors of omission rather than commission. [FN414] That is, children are more likely to forget or deny information than to fabricate events that did not occur.

b. Inconsistency

Do inconsistencies in children's testimony render children unreliable? [FN415] Consistency is a critical factor in judging witness credibility. Children's reports tend to appear less consistent than those of adults. However, when children's inconsistency is properly understood, it does not necessarily undermine testimony from young witnesses.

Children have difficulty systematically evaluating their communications for possible errors, omissions, inconsistencies, or contradictions. [FN416] *98 Additionally, young children sometimes have difficulty seeing a situation from another person's perspective. [FN417] One consequence of this egocentric perspective is that, unlike adults, children may be unable to protect themselves against the appearance of inconsistency. When adults realize their messages are being misunderstood, they stop and clarify. By contrast, young children, who have difficulty assuming another person's perspective, do not perceive that they are being misunderstood. Thus, they do not realize the need to stop and clarify. Children's normal developmental limitations in monitoring communications make it difficult for them to recognize and correct inconsistencies in their descriptions of events. Such limitations should not be misinterpreted as indicators of poor memory, or worse.

Apparent contradictions or unbelievable comments often result from children's immature reasoning skills. For example, at times preschoolers reason from one thought to the next without logically connecting ideas. During early stages of causal reasoning, children generalize in illogical ways as they make up explanations for what they observe around them. Before such misperceptions are corrected by parents and teachers, children may baffle adults who know little about child development. In an oft-cited example, a preschooler insisted that a dog could cause a train to appear. [FN418] How? By barking. The youngster reasoned that the train went by because the dog barked. The child

did not comprehend what seems self-evident to adults: The dog barked because the train went by. The child was mistaken about the causal relationship between train and dog, but observe that the boy was correct about the essential facts. If the boy was called as a witness in a case where it was relevant to prove that a train went by or that a dog barked, the child's mistaken (but developmentally understandable) reasoning about causation should not serve to disqualify him as a witness. The youngster is capable of describing the train and the dog. Illogical comments from children utilizing immature reasoning can be understood with reference to the literature on child development.

A jury's assessment of a child's credibility can also be influenced by the phrasing of questions during direct and cross-examination. Children are often asked questions about abstract concepts they do not understand, in language they do not comprehend. Children's responses are frequently misinterpreted as inconsistencies, or even recantations,*99 instead of misunderstandings. For example, suppose a young witness is developmentally capable of understanding simple sentences six to eight words in length. The child is asked a complex question thirty words long, containing double negatives and embedded clauses. The youngster may respond to a part of the question that the child understood, and ignore other parts that are crucial to adult understanding of the question and answer. Of course, the problem here lies with the question, not with the child. Yet, adults probably will not realize that the question is developmentally inappropriate, and may conclude, incorrectly, that the child is a poor witness.

Young children often fail to monitor how well they understand messages from adults. [FN419] This developmentally understandable shortcoming can undermine children's performance on the witness stand. In one study, children were given instructions that omitted vital information. Nevertheless, six-year-olds claimed to understand the instructions. Eight-year-olds, on the other hand, were likely to ask for more information. The older children recognized that they did not understand. [FN420] In another study, children were told that they could ask clarifying questions. Young children almost never spontaneously questioned the speaker or requested more information, even when the information they were receiving was completely uninformative. [FN421]

These studies indicate that children have difficulty assessing what they do not know. [FN422] This lack of understanding limits children's ability to request clarification from adults, and may lead children to attempt to answer questions they do not comprehend. Unfortunately, young children rarely announce that they do not understand, and, as a consequence, children often seem less capable on the stand than they really are.

In one further example, consider how often young children who have not learned to count are asked how many times something happened. A child may be capable of saying that something happened a lot or a little, or once or many times, but may be developmentally incapable of stating that it happened five times or ten. Unfortunately, because*100 the child realizes that he must speak, and that a room full of adults is waiting for his answer, he may attempt to answer the question even though he does not understand it. The youngster may say "five"-- not because that is how many times it happened, but because he is familiar with the number five, and feels compelled to say something. His answer could as well have been "five thousand." The child's misleading and irrelevant response was elicited because of the pressure to answer, and because young children do not understand that they can ask for clarification when they do not understand. [FN423] This phenomenon can result in inconsistent or contradictory testimony. Adults must take the responsibility to ask questions children can understand.

c. Suggestibility

Are children so suggestible that their testimony should be rejected? There is legitimate concern that children's reports of sexual abuse become a blend of their initial memory plus information suggested by interviewers, parents, or attorneys. But adults are suggestible too, and modern research is rapidly exploding the old bromide that children are always highly suggestible.

Defense counsel sometimes hopes to capitalize on the possibility of suggestibility by arguing that a person who

interviewed a child employed leading questions that may have misled the child into inaccurate or false allegations of abuse. In some cases the argument has merit. It is important to point out, however, that the developmental limitations of young children sometimes necessitates careful use of leading and specific questions. Put another way, from a developmental perspective, it is sometimes necessary and proper to use questioning techniques with children that might be inappropriate with older children and adults. Furthermore, research discloses that young children are more resistant to suggestive questioning than many adults believe. [FN424]

Psychological studies of suggestibility are often structured as follows. Subjects are exposed to an original event. An objective record is made of the event. After some period of time, subjects are interviewed about the original event. During the interview, subjects are asked misleading and suggestive questions. By contrasting a subject's performance during the interview with the record of the original event, researchers can evaluate the influence of suggestive questioning.

***101** Studies in this mold vary greatly in their method of introducing suggestive and misleading information, retention interval, type of stimuli, and relevance to real life events such as crimes. Consequently, results are difficult to compare and integrate. Overall, studies have not converged on a simple relationship between age and suggestibility. [FN425] When and if a person is suggestible depends on cognitive, social, and situational factors such as the level of interest and salience of the event, and the emotional state and knowledge base of the subject, as well as the status of the person suggesting the information.

Researchers consistently find that children ten to eleven years of age are no more suggestible than adults. [FN426] Four- to nine-year-olds are sometimes more suggestible than older children. Young children may be particularly subject to the influence of suggestion regarding peripheral details and unfamiliar events. [FN427] Resistance to suggestion appears to be highest concerning the core aspects of familiar events.

Research findings regarding suggestibility of four- to nine-year-old children are not entirely consistent, and methodological limitations of some studies make findings difficult to interpret. For example, a number of studies examine children's memories for unfamiliar, innocuous stimuli (words, pictures, stories, or videotapes), following a single exposure under nonstressful conditions. Questions asked during such experiments are rarely important to the child's life. Nor do the questions relate to physical acts perpetrated upon the children. Goodman and Hegelson caution against generalizing from such studies to children's suggestibility regarding real life events such as sexual abuse. [FN428]

In recent years, studies have been designed which have greater ecological validity in that they more closely approximate aspects of children's experiences during real-life events. For example, researchers have studied children's memories for stressful events such as a visit to the doctor for an injection or to have blood drawn. [FN429] Researchers have also staged live events that have some similarity to criminal situations. In one study, for example, children were taken to an unfamiliar***102** room, where they played games with a stranger. [FN430] After playing games, children as young as three years of age were asked questions. Some of the questions were leading and suggestive. For example, children were asked, "He took your clothes off, didn't he?"; "He put something in your mouth, isn't that right?"; and "Did he kiss you?" [FN431] Results of this study indicate that the memories of three- to six-year-olds were not affected by the stress of the event. Moreover, four- to seven-year-olds were not more easily misled into making false reports of abuse than older children. Four- to seven-year-olds continued to be resistant to misleading suggestions a year later. While three-year-olds were more suggestible than older children, even three-year-olds were able to resist suggestive questioning most of the time.

There is some evidence to suggest that young children are susceptible to social pressures to say what they think adults want to hear in the context of an interview. [FN432] In one study, when a child rather than an adult authority

figure presented misleading information, the effect of misleading questions decreased, although it did not disappear. [FN433] This study suggests that at least some of the suggestibility found in young children is due to demand characteristics. Interestingly, some studies suggest that although children may go along with certain suggestions during an interview, their original memory for the event is not actually changed by the suggested information. An accurate memory can be elicited at a later time. [FN434]

In summary, there is little evidence that children four years of age and over are more suggestible than adults regarding central aspects of events that are salient and meaningful, well understood, and directly experienced. [FN435] In particular, attempts to lead four- to seven-year-old children into making false reports of abuse have been largely unsuccessful. [FN436]

It is important to keep in mind that the studies discussed above do not examine children's suggestibility or memory with regard to traumatic*103 events. Children may recall traumatic events with more or less accuracy than they recall events involving mild discomfort, such as doctor visits. Moreover, some child abuse victims suffer from psychiatric disorders such as post-traumatic stress disorder or depression which may either enhance or distort memory for an event. Studies of suggestibility in psychologically disturbed children are not yet available.

d. Differentiating Fact from Fantasy

Are children so prone to confuse fantasy and reality that their testimony is unreliable? Developmental theorists, including Freud [FN437] and Piaget, [FN438] have suggested that children routinely confuse reality with fantasy. Researchers have not found evidence to support Freud's notion of infantile hallucination, nor does experimental work bear out Piaget's belief that children are so egocentric that they routinely fail to distinguish reality from fantasy. [FN439] Thus, it would be misleading to say that children cannot distinguish what is real from what is imagined. Modern research suggests that children are less likely than adults to differentiate fact from fantasy in some situations, but not others. [FN440]

While children use pretend in their play, they seem to know when they are pretending. During play tea parties, for example, preschoolers take pretend sips from empty cups, but they do not really attempt to eat plastic cookies. [FN441] It is obvious that children do not live entirely in a fantasy world, yet fantasy and pretend are a part of their world. Rather than absorbing the adult view of reality, preschoolers spontaneously make up explanations for what they observe around them as they construct their own view of how the world operates. Feedback from adults serves to correct any misunderstandings children develop.

Turning to another aspect of the distinction between fact and fantasy, researchers have examined children's and adult's ability to discriminate between fresh memories of an event itself, memories of **104 one's later thoughts about the event, and memories of what other people have said about the event (perhaps as witnesses discuss the event with each other or their parents). Johnson and her colleagues [FN442] report that young children (i.e., six-year-olds) show a deficit in some of these areas, but not in others.

In Johnson's studies, children were no more confused than adults when asked to discriminate what they saw someone else do or say from what they themselves did or said. Children were not more likely than adults to confuse memories of what two other people did or said. In other words, children accurately remembered who said and did what. Eight- through ten-year-olds made no more errors than adults in estimating the number of times they actually saw something, as compared to the number of times they only imagined seeing it. [FN443] However, six-year-olds had more difficulty than adults in discriminating memories of what they themselves had said or done from what they had only imagined themselves saying or doing. While adults also showed confusion on this latter task, children did so to a greater degree. [FN444]

Johnson notes that the relevance of these findings for children's testimony may be limited by the fact that the stimuli used in the experiments were artificial and were not embedded in any context that was meaningful to children's lives. In contrast, crimes are likely to be compelling, vivid, and important. Children in research studies, who are instructed to imagine an event or object, may be performing different mental processes than children spontaneously fantasizing about an event.

At this point, there is insufficient scientific evidence to support an argument that children's testimony should be excluded because children cannot differentiate fact from fantasy.

e. Understanding Time

Should a child's inability to locate an event in time render the child's testimony suspect? The developmental answer is no. It is very difficult, if not impossible, for young children to specify the date and time of a past event, especially when the memory is embedded in a series of similar ongoing acts. Time is a very complicated, abstract concept. Infants are not born with a sense of time. They are not aware of time as an objective concept. Children continue to learn how ***105** to place events in time well into adolescence. [FN445]

Adults reason backward through time to determine approximately when something occurred. Adult reasoning is aided by knowledge of the daily and annual cycle of time. Young children have limited experience and knowledge on which to base their reconstructions of past events. Children also have limited language skills for describing the timing of events, limited number skills for estimating duration and succession, limited ability to count, and limited knowledge of the arbitrary and abstract conventional systems for measuring time, such as minutes, hours, months, and years. Until children learn the conventional systems of measuring time, adult reasoning processes about time are not available to them.

Child development researchers have been studying children's understanding of time concepts since the 1920s. The results suggest that it is not until adolescence that children fully master the concept of time. [FN446] Preschoolers are aware of the timing of their daily routines, but they tend to place events in time on the basis of their own personal experiences. As a result, they may believe that time actually goes faster when they are playing hard and slower when they are bored, or that sand falls faster through an hourglass when they are busy. Young children do not understand that there is a continual flow of time independent of their feelings and actions. For preschoolers, a long time ago can be last week or last year.

Between six to eight years of age, children begin to develop a concept of conventional systems for measuring time. Children can recite the days of the week and the seasons of the year, although this does not necessarily imply more than rote memorization. [FN447] Usually by age seven, children can match pictures of the holidays with the appropriate month. [FN448] However, it is not until age eight or nine that children can order the months accurately, and can understand that there is a constant flow of time that applies to everyone, and is independent of their own activities. [FN449] Most children learn to read the hands of the clock by second grade, but such youngsters still may not understand the relationship between clock time, calendar time, and historical time. It is not until eleven years of age that most children understand the distinction between the natural cycles (seasons, months) and arbitrary cycles (days of the week, numbering of years) of time measurement. Complete understanding of calendar and historical time is not ***106** accomplished by a majority of children until approximately sixteen years of age. [FN450]

In one study, five- and seven-year-old children were interviewed about a physical examination that occurred a week or month before. [FN451] Only eighteen percent of the children could provide information about the day on which the examination occurred (e.g., day of the week, or month; or that the examination was a week or month ago). Only seventeen percent of the five-year-olds, and thirty-three percent of the seven-year-olds, could estimate the duration of the thirty-minute examination to within fifteen minutes. Only half the children could tell whether the ex-

amination occurred during the week or on the weekend. Questions about the time and date of the examination were the most difficult of all for the children. By contrast, children were much more accurate when asked to describe the doctor, the setting, and the actions that occurred (e.g., which parts of their bodies were checked and in what manner). The results of this study high-light the fact that while young children cannot identify the exact date and time of an event, this inability has little bearing on their ability to accurately recount events they have experienced.

The fact that children have very limited ability to specify the date and time of specific acts does not imply that what they recall is any less accurate than if they could attach a date or time. Moreover, adults can often reconstruct the time and date from information provided by a child. For example, although a child's inability to tell time may preclude the child from stating what time the defendant came into the room, the youngster may remember what program was on television at the time. Equipped with this information, adults can reconstruct the time by consulting the television guide.

2. Behavioral Science Testimony Regarding Developmental Differences Between Children and Adults

When the defense seeks to undermine a child's credibility by asserting that developmental differences between children and adults render children less credible than adults, it is sometimes appropriate to admit rebuttal evidence in the form of expert testimony. [FN452] For example, the defense might argue that inconsistencies in a young child's description of abuse mean the child is lying. As jurors evaluate the child's impeached credibility, they could benefit from expert testimony informing them that inconsistency is developmentally normal in ***107** young children. Such information is beyond the ken of the average juror.

The defense may attempt to convince the jury that young children are so suggestible that their testimony should be regarded with skepticism. The defense may illustrate the point during cross-examination by plying the child with suggestive questions that lead the child into providing inaccurate information. [FN453] The defense may point out that the child was interviewed numerous times, and that there was ample opportunity to plant the idea of abuse in the child's malleable young mind. [FN454] Jurors may accept the argument that young children are dangerously suggestible. Faced with such impeachment, the state has a legitimate need to rehabilitate the child. The average juror is unaware of recent psychological research indicating that young children are not always more suggestible than older children and adults. To the extent the defense asserts the contrary, expert rebuttal testimony is proper.

A final example illustrates the occasional need for expert testimony to rehabilitate children's credibility. The defense may argue that young children cannot differentiate fact from fantasy, and that the child in the case at hand lives in a fantasy world. Counsel might turn to the jury and say, "Ladies and gentleman, can you believe the testimony of this young child, who admits that she has an imaginary friend named Julius the Rabbit, and that Julius talks to her?" Fantasy plays important part in children's lives, but the professional literature indicates that even young children can distinguish real from pretend. If counsel paints an inaccurate picture of a child's ability in this regard, expert rebuttal testimony is warranted.

There is little case law regarding the type of rebuttal testimony discussed in this subsection. [FN455] However, lack of precedent should not dissuade courts from permitting expert rebuttal testimony designed ***108** to acquaint jurors with the developmental capabilities and limits of young children.

F. Behavioral Science Testimony that a Particular Child, or Sexually Abused Children as a Class, Generally Tell the Truth About Sexual Abuse

As previously observed, in child sexual abuse litigation, the child is often the state's most important witness. Thus, the child's credibility is critical. [FN456] Expert testimony in the first five categories often has the *indirect*

effect of bolstering a child's credibility. In the present category, by contrast, the expert is asked to comment *directly* on the credibility of a particular child, or on the credibility of sexually abused children as a class. [FN457]

Before turning to clinical and scientific information on children's credibility, it is useful to place the credibility issue in historical perspective. [FN458] Throughout most of the nineteenth and twentieth centuries, professionals fueled the widely held belief that children were unreliable witnesses. [FN459] One early writer asked, "When are we going to give up, in all civilized nations, listening to children in courts of law?" [FN460]

Sigmund Freud added an additional dimension to suspicion about children's credibility, especially in sexual abuse cases. [FN461] In 1896 Freud presented a paper entitled "The Aetiology of Hysteria." In this paper Freud described his seduction theory, in which he theorized that adult hysteria was related to childhood sexual trauma. [FN462] In reaching this conclusion, Freud credited as true his patients' claims of childhood sexual experience, and broached the possibility of widespread child sexual abuse. The seduction theory received a chilly reception from the psychoanalytic community, which ridiculed the idea that child sexual abuse was commonplace. Within a year, Freud withdrew the seduction theory and replaced it with the Oedipus complex. Under the Oedipal theory, Freud attributed his patients' recollections ***109** of childhood sexual abuse to fantasy rather than reality. Due to Freud's tremendous influence, children's allegations of sexual abuse were viewed with new skepticism. [FN463]

Freud's impact was far-reaching. His emphasis on sexual fantasy led many lawyers to doubt the credibility of children's allegations of abuse. Not the least among them was the brilliant legal scholar John H. Wigmore. Wigmore was persuaded that a female predilection for sexual fantasy rendered accusatory testimony from women and girls particularly suspect. In his treatise on evidence, first published in 1904, Wigmore wrote:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environments, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man....
>
> *No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*
>
> It is time that the courts awakened to the sinister possibilities of injustice that lurk in believing such a witness without careful payschiatric scrutiny. [FN464]

Like Freud, Wigmore was extremely influential. Many courts adopted Wigmore's suspicions about women and girls in sex offense cases, with the result that courts regularly subjected females to psychiatric examinations regarding credibility. [FN465] Such examinations were not imposed on victims of other crimes. Furthermore, many courts ruled that testimony from sex offense victims was so suspicious that convictions could not be based on a victim's uncorroborated testimony. [FN466] Corroboration was not required of victims of other crimes.

Fortunately, during the past thirty years, mental health professionals altered their views about the propensity of women and girls to fabricate accusations of rape and molestation. Today, Wigmore's admonition that all sex offense victims should be evaluated is flatly rejected***110** as legally [FN467] and psychologically unsound. [FN468] Unfortunately, however, the legacy of Freudian and Wigmorian thinking continues to influence the views of some people, placing child victims at a disadvantage from the outset.

1. Clinical and Scientific Information Regarding Credibility [FN469]

Three issues are addressed in this subsection. The first relates to the subjective truthfulness of children. That is, do children understand the difference between truth and falsehood, and are they capable of deliberate fabrication? When do children acquire the capacity for deliberate falsehood? Are children more likely to lie than adults? What factors influence whether children tell the truth?

Following discussion of subjective truthfulness, the focus shifts to studies of juror's assessments of the credibility of witnesses. The subsection concludes with a question: Do experts on child sexual abuse possess specialized knowledge about the credibility of sexually abused children that is not available to average jurors, and that could assist fact finders in some cases?

***111** *a. Subjective Truthfulness*

Children as young as one and one-half are capable of misstating the truth. However, deliberate lying is rare among young children. While preschool and elementary-school-aged children are capable of lying, Berliner notes that "there is no evidence that honesty increases with age.... This means that children, like adults, may lie, but that there is no need to be more concerned about lying among children." [FN470] Melton writes that " t here is in fact little correlation between age and honesty." [FN471]

While young children are able to lie, they are not very good at it. Quinn observes that "[c]urrent studies indicate that children under seven are unlikely to be successful telling a lie. By fourth and fifth grade, however, children become more proficient at telling lies." [FN472] A young child is unlikely to succeed at maintaining a conscious fabrication about sexual abuse over time. [FN473]

Situational factors influence the moral decisions of adults and children. [FN474] A child's decision to stray from the truth or engage in other improper behavior may be influenced by peer pressure, pressure from influential adults, the likelihood of detection, motive to fabricate, desire to engage in the prohibited activity, and attempts to escape blame or punishment. Every parent knows that many normal, happy three-and four-year-olds deny guilt when caught red-handed in the cookie jar.

While children are capable of deliberate falsehood, clinical experience and research disclose that children rarely fabricate false allegations of sexual abuse. [FN475] Jones and McGraw write that "from a ***112** clinical perspective, false reports of sexual abuse to children are generally considered to be an unusual occurrence." [FN476] Benedek and Schetky state that in their "experience in evaluating cases of alleged sexual abuse in children and adolescents, we have found them generally to be truthful." [FN477]

A small number of systematic studies of false allegations exist. [FN478] Jones and McGraw evaluated all cases of suspected child sexual abuse which were reported to the Denver Social Services Department during 1983. [FN479] The research disclosed that eight percent of the reports were probably fictitious. Most of the fabricated reports came from adults. Very few were generated by children. Similar figures for fabricated allegations are found in other research. Peters studied sixty-four cases, and concluded that six percent of the allegations probably were false. [FN480] Goodwin, Sahd, and Rada evaluated forty-six cases and concluded that three were probably fabricated (6.5 percent). [FN481] Horowitz and colleagues evaluated 181 cases and determined that approximately five percent of the children's reports and ten percent of other reports were untrue. [FN482] Katz and Mazur studied adult rape victims, and concluded that two percent of allegations were false. [FN483] The findings of these studies are compatible with clinical experience.***113** Deliberate false allegations of sexual abuse are rare. Among the small number of false allegations, most are made by parents, not children. [FN484]

In the context of child custody and visitation disputes, several authors report rates of fabricated sexual abuse

that are much higher than those discussed above. [FN485] For example, Green evaluated eleven children and concluded that four of the allegations were false (thirty-six percent). [FN486] Benedek and Schetky could not document abuse in ten of eighteen cases (fifty-five percent). [FN487] Commenting on these studies, Quinn observes that "these are very small clinical samples with a selective pattern of referrals." [FN488] Berliner adds that these and similar articles "describe a limited number of cases referred for evaluation.... In most of the cases described, there were multiple evaluations and conflicting opinions among professionals. Ultimately, there is no way of knowing that the authors' assessments are accurate." [FN489]

Jones and Seig studied twenty cases in which sexual abuse allegations arose in custody disputes. [FN490] They found that twenty percent of the cases probably were fictitious. [FN491] Based on this finding, the authors write:

> This figure is higher than the 5-7% range [of fabricated allegations] reported in other contexts.... Other authors have found a similarly elevated rate in custody disputes.... Thus the setting of the divorce and custody dispute does seem to raise the likelihood that clinicians will find an increased number of fictitious allegations. However, in this study nearly 3/4 (70%) were Reliable, arguing strongly against the practice of dismissing [child sexual abuse] allegations in custody disputes contexts as most likely false. [FN492]

While there is need for concern about fabricated allegations of child sexual abuse in the context of custody and visitation disputes, concern should not turn to exaggeration. Unfortunately, a number of authors appear to indulge in exaggeration. For example, Coleman writes that "a wave of false allegations, filed by persons in the midst of custody and visitation disputes, is flooding the police and the courts." [FN493]

*114 Concerned about fabricated allegations in custody cases, the federal government's National Center on Child Abuse and Neglect funded research on allegations of child sexual abuse in custody litigation. The research was conducted by the Association of Family and Conciliation Courts and the American Bar Association's National Legal Resource Center for Child Advocacy and Protection. [FN494] In summarizing the research findings, Thoennes and Pearson write:

> Some writers have suggested that the allegation of sexual abuse in divorce constitutes a major problem....
>
> However, respondents to a survey of courts around the country typically describe seeing "a small but growing number" of such charges.
>
> Interviews with court workers...confirm these views. In addition, many individuals believe that the major increase in such cases actually took place 3-5 years ago, in the early 1980's. Since that time they feel the reporting incidence has leveled off. The increased numbers earlier in the decade are largely attributed to increased attention to the problem of sexual abuse. The rise of allegations within divorces is seen as paralleling the rise in reports to protective service agencies in general. The increase in direct reports to CPS agencies has been dramatic, with a national increase of nearly 200 percent during the last decade. As one commissioner notes, "we've taught parents the warning signs of abuse, we've got to expect more reports."
>
> ....
>
> The limited information available to date suggests that in most courts approximately two percent to ten percent of all family court cases involving custody and/or visitation disputes also involve a charge of sexual abuse. Since the incidence of contested custody is estimated to be about 10 to 15 percent of divorce filings with minor-aged children, it may be more accurate to estimate that sex abuse allegations occur in the range of approximately 2 to 15 per 1000 filings.
>
> ....
>
> The number of sexual abuse charges arising during divorces and/or custody/visitation disputes is small in absolute numbers, and as a percentage of all contested cases.
>
> ....
>
> Deliberately false allegations made to influence the custody decision or to hurt an ex-spouse do happen,

but they are viewed by knowledgeable professionals*115 as rarities. [FN495]

Fabricated allegations of sexual abuse occur in custody and visitation litigation, and there is reason to proceed cautiously in such cases. [FN496] As Jones and Seig point out above, however, the higher percentage of fabricated allegations occurring in custody cases should not lead to undue skepticism about such allegations. Many are true. Furthermore, it should come as no surprise that a number of children first disclose or experience sexual abuse during the breakup of the family. [FN497] Corwin and his colleagues observe:

> There are several reasons abused children may be more likely to disclose abuse by a parent and to be believed by the other parent following separation or divorce. With the breakup of the parents comes diminished opportunity for an abusing parent to enforce secrecy as there is increased opportunity for the child to disclose abuse separately to the other parent. Decreased dependency and increased distrust between parents increases willingness to suspect child abuse by the other parent.
>
> Additionally, the losses, stresses, and overall negative impact of separation and divorce may precipitate regressive "acting out" by parents, including child sexual abuse. It is possible that the adult character traits and behavior problems frequently associated with the sexual abuse of children are more common in people whose marriages break up. Included in this list are narcissistic traits, paranoid indeation, antisocial tendencies, impulsivity, sexual difficulties, and substance abuse. It may well be that this constellation of factors is more important than false allegations in explaining the current increased numbers of such claims. Only systematic research can answer this question. [FN498]

In sum, clinical experience and systematic studies confirm that deliberately false allegations of sexual abuse are infrequent.

Because a fabricated allegation of sexual abuse can have such serious consequences, care must be taken to ferret out fabricated charges. Experienced mental health professionals possess skills which can assist in detecting fabricated and coached allegations. It must be emphasized*116 that there is no litmus test that differentiates true from false allegations. [FN499] Professional judgment turns on thorough evaluation of all relevant facts and circumstances. Medical evidence of abuse is important--sometimes dispositive-- although such proof exists in only a small percentage of cases. [FN500] In the majority of cases, the most critical evidence is the child's description of what occurred. [FN501] Thus, it is vital to assess the validity of the child's statement.

With respect to the child's description of abuse, Jones and McQuistion write:

> The statement is examined for explicit detail of an alleged sexual abuse. Younger children, particularly under the age of 5 years, are not able to relate as much detail as are older children. However, the more detail that is recalled, the more likely it is that the account is truthful, especially as it is considered unlikely that an individual child can gain such detailed knowledge unless he had personal experience of the event in question....
>
> Unique or distinguishing detail should be sought. This may be found both within the account of the sexual encounter and/or in unrelated recollections. Examples include children who describe smells and tastes associated with rectal, vaginal, or oral sex. One 4-year-old boy described a feeling of rectal stretching when being sodomized, "I felt like I wanna' go pooh pooh". Distinguishing detail may also be found in the description of the room or the clothes the child was wearing at the time. One 3-year-old girl said, "I had my panties on backwards". [FN502]

As mentioned by Jones and McQuiston, most young children lack the experience required to manufacture detailed and explicit descriptions of sexual abuse. It is difficult to imagine, for example, a four-year-old capable of inventing a detailed and anatomically accurate account of anal intercourse or ejaculation unless the child has either experienced such acts or been exposed to them. [FN503] When a child describes an event which a similarly situated child could not reasonably be expected to fabricate, the statement gains in reliability. [FN504]

*117 Courts are impressed with age-inappropriate sexual knowledge. A New York Family Court judge wrote:

> Here there is ample evidence of sexual abuse based on the explicit knowledge of the child of the sexual matters she discussed in detail. Her knowledge includes the relative size of the male organ, the manner in which manipulation results in ejaculation, the movements involved and the results of such actions. [FN505]

In a different case, the New York Court of Appeals was more than persuaded that a three-year-old had been abused. The court wrote that "[t]here was no other basis in reality...for Nicole's statements of 'white glue' or 'paste' coming from her father's genital area." [FN506] The Colorado Supreme Court wrote in a similar vein when it stated that "children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances." [FN507]

The fact that young children cannot invent detailed and anatomically accurate descriptions of sexual acts does not mean children's allegations must be accepted at face value. In rare cases deliberately false allegations are made, especially by adolescents. Furthermore, even though a particular child may be incapable of inventing the scenario described in an allegation, it is necessary to look behind the statement to determine whether an adult has planted the event in the child's mind.

The use of age-appropriate language and sentence structure increases confidence in the child's statement, [FN508] although use of adult terms should not cause one to conclude a report is false. During the course of abuse investigations, children often pick up adult terms such as molest. [FN509] When a child uses adult-like language to describe abuse, it becomes important to learn how the child described the abuse at the first disclosure. Did the child use age-appropriate language then?

It is important to note whether the child describes abuse from a child's or an adult's perspective. [FN510] A description which appears to be told from an adult perspective requires further evaluation. When a *118 child is interviewed several times, the child's account may pick up elements of adult perspective along the way. Thus, it is wise to determine how often the child has been interviewed before discounting a story that has elements of adult perspective.

As a child describes abuse, the interviewer evaluates the child's emotional response and affect, which are usually consistent with what is being described. [FN511] It is important to note, however, that some abused children describe their abuse without apparent feeling or emotion. This comes as no surprise because abused children often are asked to tell their story over and over again to a series of interviewers. By the time the youngster describes the abuse for the tenth time, the feeling that accompanied the initial disclosure may be gone. [FN512] Furthermore, Quinn notes that "children who have been severely traumatized and have symptoms of posttraumatic stress disorder may show an emotional numbness in all areas of life." [FN513]

The fact that a child's description of abuse remains consistent over time increases the likelihood the allegation is true. Consistency is another tricky issue, however. [FN514] Young children are often less consistent than older children because they are not capable of monitoring their own consistency. Older children have learned the importance of consistency, and how to monitor their communications for consistency. On the issue of consistency, Jones and McQuiston write:

> The child may have made a statement to other people before this interview. Often children talk to other children, or perhaps to neighbors, babysitters, or teachers, and the contents of their statements to these people may usefully be compared with the statement obtained from interview. The question of consistency between different statements made by a single child is more complicated than appears at first glance. There is usually, in truthful accounts, a consistency of the core elements of the child's exploitation, but there may be some

> variation in the more peripheral aspects of the child's story. Thus, the question of consistency is not an all-or-nothing matter. It may vary with the degree of personal poignancy of the particular experience for that child. Similarly,... the more violent elements of coercion and threatening behavior by ***119** the perpetrator may be very frightening for the child, and consequently these elements may be suppressed by the child for a longer period than the sexual aspects of the abuse. This may give an air of apparent inconsistency to a child's account of sexual abuse over a period of weeks or months, but running through the account will be a consistent thread. In contrast to this situation, false statements are made with monotonous consistency, and show no sign of variation over time. [FN515]

Some forms of psychiatric disturbance can lead to inconsistency. For example, a child with attention deficit disorder may be inconsistent in a number of respects. However, the fact that a young child is psychiatrically disturbed seldom leads to deliberately false allegations of abuse. [FN516]

It is important to assess whether the child or relevant adults have a motive to fabricate allegations of abuse. [FN517] It is also important to determine whether an adult who might influence a child is suffering from a mental illness that could distort the adult's perception of reality. [FN518]

Research by Faller, which is discussed in an earlier subsection, [FN519] supports the ability of professionals to detect fabricated allegations of abuse. [FN520] Faller writes that criteria such as those described above are "valid predicators of whether children have been sexually abused and should continue to be used." [FN521] No foolproof technique exists to detect fabricated charges of sexual abuse. In many cases, however, experienced professionals can uncover fabricated allegations.

b. Perceived Accuracy

A child who is consciously and accurately telling the truth may nevertheless be disbelieved by the jury. [FN522] In recent years, psychologists have begun studying factors which affect whether jurors believe witnesses. [FN523] Some studies indicate that children are viewed as less ***120** credible than adults. [FN524] However, other experiments disclose no age differences in credibility assessment. [FN525]

A number of witness characteristics may influence jurors. One important factor is the juror's perception of the witness's sincerity. Children are likely to fare quite well in this category. Many young children lack the cognitive skills needed for duplicitous responses to questions. Their testimony often has a ring of veracity. Furthermore, in sex offense litigation, jurors may believe that children cannot invent such things. Most children are liable and attractive, and many jurors are disposed toward warm feelings for children. Furthermore, most children are perceived as vulnerable and in need of protection. This is especially so with children who have been victimized.

While some attributes of child witnesses may increase their perceived credibility, others may have the opposite effect. Jurors are impressed with testimony which is consistent and certain. Testimony by children may be riddled with inconsistencies and uncertainty. A good memory for pertinent events is important. A child's memory may falter or fail. Jurors are favorably disposed toward witnesses who testify confidently and without constant assistance from counsel. Many children are hesitant on the stand. Some cannot go forward without a stream of leading questions.

***121** *c. Do Experts Possess Specialized Knowledge About Children's Credibility that Could Assist Fact Finders?*

Experts on child sexual abuse are not human lie detectors. Nor are they clairvoyant. Nothing in the literature suggests that experts can or should replace lay jurors as the ultimate arbiters of credibility. Yet, the literature suggests that on certain aspects of credibility, experts possess knowledge that could assist fact finders. For example, the clinical literature describes techniques for detecting coached statements. [FN526] Such detection techniques are unknown to average jurors. Additionally, some experts possess knowledge about the developmental capabilities and

limitations of children which could help jurors evaluate the validity of attacks on children's credibility. Thus, on some aspects of credibility, experts possess specialized knowledge that could assist the trier of fact. Whether the expert is permitted to impart that knowledge is another matter.

2. Judicial Response to Expert Testimony on Credibility

Unlike some aspects of expert testimony on child sexual abuse, courts approach unanimity when it comes to expert testimony on credibility. [FN527] The great majority of courts reject expert testimony which comments directly on the credibility of individual children [FN528] or on the ***122** credibility of sexually abused children as a class. [FN529]

Courts employ several rationales to reject expert testimony on credibility. A number of decisions hold that experts cannot discuss credibility in terms of the statistical likelihood that children tell the truth. [FN530] In *Powell v. State*, [FN531] for example, the Supreme Court of Delaware disapproved the testimony of an expert who stated that ninetynine percent of the children receiving treatment in programs where the expert worked told the truth. [FN532] The court stated that such testimony violated the rule that an "expert may not directly or indirectly express opinions concerning a particular witness' veracity or attempt to quantify the probability of truth or falsity of either the initial allegations of abuse or subsequent statements." [FN533] In an earlier decision, the Delaware Supreme Court held that an expert may not evaluate a victim's credibility in terms of statistical probability. [FN534] The court wrote that to the extent expert testimony "attempts to quantify the veracity of a particular witness or provide a statistical test for truth telling in the courtroom, it is clearly unacceptable." [FN535]

Several courts rely on state equivalents of Rules 405(a) and 608(a) of the Federal Rules of Evidence to reject expert testimony on credibility. [FN536] Rule 405(a) states that when evidence of character is admissible, proof of character "may be made by testimony as to reputation or by testimony in the form of an opinion." [FN537] Rule 608(a) provides that the credibility of a witness may be supported by testimony in the form of reputation or opinion. [FN538] Under these rules, testimony is limited***123** to general reputation for truthfulness. The witness may not delve into specific instances of truthfulness. [FN539] Thus, expert testimony that a child was truthful on a particular occasion is improper.

The Colorado courts have decided a number of cases in reliance on Rule 608(a). In *Tevlin v. People*, [FN540] a physical abuse case, an expert testified that he believed the victim when the child stated he was beaten by his father. In disapproving of this testimony, the Colorado Supreme Court wrote:

> The opinion testimony of the expert witness in this case was brought out on direct examination and was stated in the form of an opinion by the expert as to a specific instance of truthfulness, rather than referring only to character for truthfulness or untruthfulness.
>
> We conclude that the trial court erred in allowing the testimony of the expert witness stating the victim was telling the truth when he related his version of the incidents of abuse. The expert's opinion failed to refer to the witness' general character for truthfulness and instead went to the witness' truthfulness on a specific occasion.... [T]he expert's opinion was not properly admissible under [Rule] 608. [FN541]

People v. Snook [FN542] is a sex abuse case involving a ten-year-old complainant. The child testified at trial, and described how defendant touched her. Following her testimony, the state offered expert testimony that "children do not fabricate erotic experiences." [FN543] The expert had not interviewed the complainant, and confined her testimony to a statement that children as a group do not fabricate detailed allegations of sexual abuse. [FN544] The Colorado Supreme Court disapproved this testimony, writing that Rule 608(a):

> permits the credibility of a witness to be supported by opinion evidence of his character for truthfulness only after his truthful character has been attacked. Although the expert had no personal knowledge of the victim's credibility and couched her testimony in general terms, the opinion testimony necessarily refers to [the complainant'] character for truthfulness. The testimony is an expert opinion that [the complainant] is almost certainly telling the truth. In *124 fact, the jury's only conceivable use of such testimony would be as support for the complainant's truthful character.
>
> Here, the victim's character was not subject to attack at the time the expert opinion was offered and the admission of the expert opinion violated [Rule] 608(a). [FN545]

Finally, in *People v. Ross* [FN546] the Colorado Court of Appeal held that when a child's credibility is attacked, the state may offer rebuttal evidence of truthful character. The court noted that "neither a lay nor expert witness may give opinion testimony as to whether a witness is telling the truth on a specific occasion." [FN547] The Colorado decisions send the clear message that experts may not opine that particular children are believable or are telling the truth. [FN548]

Courts provide additional justifications for rejecting expert testimony on credibility. Some hold that the testimony does not assist the jury [FN549] Others believe the evidence will over-awe the jury and tempt jurors to forego independent evaluation of credibility. [FN550] Some believe the testimony invites a battle of the experts, and a trial within a trial on a collateral issue. [FN551] Others worry the testimony will waste time. [FN552] A number of decisions raise the possibility that the probative *125 worth of expert testimony on credibility may be substantially outweighed by the potential the testimony may cause unfair prejudice. [FN553] The Oregon Supreme Court did not mince words in its condemnation of credibility testimony. The court wrote: "We have said before, and we will say it again, but this time with emphasis--we really mean it--*no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists." [FN554]

At bottom, the rationale underlying rejection of expert testimony on credibility is a well-settled belief that assessment of credibility is, and must remain, the exclusive province of the jury. [FN555] The Ninth Circuit Court of Appeals quipped that "the jury is the lie detector in the courtroom." [FN556] In *Commonwealth v. Seese*, [FN557] the Pennsylvania Supreme Court articulated the prevalent judicial attitude:

> The question of whether a particular witness is testifying in a truthful manner is one that must be answered in reliance upon inferences drawn from the ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of the witness. The phenomenon of lying, and situations in which prevarications might be expected to occur, have traditionally been regarded as within the ordinary facility of jurors to assess. For this reason, the question of a witness' credibility has routinely been regarded as a decision reserved exclusively for the jury.
>
> It is an encroachment upon the province of the jury to permit admission of expert testimony on the issue of a witness' credibility. [FN558]

Indeed, the Pennsylvania Supreme Court believes so strongly that credibility is for the jury alone that in *Commonwealth v. Davis* [FN559] it held that a defense attorney provided ineffective assistance of counsel when he failed to object to expert testimony on credibility.

Perhaps the most notable exception to the nearly unanimous view *126 that experts may not testify directly on credibility is the Hawaii Supreme Court's 1982 decision in *State v. Kim*. [FN560] In *Kim* the credibility of the thirteen-year-old incest victim was impeached during crossexamination. Following impeachment, the trial court approved testimony from a child psychiatrist that the doctor found the victim's account believable. The Hawaii Supreme Court affirmed, reasoning that such testimony could assist the jury in an area where it might be difficult for jurors to evaluate credibility. The court was persuaded that the average juror does not possess an adequate foundation for assessing the credibility of young sex offense victims, and that properly qualified experts possess special

knowledge on assessment of credibility that can assist the jury.

In 1988 the Hawaii Supreme Court revisited *Kim* and declined to overrule it. In *State v. Castro*, [FN561] the court held that expert testimony ***127** regarding the credibility of an adult was inadmissible. In some child sexual abuse cases, however, the court remains convinced that expert testimony assists jurors. The court limited such testimony to the "rare case where the common experience of the jury is not likely to suffice as a basis for assessment of credibility." [FN562]

3. A Limited Role for Expert Testimony on Credibility?

It is appropriate to prohibit expert testimony that a child told the truth on a particular occasion. There is considerable intuitive appeal to the notion that jurors defer too quickly to expert assessment of credibility. Furthermore, while qualified experts possess specialized knowledge regarding certain aspects of credibility, expert capacity to detect lying and coaching is too limited to justify admission of generalized credibility testimony.

While generalized credibility testimony is properly excluded, circumstances exist where narrowly tailored expert testimony may be proper to rebut certain attacks on credibility. For example, if the defense asserts or intimates strongly that children as a group lie about sexual abuse, it seems fair to permit rebuttal expert testimony. Such testimony could draw from the clinical and scientific literature for the conclusion that fabricated allegations of sexual abuse are rare. Such testimony should be limited to an opinion that deliberately false allegations are rare. The opinion should not be couched in terms of the percentage of children who tell the truth. Such quantification of credibility runs too high a risk of misleading or confusing the jury.

The expert testimony discussed above does not run afoul of Federal Rules of Evidence 405(a) or 608(a). The contemplated testimony is not character evidence as contemplated by those rules. Thus, the testimony need not be confined to generalized reputation or opinion testimony.

It may occasionally be proper to admit narrowly tailored expert testimony regarding credibility in juvenile court protective proceedings and in child custody and visitation cases. There is no jury in such litigation. Thus, the concern about jury confusion is eliminated.

G. Expert Testimony Identifying the Perpetrator

This subsection is short, and for good reason. Nothing in the professional literature suggests that experts on child sexual abuse possess special knowledge or expertise that allows them to identify the perpetrator of sexual abuse. In the few cases that discuss such expert testimony,***128** courts quite properly reject it. [FN563]

H. Behavioral Science Testimony Describing the Profile of Persons who Abuse Children

The first seven subsections focused on the child. This subsection shifts the focus to the alleged perpetrator. The clinical and scientific material discusses current knowledge about perpetrators of sex offenses. The legal analysis concentrates on cases where prosecutors and defendants sought to establish whether or not defendants matched a profile of the type of person who sexually abuses children.

1. Clinical and Scientific Information

Sex crimes are a major social problem. The emotional costs of such crimes are great. The short-and long-term

psychological impact on the victim has been documented earlier in this Article. [FN564] The emotional impact on the perpetrator's family has received little study, although it seems clear that the impact is significant. Financial costs for victims and their families are also substantial. Victims may need medical care and long-term psychological services, both of which are expensive. Society bears the cost of the criminal justice system, including investigation, trial, and incarceration of perpetrators.

Until two decades ago, sex offenders were under the exclusive domain of the criminal justice system. Behavioral and social scientists rarely involved themselves in study of offenders. The reason for this lack of interest in offenders may be related to several factors, such as disdain for offenders, discomfort in studying sexual behavior, and the then existing lack of specific treatment strategies for offenders. Early information on sex offenders resulted from anecdotal data. [FN565] Studies based on anecdotal data were problematic, however, because they relied on the self-reports of incarcerated offenders. Such reports could be seen as self-serving and unreliable. [FN566]

***129** *a. Defining and Describing Paraphilia*

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* [FN567] is recognized as the authoritative guide to psychiatric diagnosis. The Manual defines paraphilia as characterized by repetitive or preferred sexual fantasies or acts involving non-human objects, non-consenting partners, or the suffering or humiliation of one's partner or oneself. [FN568] The paraphilia include: exhibitionism (arousal to the exposure of one's genitals to unsuspecting strangers); fetishism (arousal to inanimate or "part" objects, such as stockings, shoes, or boots); frotteurism (arousal to the touching and rubbing of a non-consenting person); pedophilia (arousal to sexual activity with a prepubescent child); voyeurism; sexual sadism; sexual masochism; and transvestism. [FN569] With the exception of sexual masochism, the majority of individuals with paraphilia are male. For example, among reported cases of sexual abuse, ninety percent of the offenders are men. [FN570]

The majority of individuals who seek treatment for paraphilia are pressured to do so by the criminal justice system. Because only a percentage of paraphiliacs encounter the justice system, there is little data on the actual prevalence of these disorders. Furthermore, the fact that most paraphiliacs are ordered into treatment compounds research problems. Individuals involved with the criminal justice system may have reason to be less than forthcoming about their sexual history.

In a study designed to overcome the research barriers described above, Abel and his colleagues [FN571] conducted structured clinical interviews with 561 paraphiliacs regarding demographic characteristics, frequency and variety of deviant sexual acts, and number and characteristics of victims. This study is unique in that all the subjects were voluntary. That is, subjects were not under court order to receive an evaluation or treatment. All subjects were instructed to withhold the specific details of any sex crimes (i.e., victim name, date, and place of the crime). Each subject was assigned an identification number and ***130** all information was kept in charts coded by the identification number. No names were placed on any files. Finally, to further insure confidentiality of data, the investigators obtained a certificate of confidentiality from the Secretary of Health and Human Services which provided that no federal, state, or local authorities could compel the investigators to reveal the identity of the subjects. [FN572] These steps were taken to assist in obtaining accurate information.

Subject characteristics were as follows: The age range was from thirteen to seventy-six, with the mean age at 31.5 years. Nearly half the subjects were single (47.6 percent). Approximately thirty percent were married (29.2 percent). Of the remainder, 7.5 percent were divorced, 9.5 percent were separated, 1.4 percent were remarried, and 0.4 percent were widowed.

Many of the subjects were well educated, with forty percent finishing at least one year of college. This finding is contrary to the stereotype that paraphiliacs lack education. Contrary to another stereotype, 64.6 percent of the sub-

jects were employed. The subjects came from a broad spectrum of socioeconomic levels, with 22.5 percent earning over $25,000 per year. Religious orientations varied. In sum, the paraphiliacs in this study were a very heterogenous group.

The study evaluated how often subjects engaged in specific paraphiliac acts. The acts occurring at the highest frequencies were: masochism (mean number of acts per subject 1,139.2); frottage (mean number of acts 849.5); exhibitionism (mean number of acts 504.9); and voyeurism (mean number of acts 469.2).

Pedophilia (child molestation) occurred from the rate of 23.2 mean number of acts for men involved with female children unrelated to them to 281.7 mean number of acts per offender for men who were involved with male children unrelated to them. For pedophilic incest, mean number of acts involving female children were 81.3 compared to 62.3 for male children. The mean number of rapes per rapist was 7.2.

Previous psychiatric literature suggested that paraphiliacs participated in only one type of deviant sexual behavior. Research by Abel and his colleagues [FN573] casts doubt on this conclusion. The researchers found that the average number of paraphilia per subject was in the range of three to five. Of the 159 men referred because of pedophilic incest with a female victim, forty-nine percent also had the paraphilia of non-incestuous pedophilia (female victim). That is, forty-nine percent of the incest offenders against females were also aroused by female children unrelated to them. Of the 142 exhibitionists seen in the *131 study, forty-six percent also had the diagnosis of female non-incestuous pedophilia.

These findings are of significance in forming clinical judgments regarding paraphiliacs. First, sex offenders find it difficult to disclose the extent of their deviant sexual behavior. Consequently, when mandated to receive an evaluation, it is highly likely that offenders attempt to conceal the true nature and extent of their deviant sexual interests. When sex offenders are guaranteed confidentiality regarding past offenses, the likelihood of disclosure is increased. Second, some individuals appearing before the court with "minor" sexual offenses such as voyeurism or frottage may also have, or be developing, other, more serious, paraphilia.

A further issue warranting attention and concern is sexual crimes committed by juveniles. Abel, Mittelman, and Becker studied 411 adult sexual offenders and found that fifty-eight percent of the subjects had onset of deviant sexual behavior during adolescence. [FN574] Research indicates that twenty percent of rapes and forty percent of child sexual abuse are perpetrated by adolescents. [FN575]

Two recent studies describe populations of adolescent sexual offenders. Fehrenbach and colleagues, reporting on a sample of 305 adolescent sexual offenders, found that more than sixty percent of the adolescents had sexually victimized a child younger than twelve. [FN576] Becker and her colleagues reported that sixty-one percent of a sample of eighty adolescent sexual offenders had engaged in sexual behavior with children, the majority of whom were less than eight years of age. [FN577] Twenty-one of the subjects were rapists, having committed a total of forty-two rapes.

Unfortunately, sexual crimes committed by juveniles are often described as innocent sex play and experimentation, or as normal aggressiveness in sexually maturing adolescents. Recent research suggests that sex offenses by adolescents are anything but innocent, non-coercive sex play. Any juvenile who engages in age-inappropriate or coercive sexual acts should receive a thorough assessment to determine whether treatment is indicated and what form of treatment is warranted.

*132 *b. Etiological Theories of Paraphilia*

Why do people become paraphiliacs? On this question Berlin writes:

> Perhaps the first point that ought to be made in discussing why persons experience particular types of sexual desires should be to emphasize that they do not do so as a consequence of a voluntary decision.... Men who are sexually attracted to children are not this way because they wanted to be so. Rather, in growing up they discovered that this was the nature of their sexual orientation. Making such a discovery about oneself in our society can lead to conflict, anguish, and difficulty. Stating that such persons are this way because they are bad and that we know they are bad because they are this way simply attaches a label, which then masquerades as an explanation. [FN578]

Numerous theories have been proposed to explain development of paraphilia. Biological theories focus on the role of androgens, principally testosterone in male sexual behavior. [FN579] Other biologic abnormalities which have been reported in a sex offender population include chromosomal disorder and cortical atrophy. [FN580] Studies investigating the role of biological factors have yielded equivocal results. Further research is needed in this area.

Psychoanalytic theory views paraphilia as expressions of unresolved problems in childhood development. [FN581] Some psychoanalytic theories suggest that a paraphilia represents and attempt by an individual to recreate and master early childhood punishment or humiliation. [FN582]

A number of researchers employ social learning theory to explain paraphilia. [FN583] Under this approach, the development and maintenance of paraphilia is attributed to the influence of a particular social learning context. [FN584]

Laws and Marshall propose a conditioning theory of the etiology ***133** and maintenance of deviant sexual preference and behavior. [FN585] Under this model, "deviant sexual preferences and cognitions are acquired by the same mechanisms by which other persons learn more conventionally accepted modes of sexual expression." [FN586]

c. Psychological Evaluation of Sexual Offenders

Numberous methods of psychological assessment are used to evaluate sex offenders. [FN587] It is important to emphasize, however, that there is *no* psychological test or combination of tests that can determine whether a person has engaged or will engage in deviant sexual activity. Psychological tests and instruments are useful aids to diagnosis and treatment, but they cannot be used to determine whether an act occurred.

Assessment batteries given to sex offenders often include: (1) a clinical interview; (2) offense-specific tests (i.e., Sexual Interest Cardsort and/or Cognitions Scale); (3) personality tests (i.e., Minnesota Multiphasic Personality Inventory (MMPI)); (4) projective tests (Rorschach, Thematic Apperception Test (TAT)). Assessment may also include a penile plethysmograph evaluation, during which the offender is presented deviant and non-deviant sexual stimuli while his erection response is monitored using a penile transducer. [FN588] Assessment of the individual's sex knowledge and social-interpersonal skills may also be conducted.

The clinical interview is one of the more popular methods for arriving at a diagnosis. A major problem in relying solely on the clinical interview is that the offender may minimize or deny the deviant behavior.

The MMPI has been utilized extensively as an assessment instrument. Levin and Stava reviewed thirty-six studies that used the ***134** MMPI with sex offenders. [FN589] They found methodological problems in most of the studies, and concluded that "in general, negative or inconsistent findings outweigh those of a positive nature." [FN590] Given that sex offenders are a heterogenous group, it is understandable that research findings have been equivocal.

Studies evaluating the social skills of child molesters and rapists in comparison to non-sex offenders have, on

the whole, found sex offenders to be deficient in social skills. [FN591]

Abel and his colleagues found that a Cognition Scale was successful in distinguishing a group of child molesters who voluntarily presented for treatment. [FN592] Child molesters who admitted their acts and sought treatment differed from non-sex offenders in their beliefs about the appropriateness of sexual contact with children.

Direct assessment of sexual arousal in the male via erection measurement appears to be the most reliable index of sexual arousal. However, this form of assessment is not without problems. [FN593] Penile ***135** response is subject to voluntary control. Obviously, the possibility of "faking" must be taken into account during assessment. Murphy and Barbaree provide an extensive review and critique of studies employing erection measures with offender groups and normals. [FN594] They write that " t he currently available evidence on validity and reliability does not provide strong support for the use of this procedure with populations where there are questions regarding whether the individual has engaged in deviant behavior." [FN595]

In summary, psychological tests are useful tools in the clinical assessment of individuals who acknowledge their behavior and seek treatment. When working with individuals who deny deviant behavior, however, all available psychological tests are subject to "faking" and concealment. There is no psychological litmus test to detect sexual deviancy.

d. Treatment

Historically, individuals who engaged in sexual relations with minors were incarcerated. Incarceration serves the dual purposes of preventing sex crimes outside the prison as long as the individual remains incarcerated, and punishing the abuser. No studies indicate that incarceration is effective in preventing sex crimes when the perpetrator is released from prison.

During the past two decades, numerous attempts have been made to provide treatment for individuals with unconventional sexual interest patterns. The therapy modalities that have been employed can be categorized as: (a) organic; (b) psychodynamic; (c) family therapy; and (d) behavioral.

Early treatment literature consisted of case reports and uncontrolled studies. [FN596] The studies were methodologically unsophisticated, ***136** and results were often difficult to interpret. Some recent treatment research is methodologically rigorous, and lends itself to replication.

Organic treatments have focused on the reduction of sexual drive by using antiandrogens to block or decrease the level of circulatory androgens. The antiandrogenic medications which have been used most extensively include medroxyprogesterone acetate (MPA) [FN597] and cyproterone acetate (CPA). [FN598] MPA appears to block testosterone synthesis, whereas CPA blocks central and peripheral androgen receptors. These medications act to decrease libido as opposed to directing sex drive toward appropriate adult partners. These medications have the best outcome when used by individuals who acknowledge their deviant sexual behavior and who also voluntarily participate in individual or group therapy.

Another organic method, surgical castration, which involves surgical removal of the testicles, has been used extensively as a treatment for sex offenders in Europe. [FN599] However, studies suggest that this is not an effective means of eliminating deviant behavior because almost one-third of castrated men are still able to engage in intercourse. [FN600]

Psychoanalysis has been employed in the treatment of paraphilia. Measuring the effectiveness of this form of treatment is complicated since there are no common standards of measurement. Psychoanalysis has been reported to

have disappointing results. [FN601]

Family therapy has been utilized with mixed results in treatment of incest offenders. [FN602] When the incest offender has a pedophilic arousal pattern, the major goal should be to teach arousal control. If the offender does not receive such specific treatment it would not be unusual for family therapy to fail. Family therapy is an appropriate adjunct to either specific individual or group therapy for sex offenders.

A variety of behavior therapies have been utilized extensively in the treatment of sex offenders. [FN603] These therapies focus on: (1) teaching*137 the individual control over inappropriate arousal; (2) confronting values and beliefs which support deviant sexual behavior; (3) identifying stimuli which serve to disinhibit control, such as alcohol abuse and stressful life events; (4) providing sex education; (5) teaching social competence; and (6) facilitating arousal to consensual peer partners. [FN604]

Abel, Mittelman, Becker, Rathner, and Rouleau report on the effectiveness of a multi-component cognitive-behavioral treatment program for pedophiles seen as outpatients. [FN605] One hundred and ninetytwo adult pedophiles entered a treatment program which consisted of thirty ninety-minute sessions, held weekly in a group format. Therapy consisted of six major components: (1) satiation; (2) covert sensitization to decrease deviant arousal; (3) cognitive restructuring; [FN606] (4) social skills training; (5) assertive skills training; and (6) sex education and sexual values clarification.

The study identified factors associated with successful treatment, treatment drop-outs, and recidivism. Of the 192 pedophiles that entered treatment, 65.1 percent completed the program. Factors predictive of treatment dropout included: (1) a diagnosis of antisocial personality disorder; (2) amount of pressure to participate (the more pressure the offender was under, the greater the likelihood that he would drop out); and (3) the lack of discrimination in the choice of sexual victim or paraphiliac act (offenders who had committed sexual acts against both males and females and children and/or adolescents were more likely to drop out).

Of the ninety-eight offenders who presented for a one-year followup, twelve had re-offended. Factors associated with recidivism included: (1) marital status (those offenders who were single or divorced were more likely to re-offend); (2) those who re-offended were less likely to endorse the goals of the treatment program (which included decreasing pedophilic behavior); and (3) re-offenders were more likely to have committed sexual crimes against both males and females, and against both children and adolescents.

The findings of this study aid clinicians in identifying sex offenders who are likely to drop out of treatment. Efforts can be made to help such clients remain in therapy. In addition, knowing which clients are *138 more likely to re-offend alerts clinicians to clients in need of more extensive supervision.

Quinsey comments on studies of behavioral treatment. "Taken as a whole, these treatment studies provide grounds for cautious optimism. Practically, they suggest that brief focused treatments can be effective, particularly when combined with continuing community interventions. Thus for child molesters who have high densities of offending, such interventions appear cost effective and socially beneficial." [FN607]

While specific treatment for sex offenders, which addresses their inappropriate sexual arousal, has been demonstrated to be effective, further research is needed. Furthermore, treatment outcome studies must include long-term follow-up to evaluate whether treatment goals are maintained, and what factors contribute to relapse prevention in different categories of offenders.

Regardless of the theory of treatment, success is unlikely when the thereapist or treatment program lacks spe-

cialized skill and experience. The following factors can be employed as guidelines in selecting a treatment agent:

1. Is the treatment agent a recognized specialist in treatment of sex offenders?
2. Does the treatment agent have extensive experience in treating sexual offenders?
3. Does the treatment agent have specialized experience in treating an offender with the type of paraphilia with which the client presents?
4. How many clients has the treatment agent treated who present with the type of paraphilia(s) the client has?
5. What form of assessment has the treatment agent utilized to arrive at the need for treatment?
6. What does the treatment agent feel are the specific treatment needs and issues? The treatment agent should be able to explain precisely what will be addressed in treatment.
7. How will the treatment agent assess treatment progress? What are the pre-treatment and post-treatment assessment measures to be utilized? Are the measures empirically grounded?
8. How many clients has the agent successfully treated and what factors are associated with relapse?
9. What is the procedure utilized for follow-up?
10. Is the treatment cost effective?

While significant advances have been made in the assessment and ***139** treatment of sex offenders, much remains to be done. The field lacks an empirically tested model to explain why some people develop paraphilia and commit sexual crimes. Also lacking is a reliable and valid typology of subtypes of offenders.

In conclusion, sex offender specialists can be of assistance to the legal system in a number of ways: (1) to evaluate whether the offender understands the seriousness and inappropriateness of the behavior; (2) to evaluate the treatment needs of offenders; and (3) to recommend and implement specific treatment procedures.

2. Behavioral Science Testimony Regarding Offender Characteristics or Profiles

In a small number of reported decisions dealing with physical and sexual abuse, the prosecution offered to prove that defendant matched a psychological profile of persons who abuse children. In another group of decisions, the defense sought to establish innocence through evidence that defendant was not similar to the "typical" child abuser. These decisions are discussed below.

a. Physical Abuse Cases

While the focus of this Article is on sexual abuse, it is instructive to review cases in which psychological profile evidence is offered to prove or disprove guilt of physical abuse. Psychological research discloses that a number of parents who physically abuse their children share certain character traits. In *State v. Loebach*, [FN608] a child abuse expert testified that " a busing parents frequently experience role reversal and often expect their children to care for them.... They often exhibit ... characteristics such as low empathy, a short fuse, ... strict authoritarianism, uncommunicativeness, low self-esteem, isolation and lack of trust." [FN609]

In addition to the traits described above, many physically abusive parents were physically or sexually abused by their own parents. [FN610] Adults possessing the foregoing traits may be at increased risk of abusing their children. The phrase "battering parent syndrome" was coined to describe the constellation of characteristics observed in some abusive parents.

In the legal context, when an individual charged with physical abuse demonstrates character traits found in the battering parent syndrome, arguably there is an increased likelihood that the person committed***140** the alleged abuse. [FN611]

Prosecutors have occasionally sought admission of testimony designed to establish that a defendant's personality fit the battering parent syndrome. [FN612] The purpose of such evidence is to convince the trier of fact that because the defendant fits the profile of a battering parent, the defendant is probably guilty.

Courts have refused to admit evidence of battering parent syndrome because such proof contravenes the rule against character evidence, is highly prejudicial, and is of marginal relevance. [FN613] An occasional decision suggests that if further research establishes the validity of the battering parent syndrome, such evidence may become admissible. [FN614]

Decisions rejecting the battering parent syndrome are correct. A cardinal principle of American law holds that evidence of a person's character generally is not admissible to prove that the person acted in conformity therewith on a particular occasion. [FN615] Teitlbaum and Hertz say it well when they remark:

> [The law] makes inadmissible, with certain exceptions, evidence relevant on the following theory: Defendant committed a wrong in the past; defendant therefore has a propensity or a character trait for committing wrongful acts; therefore defendant is more likely to have engaged in the act for which he is on trial than is someone not known to have this character trait. [FN616]

This maxim finds expression in Rule 404(a) of the Federal Rules of Evidence, which states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." [FN617]

*141 Proof of battering parent syndrome violates Rule 404(a) because the syndrome draws its evidentiary force from the chain of inferences forbidden by the Rule. The syndrome rests on the following logic: (1) People who physically abuse children possess certain character traits; (2) Defendant possesses such traits, and consequently defendant has a propensity or a character trait for child abuse; (3) Therefore, defendant probably acted in conformity with character on the occasion in question, and committed the charged abuse. This is character evidence, and it is properly excluded when offered by the state to prove guilt.

McCord employs the term "group' character evidence" to describe this type of evidence. [FN618] He writes:

> [T]his type of testimony is not immediately recognizable as character testimony.
>
> Traditionally character testimony attempts to prove that because the *defendant* acted in a particular way in the past, he is likely to have acted the same way with respect to the crime charged. "Group" character evidence, by contrast, attempts to prove that because *other persons* have acted in certain ways in the past, a defendant who shares common characteristics with those persons is likely to have acted in the same way with respect to the crime charged. A moment's reflection on these categories of evidence reveals that "group" character evidence is objectionable for the same reason as is traditional character evidence: probative value depends upon the jury drawing the forbidden inference that the defendant has a propensity to commit the crime with which he is charged. [FN619]

When battering parent syndrome is offered by the state to prove guilt, it is properly excluded as inadmissible character evidence. Unlike the prosecution, however, the defendant is permitted to offer character evidence to establish innocence. [FN620] Rule 404(a)(1) of the Federal Rules of Evidence permits " e vidence of a pertinent trait of character offered by an accused...." Theoretically, a defendant charged with physical abuse could offer proof that he or she does not fit the battering parent profile. If the defense offers such evidence, however, the door opens for the prosecution to offer rebutting character evidence. [FN621]

In *State v. Conlogue*, [FN622] the defendant was charged with physical abuse. He sought to exculpate himself by proving that the victim's mother, with whom defendant lived, committed the assault. Defendant sought to support

this defense with proof that the mother had the *142 characteristics of a battering parent. The trial court excluded the evidence on the ground that it was inadmissible character evidence. The Maine Supreme Judicial Court vacated the lower court's decision, ruling that defendant had a right to offer evidence casting blame elsewhere, and that the proffered evidence had that effect. In a dissenting opinion, Justice Scolnik agreed with the trial judge that defendant's evidence was inadmissible character evidence. [FN623]

Regardless of which party offers battering parent syndrome evidence, serious questions persist about the syndrome's reliability. Before admitting such evidence, courts should evaluate the syndrome under the applicable test for determining admissibility of novel scientific evidence.

b. Sexual Abuse Cases

In the realm of sexual abuse, the discussion in the clinical and scientific section discloses that sex offenders are a heterogeneous group with few shared characteristics apart from a predilection for deviant sexual behavior. Furthermore, there is no psychological test or device that reliably detects persons who have or will sexually abuse children. Thus, it is appropriate to conclude that under the current state of scientific knowledge, there is no profile of a "typical" child molester.

Despite the lack of a reliable profile, an occasional prosecutor has offered expert testimony describing the character traits of a "typical" child molester. In *United States v. Gillespie*, [FN624] for example, defendant was charged with sexual abuse of his three-year-old goddaughter. Defendant acknowledged that the child had been abused, but denied responsibility. The government offered the testimony of an expert to rebut what it termed defendant's assertion that he could not have abused the child. The court summarized the expert's testimony as follows: "Dr. Maloney testified that the characteristics of a molester include an early disruption in the family environment, often with one parent missing: a relationship with the parent of the opposite sex who is dominant; unsuccessful relationships with women; a poor selfconcept; and general instability in the background." [FN625]

The trial judge admitted the expert's testimony. In reversing the ensuing conviction, the Ninth Circuit Court of Appeals ruled that such testimony constituted character evidence designed to establish that defendant had a propensity for child sexual abuse. Defendant had not placed his character in issue; therefore, the expert testimony was inadmissible.

*143 There are other reasons to reject such testimony. First, the clinical and scientific literature does not support the existence of a profile of a "typical" child sexual abuser. Second, the testimony offered in *Gillespie* was so general and ambiguous that it lacked probative value. Thousands of men who would never think of abusing a child possess the personality traits described by Dr. Maloney. The risk is very high that the jury will be confused or misled by such testimony.

In several cases, prosecutors offered a variant of profile evidence to prove sexual abuse. Such evidence may take the form of testimony describing the "typical" techniques employed by child molesters to get close to their victims. [FN626] In *Haakanson v. State*, [FN627] for example, the defendant was charged with sexual abuse of three adolescent girls. The state's first witness was a police officer who described techniques employed by child abusers to ingratiate themselves to children. Defendant objected unsuccessfully that such testimony was inadmissible because it described a sex offender profile. On appeal, the state conceded that the trial court erred in admitting the officer's testimony. The government attempted to persuade the court of appeal that the error was harmless. The attempt failed. The court held that "the prosecution may not introduce a profile to show that the defendant is more likely to have committed an offense because the defendant fits within that profile." [FN628] Such evidence violates the rule against character evidence. [FN629] The court concluded that admission of the evidence denied defendant a fair trial.

As was the case in *Gillespie* and *Haakanson*, prosecution attempts to prove guilt through profile evidence should be rejected. Should a different result follow when the defense offers profile evidence? In a number of reported decisions the defendant offered expert testimony that he did not fit within a profile of a "typical" child sexual abuser. Under the Federal Rules of Evidence, a defendant is permitted to offer evidence of a pertinent trait of character to prove innocence. [FN630] In a child sexual abuse case the theory of such evidence is that because defendant lacks the personality traits found in persons who sexually ***144** abuse children, the defendant probably did not commit the charged offense.

This theory of proof is defective. The relevant scientific literature does not support the conclusion that there is a reliable profile of a "typical" sex offender. Despite this fact, however, some mental health professionals are willing to testify that a profile exists. Faced with such testimony, a number of courts have determined that sex offender profiles are a form of novel scientific evidence. Courts adopting this approach correctly conclude that profile evidence has not found general acceptance in the relevant scientific community. [FN631]

The decision to exclude profile evidence offered by either the defense or the prosecution is buttressed by the fact that such evidence may be unfairly prejudicial and confusing. [FN632] The evidence invites unwarranted consumption of trial time. [FN633]

I. A New Concept: Court Appointed Experts on Child Development

Children take the witness stand with increasing frequency. It is not uncommon for children as young as three and four to testify. When the individual on the witness stand is a child whose head is barely visible above the rail of the witness box, and whose feet dangle a foot or more from the floor, the judge and the attorneys face unique challenges.

Young witnesses have special needs which must be understood if children are to testify effectively. In some cases, it may be appropriate for the judge to appoint a neutral expert on child development to assist the court in understanding the developmental and psychological needs of particular child witnesses. A developmental expert could assist court and counsel in numerous ways. For example, the expert could advise the court on steps that could be taken to render testifying ***145** less traumatic for a child. The expert might inform the court of a child's cognitive and communicative abilities so that the court can control the proceedings to enable the child to communicate effectively.

A court appointed expert on child development should not offer testimony on the substance of allegations of child sexual abuse. The expert should remain strictly nonpartisan. The expert's role is not to prove or disprove abuse, but to assist the court in executing the difficult responsibilities of ensuring a fair trial, protecting vulnerable child witnesses, and fostering complete and accurate testimony.

V. CONCLUSION

Expert testimony plays an important role in child sexual abuse litigation. Such testimony can assist the jury in many ways. Yet, the issues raised by expert testimony are exceedingly complex, and clinical and scientific understanding of child sexual abuse is still developing. Courts should proceed cautiously when considering the admissibility of expert testimony on child sexual abuse. It is vitally important that professionals offering such testimony be highly qualified. Courts should insist on a thorough showing of expertise before permitting individuals to testify as experts. Furthermore, courts should require the proponent of expert testimony to lay a complete foundation so that the court understands precisely how the evidence is relevant. When appropriate caution is exercised, qualified ex-

perts can assist in attaining justice.

[FNa] John E.B. Myers, J.D., is Professor of Law, University of the Pacific, McGeorge School of Law, Sacramento, Cal.

Jan Bays, M.D., F.A.A.P., is Medical Director of Child Abuse Programs at Emanuel Hospital and Health Center, Portland, Or.

Judith Becker, Ph.D., is Professor of Clinical Psychology, College of Physicians and Surgeons, Columbia University, and the Director of the Sexual Behavior Clinic, New York Psychiatric Institute, New York, N.Y.

Lucy Berliner, M.S.W., is Assistant Clinical Professor of Social Work, College of Social Work, University of Washington, and Research Director, Harborview Sexual Assault Center, Seattle, Wash.

David L. Corwin, M.D., is a child psychiatrist in private practice, and psychiatric consultant to the Multidisciplinary Child Abuse Team at Children's Hospital, Oakland, Cal.

Karen J. Saywitz, Ph.D., is Assistant Professor of Psychiatry, UCLA School of Medicine, and the Director of Child and Adolescent Psychology Services in the Division of Child and Adolescent Psychiatry, Harbor/UCLA Medical Center, Los Angeles, Cal.

[FN1]. *In re* Nicole V., 71 N.Y.2d 112, 117, 518 N.E.2d 914, 915 (1987).

[FN2]. For discussion of children as witnesses, see generally J. MYERS, CHILD WITNESS: LAW AND PRACTICE (1987) [hereinafter J. MYERS].

[FN3]. For discussion of medical evidence of child sexual abuse, see *infra* section IV (A).

[FN4]. The authors are aware of the debate regarding the limits of expertise of mental health professionals. Some commentators argue for significant limitations on the use of mental health professionals as expert witnesses. In the present Article, the authors have decided not to address the ongoing debate. As things currently stand, courts permit properly qualified mental health professionals to testify as experts. The present Article can be most helpful to bench and bar by accepting the fact that mental health professionals will continue to testify as experts, and by focusing our discussion on the uses and limits of such experts. We express no opinion regarding the proper outcome of the larger debate.

For commentary discussing the limits of mental health expertise, see J. ZISKIN & D. FAUST, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (1988); Faust & Ziskin, *The Expert Witness in Psychology and Psychiatry,* 241 SCIENCE 31 (1988); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law,* 51 S. CAL. L. REV. 527 (1978) [hereinafter Morse, *Crazy Behavior*]; Morse, *Failed Expectations and Criminal Responsibility: Experts and the Unconscious,* 68 VA. L. REV. 971 (1982); Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation,* 66 VA. L. REV. 427 (1980).

[FN5]. In the field of child sexual abuse, expertise is based on a combination of clinical training and experience, and knowledge of the relevant professional literature. A portion of the literature consists of articles by clinicians, in which practitioners describe their clinical experience with sexually abused children. Purely clinical writing is not based on scientifically controlled studies. A growing portion of the literature consists of articles reporting the results of scientifically controlled studies.

The authors are aware that scientifically controlled studies often yield results which are more readily verifiable than conclusions based solely on clinical experience. With this in mind, we could have structured this Article so that scientific data would be presented in one subsection and clinical data in another. We decided against this organizational approach because in the real world of expertise on child sexual abuse, there is no bright line separating clinical from scientific information. Practitioners rely on the best of both worlds.

[FN6]. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES *passim* (1987) [hereinafter WEINSTEIN'S EVIDENCE].

[FN7]. United States v. Azure, 801 F.2d 336, 339-40 (8th Cir. 1986)("The decision whether to permit expert testimony ordinarily lies within the discretion of the trial court and will not be reversed absent an abuse of discretion."); State v. Moran, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986)("Deciding whether expert testimony will aid the jury and balancing the usefulness of expert testimony against the danger of unfair prejudice are generally fact-bound inquires uniquely within the competence of the trial court."); State v. Lindsey, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986)(concerning the admissibility of expert testimony describing behavior patterns of incest victims, the court stated: "The trial judge has discretion to allow such expert testimony where it may assist the jury in deciding a contested issue, including issues pertaining to accuracy or credibility of a witness' recollection or testimony. The trial judge may exercise this discretion where there is a reasonable basis to believe that the jury will benefit from the assistance of expert testimony that explains recognized principles of social or behavioral science which the jury may apply to determine issues in the case. Testimony of this type is not to be permitted in every case, but only in those where the facts needed to make the ultimate judgment may not be within the common knowledge of the ordinary juror.") (citations omitted).

[FN8]. *See* McCormick, *Scientific Evidence: Defining a New Approach to Admissibility,* 67 IOWA L. REV. 879, 888 (1982).

[FN9]. *See* State v. Lindsey, 149 Ariz. 472, 473, 720 P.2d 73, 74 (1986); State v. Middleton, 294 Or. 427, 435, 657 P.2d 1215, 1219 (1983).

[FN10]. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1923, at 29 (Chadbourn rev. 1974)(original emphasis removed) [hereinafter J. WIGMORE]. For the reader with a bent for history, Wigmore provides a characteristically fascinating picture of the development of expert testimony at § 1917. *Id.*

[FN11]. *See id.* § 1923, at 19, 32, where Wigmore writes:

> But the only true criterion is: On *this subject* can a jury receive from *this person* appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject. . . . No more specific test can be supplied, defining the kind of subject which certainly or usually will need no aid at all from any witness.

Id. (emphasis in original).

[FN12]. FED. R. EEID. 702 advisory committee's note (citation omitted).

[FN13]. FED. R. EVID. 702.

[FN14]. FED. R. EVID. 703.

[FN15]. *See* Arnolds, *Federal Rule of Evidence 703: The Back Door is Wide Open,* 20 THE FORUM 1 (1984).

[FN16]. The Federal Rules of Evidence contain an exception to the hearsay rule for statements made for purposes of medical diagnosis and treatment. FED. R. EVID. 803(4). This exception to the hearsay rule plays an important role in child abuse litigation. *See* J. MYERS, *supra* note 2, § 5.36, at 359.

[FN17]. 3 WEINSTEIN'S EVIDENCE, *supra* note 6, § 703[03], at 703-17 to 19.

[FN18]. *Id.*

[FN19]. *See* FED. R. EVID. 403.

[FN20]. *Id.*

[FN21]. *See* State v. Moran, 151 Ariz. 378, 380, 728 P.2d 248, 250 (1986).

[FN22]. *See* Wheat v. State, 527 A.2d 269, 272 (Del. 1987)(helpful discussion of qualifications of experts on child sexual abuse).

[FN23]. In some cases, a proffered witness is rejected as an expert. *See, e.g.*, State v. Goodwin, 320 N.C. 147, 357 S.E.2d 639 (1987)(clinical social worker was not qualified as an expert on post-traumatic stress disorder).

[FN24]. Experts on child sexual abuse are drawn predominantly from the professions of psychology, medicine, psychiatry, and social work. *See* State v. Spigarolo, 210 Conn. 359, 556 A.2d 112 (1989)(social worker with master's degree qualified); Wheat v. State, 527 A.2d 269 (Del. 1987)(master's level social worker properly qualified as expert); State v. Reser, 244 Kan. 206, 767 P.2d 1277 (1989)(social worker with master's degree qualified); State v. Black, 537 A.2d 1154 (Me. 1988)(nurse with bachelor's degree in nursing and master's in child psychology was qualified); State v. McCoy, 400 N.W.2d 807 (Minn. Ct. App. 1987)(master's level psychologist was qualified); *In re* Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914 (1987)(master's level social worker properly qualified as expert); Commonwealth v. Pearsall, 368 Pa. Super. 327, 534 A.2d 106 (1987)(master's level psychologist properly qualified as expert); State v. Hicks, 148 Vt. 459, 535 A.2d 776 (1987)(master's level social worker qualified); State v. Jensen, 141 Wis. 2d 333, 337, 415 N.W.2d 519, 521 (Ct. App. 1987)(master's level school guidance counselor properly qualified as expert).

[FN25]. *See* Wheat v. State, 527 A.2d 269, 272 (Del. 1987)("In each case the expert must demonstrate sufficient knowledge of, and contact with, victims of child abuse to be able to explain the behavioral and psychological characteristics which are material to the issues in a particular case.").

[FN26]. *See In re* E.M., 137 Misc. 2d 197, 520 N.Y.S.2d 327 (Fam. Ct. 1987)(court stressed importance of making sure experts are qualified and that proper procedures are followed).

[FN27]. FED. R. EVID. 702.

[FN28]. FED. R. EVID. 705.

[FN29]. For further discussion of the certainty required for expert testimony see *infra* text accompanying notes 117-19.

[FN30]. *See* 7 J. WIGMORE, *supra* note 10, § 1917, at 2. In discussing the origins of the opinion rule, Wigmore writes that "the witness must speak as a knower, not merely a guesser. . . ."

[FN31]. *See* People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988)("diagnosis need not

be based on certainty, but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value."); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971).

[FN32]. 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 382, at 384 (1988 Supp.)(footnote omitted)[hereinafter LOUISELL & MUELLER].

[FN33]. FED. R. EVID. 702 advisory committee's note.

[FN34]. For the history of the opinion rule see 7 J. WIGMORE, *supra* note 10, § 1917; 3 WEINSTEIN'S EVIDENCE, *supra* note 6, § 701[01].

[FN35]. McCormick describes "the doctrine that witnesses generally must give the 'facts' and not their 'inferences, conclusions, or opinions." C. MCCORMICK, MCCORMICK ON EVIDENCE § 11, at 26 (3d ed. 1984) [hereinafter C. MCCORMICK].

[FN36]. For discussion of reasons why lay opinions are often helpful, see 3 WEINSTEIN'S EVIDENCE, *supra* note 6, § 701[02].

[FN37]. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952).

[FN38]. See the advisory committee note to Rule 704, which states: "[t]he basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." FED. R. EVID. 704 advisory committee's note. *See also* 56 F.R.D. 183, 284 (1973).

[FN39]. C. MCCORMICK, *supra* note 35, § 11, at 28 (footnote omitted).

[FN40]. FED. R. EVID. 702.

[FN41]. 7 J. WIGMORE, *supra* note 10, § 1921, at 21. Modern courts occasionally state that experts may not offer opinions on the very issue before the court for decision. *See, e.g.*, State v. Lindsey, 149 Ariz. 472, 475, 720 P.2d 73, 75 (1986); State v. Chapple, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983)("Witnesses are permitted to express opinions on ultimate issues but are not required to testify to an opinion on the precise questions before the trier of fact.").

[FN42]. *See* Chicago & Alton R.R. Co. v. Springfield & Northwestern R.R. Co., 67 Ill. 142, 145 (1873)("It amounts to nothing more nor less than permitting the witnesses to usurp the province of the jury.") *See also* De Groot v. Winter, 261 Mich. 660, 247 N.W. 69 (1933). For a persuasive argument that objections such as "invades the province of the jury" and "usurps the function of the jury" have no place in modern trials see McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 24-25 (1986) [hereinafter McCord].

[FN43]. *See* C. MCCORMICK, *supra* note 35, § 12; 3 WEINSTEIN'S EVIDENCE, *supra* note 6, § 704[01].

[FN44]. 7 J. WIGMORE, *supra* note 10, § 1921, at 20-21 (footnotes omitted).

[FN45]. *Id.* § 1920, at 18-19. *See* State v. Middleton, 294 Or. 427, 435, 657 P.2d 1215, 1219 (1983)("It is the settled law in Oregon that testimony on the ultimate issue is not inadmissible solely on that basis. . . . [I]t is impossible to

usurp the jury's function. Even if there is uncontradicted expert testimony, the jury is not bound by it, for the jury alone must make the ultimate decision.").

[FN46]. FED. R. EVID. 704 advisory committee's note (citations omitted), *quoting* 7 J. WIGMORE, *supra* note 10, § 1921, at 20.

[FN47]. It is difficult to satisfactorily define an "ultimate fact." Black's Law Dictionary provides the following definitions of an ultimate fact: "Issuable facts; essential to the right of action or matter of defense. Facts necessary and essential for decision by court." BLACK'S LAW DICTIONARY 1365 (5th ed. 1979) (citation omitted).

Perhaps examples will give a flavor for ultimate facts. The common-law definition of larceny is a trespassory taking and asportation of the personal property of another with the intent to steal. Each element of the definition constitutes an ultimate fact that must be proved by the state beyond a reasonable doubt.

In a sex abuse case in which a defendant is charged with orally copulating a minor, the act of oral copulation by the defendant on the victim constitutes an ultimate fact.

[FN48]. *See* FED. R. EVID. 704 advisory committee's note, which states in part:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

[FN49]. *See* C. MCCORMICK, *supra* note 35, § 12, at 31 (footnotes omitted), which states that "[r]egardless of the rule concerning admissibility of opinion upon ultimate facts, courts do not permit opinion on a question of law, unless the issue concerns a question of foreign law. Nor do the Federal Rules of Evidence permit opinion on law except questions of foreign law." This statement quoted from McCormick is too sweeping. While courts generally do not permit opinion testimony on questions of law, in some cases expert testimony on matters of law is admitted. For helpful discussion, see Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988).

[FN50]. G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, PSYCHOLOGICAL EVILAUTIONS FOR THE COURTS § 1.04, at 14 (1987)(emphasis in original) [hereinafter G. MELTON]. In a footnote which is omitted from the language quoted in the text, the authors cite several articles in support of their assertion that scholars agree experts should not offer opinions on questions of law. Specifically, they cite: AMERICAN PSYCHIATRIC ASSOCIATION, STATE OF THE INSANITY DEFENSE 13-14 (1982); Bazelon, *Veils, Values, and Social Responsibility*, 37 AM. PSYCHOLOGIST 115 (1982); Morse, *Crazy Behavior, supra* note 4, at 554-60; Slobogin, *supra* note 4, at 456; Comment, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 MD. L. REV. 539, 593-98 (1979).

[FN51]. G. MELTON, *supra* note 50, § 14.05, at 364.

[FN52]. C. MCCORMICK, *supra* note 35, § 12, at 30 (footnote omitted).

[FN53]. *See* State v. Butler, 256 Ga. 448, 450, 349 S.E.2d 684, 686 (1986)(opinion that child was sexually abused was question of fact, not law).

[FN54]. The example offered in the text is taken from the Advisory Committee's note to Rule 704. The Advisory Committee borrowed the example from McCormick. *See* C. MCCORMICK, *supra* note 35, § 12, at 32.

[FN55]. G. MELTON, *supra* note 50, § 1.04, at 14.

[FN56]. For discussion of expert testimony on whether a child was sexually abused, see section IV (C) of this Article. *See* Johnson v. State, 292 Ark. 632, 639, 732 S.W.2d 817, 821 (1987)("The opinion of an expert that a child has been sexually abused is not objectionable on the basis that it is an opinion on the 'ultimate issue'.; however, experts should not be permitted to offer opinion on whether child was abused); Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987)("[I]t was proper for the State's expert to express an opinion on the issue of whether the child had, in fact, been sexually assaulted or abused. Such an opinion, although embracing an ultimate issue, represents both the peculiar expertise and consummate purpose of an expert's analysis.").

[FN57]. *See supra* note 53.

[FN58]. Some physicians are also experts concerning the behavioral aspects of child sexual abuse.

[FN59]. *See* authorities collected *supra* note 4.

[FN60]. Not all behavioral science testimony regarding child sexual abuse is based on "soft science." A growing number of studies that are relevant to child sexual abuse are scientifically rigorous. Furthermore, researchers are constantly attempting to improve the scientific rigor of studies concerning sexually abused children.

[FN61]. *See* State v. Moran, 151 Ariz. 378, 380, 728 P.2d 248, 250 (1986)(expert testimony must be reliable).

[FN62]. *See* RANDON HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1279 (1966), where science is defined as "1. a branch of knowledge or study dealing with a body of facts or truths systemactically arranged and showing the operation of general laws. . . . 3. systematized knowledge in general."

[FN63]. *See* Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1202 (1980).

[FN64]. *See* State v. Cavallo, 88 N.J. 508, 516-17, 443 A.2d 1020, 1024 (1982).

[FN65]. Kempe, Silverman, Steele, Droegmuller & Silver, *The Battered-Child Syndrome,* 181 J. A.M.A. 17 (1962) [hereinafter Kempe].

[FN66]. *See generally* Myers & Carter, *Proof of Physical Child Abuse*, 53 MO. L. REV. 189, 190-93 (1988).

[FN67]. Every appellate court to consider the battered child syndrome has approved it. *See* State v. Tanner, 675 P.2d 539, 543 (Utah 1983)("Our research shows that all courts which have addressed the question have affirmed the admission of expert medical testimony regarding the presence of the battered child syndrome.").

[FN68]. *See* State v. Moyer, 151 Ariz. 253, 255, 727 P.2d 31, 33 (Ct. App. 1986); State v. Dumlao, 3 Conn. App. 607, 610, 491 A.2d 404, 409 (1985)("Battered child syndrome has become a well established medical diagnosis."); State v. Tanner, 675 P.2d 539, 543 (Utah 1983).

[FN69]. *See* Giannelli, *supra* note 63, at 1231-50.

[FN70]. 293 F. 1013 (D.C. Cir. 1923).

[FN71]. *Id.* at 1014.

[FN72]. For in-depth discussion of the *Frye* test see Giannelli, *supra* note 63, and C. MCCORMICK, *supra* note 35.

[FN73]. *See* 1 LOUISELL & MUELLER, *supra* note 32, § 105, at 821 ("The *Frye* approach has been widely adopted by both state and federal courts"); C. MCCORMICK, *supra* note 35, at 882; Giannelli, *supra* note 63, at 1205 ("the *Frye* test has dominated the admissibility of scientific evidence for more than half a century"); McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 82 (1987) [hereinafter McCord, *Syndromes*].

[FN74]. *See, e.g.*, C. MCCORMICK, *supra* note 35; Giannelli, *supra* note 63. Professor McCord points out that the *Frye* test is ill-suited to novel forms of psychological testimony. He writes:

> [T]here are four serious drawbacks to the use of the *Frye* rule with respect to "novel" psychological evidence. First, how to apply the *Frye* rule is often not entirely clear. It is not always clear what evidence is "scientific" and what evidence is not. Further, it is unclear whether *Frye* requires general acceptance of the underlying scientific principle, the scientific technique employed, or both. Second, the *Frye* rule's exclusive focus on general acceptance diverts attention from other important questions regarding the admissibility of expert testimony. Third, the bedrock rationale of the *Frye* rule--to assure that the jury can rationally and intelligently weigh the evidence--leads to the conclusion that the rule is not even appropriate for simple, easily understood types of psychological expert testimony, which is by its very nature subjective and therefore not likely to overwhelm the jury. Lastly, requiring general acceptance may deprive the trier of fact of helpful evidence both because of the lag time that is inevitably entailed in gaining general acceptance, and because psychological evidence by virtue of its subjective nature may have a more difficult time gaining general acceptance than will an objective, mechanical technique. Indeed, very few concepts are generally accepted by all behavioral scientists.

McCord, *supra* note 42, at 29-30 (footnotes omitted).

[FN75]. *See* Giannelli, *supra* note 63, at 1208 ("Many scientific techniques do not fall within the domain of a single academic discipline or professional field.").

[FN76]. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[FN77]. *See* United States v. Torniero, 735 F.2d 725, 731 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985)("we recognize that unanimity on mental health issues is rare.").

[FN78]. *See* Giannelli, *supra* note 63, at 1210-11 ("The percentage of those in the field who must accept the technique has never been clearly delineated.").

[FN79]. *Id.* at 1211.

[FN80]. Some might disagree with this conclusion. *See* authorities collected *supra* note 4.

[FN81]. *See* State v. Cavallo, 88 N.J. 508, 520-26, 443 A.2d 1020, 1026-29 (1982)(helpful discussion of methods of proving general acceptance).

[FN82]. *See* Giannelli, *supra* note 63, at 1215-16.

[FN83]. *See, e.g.*, People v. Kelly, 17 Cal. 3d 24, 37, 549 P.2d 1240, 1248, 130 Cal. Rptr. 144, 152 (1976)(The court questioned "whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community regarding the reliability of a new technique.").

[FN84]. People v. Kelly, 17 Cal. 3d 24, 38, 549 P.2d 1240, 1249, 130 Cal. Rptr. 144, 153 (1976).

[FN85]. *See* Giannelli, *supra* note 63, at 1217-18.

[FN86]. *See infra* notes 305 and 306.

[FN87]. *See* Giannelli, *supra* note 63, at 1218-19.

[FN88]. *See* 1 LOUISELL & MUELLER, *supra* note 32, § 105; C. MCCORMICK *supra* note 35, at 885-86. *Frye* has good points as well. *See* Giannelli, *supra* note 63; McCord, *supra* note 42. The benefits of the *Frye* test are: (1) *Frye* leaves decisions about the reliability of novel scientific evidence to those most qualified to make such decisions, scientists in the relevant scientific community; (2) The test may promote uniformity of decision; (3) once an appellate court holds that the *Frye* threshold has been achieved, future courts can take judicial notice of the reliability of the evidence; (4) The conservative nature of the test keeps unreliable evidence from the jury; and (5) *Frye* ensures that a sufficiently large pool of experts will be available to analyze the reliability of novel evidence.

[FN89]. *See* 1 LOUISELL & MUELLER, *supra* note 32, § 105, where the authors state that "[t]he 'general acceptance' standard is highly susceptible to the criticism that it is both vague and conservative. Its essential vagueness comes to the fore in cases which emphasize that the admissibility of scientific evidence under *Frye* is very much a matter of judicial discretion." *Id.* at 821 (footnote omitted). *See also Symposium on Science and the Rules of Evidence,* 99 F.R.D. 187, 192 (1983)[hereinafter *Federal Rules Symposium*].

[FN90]. *See Federal Rules Symposium, supra* note 89, at 192.

[FN91]. *Id.*

[FN92]. *Id.* at 193.

[FN93]. For discussion of California case law dealing with the impact of the *Frye* test on expert testimony in child sexual abuse litigation see Carter, *Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire Kelly v. Frye and Return to a Traditional Analysis,* 22 LOY. L. REV. 1103 (1989).

[FN94]. People v. Bledsoe, 36 Cal. 3d 236, 247-51, 681 P.2d 291, 298-301, 203 Cal. Rptr. 450, 457-60 (1984).

[FN95]. People v. Phillips, 122 Cal. App. 3d 69, 83-88, 175 Cal. Rptr. 703, 711-14 (1981).

[FN96]. People v. McDonald, 37 Cal. 3d 351, 372-74, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984).

[FN97]. *In re* Amber B., 191 Cal. App. 3d 682, 686-88, 236 Cal. Rptr. 623, 625-26 (1987)(court held that when an expert bases an opinion that a child has been sexually abused on the child's statements and play with anatomically detailed dolls, the proponent of the evidence must prove that such diagnostic techniques meet the *Frye* standard of general acceptance). *Accord, In re* Sara M., 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (1987); *In re* Christine C., 191

Cal. App. 3d 676, 236 Cal. Rptr. 630 (1987).

[FN98]. Seering v. Department of Social Servs., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987)(court held that expert testimony based on the child sexual abuse accommodation syndrome must meet the *Frye* test; however, the court also found that when a psychiatrist bases a clinical opinion of sexual abuse not on the syndrome, but on the expert's personal clinical experience, the *Frye* test does not apply, and the expert may testify that in the expert's opinion, a particular child was sexually abused.)

[FN99]. *See* 1 LOUISELL & MUELLER, *supra* note 32, § 105, at 818; *Federal Rules Symposium, supra* note 89, at 192 ("One recurring point is that the heavy burden demanded by the *Frye* test deprives courts of relevant evidence.")

[FN100]. For discussion of the conservative nature of the *Frye* test see 1 LOUISELL & MUELLER, *supra* note 32, § 105, 821-22, where the authors write:

> The essential conservatism of *Frye* lies in the fact that the "general acceptance" standard amounts to a harsh prejudged skepticism with respect to any scientific technique which is new, or which originated in an effort to deal specifically with a particular legal problem. Regardless of inherent worth or validity, scientific evidence of these sorts cannot hope to satisfy the "general acceptance" standard if it is literally applied.

Id. at 822.

[FN101]. *See Federal Rules Symposium, supra* note 89, at 192.

[FN102]. For discussion of relevance analysis see United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); State v. Butler, 256 Ga. 448, 349 S.E.2d 684 (1986)(novel scientific evidence must be verifiably reliable); State v. Black, 537 A.2d 1154 (Me. 1988); State v. Brown, 297 Or. 404, 687 P.2d 751 (1984)(very helpful analysis); C. MCCORMICK, *supra* note 35, § 203; 3 WEINSTEIN'S EVIDENCE, *supra* note 6, § 703[03]; Giannelli, *supra* note 63; McCord, *supra* note 42, at 31-34 (advocating a modified form of relevance analysis in which the critical factors affecting admissibility of novel psychological evidence are necessity, reliability, understandability, and importance).

[FN103]. The factors listed below are gleaned largely from the authorities cited *supra* note 102. The present authors have added factors which appear to them to be appropriate for evaluation of expert testimony on child sexual abuse.

[FN104]. *See infra* notes 305 and 306 and accompanying text.

[FN105]. *See* McCord, *supra* note 42, at 32.

[FN106]. In the final analysis, the ultimate inquiry is whether proffered expert testimony will assist the jury. Professor McCord makes this factor the centerpiece of his suggested approach to evaluation of novel scientific evidence. *See* McCord, *supra* note 42, at 31.

[FN107]. The fact that evidence is highly probative should not lead to the conclusion that it may be unfairly prejudicial. *See* State v. Moran, 151 Ariz. 378, 384, 728 P.2d 248, 254 (1986).

[FN108]. *See* McCord, *supra* note 42, at 33.

[FN109]. *See id.* at 32-33.

[FN110]. TABER'S CYCLOPEDIC MEDICAL DICTIONARY (15th ed. 1985).

[FN111]. *Id.* at 1251.

[FN112]. BLACK'S LAW DICTIONARY (5th ed. 1979).

[FN113]. *Id.* at 1021.

[FN114]. J. GARBARINO, E. GUTTMANN & J. SEELEY, THE PSYCHOLOGICALLY BATTERED CHILD 1 (1986).

[FN115]. *Id.*

[FN116]. *Id.*

[FN117]. L. WEED, MEDICAL RECORDS, MEDICAL EDUCATION, AND PATIENT CARE: THE PROBLEM-ORIENTED RECORD AS A BASIC TOOL (1969).

[FN118]. *See* E. DEGOWIN & R. DEGOWIN, BEDSIDE DINGNOSTIC EXAMINATION (3d ed. 1976), where the authors write:

> Unfortunately there is no accepted scale of degrees of certainty whereby the examiner can express the extent to which he has proved his diagnosis. The term "the diagnosis" is applied, on the one hand, to a fracture of the tibia where the fracture line can readily be seen in the xray film with perfect accuracy. On the other hand, the same term is applied to a diagnosis of rheumatoid arthritis, a situation often with much less certainty . . . .

Id. at 6.

[FN119]. *See* People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988)(a physician's diagnosis of sexual abuse "need not be based on certainty, but may be based on probability"; the lack of absolute certainty does not deprive the opinion of evidentiary value); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971)(opinion regarding battered child syndrome); State v. Hartman, 145 Wis. 2d 1, 14, 426 N.W.2d 320, 325 (1988)(to be relevant, evidence does not have to establish a fact conclusively).

[FN120]. Most authors report that physical or laboratory evidence of child sexual abuse is found in only 10 to 50 percent of cases. *See* Enos, Conrath & Byer, *Forensic Evaluation of the Sexually Abused Child*, 78 PEDIATRICS 385 (1986) [hereinafter Enos] (of 162 cases evaluated by forensic examiners for child sexual abuse, 26.5 percent of the girls and 23 percent of boys had positive physical and/or laboratory evidence of abuse); Levitt, *Sexual Abuse in Children*, 80 POSTGRADUATE MED. 201, 202 (1986) ("if disclosure of the abuse is delayed, which is common, physical findings are present in only 10% to 20% of cases"); Marshall, Puls & Davidson, *New Child Abuse Spectrum in an Era of Increased Awareness*, 142 AM. J. DISEASES OF CHILDREN 664 (1988)(of 382 children evaluated for abuse, 71 percent had normal findings on examination, including 48 percent with a history of sexual penetration). *See also* Rimsza & Niggemann, *Medical Evaluation of Sexually Abused Children: A Review of 311 Cases*, 69 PEDIATRICS 8 (1982). In this clinical study, genital trauma was found in 16 percent of 311 children examined for sexual abuse. Nongenital trauma was found in 16 percent. Findings suggesting penetration were recorded in 32 percent. Genital trauma was more common in cases involving assault by a stranger (25 percent) than in assaults involving a known assailant (12 percent). The differences were attributed in part to greater delay in seeking medical examinations for incest victims and victims of known assailants. The greater the delay prior to medical examination, the less likely it is that the examination will reveal evidence of trauma. Of children with a history of penetration, 36 percent had genital trauma when examined within 24 hours of the assault, whereas only 13 percent had such trauma

when examined after 24 hours. The need for prompt medical evaluation is clear.

[FN121]. *See* cases cited *infra* subsection IV (A)(2). The results of a pilot study indicate that presence of medical evidence of sexual abuse may actually decrease the likelihood of obtaining a conviction. *See* DeJong & Rose, *The Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse*, 142 AM. J. DISEASES CHILDHOOD 406 (1988), where the authors write:

> Clinicians have long recognized that physical evidence of injury, sexually transmitted diseases, or seminal fluid is often absent in cases of child sexual abuse. Some legal experts argue that this clinical observation is based on alleged rather than "proven" cases. To determine the frequency and significance of physical evidence in legally "proven" felony cases, a pilot study was done using a retrospective review of court records of felony child sexual abuse.
>
> Forty-five randomly selected cases were reviewed and abstracted, of which 39 cases (87%) had resulted in conviction of the perpetrator on felony charges. This conviction rate was similar to that for all child abuse cases tried last year (84%). The perpetrators were relatives in 26 and acquaintances in 17 cases. The victims ranged in age from 3.5 to 16 years, and most cases involved female victims (80%). Charges of vaginal rape were made in 32 cases and oral and/or anal sodomy in 23 cases.
>
> No significant difference in rate of felony conviction was found in cases with or without physical evidence of injury, sexually transmitted diseases, or seminal fluid. Thirty (94%) of 32 cases without physical evidence resulted in felony conviction; the remaining two cases resulted in a misdemeanor conviction and an acquittal. Only nine (69%) of 13 cases with physical evidence resulted in felony conviction; the remaining four cases resulted in two misdemeanor convictions and two acquittals. Thus an interesting trend was found for a higher rate of convictions in cases without physical evidence. The children's age or sex, the types of sexual contact, the relationship of the perpetrator to the victim, the number of victims or perpetrators involved in a single case, the duration of the abuse, the interval from the time of disclosure to the trial, and the testimony of the examining or an expert physician were not shown to affect the legal outcome of the cases.

Id. at 406.

[FN122]. A lay jury may expect that certain types of sexual abuse always or nearly always cause physical injury. For example, lay jurors may believe sexual intercourse necessarily damages the hymen. This is not always the case, however. If the defense argues or intimates abuse did not occur because there is no injury to the hymen, expert medical testimony will assist the jury in evaluating the evidence.

[FN123]. *See* INTERNATIONAL CLASSIFICATION OF DISEASES (9th ed. 1980) (disease listings NEC 995.5, V 61.21, 959.9, 959.1).

[FN124]. *See* E. DEGOWIN & R. DEGOWIN, *supra* note 118, at 15-16.

[FN125]. *See id.* at 12-13, where the authors write:

> The medical history is an account of the events in the patient's life that have relevance to his mental and physical health. Much more than the patient's unprompted narrative, it is a specialized literary form in which the physician composes and writes an account based upon facts, supplied by the patient or other informants, offered spontaneously or secured by skillful probing. Items are accepted for the record only after rigorous evaluation by the physician, who employs his knowledge of the natural history of diseases to secure pertinent details and establish the sequence of events.

[FN126]. In reaching diagnostic impressions, physicians often rely in part on psychological reactions commonly

observed in the sexually abused. Such reactions are discussed in section IV (B) *infra*.

[FN127]. *See* authorities cited *supra* note 120.

[FN128]. A child examined by one of the authors (Bays) reported that her father came in the bathroom and asked her to spread her legs in the bath so he could make sure she was clean. He would then gaze at her vaginal area for several minutes. Needless to say, the child's physical examination was normal.

[FN129]. *See* Enos, *supra* note 120, at 395, where the authors write that "[p]enile penetration resulting in rupture of the hymen is not a requisite indication of intercourse." In this article there is a picture of an "intact hymen" in a twelve-year-old girl who had "repeated intercourse with her boyfriend." *See also* Herman-Giddens & Frothingham, *Prepubertal Female Genitalia: Examination for Evidence of Sexual Abuse*, 80 PEDIATRICS 203, 208 (1987) where the authors write that "it is never accurate to say that, because a hymen appears intact, 'no' sexual abuse has occurred'; unfortunately, we still see some examiners making statements like this"; Muram, *Child Sexual Abuse: Relationship Between Sexual Acts and Genital Findings*, 13 CHILD ABUSE & NEGLECT 211 (1989). The author reported on 18 cases of sexual abuse in which the offender admitted to vaginal penetration. Specific physical findings (including lacerations of the hymen and vagina, bite marks, enlarged vaginal opening, and the presence of veneral disease or sperm) were found in 11 of the 18 female victims. In seven girls the examination was normal or nonspecific for sexual abuse. The author concluded that "all complaints of sexual abuse must be considered potentially valid and should be investigated further even if the physical examination fails to detect any abnormalities." Muram, *supra*, at 211.

[FN130]. *See* Groth & Burgess, *Sexual Dysfunction During Rape*, 297 NEW ENG. J. MED. 764 (1977) (authors report that 34 percent of rapists had erectile or ejaculatory dysfunction during rape).

[FN131]. *See* Enos, *supra* note 120, at 392 ("Severe injuries to the external genitalia or anus of sexually abused children are relatively rare. Edema, contusions, abrasions and superficial lacerations were most commonly encountered."); Herman-Giddens & Frothingham, *supra* note 129, at 207("Force is rarely used in the sexual use of young children; therefore, bruises, fresh tears, and lacerations are uncommon findings."). For a case in which a young child suffered severe genital injury requiring surgery, see Owens v. State, 514 N.E.2d 1257 (Ind. 1987).

[FN132]. *See* J. McCann, Patterns of Healing in Cases of Sexual Abuse (paper presented at a symposium entitled *Health Science Response to Child Maltreatment*, Center for Child Protection, San Diego, Cal., Jan. 21, 1988). Doctor McCann reported longitudinal follow-up of children with marked genital and anal injuries from sexual abuse. He presented photographic documentation that healing progresses so well that over time physical evidence of abuse may be very minimal, and in less severe injuries, non-existent.

[FN133]. *See* Herman-Giddens & Frothingham, *supra* note 129, at 208 ("Normal findings do not rule out sexual abuse. The interview remains the most critical factor in establishing whether or not sexual abuse or exploitation has occurred"). *See also* Levitt, *supra* note 120, at 202, where the author writes:

> Often the history alone must document that sexual abuse has occurred. Indeed, if disclosure of the abuse is delayed, physical findings are present in only 10% to 20% of cases. The physician who limits the evaluation to physical evidence alone is, then, making decisions regarding whether or not abuse occurred with 80 to 90% of the data missing . . . . By discarding the history, the physician places himself or herself in an untenable position. In the courtroom, defense attorneys typically struggle to make sure medical testimony includes only physical findings and they may try to prevent the physician from testifying about the history, which is often damaging to the defendant. The physician should draw on all of his or her technical abilities to make meaningful decisions on behalf of the child. The physician should refuse to use physical findings as the sole

basis for an opinion or testimony and explain to the court that in most medical diagnoses the history outweighs the physical findings in the final assessment.

[FN134]. *See* MERK MANUAL 489 (14th ed., R. Berkow ed. 1982)("Between attacks and even during attacks, patients with angina pectoris may not have signs of organic heart disease.").

[FN135]. *See* Enos, *supra* note 120, at 387, discussing the examination of the hair, mouth, and skin prior to conducting the genital examination. The physician looks for bites, bruises, ligature marks, abrasions, and other indications of abuse and/or neglect. *See also* Paul, *The Medical Examination in Sexual Offenses Against Children*, 17 MED. SCI. & L. 251, 255 (1977) where the author writes:

> [T]he inner surface of the lips must be examined, for it is here that signs will often be found that are consistent with an attempt to muffle the scream by the assailant. . . . Typical grasping injuries may be found on the arms, thighs, wrists, legs and ankles. However, these injuries are almost invariably absent in cases where the assailant is the parent of the child or someone the child knows well.

[FN136]. *See* Emans, Woods, Flagg & Freeman, *Genital Findings in Sexually Abused, Symptomatic and Asymptomatic Girls*, 79 PEDIATRICS 778 (1987)(Emans did not find that erythema distinguished sexually abused girls from those with other genital complaints); Paul, *supra* note 135, at 254 ("This [generalized] redness of the vaginal mucosa is not the same as the more localized redness due to bruising and abrasion that can result from attempted or accomplished penetration. The latter . . . persists as areas of increased redness against the overall background color."); Rimsza & Niggeman, *supra* note 120, at 10 ("Vulvar or perianal erythema was the only physical finding in" 14 percent of 311 patients the authors examined for sexual abuse).

[FN137]. Enos, *supra* note 120, at 396 ("Penetration may or may not have been attempted but did not occur, the ejaculate was released on the external genitalia, legs, knees, thighs, buttocks, lower abdomen, clothing, or materials located at the scene."). Acid phosphatase is a chemical found in ejaculate even in the absence of sperm.

[FN138]. Paul, *supra* note 135, at 254-55.

[FN139]. Physicians are sometimes asked to date bruises. Dating bruises is not an exact science, but the physician can estimate the approximate age of a bruise. *See* Schmitt, *The Child With Nonaccidental Trauma*, in THE BATTERED CHILD 178, 192 (4th ed., R. Helfer & R. Kempe eds. 1987). For discussion of proof of physical child abuse see Myers & Carter, *supra* note 66.

[FN140]. J. McCann, Anatomical Standardization of Normal Prepubertal Children (presentation at a symposium entitled *Health Science Response to Child Maltreatment*, Center for Child Protection, San Diego, Cal., Jan. 21, 1988).

Background information concerning the hymen may be helpful. The vagina is a tube with an outer and inner segment separated by the hymen, a rim of tissue like the iris in a camera. The hymen may be circular, horseshoe, tube, or crescent shaped. Normal hymens do not cover the vagina completely; there is a hole to allow menstruation. The outer vagina is also called the introitus. The hymen lies one-half inch to one inch inside the introitus, depending on the size of the child. Penetration can occur inside a child's labia, into the outer vagina, without the hymen being damaged. If penetration occurs through the hymen into the deeper vagina, damage to the hymen may or may not occur, depending upon such factors as the size of the child, the size of the penetrating object, the amount of hymen tissue, the amount of force, and whether lubrication was used.

The appearance of normal hymen tissue is changed by hormones. The effect of estrogen produces thicker, redundant hymen tissue on the newborn and the adolescent. A thorough examination of the hymen and vaginal opening is often made more difficult by these changes. *See* Underhill, *The Doctor Cannot Always Tell*, LANCET 375,

Feb. 18, 1978. The author examined 28 adult women who had never had intercouse. ("Contrary to popular belief no definite criteria have ever been established for deciding whether [an adult] woman is a virgin or not. . . . In some women the hymen forms a firm ring inside the introitus. The hymenal opening is so small there can be no doubt that sexual intercourse has not taken place. However in other women, the hymen is less well developed and the introitus is distensible, and it is extremely difficult for the medical examiner to state with certainty whether the women is, or is not, a virgin.") More delicate hymen tissue is characteristic of the child between age three years and early puberty. There are a number of variations in the normal and abnormal hymen described in the medical literature. *See* Pokornoy, *Configuration of the Prepubertal Hymen*, 157 AM. J. OBSTET. GYNECOL. 950 (1987). Just below the vagina is a band of tissue called the posterior fourchette. The valley between the hymen and the posterior fourchette is called the posterior fossa or fossa navicularis. Between the vagina and the anus is an area called the perineum. A fusion line called the median raphe often extends from the vagina in girls to the anal verge. In boys this line extends from the under surface of the penis, over the middle of the scrotum, and down to tuck into the anus.

[FN141]. *See* A. HEGER, CHILD SEXUAL ABUSE: A MEDICAL VIEW 19 (1985) ("Digital manipulation and stretching as well as penetration may result in an enlarged hymenal opening"); Enos, *supra* note 120, at 396 ("Two of 112 intact hymens were found dilated and considered indicative of previous intercourse."); Herman-Giddens & Frothingham, *supra* note 129, at 207 ("Sometimes a hymen may appear 'intact' when, in fact, it has been gradually stretched enough to allow digital or even penile penetration.").

[FN142]. *See* Pokornoy, *supra* note 140.

[FN143]. Cantwell, *Update on Vaginal Inspection as it Relates to Child Sexual Abuse in Girls Under Thirteen*, 11 CHLLD ABUSE & NEGLECT 545 (1987). The author reexamined 20 sexually abused children with enlarged hymenal openings, who were protected from further sexual abuse. The horizontal hymenal diameter shrank from one mm to twelve mm over a period of three days to three years. In four children who admitted sexual abuse had occurred between the first and second examination, the horizontal hymenal diameter enlarged by three mm to nine mm.

[FN144]. *See* Berkowitz, Elvik & Logal, *A Simulated "Acquired" Imperforate Hymen Following the Genital Trauma of Sexual Abuse*, 26 CLINICAL PEDIATRICS 307 (1987). The authors describe a sexually abused child in whom the injured hymen healed completely over the vaginal orifice, creating a simulated imperforate hymen, which is a hymen with no aperture. *See also* J. McCann, *supra* note 132.

One of the authors (Bays) has followed an infant with a severe injury (a tear through the hymen, fourchette, and perineum into the rectum) whose examination is virtually normal one year later.

[FN145]. Paul, *supra* note 135, at 253.

[FN146]. *See* Herman-Giddens & Frothingham, *supra* note 129, at 207; Levitt, *supra* note 120, at 213.

[FN147]. Pokornoy, *supra* note 140, at 954.

[FN148]. Levitt, *supra* note 120, at 213.

[FN149]. In the absence of congenital deformities of the genitalia, all females are born with a hymen. There is no evidence in the medical literature of congenital absence of the hymen. *See* Jenny, Kuhns & Arakawa, *Hymens in Newborn Female Infants*, 80 PEDIATRICS 399 (1987); Mor & Merlob, *Congenital Absence of the Hymen Only A Rumor?*, 82 PEDIATRICS 679 (1988).

In these two studies, a total of 26,199 infant girls were examined; all had hymens. The highest possible fre-

quency of congenital absence of the hymen would be less than 0.01 percent. The lowest estimate would be zero.

[FN150]. *See* A. HEGER, *supra* note 141; Enos, *supra* note 120; Herman-Giddens & Frothingham, *supra* note 129; Levitt, *supra* note 120; Paul, *supra* note 135.

[FN151]. The growth of new blood vessels into an area of scarring is termed neovascularity. *See* A. HEGER, *supra* note 141, at 19 ("The development of intrascar neovascularity called neovascularization frequently occurs following genital injury and is also more easily visualized utilizing a green filter.")

[FN152]. *See* A. HEGER, *supra* note 141, at 19; Herman-Giddens & Frothingham, *supra* note 129, at 207; Paul, *supra* note 135, at 253.

[FN153]. *See* McCann, Voris & Simon, *Labial Adhesions and Posterior Fourchette Injuries in Childhood Sexual Abuse*, 142 AM. J. DISEASES CHILDHOOD 659 (1988). The authors examined six sisters with labial adhesions and posterior fourchette injuries, whose father, grandfather, and uncle confessed to abusing the children. *See also* Herman-Giddens & Frothingham, *supra* note 129, at 207.

[FN154]. Paul, *supra* note 135, at 253.

[FN155]. *See* Berkowitz, Elvik & Logan, *Labial Fusion in Prepubescent Girls: A Marker for Sexual Abuse?*, 156 AM. J. OBSTET. GYNECOL. 16, 19 (1987)("in young infants, fecal soiling and diaper dermatitis may promote the condition [labial fusion]. In older girls, trauma such as that associated with sexual abuse may predispose to labial fusion.").

[FN156]. *See* Spencer & Dunklee, *Sexual Abuse of Boys*, 78 PEDIATRICS 133 (1986).

[FN157]. Hobbs & Wynne, *Management of Sexual Abuse*, 62 ARCHIVES OF DISEASE IN CHILDHOOD 1182, 1185 (1987).

[FN158]. For a description of anal signs of abuse see A. HEGER, *supra* note 141, at 19-20; Herman-Giddens & Frothingham, *supra* note 129, at 206; Hobbs & Wynne, *Buggery in Childhood--A Common Syndrome of Child Abuse*, LANCET 792 (Oct. 4, 1986); Hobbs & Wynn, *Sexual Abuse of English Boys and Girls: The Importance of the Anal Examination*, in 13 CHILD ABUSE AND NEGLECT 195 (1989) [hereinafter Hobbs & Wynn, *Sexual Abuse*]; Paul, *supra* note 135, at 256-57.

Information concerning the anus may be helpful. When the buttocks are spread, the folds of skin around the anal verge can be seen. The verge is the anal margin where a transition occurs between the hairy skin and the smooth perianal area. The anal canal begins just inside the anal verge. It is about one and onehalf inches long in an adult and contains the external and internal anal sphincters, the circular muscles which open and shut to allow passage of flatus and stool. If penetration into the anus occurs, damage to tissues or muscles may or may not occur, depending upon the size of the child, the size of the penetrating object, and use of force or lubrication. An object the size of a finger or a penis can be passed into the anus without damage, as stools of at least this diameter or larger are commonly passed out. *See* Levitt, *supra* note 120, at 204 ("Young children, naive about sexual practices, will usually not know that something can penetrate deep into the vagina (or rectum). Their own definition of "inside" as evidenced by their answers or as demonstrated on an anatomically correct doll, may not in fact, turn out to actually mean deep, or even any, penetration. Precise definition of the child's idea of penetration can be arrived at by having her compare the sensations occurring at the time of examination with those felt at the time of abuse.")

[FN159]. *See* Paul, *supra* note 135, at 256, where the author writes that "[d]igital penetration may result in no injury

of any kind, even in an infant of less than one year of age....The signs of penile penetration will vary depending upon the use of a lubricant, the force used, and the number of times that such an act has taken place."

[FN160]. Sanfilippo & Schikler, *Identifying the Sexually Molested Preadolescent Girl*, 15 PEDIATRIC ANNALS 621, 622 (1986).

[FN161]. *See* Herman-Giddens & Frothingham, *supra* note 129, at 206, where the authors write that "[w]e have seen gaping [of the anus] of 1.0 to 1.5 cm in children known to have been subjected to repeated anal intercourse. Gaping of a smaller diameter may or may not be normal...." *See also* Bamford & Kiff, *Letter to the Editor*, LANCET 1396 (Dec. 12, 1987); Priestly, *Letter to the Editor*, LANCET 1396 (Dec. 12, 1987).

[FN162]. Hobbs & Wynne, *Sexual Abuse, supra* note 158, at 203.

[FN163]. A. HEGER, *supra* note 141, at 19-20; Paul, *supra* note 135, at 257.

[FN164]. *See* Hobbs & Wynne, *Sexual Abuse, supra* note 158, at 205.

[FN165]. *See* Paul, *supra* note 135, at 256, where the author writes:

> The shearing force required to insert a penis into the virginal anus of a very young child, particularly if no lubricant has been used, tends to rupture the delicate and poorly supported blood vessels at the anal verge. This rupture can produce the overall swelling previously described or it can produce a local collection of blood in the form of an anal verge hematoma. Such a hematoma will take up to 10 days to resolve, and may leave a small tag of loose skin for a further 2-3 weeks to mark its site.

[FN166]. *See* A. HEGER, *supra* note 141, at 20.

[FN167]. *See* Handfield-Jones, Hinde & Kennedy, *Lichen Sclerosis et Atrophicus in Children Misdiagnosed as Sexual Abuse*, 294 BRITISH MED. J. 1404 (1987).

[FN168]. *See* Boyd & Jordan, *Unusual Presentation of Varicella Suggestive of Sexual Abuse*, 141 AM. J. OF DISEASES OF CHILDREN 940 (1987).

[FN169]. *See* Clayden, *Reflex Anal Dilatation Associated With Severe Chronic Constipation in Children*, 63 ARCHIVES OF DISEASE IN CHILDHOOD 832 (1988); Wales & Taitz, *Letter to the Editor*, LANCET 1396, 1397 (Dec. 12, 1987)(authors collected data on anal sphincter tone in 74 children referred for constipation. They found that "a minority of children with chronic constipation may show a 'positive' anal dilation test.".)

[FN170]. *See* Hey, Buchan, Littlewood & Hall, *Differential Diagnosis in Child Sexual Abuse*, LANCET 283 (Jan. 31, 1987).

[FN171]. *See* Vickers, Morris, Coulthard & Eastham, *Anal Signs in Haemolytic Uraemic Syndrome*, LANCET 998 (April 30, 1988).

[FN172]. *See* Williams, Callen & Owen, *Vulvar Disorders in the Pubertal Female*, 15 PEDIATRIC ANNALS 588 (1986).

[FN173]. Cowell, *The Gynecological Examination of Infants, Children, and Young Adolescents*, 28 PEDIATRIC

CLINICS OF N. AM. 247 (1981). The author writes that "The first myth to be dispelled is that tampons alter hymenal integrity. Distensibility is increased due to slight stretching...." *Id.* at 260.

[FN174]. Baker, *Seat Belt Injury Masquerading as Sexual Abuse*, 77 PEDIATRICS 435 (1986).

[FN175]. Hobbs & Wynne, *Child Sexual Abuse--An Increasing Rate of Diagnosis*, LANCET 837, 840 (Oct. 10, 1987)("Straddle injuries, sometimes difficult to differentiate from abuse, will tend to lead to anterior injury other than to the vaginal introitus."); Muram, *Genital Tract Injuries in the Prepubertal Child*, 15 PEDIATRIC ANNALS 616, 620 (1986)("Severe self-inflicted injuries [to the genitalia] are extremely rare, but vulvar contusions can be seen in mentally handicapped girls, particularly those who masturbate regularly."); Woodling & Kossoris, *Sexual Misuse: Rape, Moles tation and Incest*, 28 PEDIATRIC CLINICS OF N. AM. 481, 492 (1981)("Autostimulation will not produce abrasions, lacerations, or contusions, nor does tampon insertion.").

[FN176]. *See* Dahlke, Cooke, Cunnane, Chawla & Lau, *Identification of Semen in 500 Patients Seen Because of Rape*, 68 AM. J. OF CLINICAL PATHOLOGY 740 (1977).

[FN177]. McCauley, Gorman & Guzinski, *Toluidine Blue in the Detection of Perineal Lacerations in Pediatric and Adolescent Sexual Abuse Victims*, 78 PEDIATRICS 1039 (1986).

[FN178]. Krebs & Schneider, *Human Papillomavirus-Associated Lesions of the Penis: Colposcopy, Cytology, and Histology*, 70 OBSTETRICS & GYNECOLOGY 299 (1987)("Routine application of 3% or 5% acetic acid yielded white or grayish epithelial changes in 22% of the cases, which would have been missed without this technique."); Rosenberg & Reid, *Sexually Transmitted Papillomaviral Infections in the Male: I. Anatomic Distribution and Clinical Features*, 29 UROLOGY 488 (1987).

[FN179]. 533 So. 2d 841 (Fla. Dist. Ct. App. 1988). *See also* State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988); Shines, *Blood Grouping and Genetic Marker Evidence: The Use of Electrophoretic Testing*, 24 CRIM. L. BULL. 475 (1988); Williams, *DNA Fingerprinting: A Revolutionary Technique in Forensic Science and Its Probable Effects on Criminal Evidentiary Law*, 37 DRAKE L. REV. 1 (1987-88); Comment, *DNA Identification Tests and the Courts*, 63 WASH. L. REV. 903 (1988).

[FN180]. Andrews v. State, 533 So. 2d 841, 843 (Fla. Dist. Ct. App. 1988).

[FN181]. *Id.* at 849.

[FN182]. *See* A. HEGER, *supra* note 141, at 19.

[FN183]. Teixeira, *Hymenal Colopscopic Examination in Sexual Offenses*, 2 AM. J. FORENSIC MED. & PATHOLOGY 209 (1981).

[FN184]. *See* Norveli, Benrubi & Thompson, *Investigation of Microtrauma After Sexual Intercourse*, 29 J. REPRODUCTIVE MEDICINE 269 (1984).

[FN185]. Woodling & Heger, *The Use of the Coloposcope in the Diagnosis of Sexual Abuse in the Pediatric Age Group*, 10 CHILD ABUSE & NEGLECT 111, 114 (1986).

[FN186]. *See, e.g.*, People v. Mendibles, 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553 (1988); State v. Butler, 256 Ga.

448, 349 S.E.2d 684 (1986); People v. Land, 178 Ill. App. 3d 251, 533 N.E.2d 57 (1989); Owens v. State, 514 N.E.2d 1257 (Ind. 1987); People v. Vasher, 423 N.W.2d 40 (Mich. Ct. App. 1988); State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987). In very few cases would medical evidence of abuse lack probative value, and in equally few cases would the probative value of such evidence be substantially outweighed by the potential for unfair prejudice.

[FN187]. *See* State v. Butler, 256 Ga. 448, 448, 349 S.E.2d 684, 685 (1986).

[FN188]. *Id.* at 450, 349 S.E.2d at 686 (the doctor's "opinion was one of fact, and was not inadmissible as a legal conclusion").

[FN189]. *See* FED. R. EVID. 704. *See supra* section II (E), for discussion of the ultimate issue rule.

[FN190]. *See supra* subsection II (E).

[FN191]. *See* People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988)("it is settled by 'a long line of California decisions' that an expert medical witness is qualified 'to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself."(quoting People v. Bledsoe, 36 Cal. 3d 236, 249, 203 Cal. Rptr. 450, 459 (1984))).

[FN192]. *See* Owens v. State, 514 N.E.2d 1257 (Ind. 1987).

[FN193]. *See* State v. Tanner, 675 P.2d 539, 544 (Utah 1983)(physical abuse case).

[FN194]. *See* State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981), where the court wrote:

> A physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby....Testimony that an examination revealed evidence of traumatic and forcible penetration *consistent with* an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force.

Id at 489, 284 S.E.2d at 512 (emphasis in original). *See also* People v. Vasher, 423 N.W.2d 40 (Mich. Ct. App. 1988); State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987).

[FN195]. 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553 (1988).

[FN196]. *Id.* at 1295, 245 Cal. Rptr. at 563.

[FN197]. *Id.*

[FN198]. *See* State v. Butler, 256 Ga. 448, 349 S.E.2d 684 (1986), where the court wrote:

> Dr. Fleming's opinion that the child had been sexually abused was based on her physical examination of the child as well as on the history related to her by the child. This opinion was admissible under the rule that medical opinions concerning a patient's physical condition are admissible in evidence even when they are based in part on the physical history elicited from the patient.

Id. at 449-50, 349 S.E.2d at 685.

[FN199]. Under Rule 803(4) of the Federal Rules of Evidence, certain statements made for purposes of diagnosis and treatment are excepted from the hearsay rule. *See* J. NYERS, *supra* note 2, § 5.36.

[FN200]. *See supra* discussion of permissible bases of expert testimony, at section II (B).

[FN201]. *See* AMERICAN HUMANE ASSOCIATION, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 (1987); Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149, 169-72 (1985-86).

[FN202]. D. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE AND WORKPLACE HARRASSMENT (1984); D. Finkelhor, G. Hotaling, I. Lewis & C. Smith, Risk Factors for Sexual Abuse in a National Survey of Adult Men and Women, (unpublished manuscript available from the Family Research Laboratory, University of New Hampshire, 126 HSSC, Durham, N.H. 03824); Wyatt, *The Sexual Abuse of Afro-American and White-American Women in Childhood*, 9 CHILD ABUSE & NEGLECT 507 (1985).

[FN203]. D. RUSSELL, *supra* note 202; Kilpatrick, Saunders, Veronen, Best & Von, *Criminal Victimization: Lifetime Prevalence, Reporting to Police and Psychological Impact*, 33 CRIME & DELINQ. 479 (1987).

[FN204]. Jacobson & Richardson, *Assault Experiences of 100 Psychiatric Inpatients: Evidence of the Need for Routine Inquiry*, 144 AM. J. PSYCHIATRY 908 (1987). It has been discovered that many mental patients do not volunteer information about sexual abuse unless they are asked specifically about abuse. In one study the proportion of female psychiatric outpatients with histories of sexual abuse increased from eight percent to over 70 percent simply by asking about sexual abuse. J. Briere & L. Zaidi, Sexual Abuse Histories and Sequelae in Psychiatric Emergency Room Patients (paper presented at Annual Meeting of American Psychological Association, Atlanta, Ga., Aug., 1988).

[FN205]. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

[FN206]. Bender & Blau, *The Reaction of Children to Sexual Relationships with Adults*, 7 AM. J. ORTHOPSYCHIATRY 500 (1937).

[FN207]. Yorukoglu & Kempe, *Children Not Severely Damaged by Incest with a Parent*, 5 J. AM. ACAD. CHILD PSYCHIATRY 111 (1961).

[FN208]. Constantine, *The Effects of Early Sexual Experiences: A Review and Synthesis of the Research*, in CHILDREN AND SEX: NEW FINDINGS, 217, 222-23 (1981).

[FN209]. Henderson, *Is Incest Harmful?*, 28 CAN. J. PSYCHIATRY 34 (1983).

[FN210]. L. ARMSTRONG, KISS DADDY GOODNIHGT (1978); K. BRADY, FATHER'S DAYS (1970); S. FORWARD & C. BUCK, BETRAYAL OF INNOCENCE: INCEST AND ITS DEVASTATION (1978); S. FRASER, MY FATHER'S HOUSE: A MEMOIR OF INCEST AND HEALING (1988).

[FN211]. J. HERMAN, FATHER-DAUGHTER INCEST (1982); K. MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS (1978); Tsai, Feldman-Summers & Edgar, *Childhood Molestation: Variables Related to Differential Impacts of Psychosexual Functioning in Adult Women*, 66 J. ABNORMAL PSYCHOLOGY 407 (1978).

[FN212]. Briere & Runtz, *Symtomatology Associated with Childhood Sexual Victimization in a Non-Clinical Sam-*

ple, 12 CHILD ABUSE & NEGLECT 51 (1988); Gold, *Long Term Effects of Sexual Victimization in Childhood: An Attributional Approach*, 54 J. CONSULT. & CLIN. PSYCHOLOGY 471 (1986); Stein, Golding, Seigel, Burnam & Sorenson, *Long Term Psychological Sequelae of Child Sexual Abuse: The Los Angeles Epidemeological Catchment Area Study*, in LASTING EFFECTS OF CHILD SEXUAL ABUSE (G.Wyatt & G. Powell eds. 1988)[hereinafter Stein].

[FN213]. Bagley & Ramsey, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, 4 J. SOC. WORK & HUMAN SEXUALITY 33 (1985); Murphy, Kilpatrick, Amick-McMullan, Veronen, Paduhovich, Best, Villeponteaux & Saunders, *Current Psychological Functioning of Child Sexual Assault Survivors*, 3 J. INTERPERSONAL VIOLENCE 55 (1988); Stein, *supra* note 212.

[FN214]. Gross, *Incestuous Rape: A Cause for Hysterical Seizures in Four Adolescent Girls*, 49 AM. J. ORTHOPSYCHIATRY 704 (1979).

[FN215]. Briere & Runtz, *Suicidal Thoughts and Behaviors in Former Sexual Abuse Victims*, 18 CAN. J. BEHAVIOURAL SCIENCE 413 (1986).

[FN216]. Shapiro, *Self-Mutiliation and Self-Abuse in Incest Victims*, 41 AM. J, PSYCHOTHERAPY 46 (1987).

[FN217]. Putnam, Guroff, Silberman, Barban & Post, *The Clinical Phenomenology of Multiple Personality Disorder: Review of 100 Recent Cases*, 47 J. CLINICAL PSYCHIATRY 285 (1986); Saltman & Solomon, *Incest and Multiple Personality*, 50 PSYCHOLOGICAL REPORTS 1127 (1982).

[FN218]. Walker, Katon, Harrop-Griffiths, Holm, Russo & Hickok, *Relationship of Chronic Pelvic Pain to Psychiatric Diagnosis and Childhood Sexual Abuse*, 145 AM. J. PSYCHIATRY 75 (1988).

[FN219]. Root, *The Incidence of Victimization in a Bulemic Sample*, 3 J. INTERPERSONAL VIOLENCE 161 (1988).

[FN220]. James & Meyerding, *Early Sexual Experience and Prostitution*, 134 AM. J. PSYCHIATRY 1381 (1977).

[FN221]. McCormick, Janus & Burgess, *Runaway Youths and Sexual Victimization: Gender Differences in an Adolescent Runaway Population*, -- CHILD ABUSE & NEGLECT -- (in press).

[FN222]. A. BURGESS, N. GROTH, L. HOLMSTROM & S. SGROI, SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (1978); S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978); J. GOODWIN, SEXUAL ABUSE: INCEST VICTIMS AND THEIR FAMILIES (1982); B. JUSTICE & R. JUSTICE, THE BROKEN TABOO (1979); R. KEMPE & C. KEMPE, THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS (1984); SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (P. Mrazek & C. Kempe eds. 1981); Peters, *Children Who are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398 (1976).

[FN223]. Rogers & Terry, *Clinical Intervention With Boy Victims of Sexual Abuse*, in VICTIMS OF SEXUAL AGGRESSION (I. Stuart & J. Greer eds. 1984); Adams-Tucker, *Proximate Effects of Sexual Abuse in Childhood: A Report on 28 Children*, 139 AM. J. PSYCHIATRY 1252 (1982); Mian, Wehrspann, Klajner-Diamond, LeBaron & Winder, *Review of 125 Children 6 Years of Age and Under Who Were Sexually Abused*, 10 CHILD ABUSE & NEGLECT 223 (1986) [hereinafter Mian]; Anderson, Bach & Griffiths, Psychosocial Sequelae in Intrafamilial Victims

of Sexual Assault and Abuse (paper presented at the Third International Conference on Child Abuse and Neglect, Amsterdam, The Netherlands, 1981).

[FN224]. V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969).

[FN225]. B. JAMES & M. NASJLETI, TREATING SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1983); Porter, Blick & Sgroi, *Treatment of the Sexually Abused Child*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 109 (S. Sgroi ed. 1982).

[FN226]. *See, e.g.*, Sgroi, Porter & Blick, *Validation of Child Sexual Abuse*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 39, 40-41 (S.Sgroi ed. 1982) [hereinafter Sgroi].

[FN227]. J. HAUGAARD & D. REPUCCI, THE SEXUAL ABUSE OF CHILDREN (1988); Browne & Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOLOGICAL BULLETIN 66 (1986).

[FN228]. Tufts New England Medical Center, Division of Child Psychiatry, Sexually Exploited Children: Service and Research Project (Final Report for the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice (1984)) [hereinafter Tufts].

[FN229]. J. Conte, L. Berliner & J. Schuerman, The Impact of Sexual Abuse on Children: Final Technical Report (National Institute of Mental Health 1988, U.S. Department of Health and Human Services (Grant No. MH 37133)(also appearing in HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISUES (L. Walker 1988)) [hereinafter J. Conte].

[FN230]. An article describing Mannarino and Cohen's study of 60 children has been completed and submitted for publication. A pilot study involving 24 of the children is found at Cohen & Mannarino, *Psychological Symptoms in Sexually Abused Girls*, 12 CHILD ABUSE & NEGLECT 571 (1988). The abstract of this article reads:

> This study examined psychological symptoms exhibited by children who had recently been sexually abused.
>
> Twenty-four girls aged 6 to 12 years old were evaluated within six months of being abused using a variety of standardized child psychiatric instruments. Results showed a marked discrepancy between child and parent reports of symptoms. The abused children did not exhibit significant depressive, anxiety, or low self-esteem symptoms by self-report; however, their parents rated them as having significantly more behavioral problems than a normative sample but as somewhat less pathological than a clinical sample....

[FN231]. Friedrich, Beilke & Urguiza, *Children from Sexually Abusive Families: A Behavioral Comparison*, 2 J. INTERPERSONAL VIOLENCE 391 (1987) [hereinafter Friedrich, *Children*]; Friedrich, Urquiza & Beilke, *Behavior Problems in Young Sexually Abused Children*, 11 J. PEDIATRIC PSYCHOLOGY 47 (1986) [hereinafter Friedrich, *Behavior*].

[FN232]. Einbender & Friedrich, *The Psychological Functioning and Behavior of Sexually Abused Girls*, J. CLINICAL & CONSULTING PSYCHOLOGY (in press).

[FN233]. Tong, Oates & McDowell, *Personality Development Following Sexual Abuse*, 11 CHILD ABUSE & NEGLECT 371 (1987).

[FN234]. Saunders, McClure & Murphy, Structure, Function and Symptoms in Father-Child Sexual Abuse Families: A Multi-level, Multi-Respondent Empirical Assessment (Grant from Family Support Program, Department of the Navy) (Available at Crime Victim Center, Medical University of South Carolina, 171 Ashley Street, Charleston, S.C.).

[FN235]. Runyon, Everson, Edelsohn, Hunter & Coulter, *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647 (1988).

[FN236]. White, Halpin, Strom & Santilli, *Behavioral Comparisons of Young Sexually Abused, Neglected and Non-referred Children*, 17 J. CLINICAL CHILD PSYCHOLOGY 53 (1988)[hereinafter White].

[FN237]. Wolfe, Gentile & Wolfe, *The Impact of Sexual Abuse on Children: A PTSD Formulation*, BEHAVIOR THERAPY (in press)[hereinafter Wolfe].

[FN238]. Conte & Berliner, *The Impact of Sexual Abuse on Children: Empirical Findings*, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN 72 (L. Walker ed. 1988); White, *supra* note 236.

[FN239]. Wolfe, *supra* note 237.

[FN240]. *See* Conte & Berliner, *supra* note 238.

[FN241]. *See* Browne & Finkelhor, *supra* note 227.

[FN242]. *See* Conte & Schuerman, *Factors Associated with an Increased Impact of Child Sexual Abuse*, 11 CHILD ABUSE & NEGLECT 201 (1987).

[FN243]. *See* Tufts, *supra* note 228.

[FN244]. *See* Conte & Schuerman, *supra* note 242; Friedrich, *Children, supra* note 231.

[FN245]. Yates, *Children Eroticized by Incest*, 139 AM. J. PSYCHIATRY 482 (1982).

[FN246]. *See* Burgess, McCausland & Wolbert, *Children's Drawings as Indicators of Sexual Trauma*, 19 PERSP. ON PSYCHIATRIC CARE 50 (1981); Hibbard, Roghmann & Hoekelman, *Genitalia in Children's Drawings: An Association with Sexual Abuse*, 79 PEDIATRICS 129 (1987) [hereinafter Hibbard]; Kelley, *The Use of Art Therapy with Sexually Abused Children*, 22 J. PSYCHOSOCIAL NURSING 12 (1984); Stember, *Art Therapy: A New Use in the Diagnosis and Treatment of Sexually Abused Children*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS (U.S. Dept. Health & Human Services, Washington D.C., 1980); Yates, Beutler & Crago, *Drawings by Child Victims of Incest*, 9 CHILD ABUSE & NEGLECT 183 (1985).

[FN247]. *See* Hibbard, *supra* note 246.

[FN248]. For discussion of anatomically detailed dolls see *infra* note 259.

[FN249]. *See* Fredrich, *Children, supra* note 231; Gale, Thompson, Moran & Sack, *Sexual Abuse in Young Chil-*

dren: Its Clinical Presentation and Characteristic Patterns, 12 CHILD ABUSE & NEGLECT 163 (1988); Mian, *supra* note 223; White, *supra* note 236.

[FN250]. *See* Friedrich, The Child Sexual Behavior Inventory: Reliability and Validity, Scientific Proceedings of the Annual Meeting, American Academy of Child and Adolescent Psychiatry with the Canadian Academy of Child Psychiatry, Vol. IV., NR-73, at 59 (1988) [hereinafter Friedrich, Inventory]. Friedrich describes the research as follows:

> The 42-item Child Sexual Behavior Inventory [hereinafter CSBI] was developed to assess the sexual behaviors seen in young children, and has particular utility in evaluating children with a history of sexual abuse. The items assess a broad range of sexual behaviors exhibited in children ranging from masturbation, gender confusion, sexual aggression, erotic behavior, and boundary permeability. An initial factor analysis revealed five factors, i.e., boundary permeability, sexual aggression, self-stimulation, sexual inhibition, and sexual confusion. This paper reports the frequency of these behaviors in a nonabused and normative sample of three hundred 3-10 year old male and female children. In addition, it contrasts these children with two separate clinical samples of sexually abused children and demonstrates the high degree of discriminating ability of this measure. Finally, the five factors of the CSBI are correlated with factors derived from the Child Behavior Checklist [hereinafter CBC], a measure of general child behavior. Significant correlations are demonstrated from the CSBI and the CBC, including aggression.

[FN251]. *See* M. DE YOUNG, THE SEXUAL VICTIMIZATION OF CHILDREN (1982); Rosenfeld, Browning & Boatman, *Incest: Children at Risk*, 134 AM. J. PSYCHIATRY 69 (1977).

[FN252]. *See* James & Meyerding, *supra* note 220; Silbert & Pines, *Sexual Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407 (1981).

[FN253]. *See* Browne & Finkelhor, *supra* note 227.

[FN254]. *See* Pynos & Eth, *Children Traumatized by Witnessing Acts of Personal Violence: Homicide, Rape or Suicide Behavior*, in POST-TRAUMATIC STRESS DISORDER IN CHILDREN 19 (1985).

[FN255]. *See* Terr, *Psychic Trauma in Children and Adolescents*, 8 SYMPOSIUM CHILD PSYCHIATRY 815 (1985).

[FN256]. *See* Wallerstien & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCHIATRY 256 (1976).

[FN257]. *See* Friedrich, Inventory, *supra* note 250.

[FN258]. *See* Sgroi, *supra* note 226, at 40-41.

[FN259]. Anatomically detailed dolls are frequently used in investigations of suspected child sexual abuse, and as an adjunct to therapy. *See* Boat & Everson, *Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations*, 12 CHILD ABUSE & NEGLECT 171 (1988), where the researchers discuss the results of a survey of law enforcement officers, mental health practioners, physicians, and child protective services workers. Many of the professionals use the dolls during interviews. However, relatively few professionals have received training in proper use of the dolls.

The dolls have three primary uses:

(1) As demonstrative evidence in court to assist child witnesses to testify more effectively. This use of the dolls

is recognized by the courts as proper. *See* J. MYERS, *supra* note 2, § 4.17L (Supp. 1989)(collecting cases). *See also* MICH. COMP. LAW ANN. § 600.2163a(3) (West Supp. 1988)("If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination").

(2) As an aid during interviews to assist children in describing events they find difficult to describe in words, and to assist young children who lack the verbal skills required to describe events. Provided the interviewer uses proper interview techniques, this use of anatomical dolls should not be controversial.

(3) As a diagnostic or interperative tool to aid in determining whether sexual abuse occurred. This use of the dolls is controversial. Recent research indicates that the dolls can be helpful in evaluating suspected abuse. *See* White, Strom, Santilli & Halpin, *Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls*, 10 CHILD ABUSE & NEGLECT 519 (1986). In this study 25 children who were referred for suspected sexual abuse were compared to 25 nonreferred children in the way the children interacted with anatomically detailed dolls. The age range was from two to five years. The children in the referred group displayed more sexualized behaviors with the dolls than the nonreferred children. The differences were statistically significant. Children who were not suspected of being sexually abused showed no unusual behaviors with the dolls relative to sexualized play.

See also Jampole & Weber, *An Assessment of the Behavior of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls*, 11 CHILD ABUSE & NEGLECT 187 (1987)(there were statistically significant differences between sexually abused and nonsexually abused children in play with the dolls; 90 percent of the sexually abused children demonstrated sexual behaviors with the dolls; 80 percent of the nonsexually abused children did not demonstrate sexual behaviors with the dolls); Sivan, Schor, Koepple & Noble, *Interaction of Normal Children with Anatomical Dolls*, 12 CHILD ABUSE & NEGLECT 295 (1988)(In this study of 144 children with no history of sexual abuse, the age range was three to eight years. The children interacted with anatomically detailed dolls. Little aggression and no explicit sexual activity were observed. In contrast to clinical observation of abused children, the doll play of nonreferred children is unlikely to be characterized by aggression or sexual concerns; thus, these behaviors when observed in interaction with these dolls should be taken seriously); White & Santilli, *A Review of Clinical Practices and Research Data on Anatomical Dolls*, 3 J. INTERPERSONAL VIOLENCE 430 (1988).

[FN260]. *See* FED. R. EVID. 401, defining relevant evidence as "evidence having 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."

[FN261]. *Id.*

[FN262]. *See* Corwin, Berliner, Goodman, Goodwin & White, *Child Sexual Abuse and Custody Disputes: No Easy Answers*, 2 J. INTERPERSONAL VIOLENCE 91, 94 (1987) [hereinafter Corwin].

[FN263]. *See* FED. R. EVID. 403.

[FN264]. *See* Anderson v. State, 749 P.2d 369, 371 (Alaska Ct. App. 1988) (expert did not personally examine children).

[FN265]. *See id.* at 373 (lay testimony provided by victim's mother).

[FN266]. For a decision approving expert testimony as described in this subsection see Ward v. State, 519 So. 2d 1082 (Fla. Ct. App. 1988).

[FN267]. *See, e.g.*, State v. Black, 537 A.2d 1154 (Me. 1988).

[FN268]. Cases from Pennsylvania exemplify the confusion. In Commonwealth v. Baldwin, 348 Pa. Super. 368, 502 A.2d 253 (1985), the court appeared to approve expert testimony on behaviors observed in the class of sexually abused children as substantive evidence of abuse. Such evidence assists the jury in understanding the evidence. In particular, the evidence helped the jury understand that the gaps and inconsistencies in the victim's testimony resulted from incest rather than fabrication. But in Commonwealth v. Pearsall, 368 Pa. Super. 327, 534 A.2d 106 (1987) the court obscures *Baldwin*. The *Pearsall* court seemed to imply that expert testimony is permitted to support credibility, and not as proof on the merits.

[FN269]. 151 Ariz. 378, 728 P.2d 248 (1986). *See also* Hilburn v. State, 765 P.2d 1382 (Alaska Ct. App. 1988); Commonwealth v. Emge, 553 A.2d 74 (Pa. Super. Ct. 1988). For two decisions which appear to approve the type of expert testimony discussed in this subsection, see State v. Reser, 244 Kan. 306, 767 P.2d 1277 (1989); Stephens v. State, -- P.2d -- (Wyo. 1989).

[FN270]. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986).

[FN271]. *See id.* at 378, 728 P.2d at 255.

[FN272]. 293 S.C. 97, 359 S.E.2d 59 (1987).

[FN273]. *See id.* at 97, 359 S.E.2d at 61-62.

[FN274]. *See, e.g.*, Anderson v. State, 749 P.2d 369, 373 (Alaska Ct. App. 1988); State v. Rimmasch, 775 P.2d 388 (Utah 1989).

[FN275]. *See* Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

[FN276]. *Id.* at 181.

[FN277]. *Id.* at 191.

[FN278]. *See* People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988); People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1987)(recognizing that the syndrome does not diagnose, and is not a test for sexual abuse).

[FN279]. *See* People v. Sanchez, 208 Cal. App. 3d 721, 256 Cal. Rptr. 446 (1989); People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988); *In re* Sara M., 194 Cal. App. 3d. 585, 239 Cal. Rptr. 605 (1987).

[FN280]. One of the present authors fell into this trap. *See* J. MYERS, *supra* note 2, § § 4.15, 4.16.

[FN281]. For a decision which appears to approve of "pure" CSAAS testimony to prove abuse see Keri v. State, 179 Ga. App. 664, 347 S.E.2d 236 (1986).

[FN282]. 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988).

[FN283]. *Id.* at 385, 249 Cal. Rptr. at 890.

[FN284]. 713 S.W.2d 816 (Ky. 1986).

[FN285]. *Id.* at 817.

[FN286]. *Id.*

[FN287]. *See, e.g.*, People v. Luna, 204 Cal. App. 3d 726, 250 Cal. Rptr. 878 (1988); People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988).

[FN288]. *See, e.g.*, Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987)(An expert may describe behavioral characteristics common in sexually abused children, but may not opine that a particular child was abused. While the opinion is not entirely clear, it appears that the expert testimony was offered on rebuttal to prove that abuse occurred.); Bussey v. Commonwealth, 697 S.W.2d 139 (Ky. 1985)(court refers to child sexual abuse accommodation syndrome and rejects syndrome evidence).

[FN289]. *See* McCord, *supra* note 42, at 24. *See also* Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, 8 ADVANCES IN DEV. & BEHAV. PEDIATRICS 179, 189 (1987)[hereinafter Melton, *Children's Testimony*]; Melton & Limber, *Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise*, AMERICAN PSYCHOLOGIST (in press)[hereinafter Melton & Limber].

[FN290]. *See infra* note 307 and accompanying text.

[FN291]. *See* Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 48 (B. Nicholson & J. Bulkley eds. 1988).

[FN292]. *Id. See also* Chadwick, *Interdisciplinary Guidelines for the Evaluation of Suspected Child Abuse Cases*, 1 THE ADVISOR 7 (Newsletter of the American Professional Society on the Abuse of Children, Aug., 1988), where Dr. Chadwick discusses the importance of accurate decisionmaking in all child abuse cases:

> Mistakes made in assessment of child abuse cases are costly. Failure to recognize and document abuse allows it to continue, often with serious, occasionally with fatal results for the child. Erroneously concluding that a child has been abused may result in the unnecessary removal of a child from a family or the unjust conviction of a person for a crime. Making or missing this diagnosis is comparable, in medicine, to making or missing a diagnosis of cancer.

[FN293]. For historical perspectives of child abuse see Radbill, *Children in a World of Violence: A History of Child Abuse*, in THE BATTERED CHILD 2 (R. Helfer & R. Kempe eds., 4th ed. 1987); Myers, *supra* note 201, at 151-68.

[FN294]. *See* Kempe, *supra* note 65.

[FN295]. For in-depth discussion of non-accidental injury and battered child syndrome from a medical perspective see THE BATTERED CHILD (R. Helfer & R. Kempe eds., 4th ed. 1987); CHILD ABUSE AND NEGLECT: A MEDICAL REFERENCE (N. Ellerstein ed. 1981). For discussion of battered child syndrome as legally admissible evidence of non-accidental injury see Myers & Carter, *supra* note 66.

[FN296]. *See* J. MYERS & W. PETERSON, CHILD ABUSE REPORTING LEGISALATION IN THE 1980s (American Humane Association 1987).

[FN297]. *Id.*

[FN298]. Professionals working with children are required to report suspected abuse and neglect to designated child protection authorities. The duty to report implies a duty to evaluate when the professional suspects maltreatment.

[FN299]. *See* Garbarino, *Report of APA Interdivisional Task Force on Child Abuse Training*, 11 DIV. CHILD, YOUTH & FAM. SERVICES NEWSLETTER 7 (Am. Psychological Assn., Fall 1988).

[FN300]. Some commentators point out that most mental health professionals lack specific forensic training.

[FN301]. *See, e.g.*, D. JONES & M. MCQUISTON, INTERVIEWING THE SEXUALLY ABUSED CHILD (Royal College of Psychiatrists 1988); Berliner, *supra* note 291; Corwin, *Early Diagnosis of Child Sexual Abuse: Diminishing the Lasting Effects*, in THE LASTING EFFECTS OF CHILD SEXUAL ABUSE, (G. Wyatt & G. Powell eds. 1988) [hereinafter Corwin, *Early Diagnosis*]; Sgroi, *supra* note 226.

[FN302]. *See, e.g., infra* notes 304-15 and accompanying text.

[FN303]. The *National Summit Conference on Diagnosing Child Sexual Abuse* is described in Corwin, *Early Diagnosis, supra* note 301.

[FN304]. *AMA Diagnostic and Treatment Guidelines Concerning Child Abuse and Neglect*, 254 J. A.M.A. 798 (1985). The American Medical Association was careful to note the limitations of its guidelines. A footnote to the guidelines reads:

> Adopted at the Interim Meeting, December 1984, by the House of Delegates of the American Medical Association. These guidelines, submitted by the AMA's Council on Scientific Affairs, were prepared under the guidance of its advisory Panel on Child Abuse and Neglect.
>
> This report is not intended to be construed or to serve as a standard of medical care. Standards of medical care are determined on the basis of all the facts and circumstances involved in an individual case and are subject to change as scientific knowledge and technology advance and patterns of practice evolve.

[FN305]. *See Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse*, 27 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 655 (1988).

[FN306]. *Id.* at 657.

[FN307]. Sgroi, *supra* note 226.

[FN308]. J. Conte, E. Sorenson, L. Fogarty & J. Rosa, Evaluating Children's Reports of Sexual Abuse: Results From a Survey of Professionals (unpublished manuscript) (available from J. Conte, Ph.D., School of Social Service Administration, University of Chicago, Chicago, Ill.).

[FN309]. *Id.*

[FN310]. *See* Faller, *Criteria for Judging the Credibility of Children's Statements About Their Sexual Abuse*, 67 CHILD WELFARE 389 (1988).

[FN311]. *See id.* at 391. Faller defines the factors. She defines the context of the abuse as follows:

> The context of the sexual abuse includes when and where it happened; what the victim and offender were wearing; what clothing was removed and by whom; where other members of the family were; how the perpetrator induced the child to become involved; and whether the offender admonished the victim not to tell, or said anything else in the course of the abuse. Sometimes the child will relate an idiosyncratic event that occurred during the course of the abuse that enhances his or her credibility.

Id. at 391. Faller describes the demonstration or description of the sexual abuse as follows: Characteristics of the sexual victimization itself that indicate the allegation is true are the child's ability to describe specific sexual acts, an account of sexual behavior that is told from a child's viewpoint, and sexual knowledge in the child's statements or behavior that is beyond that expected for the child's developmental stage.

Id. at 392. Faller describes the child's emotional state as follows: "The child's emotional state refers to both the child's state of mind when recounting the sexual abuse and the child's recollection of her or his feelings at the time of the abuse." *Id.*

[FN312]. *Id.* at 395 (footnote omitted).

[FN313]. *Id.* at 396-98. Faller cautions that while the "results of this study are promising," replication studies should be conducted to ensure the validity of the findings.

[FN314]. *Id.* at 390. *See also* Corwin, *supra* note 262, at 93 (reference omitted), where the authors write:

> While clinical experience and anecdotal case reports can provide valuable insights to be tested by rigourous, scientific study, there are a number of known pitfalls in making firm statements based on clinical impression. For example, confirmation biases can affect clinical interpretation. That is, beliefs about such problems as child sexual abuse are likely to affect the symptoms and behaviors that clinicians find of note....
>
> A second pitfall concerns the nature of the clinician's experience. If the clients seen are not representative of the typical child sexual abuse case or range of possible cases, the clinician's conclusions may not generalize.

[FN315]. As clinical and scientific knowledge expands, the argument gains strength.

[FN316]. *See* McCord, *supra* note 42, at 38. *See also* McCord, *Syndromes, supra* note 73.

[FN317]. *See* McCord, *supra* note 42, at 24.

[FN318]. *See id.* at 18-24.

[FN319]. *Id.* at 20.

[FN320]. *Id.*

[FN321]. *See supra* subsection IV (B)(1).

[FN322]. *Id.*

[FN323]. *See* text accompanying notes 305-14.

[FN324]. *See* authorities cited *supra* note 289.

[FN325]. Melton, *Children's Testimony, supra* note 289, at 189. *See also* Melton & Limber, *supra* note 289.

[FN326]. *Id.*

[FN327]. *See supra* note 49 and accompanying text.

[FN328]. N.Y. JUD. LAW § 1011-84 (McKinney 1983).

[FN329]. *See In re* Linda K., 132 A.D.2d 149, 158, 521 N.Y.S.2d 705, 711 (1987)"Validation' has been defined as 'the process by which an expert confirms or fails to confirm the existence of "intrafamilial child sex abuse syndrome"").

[FN330]. New York, like many other states, has a hearsay exception for reliable out-of-court statements of children. If the child declarant is not present to testify at trial, however, the statements must be corroborated. *See In re* Nicole V., 71 N.Y.2d 112, 518 N.E.2d 914 (1987); *In re* Linda K., 132 A.D.2d 149, 521 N.Y.S.2d 705 (1987); *In re* Donna K., 132 A.D.2d 1004, 1005, 518 N.Y.S.2d 289, 290 (1987)("the opinion of the expert on 'intrafamilial child abuse syndrome' was admissible on the issue of whether the child had, in fact, been sexually abused and to corroborate the child's previous out-of-court statements"); Jane P. v. John P., 135 Misc. 2d 400, 515 N.Y.S.2d 365 (N.Y. Sup. Ct. 1987)(visitation proceeding incident to divorce); *In re* E.M., 137 Misc. 2d 197, 520 N.Y.S.2d 327 (Fam. Ct. 1987).

[FN331]. *See In re* Donna K., 132 A.D.2d 1004, 518 N.Y.S.2d 289 (1987); *In re* of Dona D., 141 Misc. 2d 46, 532 N.Y.S.2d 696 (Fam. Ct. 1988); *In re* E.M., 137 Misc. 2d 197, 520 N.Y.S.2d 327 (Fam. Ct. 1987); *In re* Melissa M., 136 Misc. 2d 773, 519 N.Y.S.2d 453 (Fam. Ct. 1987).

[FN332]. *In re* E.M., 137 Misc. 2d 197, 204, 520 N.Y.S.2d 327, 331 (Fam. Ct. 1987).

[FN333]. *Id.*

[FN334]. *See, e.g.*, People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

[FN335]. *See* State v. Lamb, 145 Wis. 2d 454, 427 N.W.2d 142 (Ct. App. 1988); State v. Jensen, 141 Wis. 2d 333, 415 N.W.2d 519 (Ct. App. 1987), *aff'd*, 147 Wis. 2d 240, 432 N.W.2d 913 (1988); State v. Haseltine, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App.(1984).

[FN336]. 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

[FN337]. *Id.* at 95, 352 N.W.2d at 675.

[FN338]. *Id.* at 96, 352 N.W.2d at 676.

[FN339]. *Id.* at 97, 352 N.W.2d at 676.

[FN340]. Such testimony could be excluded as unduly prejudicial or likely to confuse jurors. FED. R. EVID. 403.

[FN341]. *See* State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988); State v. Haseltine, 120 Wis. 2d 92, 98, 352 N.W.2d 673, 677 (Ct. App. 1984) (Cane, J., dissenting). *But see* State v. Moran, 151 Ariz. 378, 728 P.2d 249 (1986)(a diagnosis can be the equivalent of testimony on credibility).

[FN342]. *See* State v. Myers, 359 N.W.2d 604, 609 (Minn. 1984); Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 709 (1987)("expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness"); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); Commonwealth v. Pearsall, 368 Pa. Super. 327, 534 A.2d 106 (1987); Commonwealth v. Baldwin, 348 Pa. Super. 368, 502 A.2d 253 (1985).

[FN343]. 141 Wis. 2d 333, 415 N.W.2d 519 (Ct. App. 1987), *aff'd*, 147 Wis.2d 240, 432 N.W.2d 913 (1988).

[FN344]. *Id.* at 340, 415 N.W.2d at 522.

[FN345]. Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987); Russell v. State, 289 Ark. 533, 712 S.W.2d 916 (1986). *See also* Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987). In *Allison* the trial court permitted an expert to describe characteristics commonly observed in sexually abused children. The expert went on to give an opinion that the child had been abused. The Georgia Supreme Court disapproved of this testimony. The court wrote:

> The jury, having the benefit of extensive testimony as to the lineaments of the child abuse syndrome, as well as testimony that this child exhibited several symptoms that are consistent with the syndrome, was fully capable of deciding-- upon their own-- whether the child *in fact* was abused, and, if so, whether Allison did it.

Allison v. State, 256 Ga. 851, 853, 353 S.E.2d 805, 808 (emphasis in original).
[FN346]. 292 Ark. 632, 732 S.W.2d 817 (1987).

[FN347]. *Id.* at 638, 732 S.W.2d at 820.

[FN348]. *Id.* at 640, 732 S.W.2d at 821. *See id.* at 647, 732 S.W.2d at 829 (Hays, J., dissenting).

[FN349]. 289 Ark. 533, 712 S.W.2d 916 (1986).

[FN350]. *Id.* at 534, 712 S.W.2d at 916-17 (citations omitted). While the trial court erred in admitting the expert testimony, the error was harmless. *Id.* at 535, 712 S.W.2d at 917.

[FN351]. *See* Commonwealth v. Baldwin, 348 Pa. Super. 368, 377, 502 A.2d 253, 257 (1985). The *Baldwin* court recognized the skill required to evaluate suspected child sexual abuse, observing that "the behavioral and psychological characteristics of child sexual abuse victims are proper subjects for expert testimony." *Id.* The court noted that lay jurors are not in a position to understand the dynamics of child sexual abuse.

[FN352]. *See* McCord, *supra* note 42, where the author asks "whether the effects upon children of sexual abuse is a subject matter where expert testimony would likely assist the ordinary juror." Answering his own question, McCord cogently observes that:

> Common experience dictates that the answer to this question is yes. To most people the topic of child sexual abuse is unfamiliar and mysterious. There is no reason to believe that most people would understand what effects sexual abuse has on a child and how those effects might be detected.

Id. at 34.

[FN353]. *See, e.g., In re* Amber B., 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987). *See also* State v. Black, 537 A.2d 1154 (Me. 1988). In *Black*, Maine's Supreme Judicial Court rejected expert testimony to diagnose child sexual abuse. The court stated:

> [The expert witness] described the type of play therapy and behavioral management utilized in the treatment of sexually abused children, as well as the methods of clinical diagnosis on which professionals such as herself rely. Moreover, she describes certain "indicators" frequently encountered in sexually abused children. These "clinical features of sexual abuse" are relied on by [her] and other mental health professionals in the context of their therapy programs. As a result of her treatment of [the child], [she] expressed her opinion "that a male adult who [the child] was in trust relationship with, an authority figure, surrogate parent or such, had sexually abused [him] by having anal intercourse." Neither [the expert's] qualifications nor her methods as a mental health professional are in question. The record, however, does not support the admissiblity of her testimony identifying [the child] as a victim of past sexual abuse. The validity of the summary of symptoms encountered in the populaton of her patients is seriously imparied by selection bias. No comparison testing was done with children who were not victims of sexual abuse to determine whether they also demonstrated like indicators. Her testimony demonstrates no scientific basis for determining that a causal relationship exists between sexual abuse and the "clinical features of sexual abuse," nor is there demonstrated even a positive correlation between the two. In the absence of any demonstration of scientific reliability, we reject the testimony of the mental health expert identifying [the child] as a victim of child sexual abuse.

537 A.2d at 1157. The type of empirical information which the *Black* court found wanting is increasingly available. *See supra* notes 249-50, 308-14 and accompanying text.

[FN354]. 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987).

[FN355]. California courts apply the *Frye* test to evaluate novel scientific evidence. For discussion of *Frye* see subsection III (C) *supra*.

[FN356]. *See* discussion of anatomically detailed dolls *supra* note 259.

[FN357]. *See, e.g.*, Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987).

[FN358]. 103 Nev. 113, 734 P.2d 705 (1987).

[FN359]. *Id.* at 113, 734 P.2d at 708.

[FN360]. 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987).

[FN361]. 536 So. 2d 212 (Fla. 1988).

[FN362]. *Id.* at 220.

[FN363]. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD AUBSE & NEGLECT 133 (1983).

[FN364]. J. HERMAN, *supra* note 211; Gagnon, *Female Child Victims of Sex Offenses*, 13 SOC. PROBS. 176 (1965); Russell, *supra* note 363; Summit, *supra* note 275, at 186.

[FN365]. *See* D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979); K. MEISELMAN, INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS (1978); D. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GLRLS AND WOMEN (1986); J. Conte, *supra* note 229; Summit, *supra* note 275. For the children who do disclose their victimization, disclosure may have to await adolescence, when the child is no longer entirely helpless and dependent.

[FN366]. D. JONES & M. MCQUISTON, *supra* note 301, at 2.

[FN367]. *See* Summit, *supra* note 275.

[FN368]. *See id.* at 181.

[FN369]. *See* D. JONES & M. MCQUISTON, *supra* note 301, where the authors write that "[u]sually children disclose a small portion of their total experience initially, apparently in an attempt to test the adult's response before letting them know more about the assault. If they receive a positive and supportive response, they may feel safe enough to disclose more about their experience." *Id.* at 3. *See also* Bastic v. State, 772 P.2d 1089 (Alaska Ct. App. 1989)(approving expert testimony stating that many sexually abused children reveal details gradually).

[FN370]. D. JONES & M. MCQUISTON, *supra* note 301 at 8, where the authors write:

> After the disclosure has been made by the victims, the guilt connected with their participation in the abuse may intensify over the ensuing months. The feelings of guilt and personal responsibility may become combined with feelings of loss, and grieving for the emotional warmth that the abuser provided. At that stage, it is difficult for the victim to appreciate that the warmth and emotional availability were only provided at a price. The victims begin to feel that they caused the family's break-up, and perhaps the incarceration of the abuser. Retraction may be a frequent accompaniment at this stage.

[FN371]. Summit, *supra* note 275.

[FN372]. *Id.* at 188 (emphasis in original).

[FN373]. *See* State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986), where the court wrote that expert testimony describing recantation, delay, and so forth "informs jurors that commonly held assumptions are not necessarily accurate and allows them to fairly judge credibility." *Id.* at 382, 728 P.2d at 252 (citation omitted). *See also* People v. Bowker, 203 Cal. App. 3d 385, --, 249 Cal. Rptr. 886, 892 (1988), where the court writes that expert testimony of the type now under discussion "is admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested."

[FN374]. *See, e.g.*, State v. Davis, 422 N.W.2d 296 (Minn. Ct. App. 1988) (court approved expert testimony to inform jury that running away from home is common in sexually abused adolescents); State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988)(expert could state why child would continue to cooperate with abuser); State v. Robinson, 431 N.W.2d 165 (Wis. 1988).

[FN375]. *See, e.g.*, Bostic v. State, 772 P.2d 1089 (Alaska Ct. App. 1989); People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988)(child sexual abuse accommodation syndrome testimony admitted to explain delay); People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986); People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (1984); People v. Hampton, 746 P.2d 947 (Colo. 1987)(adult rape victim; rape trauma syndrome admitted to explain delay); Wheat v. State, 527 A.2d 269 (Del. 1987); People v. Matlock, 153 Mich. App. 171, 395 N.W.2d 274 (1986); State v. Sandberg, 406 N.W.2d 506 (Minn. 1987); State v. Hall, 406 N.W.2d 503 (Minn. 1987);

State v. Myers, 359 N.W.2d 604 (Minn. 1984); State v. Davis, 422 N.W.2d 296 (Minn. Ct. App. 1988); Smith v. State, 100 Nev. 570, 688 P.2d 326 (1984); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (1984); State v. Garfield, 34 Ohio App. 3d 300, 518 N.E.2d 568 (1986); State v. Hicks, 148 Vt. 459, 535 A.2d 776 (1987); State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (Ct. App. 1984); Griego v. State, 761 P.2d 973 (Wyo. 1988); Scadden v. State, 732 P.2d 1036 (Wyo. 1987). *But see* Dunnington v. State, 740 S.W.2d 896 (Tex. Ct. App. 1987)(delay in reporting not beyond ken of lay jurors; therefore, expert testimony not needed).

[FN376]. State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); People v. Luna, 204 Cal. App. 3d 726, 250 Cal. Rptr. 878 (1988)(evidence of child sexual abuse accommodation was offered during state's case in chief; it is not clear from the opinion why the evidence was admitted during state's case and not on rebuttal); People v. Bowker, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988); Wheat v. State, 527 A.2d 269 (Del. 1987); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); Commonwealth v. Baldwin, 348 Pa. Super. 368, 502 A.2d 253 (1985); State v. Madison, 770 P.2d 662 (Wash. Ct. App. 1989). *See also* State v. Davis, 422 N.W.2d 296 (Minn. Ct. App. 1988). In *Davis*, defendant was convicted of child abuse. Following conviction, the adolescent victim recanted her allegations. Defendant moved for a new trial on the basis of the recantation. The trial court denied the motion, finding the recantation untruthful. The court of appeals affirmed.

[FN377]. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986); State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); State v. Spigarolo, 210 Conn. 359, 556 A.2d 112 (1989); State v. Black, 537 A.2d 1154 (Me. 1988)(on rebuttal the state may offer expert testimony as to why a child would be inconsistent; the expert may testify during the state's case in chief, following impeachment of a child); State v. Pettit, 66 Or. App. 575, 675 P.2d 183 (1984); State v. Rogers, 293 S.C. 505, 362 S.E.2d 7 (1987). *But see* Commonwealth v. Gibbons, 556 A.2d 915 (Pa. Super. Ct. 1989)(error to admit expert testimony regarding inconsistency even though defendant based his case on inconsistency).

[FN378]. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986)(defendant argued the child was angry due to proper parental discipline; the expert supplied an alternative explanation for the child's anger at the defendant.). *See also* State v. Robinson, 431 N.W.2d 165 (Wis. 1988)(defendant argued that fact that adult sexual assault victim was calm after the assault indicated that there was no assault; it was proper to admit expert testimony that sexual assault victims often demonstrate calm affect following assault).

[FN379]. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986)("The defense repeatedly argued that it was incomprehensible that the daughter would want to return home if her father had molested her." *Id.* at 383, 728 P.2d at 253. It was proper for the expert to explain "factors that could lead a victim to recant and attempt to return home." *Id.* (footnote omitted)).

[FN380]. *See* People v. Matlock, 153 Mich. App. 171, 395 N.W.2d 274 (1986).

[FN381]. Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 446 (1985).

[FN382]. 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (1988).

[FN383]. *Id.* at 394, 249 Cal. Rptr. at 891.

[FN384]. *See* Commonwealth v. McNeely, 368 Pa. Super. 517, 534 A.2d 778 (1987).

[FN385]. People v. Bowker, 203 Cal. App. 3d 385, 393-94, 249 Cal. Rptr. 886, 891 (citations omitted). The *Bowker*

court placed another limitation on expert rehabilitation testimony. When such testimony is designed to explain such things as delay or recantation, the court observed that there is little need for the expert to mention a syndrome. The expert's testimony can be limited to the fact that delay and recantation are common in sexually abused children. The expert need not raise the spectre of a syndrome, and the possibility of confusion which such a technical, medical term carries. *Id.* at 392, 249 Cal. Rptr. at 890 n.8.

[FN386]. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986).

[FN387]. *See, e.g.*, People v. Gray, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (1986); People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

[FN388]. 305 Or. 621, 756 P.2d 620 (1988).

[FN389]. *See* People v. Sanchez, 208 Cal. App. 3d 721, 256 Cal. Rptr. 446 (1989)(approving expert testimony to rehabilitate child's credibility during state's case in chief following cross-examination of child).

[FN390]. So are the commentators. *See* McCord, *supra* note 42, at 67.

[FN391]. Goodman, Bottoms, Herscovici & Shaver, *Determinants of the Child Victim's Perceived Credibility*, in PERSPECTIVES ON CHILDREN'S TESTIMONY 1 (S. Ceci, D. Ross & M. Toglia eds. 1989) [hereinafter Goodman, *Determinants*]; Lieppe & Romanczyk, *Children on the Witness Stand: A Communication/Persuasion Analysis of Juror's Reactions to Child Witnesses*, in CHILDREN'S EYEWITNESS MEMORY 155 (S. Ceci, M. Toglia & D. Ross eds. 1987); Goodman, Golding & Haith, *Juror's Reactions to Child Witnesses*, 40 J. SOC. ISSUES 139 (1984) [hereinafter Goodman, *Reactions*].

[FN392]. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Ecological Issues in the Study of Children's Eyewitness Testimony*, in WHAT YOUNG CHILDREN REMENBER AND WHY (R. Fivush & J. Hudson eds., in press); Melton & Thompson, *Getting Out of a Rut: Detours to Less Traveled Paths in Child Witness Research*, in CHILDREN'S EYEWITHESS MEMORY 209 (S. Ceci, M. Toglia & D. Ross eds. 1987).

[FN393]. Goodman provides an excellent historical review. Goodman, *Children's Testimony in Historical Perspective*, 40 J. SOC. ISSUES 9 (1984).

[FN394]. *Id.*

[FN395]. For an example of methodologically flawed early research see Varendock, *Les Termiognages d'Enfants Dans un Proces Retentissant*, 11 ARCHIVES DE PSYCHOLOGIE 129 (1911).

[FN396]. E. LOFTUS, EYEWITNESS TESTIMONY (1979); A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979).

[FN397]. Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974)(broken glass at scene of auto accident).

[FN398]. For studies devoted to child testimony research see PERSPECTIVES ON CHILDREN'S TESTIMONY (S. Ceci, D. Ross & M. Toglia eds. 1989); CHILDREN'S EYEWITNESS MEMORY (J. Ceci, M. Toglia & D. Ross

eds. 1987).

[FN399]. Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 L. & HUM. BEHAV. 317 (1986) [hereinafter Goodman & Reed]; King & Yuille, *Suggestibility and the Child Witness*, in CHILDREN'S EYEWITNESS MEMORY (S. Ceci, M. Toglia & D. Ross eds. 1987); L. Rudy & G. Goodman, Accuracies and Inaccurcies in Children's Testimony (submitted for publication) [hereinafter L. Rudy & G. Goodman]; K. Saywitz, G. Goodman, E. Nicholas & S. Moan, Children's Memories of Genital Examinations: Implications for Cases of Child Sexual Assault (paper presented at Biennial Meeting of the Society for Research on Child Development, April 30, 1989, Kansas City, Mo.) [hereinafter K. Saywitz].

[FN400]. Chance & Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 J. SOC. ISSUES 69 (1984). Young children experience more difficulty than adults in recognizing unfamiliar or disguised faces.

[FN401]. Chi, *Knowledge Structures and Memory Development*, in CHILDREN'S THINKING: WHAT DEVELOPS? 73 (R. Siegler ed. 1978); Neisser, *The Control of Information Pickup in Selective Looking*, in PERCEPTION AND DEVELOPMENT: A TRIBUTE TO ELEANOR GIBSON 210 (A. Pick ed. 1979).

[FN402]. *See* G. MELTON, *supra* note 50, § 5.06, at 102, where the authors write: "In sum, the available data suggest that, given simple, supportive questions, even young children generally have sufficient memory skills to respond to the recall demands of testimony." *See also* Melton, *Children's Competency to Testify*, 5 L. HUM. BEHAV. 73, 77 (1981).

[FN403]. Melton & Thompson, *supra* note 392; Lindberg, *Is Knowledge Base Development a Necessary and Sufficient Condition for Memory Development?*, 30 J. EXPERIMENTAL CHILD PSYCHOLOGY 401 (1980); Renniger & Wozniak, *Effects of Interest Attentional Shift, Recognition, and Recall in Young Children*, 21 DEVELOPMENTAL PSYCHOLOGY 624 (1985); L. Rudy & G. Goodman, *supra* note 399.

[FN404]. Cole & Loftus, *The Memory of Children*, in CHILDREN'S EYEWITNESS MEMORY 179, 181 (S. Ceci, M. Toglia & Ross eds. 1987); Saywitz, *Children's Testimony: Age-Related Patterns of Memory Errors*, in CHILDREN'S EYEWITNESS MEMORY 36 (S. Ceci, M. Toglia & D. Ross eds. 1987).

[FN405]. A child uses free recall memory when the child remembers an event without the aid of memory cues or specific questions.

[FN406]. Adults and older children employ a number of memory strategies to retrieve information from memory. The classic example is tying a string around the finger. Another simple example is rehearsing a phone number until it is memorized. Young children do not spontaneously employ such memory strategies. Development of memory strategies is a gradual process. "A great deal of the development of the strategic skills necessary for recall occurs between the ages of 5 and 10 years." Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in CHILDREN'S EYEWITNESS MEMORY 61, 65 (S. Ceci, M. Toglia & D. Ross eds. 1987).

[FN407]. Six-year-olds typically provide less information on free recall than older children and adults. Three-year-olds provide less than six-year-olds. By about age 12, children provide the same amount of information on free recall as adults. *See* Cole & Loftus, *supra* note 404, at 205; Goodman, Aman & Hirschman, *Child Sexual and Physical Abuse: Children's Testimony*, in CHILDREN'S EYEWITNESS MEMORY 1, 11 (S. Ceci, M. Toglia & D. Ross eds. 1987); Saywitz, *Children's Testimony: Age-Related Patterns of Memory Errors*, in CHILDREN'S EYEWITNESS MEMORY 36 (S. Ceci. M. Toglia & D. Ross eds. 1987).

[FN408]. Nelson, *How Children Represent Their World In and Out of Language: A Preliminary Report*, in CHILDREN'S THINKING: WHAT DEVELOPS? (R. Seigler ed. 1979); Nelson, Fivush, Hudson & Lucariello, *Scripts and the Development of Memory*, in CURRENT TRENDS IN MEMORY DEV. RES. 52 (M. Chi ed. 1983); Nelson & Gruendel, *At Morning Its Lunchtime: A Scriptal View of Children's Dialogues*, 2 DISCOURSE PROCESSES 73 (1979); Nelson & Gruendel, *Generalized Event Representations: Basic Building Blocks of Cognitive Development*, 1 ADVANCES IN DEV. PSYCHOLOGY 131 (M. Lamb & A. Brown eds. 1981); Todd & Perlmutter, *Reality Recalled by Preschool Children*, in CHILDREN'S MEMORY: NEW DIRECTIONS IN CHILD DEV. 69 (M. Perlmutter ed. 1980).

[FN409]. *See* Cole & Loftus, *supra* note 404, at 178, 182, 183, 205. "The information freely recalled by children tends to be as accurate as adult accounts." *Id.* at 205; Goodman, Aman & Hirschman, *supra* note 407, at 12.

[FN410]. Goodman & Reed, *supra* note 399; Melton & Thompson, *supra* note 392; L. Rudy & G. Goodman, *supra* note 399; K. Saywitz, *supra* note 399; Saywitz, *supra* note 407.

[FN411]. Goodman & Reed, *supra* note 399; Marin, Holmes, Guth & Kovacs, *The Potential of Children as Eyewitnesses*, 3 L. & HUM. BEHAV. 295 (1979).

[FN412]. Jones, Swift & Johnson, *Nondeliberate Memory for a Novel Event Among Preschoolers*, 24 DEV. PSYCHOLOGY 641 (1988).

[FN413]. Goodman & Hegelson, *Child Sexual Assault: Children's Memory and the Law*, in PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 41 (J. Bulkley ed. 1986); Saywitz, *supra* note 407.

[FN414]. Goodman & Hegelson, *supra* note 413; K. Saywitz, G. Goodman, E. Nicholas & S. Moan, A New Look at Suggestibility (paper presented at a conference of the American Psychology-Law Society, Miami, Fla., Mar. 1988) [hereinafter K. Saywitz, New Look].

[FN415]. For cases discussing expert testimony to rehabilitate a child whose credibility has been impeached because of inconsistencies see *supra* note 377.

[FN416]. Flavell, *Cognitive Monitoring*, in CHILDREN'S ORAL COMMUNICATION SKILLS 35 (W. Dickson ed. 1981); Singer & Flavell, *Development of Knowledge About Communication: Children's Evaluations of Explicitly Ambiguous Messages*, 52 CHILD DEV. 1211 (1981).

[FN417]. Selman & Byrne, *A Structural Developmental Analysis of Levels of Role Taking in Middle Childhood*, 45 CHILD DEVELOPMENT 803 (1974).

[FN418]. D. SINGER & T. REVENSON, HOW A CHILD THINKS (1978).

[FN419]. E. OCHS & B. SCHIEFFLIN, DEVELOPMENTAL PRAGMATICS (1979); Flavell, Speer, Green & August, *The Development of Comprehension Monitoring and Knowledge About Communication*, 46 MONOGRAPHS OF THE SOC'Y FOR RES. ON CHILD DEV. (Serial No. 192 1981) [hereinafter Flavell].

[FN420]. Markman, *Realizing That You Don't Understand: Elementary School Children's Awareness of Inconsis-*

tencies, 50 CHILD DEV. 543 (1979); Markman, *Realizing That You Don't Understand: A Preliminary Investigation*, 48 CHILD DEV. 986 (1977).

[FN421]. Cosgrove & Patterson, *Plans and the Development of Listening Skills*, 13 DEV. PSYCHOLOGY 557 (1977) [hereinafter Cosgrove & Patterson]; Patterson, Massad & Cosgrove, *Children's Referential Communication: Components of Plans for Effective Listening*, 14 DEV. PSYCHOLOGY 401 (1978).

[FN422]. W. DICKSON, CHILDREN'S ORAL COMMUNICATION SKILLS (1981).

[FN423]. Flavell, *supra* note 419; Cosgrove & Patterson, *supra* note 421.

[FN424]. Everson & Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 230 (1989); L. Rudy & G. Goodman, *supra* note 399.

[FN425]. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in CHILDREN'S EYEWITNESS MEMORY 53, 73 (J. Ceci, M. Toglia & D. Ross eds. 1987) ("at this point it can be concluded with some confidence that young children are not more suggestible than adults in all circumstances"); Cole & Loftus, *supra* note 404; Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51 (1984).

[FN426]. Cole & Loftus, *supra* note 404, at 195 ("The developmental studies discussed so far have consistently demonstrated that by the age of 10 or 11 years, children are no more vulnerable to suggestion than adults.").

[FN427]. Goodman, Aman & Hirschman, *supra* note 407; King & Yuille, *Suggestibility and the Child Witness*, in CHILDREN'S EYEWITNESS MEMORY 24 (J. Ceci, M. Toglia & D. Ross eds. 1987).

[FN428]. Goodman & Hegelson, *supra* note 413.

[FN429]. Goodman, Aman & Hirschman, *supra* note 407.

[FN430]. L. Rudy & G. Goodman, *supra* note 399.

[FN431]. Goodman, Aman & Hirschman, *supra* note 407.

[FN432]. Ceci, Ross & Toglia, *Age Differences in Suggestibility: Narrowing the Uncertainties*, in CHILDREN'S EYEWITNESS MEMORY 79 (J. Ceci, M. Toglia & D. Ross eds. 1987) [hereinafter Ceci]; J. Baxter & G. Davies, Conformity and the Child Witness (paper presented at a meeting of the Society for Research on Child Development, Baltimore, Md., April 1987); J. Baxter & G. Davies, The Suggestibility of Child Witnesses (unpublished manuscript, 1985).

[FN433]. Ceci, *supra* note 432.

[FN434]. Zaragoza, *supra* note 425, at 52; J. Popp & M. Zaragoza, Suggestibility of Eyewitness Memory in Preschoolers (paper presented at a meeting of the American Psychological Association, New York, N.Y., Aug. 1987). Some researchers believe that the original memory is replaced by misleading information. *See* Cole & Loftus, *supra* note 404. More research is needed to clarify this issue.

[FN435]. Melton & Thompson, *supra* note 392.

[FN436]. L. Rudy & G. Goodman, *supra* note 399; K. Saywitz, *supra* note 399.

[FN437]. Freud, *Two Principles of Mental Functioning*, in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 218 (J. Strachey ed. & trans. 1985) (original work published in 1911).

[FN438]. *See* J. PIAGET, JUDGMENT AND REASONING IN THE CHILD (1928); J. PIAGET, PLAY, DREAMS, AND IMITATION IN CHILDHOOD (1951); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932).

[FN439]. J. FLAVELL, COGNITIVE DEVELOPMENT (1977); P. MILLER, THEORIES OF DEVELOPMENTAL PSYCHOLOGY (1983); Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories from Different Sources*, in CHILDREN'S EYEWITNESS TESTIMONY 92 (J. Ceci, M. Toglia & D. Ross eds. 1987).

[FN440]. Lindsay & Johnson, *supra* note 439.

[FN441]. *See* C. GARVEY, PLAY (1977), on the development of play.

[FN442]. Johnson & Foley, *Differentiating Fact From Fantasy: The Reliability of Children's Memory*, 40 J. SOS, ISSUES 33 (1984); Johnson, Raye, Hasher & Chromiak, *Are There Developmental Differences in Reality Monitoring?*, 27 J. EXPERIMENTAL CHILD PSYCHOLOGY 120 (1979); Lindsay & Johnson, *supra* note 439.

[FN443]. *See supra* note 442.

[FN444]. Foley, Johnson & Raye, *Age Related Changes in Confusions Between Memories for Thoughts and Memories for Speech*, 54 CHILD DEV. 51 (1983).

[FN445]. THE DEVELOPMENTAL PSYCHOLOGY OF TIME (W. Friedman ed. 1982).

[FN446]. *Id.*

[FN447]. Friedman, *Conventional Time Concepts and Children's Structuring of Time*, in THE DEVELOPMENTAL PSYCHOLOGY OF TIME 171 (W. Friedman ed. 1982).

[FN448]. Friedman, *The Development of Children's Understanding of Cyclic Aspects of Time*, 48 CHILD DEV. 1593 (1977).

[FN449]. Friedman, *supra* note 447.

[FN450]. Friedman, *Development of Time Concepts in Children*, in ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR 267 (H. Reese & L. Lipsitt eds. 1978).

[FN451]. K. Saywitz, *supra* note 399.

[FN452]. *See* Saywitz, *The Child Witness: Experimental and Clinical Considerations*, in THROUGH THE EYES OF A CHILD: OBTAINING SELE REPORTS FROM CHILDREN AND ADOLESCENTS (A. LaGrecca ed. in press).

[FN453]. For an example of this technique, employed by a skilled trial attorney, see Yengich, *Child Sexual Abuse Cases*, 1986 UTAH L. RRV. 443, 446.

[FN454]. In some cases the defense offers its own expert to provide an opinion about the quality of the interviews to which a child was subjected. The defense expert may opine that interviewing techniques were improperly leading or suggestive, and that defective interviewing technique probably contaminated the child's memory. *See* People v. Stricklin, 162 Mich. App. 623, 413 N.W.2d 457 (1987) (defense should have been permitted to introduce expert testimony that children who have been sexually abused could fantasize about sex).

[FN455]. *See* United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986) ("Dr. ten Bensel might have aided the jurors without usurping their exclusive function by generally testifying about a child's ability to separate truth from fantasy"); Tingle v. State, 535 So. 2d 202 (Fla. 1988); Head v. State, 519 N.E.2d 151 (Ind. 1988) (proper to admit expert testimony that child was not prone to exaggeration or fantasy); State v. Brotherton, 384 N.W.2d 375 (Iowa 1986) (court held that an expert opinion that a child is not capable of fantasizing a sexual experience is an impermissible indirect opinion regarding the child's credibility).

[FN456]. Calloway v. State, 520 So. 2d 665, 667 (Fla. Ct. App. 1988) ("credibility becomes the focal issue").

[FN457]. *See* Commonwealth v. Pearsall, 368 Pa. Super. 327, 534 A.2d 106 (1987) (court drew distinction between direct and indirect support of credibility).

[FN458]. For a more detailed historical discussion of the credibility of sex offense victims see J. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY (1984); Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. CONTEMP. LAW 31 (1989); Summit, *Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse*, in THE LASTING EFFECTS OF CHILD SEXUAL ABUSE (G. Wyatt & G. Powell eds. 1988).

[FN459]. *See* Goodman, *supra* note 393.

[FN460]. Psychologist J. Varendonck, quoted in Goodman, *supra* note 393.

[FN461]. For detailed discussion of Freud's impact, see authorities cited *supra* note 458.

[FN462]. For discussion of Freud's seduction theory, see authorities cited *supra* note 458.

[FN463]. *See* Berliner, *supra* note 291, where Berliner writes: "Throughout history, accusations of child abuse have been considered suspect. Freud's dismissal of his female patients' accounts of child sexual abuse established a climate of disbelief in the psychiatric community. Both child and adult reports to counselors and therapists were likely to be labeled as fantasy."

[FN464]. 3A J. WIGMORE, *supra* note 10, § 924(a), at 736-37 (emphasis in original).

[FN465]. *See, e.g.*, Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966); 18 A.L.R.3d

1433 (1968). For criticism of psychiatric examinations in sex offense cases, see Note, *Psychiatric Examination of Sexual Assault Victims: A Reevaluation*, 15 U. CAL. DAVIS L. REV. 973 (1982).

[FN466]. *See* J. MYERS, *supra* note 2, § 4.21.

[FN467]. *See, e.g.*, People v. King, 41 Colo. App. 177, 581 P.2d 739 (1978); J. MYERS, *supra* note 2, § 3.27 (collecting cases). Myers writes:

> While courts have properly rejected Wigmore's misguided psychological notions about the credibility of women, the great majority of courts continue to acknowledge that in rare cases it is appropriate to require a witness-- female or male--to undergo a psychiatric evaluation concerning credibility. The decisions repose discretion in the trial judge to order evaluations on a case-by-case basis. The authorities caution, however, that trial courts should not order such examinations unless the party seeking the examination comes forward with compelling reasons therefore.

J. MYERS, *supra* note 2, § 3.27, at 119. Some states have gone so far as to prohibit psychiatric evaluations of victims in sex offense cases. *See, e.g.*, CAL. PENAL CODE § 1112 (West 1988).

[FN468]. *See* State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980). While it is entirely appropriate to reject Wigmore's unfounded suspicisions about women and girls, some professionals went too far in the opposite direction, asserting that children never lie, and that allegations should always be believed. Such overstatement invites criticism of efforts to protect children, and skepticism of professional knowledge and motives. False allegations are infrequent, but they do occur.

For discussion of assertions that children do not lie about sexual abuse see Benedek & Schetky, *Problems in Validating Allegations of Sexual Abuse. Part 1: Factors Affecting Perception and Recall of Events*, 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 912, 914 (1987) ("Unfortunatly, some clinicians still adhere to the myth that children never lie, despite the fact they themselves may be parents of normal children who 'fib."); Faller, *Is the Child Victim of Sexual Abuse Telling the Truth*?, 8 CHILD ABUSE & NEGLECT 473 (1984); Yates & Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation,* 145 AM. J. PSYCHIATRY 989, 989 (1988) ("Until recently, the sine qua non of sexual abuse investigations has been that 'children don't lie' about molestation.").

[FN469]. Most of the information in this subsection is drawn from clinical experience.

[FN470]. Berliner, *supra* note 291. *See also* Burton, *Honesty and Dishonesty*, in MORAL DEVELOPMENT AND BEHAVIOR (T. Licona ed. 1976); G. MELTON, *supra* note 50, where the authors write:

> There is in fact little correlation between age and honesty.... Where there *is* a developmental trend, though, is in the reasons that children give to justify behavior. As children grow older, they become more sociocentric and oriented toward respect for persons.... Where immature moral development may be a factor is in suggestibility. Young children tend to perceive rules as "morally absolute," unchangeable, and bestowed by authority. Therefore, they may confuse suggestions of an adult authority figure with the truth.

[FN471]. Melton, *Children's Competency to Testify*, 5 L. & HUM. BEHAV. 73, 79 (1981).

[FN472]. Quinn, *The Credibility of Children's Allegations of Sexual Abuse*, 6 BEHAV. SCI. & L. 181 (1988).

[FN473]. *See* Yates & Musty, *supra* note 468, at 992 ("In our experience, young children rarely or never sustain fabrications about sexual molestation.").

[FN474]. E. HALL, M. LAMB & M. PERLMUTTER, CHILD PSYCHOLOGY TODAY 505 (1986) ("even when a

child develops a general tendency to resist or to succumb to temptation, the conditions surrounding each moral choice will have a strong effect on the child's final decision").

[FN475]. *See* Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 127 (1984), where the authors write:

> While adults are often skeptical when children report sexual abuse, especially by those in or close to the family, there is little or no evidence indicating that children's reports are unreliable, and none at all to support the fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults. The general veracity of children's reports is supported by relatively high rates of admission by offenders. Not a single study has ever found false accusations of sexual assault a plausible interpretation of a substantial portion of cases.
>
> In addition to clinical experience, experimental work conducted by Gail Goodman and her colleagues indicates that children are unlikely to make up stories of abuse. Goodman, Aman & Hirschman report that in their experiments, "children never made up false stories of abuse even when asked questions that might foster such reports."

[FN476]. Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 28 (1987). *See also* Goodwin, Sahd & Rada, *False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities*, in SEXUAL ABUSE: INCEST VICTIMS AND THEIR FAMILIES 17 (Goodwin ed. 1982); Peters, *Children Who are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 598 (1976).

[FN477]. Benedek & Schetky, *supra* note 468. *See also* Faller, *supra* note 468.

[FN478]. For discussion of the available studies see Berliner, *supra* note 291, at 51-52; Quinn, *supra* note 472; Sink, *Studies of True and False Allegations: A Critical Review*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 37 (B. Nicholson & J. Bulkley eds. 1988).

[FN479]. Jones & McGraw, *supra* note 476.

[FN480]. Peters, *supra* note 476.

[FN481]. Goodwin, Sahd & Rada, *supra* note 476.

[FN482]. J. Horowitz, P. Salt, B. Gomes-Schwartz & M. Sauzier, False Allegations of Child Sexual Abuse (unpublished paper, 1985).

[FN483]. S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 214 (1979).

[FN484]. *See* Jones & McGraw, *supra* note 476, at 30.

[FN485]. *See, e.g.*, Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449-50 (1986).

[FN486]. *Id.* at 449. For criticism of Dr. Green's article see Corwin, *supra* note 262.

[FN487]. Benedek & Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 145, 155 (D. Schetky & E. Benedek eds. 1985).

[FN488]. Quinn, *supra* note 472, at 181.

[FN489]. Berliner, *supra* note 291, at 52.

[FN490]. Jones & Seig, *Child Sexual Abuse Allegations in Custody and Visitation Disputes*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 22 (E. Nicholson & J. Bulkley eds. 1988).

[FN491]. *Id.* at 29.

[FN492]. *Id.*

[FN493]. Coleman, *False Allegations of Sexual Abuse: Have the Experts Been Caught with their Pants Down?*, FORUM 12 (Jan.-Feb. 1986). *See also* Gordon, *False Allegations of Abuse in Child Custody Disputes*, 2 MINN. FAM. L.J. 225 (1985); McIver, *The Case for the Therapeutic Interview in Situations of Alleged Sexual Molestation*, THE CHAMPION 11 (1986); R. Underwager, False Allegations of Child Abuse (unpublished manuscript, 1986); R. Underwager, H. Wakefield, R. Legrand, C.S. Bartz & J. Erickson, The Role of the Psychologist in the Assessment of Cases of Alleged Sexual Abuse of Children (paper presented at the 94th Annual Convention of the American Psychological Association, Wash. D.C., Aug., 1986).

[FN494]. *See* Thoennes, *Child Sexual Abuse: Whom Should a Judge Believe? What Should a Judge Believe?*, 27 JUDGE'S J. 14 (1988). The results of the research are described in two documents: Association of Family and Conciliation Courts, The Sexual Abuse Allegations Project, Final Report (1988), and Association of Family and Conciliation Courts, Allegations of Sexual Abuse in Custody and Visitation Cases: An Empirical Study of 169 Cases from 12 States (1988). For information on the study and copies of the reports contact Nancy Thoennes, Ph.D., Association of Family and Conciliation Courts, Research Unit, 1720 Emerson Street, Denver, CO 80218, (303) 837-1555.

[FN495]. Thoennes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISTIATION CASES 1, 4, 16, 17 (E.B. Nicholson & J. Bulkley eds. 1988) (footnote omitted).

[FN496]. *See* Yates & Musty, *supra* note 468, at 992 ("Allegations of sexual abuse are especially likely to occur in the course of custody disputes.").

[FN497]. *See* Berliner, *supra* note 291 at 60, where the author writes:

> Custody situations present one type of special case because of the confounding factor of the conflict between the parents. However, it must be kept in mind that not all such accusations of abuse arise when there is an ongoing dispute, and that simply because the parents are divorced or divorcing does not warrant an assumption that the accusation is automatically less reliable. There are good reasons why a child might wait until the parents are divorcing to disclose abuse, or, why a parent might not be willing to entertain the possibility of abuse by a spouse until a divorce is imminent. Further, it is conceivable that the stress of a divorce situation, coupled with unsupervised contact with a child, might precipitate sexual abuse.

[FN498]. Corwin, *supra* note 262, at 102.

[FN499]. Benedek & Schetky, *Problems in Validating Allegations of Sexual Abuse. Part 2: Clinical Evaluation*, 26 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 916 (1987) ("no absolute formulas exist for determining a child's credibility"). *See also* Corwin, *supra* note 262, at 91.

[FN500]. *See supra* note 120 and accompanying text.

[FN501]. Quinn writes that "[t]he strongest validation criteria are based upon eliciting of explicit sexual experiences with progression of acts over time described by the child." Quinn, *supra* note 472, at 186.

[FN502]. D. JONES & M. MCQUISTON, *supra* note 301, at 43.

[FN503]. *See* Waterman, *Developmental Considerations*, in SEXUAL ABUSE OF YOUNG CHILDREN 27 (K. MacFarlane & J. Waterman eds. 1986), where Waterman writes:

> [I]ssues of truth versus lying are complex in the preschool years.... However, children cannot manufacture stories based on information that they have not learned or experienced. For example, children will not make up a story about the comings and goings of Eskimos if they have never been exposed to any learning about Eskimos, and will not say someone attempted oral copulation with them if they have not had either direct or vicarious experience with that act.

[FN504]. *See* Faller, *supra* note 468, at 475 (because young children do not have the sexual knowledge necessary to fabricate stories of sexual abuse, false allegations are rare); Quinn, *supra* note 472, at 187.

[FN505]. *In re* Melissa M., 136 Misc. 2d 773, 777, 519 N.Y.S.2d 453, 457 (Fam. Ct. 1987).

[FN506]. *In re* Nicole V., 71 N.Y.2d 112, 121, 518 N.E.2d 914, 918, 524 N.Y.S. 2d 19, 23 (1987).

[FN507]. Lancaster v. People, 200 Colo. 448, 453, 615 P.2d 720, 723 (1980).

[FN508]. *See* D. JONES & M. MCQUISTON, *supra* note 301, at 43, where the authors write:

> The words and sentence formation should be congruent with the age and developmental status of the child; a 5-year-old child who falsely recanted her allegations, when asked why the sexual abuse had stopped some 18 months previously, said, "because it was inappropriate". This phrase belied its adult, rather than child origins.

See also Benedek & Schetky, *supra* note 499, at 917 (Table 1).

[FN509]. *See* Corwin, *supra* note 262, at 100 ("We have interviewed many young children, especially those with highly educated parents, who have been taught to use the terms penis and vagina in describing genital anatomy.").

[FN510]. D. JONES & M. MCQUISTON, *supra* note 301, at 44 ("The statement may be searched for evidence of a child's perspective of the abuse incident, in contrast to that of an adult or third-party."); Faller, *supra* note 468, at 476.

[FN511]. D. JONES & M. MCQUISTON, *supra* note 301, at 44 ("The emotion expressed by the child during the interview is usually congruent with the events being described.... We may further ask whether the child's account is given in a rehearsed or packaged manner, or with appropriate emotion"); Benedek & Schetky, *supra* note 499, at 917 (Table 1); Faller, *supra* note 468, at 476; Yates & Musty, *supra* note 468, at 990 ("children who are misled are

often inconsistent in recalling the events. Their affect may not be appropriate, and they are unable to provide details about time, place, and so forth.").

[FN512]. *See* Berliner & Barbieri, *supra* note 475, at 133; Quinn, *supra* note 472, at 188 ("Children who have been subjected to multiple interviews may begin to report their experience in a rote manner.").

[FN513]. Quinn, *supra* note 472, at 188-89.

[FN514]. For discussion of inconsistency, see *supra* text following note 372, and *supra* notes 416-25 and accompanying text.

[FN515]. D. JONES & M. MCQUISION, *supra* note 301, at 45.

[FN516]. *See* Benedek & Schetky, *supra* note 499.

[FN517]. Faller, *supra* note 468, at 474-75; Quinn, *supra* note 472, at 192.

[FN518]. *See* Yates & Musty, *Preschool Children's Erroneous Allegations of Sexual Molestation*, 145 AM. J. PSYCHIATRY 989 (1988).

[FN519]. *See supra* notes 310-14 and accompanying text.

[FN520]. *See* Faller, *Criteria for Judging the Credibility of Children's Statements About Their Sexual Abuse*, 67 CHILD WELFARE 389 (1988).

[FN521]. *Id.* at 396-97. Faller cautions that while the "results of this study are promising," replication studies should be conducted to ensure the validity of the findings. *Id.* at 398.

[FN522]. Experimental work is beginning on whether mock-jurors can differentiate accurate from inaccurate testimony. *See* Goodman, *Determinants, supra* note 391 (children's perceived credibility was low; mock jurors were not able to distinguish between accurate and inaccurate testimony; guilt judgments were influenced by witness confidence but not by witness age).

[FN523]. *See, e.g.*, Cutler, Penrod & Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 L. & HUM. BEHAV. 41 (1988); Duggan, Aubrey, Doherty, Isquity, Levine & Scheiner, *The Credibility of Children as Witnesses in a Simulated Child Sexual Abuse Trial*, in PERSPECTIVES ON CHILDREN'S TESTIMONY (J. Ceci, M. Toglia & D. Ross eds. 1989) (women tended to believe children more, although this gender effect did not affect guilt judgments); Goodman, *Determinants, supra* note 391 (perceived credibility of children was low; jurors could not distinguish between accurate and inaccurate testimony; guilt judgments were influenced by witness confidence but not by age); Goodman, *Reactions, supra* note 391 (children were perceived as less credible than adults; however, age did not affect juror's perceptions of guilt); Goodman, Golding, Helgeson, Haith & Michelli, *When a Child Takes the Stand: Jurors' Perceptions of Children's Eyewitness Testimony*, 11 L. & HUM. BEHAV. 27 (1987); Leippe & Romanczyk, *supra* note 391 (children were seen as less credible than adults; however, age did not significantly affect juror perceptions of guilt; children were perceived as more susceptible to suggestion than adults and more likely to make errors of memory); Nigro, Buckley, Hill & Nelson, *When Juries "Hear" Children Testify: The Effects of Eyewitness Age and Speech Style on Juror's Perceptions of Testimony*, in PERSPECTIVES ON CHILDREN'S TESTIMONY (J. Ceci, M. Toglia & D. Ross eds. 1989) (children with powerful speech style were viewed as more

credible than children with powerless speech style); Ross, Miller & Moran, *The Child in the Eyes of the Jury: Assessing Mock Jurors' Perceptions of the Child Witness*, in CHILDREN'S EYEWITNESS MEMORY 142 (J. Ceci, M. Toglia & D. Ross eds. 1987); Wells, Turtle & Luus, *The Perceived Credibility of Child Eyewitnesses: What Happens When They Use Their Own Words?*, in PERSPECTIVES ON CHILDREN'S TESTIMONY (J. Ceci, D. Ross & M. Toglia eds. 1989).

[FN524]. *See, e.g.*, Goodman, *Reactions, supra* note 391; Leippe & Romanczyk, *supra* note 391.

[FN525]. For discussion, see Goodman, *Determinants, supra* note 391.

[FN526]. *See, e.g.*, MacFarlane, *Child Sexual Abuse in Divorce Proceedings*, in SEXUAL ABUSE OF YOUNG CHILDREN 124-25 (K. MacFarlane & J. Waterman eds. 1986).

[FN527]. An occasional decision approves expert testimony on credibility when the defendant opens the door to such evidence through a direct attack on the victim's credibility. *See, e.g.*, State v. Myers, 359 N.W.2d 604, 611-12 (Minn. 1984).

[FN528]. *See, e.g.*, State v. Moran, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986), where the court wrote:

> Experts called to testify about behavioral characteristics that may affect an alleged victim's credibility *may not* give an opinion of the credibility of a particular witness. Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to acts as judges of patients' credibility.

See also Thompson v. State, 769 P.2d 997 (Alaska Ct. App. 1989); State v. Lindsey, 149 Ariz. 472, 474-75, 720 P.2d 73, 75-76 (1986); People v. Oliver, 745 P.2d 222, 225 (Colo. 1987); People v. Ross, 745 P.2d 277, 278 (Colo. Ct. App. 1987); Tingle v. State, 536 So. 2d 202 (Fla. 1988); Head v. State, 519 N.E.2d 151, 153 (Ind. 1988); Lawrence v. State, 464 N.E.2d 923, 925 (Ind. 1984); State v. Brotherton, 384 N.W.2d 375, 378-79 (Iowa 1986)(court held that testimony that a young child could not fantasize about a sexual act was improper indirect testimony regarding the child's credibility); State v. Jackson, 239 Kan. 463, 470, 721 P.2d 232, 238 (1986); People v. Reinhardt, 167 Mich. App. 584, 596, 423 N.W.2d 275, 282 (1988); State v. Miller, 377 N.W.2d 506, 508 (Minn. Ct. App. 1985); State v. Bailey, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); State v. Holloway, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986); State v. Middleton, 294 Or. 427, 437 n.11, 657 P.2d 1215, 1221 n. 11 (1983); Commonwealth v. McNeely, 368 Pa. Super. 517, 520, 534 A.2d 778, 779 (1987)(an expert's "opinion on the accuracy of the victim's recitation of facts is inadmissible."); State v. Rimmasch, -- P.2d -- (Utah 1989); State v. Eldredge, 773 P.2d 29 (Utah 1989); State v. Madison, 770 P.2d 662 (Wash. Ct. App. 1989); Zabel v. State, 765 P.2d 357 (Wyo. 1988); Griego v. State, 761 P.2d 973 (Wyo. 1988).

[FN529]. *See* Commonwealth v. Ianello, 401 Mass. 197, 515 N.E.2d 1181 (1987); People v. Reinhardt, 167 Mich. App. 584, 423 N.W.2d 275 (1988); People v. Matlock, 153 Mich. App. 171, 395 N.W.2d 274 (1986); Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987); Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315 (1988)(expert testimony on credibility of sexually abused children as a class is inadmissible).

[FN530]. *See, e.g.*, State v. Moran, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986)("Nor may the expert's opinion as to credibility be adduced indirectly by allowing the expert to quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation"); State v. Lindsey, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986).

[FN531]. 527 A.2d 276 (Del. 1987).

[FN532]. *Id.* at 278-79.

[FN533]. *Id.* at 279 (quoting Wheat v. State, 527 A.2d 269, 275 (Del. 1987)).

[FN534]. Wheat v. State, 527 A.2d 269, 274 (Del. 1987).

[FN535]. *Id.* at 275.

[FN536]. *See, e.g.*, United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); State v. Aguallo, 318 N.C.590, 591, 350 S.E.2d 76, 81 (1986)(opinion that child was believable inadmissible under Rules 405 and 608(a)); State v. Kim, 318 N.C. 614, 620, 350 S.E.2d 347, 351 (1986); State v. Holloway, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986); State v. Rimmasch, --P.2d -- (Utah 1989).

[FN537]. FED. R. EVID. 405(a).

[FN538]. However, credibility can only be supported after it is attacked. FED. R. EVID. 608(a).

[FN539]. FED. R. EVID. 608(a). On cross-examination the witness may be asked about relevant specific instances of conduct. FED. R. EVID. 608(b).

[FN540]. 715 P.2d 338 (Colo. 1986). *See also* People v. Gaffney, 769 P.2d 1081 (Colo. 1989).

[FN541]. *Id.* at 340-41 (footnote omitted).

[FN542]. 745 P.2d 647 (Colo. 1987).

[FN543]. *Id.* at 648.

[FN544]. The expert testified as follows:

> General attitudes, accepted attitudes as far as the literature concerning children is that children tend not to fabricate stories of sexual abuse and in giving reports tend to reproduce their experiences and your statement about children having had the erotic experience when young, in order to make these things up, there has to be a basis for that experience and unless it happened to them in this area, then in fact the description would be what had been done to them.

Id. For another case rejecting expert testimony that children do not invent explicit accounts of sexual abuse, see Hester v. Commonwealth, 734 S.W.2d 457 (Ky. 1987).

[FN545]. People v. Snook, 745 P.2d 647, 648-49 (Colo. 1987)(citations and footnotes omitted).

[FN546]. 745 P.2d 277 (Colo. Ct. App. 1987).

[FN547]. *Id.* at 278 (quoting People v. Koon, 713 P.2d 410, 412 (Colo. Ct. App. 1985)). A police officer testified that the victim was truthful on specific occasions. This was error. *Id.*

[FN548]. *See also* People v. Jensen, 747 P.2d 1247, 1250 (Colo. 1987); People v. Oliver, 745 P.2d 222, 225 (Colo. 1987)("The defendant contends that the rebuttal testimony of a social worker and an investigator that they personally believed each of the three victims, based upon their experience and interviews of the victims, was reversible

error. We agree.") (footnotr omitted).

[FN549]. The Arizona Supreme Court wrote:

> Opinion evidence on who is telling the truth in cases such as this is nothing more than the expert's opinion on how the case should be decided. We believe that such testimony is inadmissible, both because it usurps the jury's traditional functions and roles and because, when given insight into the behavioral sciences, the jury needs nothing further from the expert.

State v. Lindsey, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). *See also* State v. Moran, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986); State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986); State v. Holloway, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986).

[FN550]. *See* United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); Commonwealth v. Seese, 512 Pa. 439, 443-44, 517 A.2d 920, 922 (1986); Dunnington v. State, 740 S.W.2d 896, 898 (Tex. Ct. App. 1987)("[The] use of expert testimony presents a risk of overbearing the jury in its deliberative responsibility. The disparate expertise of the witness and the average juror tends to produce a natural inclination to accept the expert testimony as gospel." Court was not discussing expert testimony on credibility.).

[FN551]. *See* United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); People v. Snook, 745 P.2d 647, 649 n.4 (Colo. 1987).

[FN552]. *See* People v. Snook, 745 P.2d 647, 649 n.4 (Colo. 1987).

[FN553]. *See, e.g.*, State v. Moran, 151 Ariz. 378, 382, 728 P.2d 248, 252 (1986); State v. Petrich, 101 Wash. 2d 566, 575, 683 P.2d 173, 180 (Ct. App. 1984).

[FN554]. State v. Milbradt, 305 Or. 621, 629, 756 P.2d 620, 624 (1988)(emphasis in original, footnote omitted). The Arizona Supreme Court was just about as clear when it wrote, "[W]e explicitly state at this time that trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness." State v. Lindsey, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986).

[FN555]. *See* State v. Lindsey, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986); Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987); State v. Holloway, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986); State v. Friedrich, 135 Wis. 2d 1, 16, 398 N.W.2d 763, 770 (1987)("The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment. The credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of expert opinion." (citations omitted)).

[FN556]. United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

[FN557]. 512 Pa. 439, 517 A.2d 920 (1986).

[FN558]. *Id.* at 443, 517 A.2d at 922.

[FN559]. 518 Pa. 77, 541 A.2d 315 (1988).

[FN560]. 64 Haw. 598, 645 P.2d 1330 (1982). *See also* State v. Busch, 515 So. 2d 605 (La. Ct. App. 1988); State v. Myers, 359 N.W.2d 604, 611-12 (Minn. 1984)(permitting expert testimony on credibility where defendant opened

the door to such testimony by directly attacking child's credibility); State v. J.C.F., 767 P.2d 309 (Mont. 1988); State v. French, 760 P.2d 86 (Mont. 1988); State v. Geyman, 729 P.2d 475, 479-80 (Mont. 1986)(expert testimony on credibility is admissible to help the jury understand credibility); State v. Oliver, 85 N.C. App. 1, 10-11, 354 S.E.2d 527, 533 (1987)(not error to permit expert to testify that children as a class do not lie about sexual abuse); Dunham v. State, 762 P.2d 969, 973 (Okla. Crim. App. 1988).

The Indiana Supreme Court has addressed the admissibility of testimony relating to credibility. *See* Stout v. State, 528 N.E.2d 476 (Ind. 1988); Settle v. State, 526 N.E.2d 974 (Ind. 1988); Head v. StatE, 519 N.E.2d 151 (Ind. 1988); Lawrence v. State, 464 N.E.2d 923 (Ind. 1984). The court held that an expert may not "review each item of the child's testimony and ... specifically vouch for the truthfulness of such testimony." Head v. State, 519 N.E.2d 151, 153 (Ind. 1988). It may be proper, however, for an expert to state an opinion "as to the general competence of the child witness and the child witness's ability to understand the subject...." Head v. State, 519 N.E.2d 151, 153 (Ind. 1988).

> In Lawrence v. State, 464 N.E.2d 923, 925 (Ind. 1984), the Indiana court wrote: Whenever an alleged child victim takes the witness stand in such cases, the child's capacity to accurately describe a meeting with an adult which may involve touching, sexual stimulation, displays of affection and the like, is automatically in issue, whether or not there is an effort by the opponent of such witness to impeach on the basis of a lack of such capacity. The presence of that issue justifies the court in permitting some accrediting of the child witness in the form of opinions from parents, teachers, and others having adequate experience with the child, that the child is not prone to exaggerate or fantasize about sexual matters. Such opinions will facilitate an original credibility assessment of the child by the trier of fact, so long as they do not take the direct form of "I believe the child's story", or "In my opinion the child is telling the truth."

In Stout v. State, 528 N.E.2d 476 (Ind. 1988), the court permitted a child witness's psychiatric social worker to describe the victim's trial testimony, and to state that "there was nothing unusual in the victim's rather factual and unemotional rendition and that the victim just wanted to hurry up, tell her story, and not have to deal with it anymore." Stout v. State, 528 N.E.2d 476, 479 (Ind. 1988).

[FN561]. 756 P.2d 1033 (Haw. 1988). *See also In re* Doe, 761 P.2d 299 (Haw. 1988)(testimony relating to credibility is not permissible until there has been an attack on the child's credibility).

[FN562]. State v. Castro, 756 P.2d 1033, 1044 (Haw. 1988).

[FN563]. *See, e.g.*, Seering v. Department of Social Servs., 196 Cal. App. 3d 298, 306, 239 Cal. Rptr. 422, 427 (1987)("a psychiatrist's opinion that a specific third person or persons had committed a molestation is inadmissible"); *In re* Christine C., 191 Cal. App. 3d 676, 680, 236 Cal. Rptr. 630, 632 (1987); State v. J.C.F., 767 P.2d 309 (Mont. 1988); Townsend v. State, 103 Nev. 113, 723 P.2d 705 (1987); Stephens v. State, --P.2d-- (Wyo. 1989).

[FN564]. *See supra* subsection IV(B)(1).

[FN565]. *See* P. GEBHARD, J. CAGNON, W. POMEROY & C. CHRISTENSON, SEX OFFENDERS (1965); Baxter, Marshall, Barbaree, Davidson & Malcolm, *Deviate Sexual Behavior: Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures, and Sexual Response*, 11 CRIM. JUST. & BEHAV. 477 (1984); Panton, *MMPI Profile Configurations Associated with Incestuous and Non-Incestuous Child Molesting*, 45 PSYCHOLOGICAL REP. 335 (1979).

[FN566]. Abel, Barlow, Blanchard & Mavissakalian, *Measurement of Sexual Arousal in Male Homosexuals: The Effects of Instructions and Stimulus Modality*, 4 ARCHIVES SEXUAL BEHAV. 623 (1975); Kaplan, *A Description of Self-Reports of Convicted Child Molesters Following Incarceration*, INT'L J. OFFENDER THERAPY & COM-

PARATIVE CRIMINOLGOY (in press).

[FN567]. ANERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987).

[FN568]. *Id.* at 279-90.

[FN569]. For a complete listing of paraphilias see J. MONEY, LOVEMAPS: CLINICAL CONCEPTS OF SEXUAL/EORTICE HEALTH AND PATHOLOGY, PARAPHILIA, AND GENDER TRANSPOSITION IN CHILDHOOD, ADOLESCENCE, AND MATURITY (1986).

[FN570]. *See* D. FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986).

[FN571]. Abel, Becker, Mittelman, Cunningham-Rathner, Rouleau & Murphy, *Self-Reported Sex Crimes of Non-Incarcerated Paraphiliacs*, 1 J. INTERPERSONAL VIOLENCE 3 (1987).

[FN572]. Fed. Reg. (1975).

[FN573]. Abel, Mittelman, Becker, Rathner & Rouleau, *Predicting Child Molesters Response to Treatment*, in 528 HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVS 223 (N.Y. Academy of Seciences 1988) [hereinafter Abel, *Predicting*].

[FN574]. Abel, Mittelman & Becker, *Sexual Offenders: Results Assessment and Recommendations for Treatment*, in CLINICAL CRIMINOLOGY: CURRENT CONCEPTS 191 (H. Ben-Aron, S. Huckers & C. Webster eds. 1985) [hereinafter Abel, *Results*].

[FN575]. Nationwide Crime Survey Report (U.S. Govt. Printing Office 1981).

[FN576]. Fehrenbach, Smith, Monastersky & Deisher, *Adolescent Sexual Offenders: Offenders and Offense Characteristics*, 56 AM. J. ORTHOPSYCHIATRY 225 (1986).

[FN577]. Becker, Cunningham-Rathner & Kaplan, *The Adolescent Sexual Perpetrator: Demographics, Criminal History, Victims, Sexual Behaviors and Recommendations for Reducing Future Offenses* 1 J. INTERPERSONAL VIOLEMCE 421 (1986).

[FN578]. Berlin, *Issues in the Exploration of Biological Factors Contributing to the Etiology of the "Sex Offender," Plus Some Ethical Considerations*, in 528 HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVES 183 (New York Academy of Sciences 1988).

[FN579]. *See* Bancroft, *The Hormonal and Biochemical Basis of Human Sexuality*, in HUMAN SEXUALITY AND ITS PROBLEMS 64 (1983); Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in THE SEXUAL AGGRESSOR: CURRENT PERSPECTIVES ON TREATMENT 83 (J. Greer & J. Stuart eds. 1983); Bradford & McClean, *Sexual Offenders, Violence and Testosterone: A Clinical Study*, 29 CAN. J. PSYCHIATRY 335 (1984).

[FN580]. *See* Berlin, *supra* note 579.

[FN581]. ADULT SEXUAL INTEREST IN CHILDREN (M. Cook & K. Howells eds. 1981); A. STORR, SEXUAL DEVIATION (1964).

[FN582]. R. STOLLER, PERVERSION, THE EROTIC FORM OF HATRED (1975).

[FN583]. Abel, *Results, supra* note 574; Barlow & Abel, *Sexual Deviation*, in BEHAVIOR MODIFICATION 337 (W. Graigshead, A. Kazdin & M. Mahoney eds. 1976).

[FN584]. A. BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS (1973); McGuire, Carlisle & Young, *Sexual Deviations as Conditioned Behaviour: A Hypothesis*, 2 BEHAV. RES. & THERAPY 185 (1965).

[FN585]. Laws & Marshall, *A Conditioning Theory of the Etiology and Maintenance of Deviant Sexual Preference and Behavior*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER (W. Marshall, D. Laws & H. Barbaree eds.) (in press).

[FN586]. *Id.* at -- (in press).

[FN587]. For assistance in evaluating the efficacy of specific psychological tests and instruments, see AMERICAN EDUCATION RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION & NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985).

[FN588]. *See* People v. John W., 185 Cal. App. 3d 801, 229 Cal. Rptr. 783 (1986). In John W., the defense offered expert testimony that defendant was not a sexual deviant. The expert had administered a clinical interview, an MMPI, and a penile plethysmograph examination. The expert's opinion that defendant was not a sexual deviant was predicated largely on defendant's response to the plethysmograph. The trial judge rejected the expert testimony, and the court of appeal affirmed. The court held that the penile plethysmograph was a novel scientific technique, and that defendant had not established its general acceptance in the relevant scientific community.

[FN589]. Levin & Stava, *Personality Characteristics of Sex Offenders: A Review*, 16 ARCHIVES SEXUAL BEHAV. 57 (1987).

[FN590]. *Id.*

[FN591]. Overholser & Beck, *Multimethod Assessment of Rapists, Child Molesters, and Three Control Groups on Behavioral and Psychological Measures*, 54 J. CONSULTING & CLINICAL PSYCHOLOGY 682 (1986); Segal & Marshall, *Heterosexual Social Skills in a Population of Rapists and Child Molesters*, 53 J. CONSULTING & CLINICAL PSYCHOLOGY 55 (1985).

[FN592]. G. Abel, D. Gore, C. Holland, N. Camp, J. Becker & J. Rathner, The Measurement of the Cognitive Distortion of Child Molesters (unpublished manuscript, under review for publication).

[FN593]. Abel & Blanchard, *The Measurement and Generation of Sexual Arousal in Male Sexual Deviants*, in PROGRESS IN BEHAVIOR MODIFICATION: VOLUME 2 (M. Hersen, R Eisler & P. Miller eds. 1976); Barlow, *Assessment of Sexual Behavior*, in HANDBOOK OF BEHAVIORAL ASSESSMENT 461 (A. Cirminero, K. Calhourn & H. Adams eds. 1977); Zuckerman, *Psychological Measures of Sexual Arousal in the Human*, 75 PSYCHOLOGICAL BULL. 297 (1971). *See also* American Prof. Society on the Abuse of Children, Task Force on As-

sessment and Treatment of Perpetrators of Child Sexual Abuse, *Proposed Guidelines for Penile Plethysmography*, 1 THE ADVISOR 7 (Am. Prof. Soc. on the Abuse of Children Newsletter, Aug., 1988), where Judith Becker writes:

Historically, the penile plethysmograph has been used in research settings and with individuals who admitted paraphilic behavior. Murphy and Barbaree (1988) note in their current extensive review on the use of the plethysmograph, "The currently available evidence on validity and reliability does not provide strong support for the use of this procedure with populations where there are questions regarding whether the individual has engaged in deviant behavior." That is, there is no evidence to support the use of erection measures as a means of determining guilt or innocence in an alleged sex crime. Therefore, since reliability and validity have not been established to date with non-admitters, there is no empirical data to justify its use in diagnosis, or prediction of treatment outcome or recidivism. Furthermore, norms for the various populations are lacking in adolescents and a variety of ethnic groups.

> In clinical settings penile plethysmography has proven exceedingly helpful. Using penile responses to deviant stimuli a therapist is frequently able to confront clients with their laboratory arousal and get them to self-disclose deviant sexual interest they had previously denied. This clinical tool is one of a variety of other evaluative methods that a therapist may use to form an opinion.
>
> Especially problematic has been the appearance of penile plethysmography results in the courtroom setting. The use of penile plethysmography results in the courtroom is strongly discouraged until the validity and reliability of its use in that setting have been established. Research is in progress to establish psychometric properties of this form of assessment.

[FN594]. W. Murphy & H. Barbaree, Assessments of Sexual Offenders by Measures of Erectile Response: Psychometric Properties and Decision Making (manuscript prepared under contract with NIMH, Order No. 86M0506500501D).

[FN595]. *Id.*

[FN596]. Quinsey, *The Assessment and Treatment of Child Molesters: A Review*, 18 CAN. PSYCHOLOGICAL REV. 204 (1977).

[FN597]. *See* Bradford, *Organic Treatment for the Male Sexual Offender*, 528 HUMAN SEXUAL AGGRESSION 193 (New York Academy of Sciences 1988); Davies, *Cyproterone Acetate for Male Hypersexuality*, 2 J. INT'L MED. RESEARCH 159 (1974).

[FN598]. *Id.*

[FN599]. Heim, *Sexual Behavior of Castrated Sex Offenders*, 10 ARCHIVES SEXUAL BEHAVIOR 11 (1981).

[FN600]. *Id.*

[FN601]. ADULT SEXUAL INTEREST IN CHILDREN (M. Cook & K. Howells eds. 1981).

[FN602]. Eist & Mandel, *Family Treatment of Ongoing Incest Behavior*, 7 FAMILY PROCESS 216 (1968); Gutheil & Avery, *Multiple Overt Incest as Family Defense Against Loss*, 16 FAM. PROCESS 105 (1977); Molnar & Cameron, *Incest Syndromes: Observations in a General Hospital Psychiatric Unit*, 20 CAN. PSYCHIATRIC ASS'N J 373 (1975).

[FN603]. For detailed reviews of behavioral treatment of pedophiles see Kelly, *Behavioral Reorientation of Pedo-*

philes: Can It Be Done?, 2 DLINICAL PSYCHOLOGY REV. 387 (1982); Quinsey, *supra* note 596.

[FN604]. Becker, Kaplan & Kavoussi, *Measuring the Effectiveness of Treatment for the Aggressive Adolescent Sexual Offender*, 528 HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVES 215 (New York Academy of Sciences 1988); Marshall & Barbaree, *An Outpatient Treatment Program for Child Molesters*, 528 HUMAN SEXUAL AGGRESSION: CURRENT PERSPECTIVES 295 (New York Academy of Sciences 1988); G. Abel, J. Becker, J. Cunningham-Rather, J. Rouleau, M. Kaplan & J. Reich, The Treatment of Child Molesters: A Manual (Unpublished manuscript, 1984).

[FN605]. Abel, *Predicting, supra* note 573.

[FN606]. Alteration of the pedophile's maladaptive beliefs about his behavior.

[FN607]. Quinsey, *Men Who Have Sex with Children*, in LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES (D. Weisstub ed., in press).

[FN608]. 310 N.W.2d 58 (Minn. 1981).

[FN609]. *Id.* at 62-63.

[FN610]. *See* Berger, *The Child Abusing Family*, 8 AM. J. FAM. THERAPY 53, 55 (1980); Jayartne, *Child Abusers as Parents and Children: A Review*, 22 SOC. WORK 5 (1977).

[FN611]. Such proof is relevant within the meaning of Rule 401 of the Federal Rules of Evidence, which defines relevant evidence as "evidence having 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." *See* State v. Miller, 709 P.2d 350, 353 (Utah 1985) (court rejected testimony offered by defendant that he did not fit the profile of a child sexual abuser even though the testimony was found to be relevant).

[FN612]. *See* Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Sloan v. State, 70 Md. App. 630, 522 A.2d 1364 (1987), *cert. denied*, 310 Md. 276, 528 A.2d 1287 (1987)(reversible error to admit testimony concerning "classic indicators" of a child abuser); State v. Loebach, 310 N.W.2d 58 (Minn. 1981); State v. Goblirsch, 309 Minn. 401, 246 N.W.2d 12 (1976); State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973).

[FN613]. *See* cases collected *supra* note 612. *See also* Note, *The Battering Parent Syndrome: Inexpert Testimony as Character Evidence*, 17 U. MICH. J.L. REF. 653 (1984).

[FN614]. Sanders v. State, 251 Ga. 70, 76 n.7, 303 S.E.2d 13, 18 n.7 (1983); State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981).

[FN615]. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948); Ali v. United States, 520 A.2d 306, 309 (D.C. 1987); Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479.

[FN616]. Teitelbaum & Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. REV. 423, 423-24 (1983).

[FN617]. FED. R. EVID. 404(a). Rule 404 of the Federal Rules of Evidence governs charac ter evidence used to

prove conduct in conformity with character. The Rule does not govern character evidence offered to impeach credibility, nor does it regulate cases in which character is in issue.

[FN618]. McCord, *Syndromes, supra* note 73, at 51.

[FN619]. *Id.* at 52 (emphasis in original)(footnote omitted).

[FN620]. *See* FED. R. EVID. 404(a)(1).

[FN621]. *Id.*

[FN622]. 474 A.2d 167 (Me. 1984).

[FN623]. *Id.* at 173 (Scolnik, J., dissenting in part).

[FN624]. 852 F.2d 475 (9th Cir. 1988). *See also* State v. Clements, 770 P.2d 447 (Kan. 1989)(collecting cases); 42 A.L.R. 4th 937 (1985).

[FN625]. 852 F.2d at 480.

[FN626]. *See* State v. Hansen, 304 Or. 169, 743 P.2d 157 (1987). In this case the state offered the testimony of a police officer describing the techniques used by child molesters to get close to their victims. The court ruled that such evidence "has no bearing on whether a person who does these things is a child abuser." *Id.* at 176, 743 P.2d at 161. Thus, the evidence was irrelevant. *See also* Dunnington v. State, 740 S.W.2d 899, 902 (Tex. Ct. App. 1987) (testimony on grooming practices not beyond ken of average juror, therefore, expert testimony not needed).

[FN627]. 760 P.2d 1030 (Alaska Ct. App. 1988). *But see* Rodriquez v. State, 741 P.2d 1200 (Alaska Ct. App. 1987).

[FN628]. Haakanson v. State, 760 P.2d 1030, 1036 (Alaska Ct. App. 1988).

[FN629]. The court wrote: "The weight of authority clearly suggests that Rule 404(a) prohibits the profile testimony introduced at trial, unless the defense has raised the issue first." *Id.*

[FN630]. FED. R. EVID. 404(a)(1).

[FN631]. *See* United States v. St. Pierre, 812 F.2d 417, 420 (8th Cir. 1987)(trial court properly refused to appoint expert to examine defendant to determine whether he fit a sex offender profile which was not generally accepted by scientific community); People v. John W., 185 Cal. App. 3d 803, 804-06, 229 Cal. Rptr. 783, 785 (1986)(defense expert would have testified that he could find no evidence of deviant sexual interest in defendant based upon clinical interview, MMPI, and penile plethysmograph, where expert relied heavily on results of plethysmograph; court held that plethysmograph was novel scientific evidence, and there was no showing of acceptance in the relevant scientific community); State v. Cavallo, 88 N.J. 508, 520-23, 443 A.2d 1020, 1026 (1982)(testimony that defendant did not have character traits of a rapist not generally accepted in scientific community). *See also* Dunnington v. State, 740 S.W.2d 899, 902 (Tex. Ct. App. 1987)(subject of grooming potential victims not beyond ken of jury).

[FN632]. *See* State v. Miller, 709 P.2d 350, 353 (Utah 1985)(profile evidence offered by defendant is relevant as evidence of a pertinent trait of defendant's character; trial court properly rejected the evidence under Rule of Evi-

dence 403 because it could confuse and mislead the jury).

[FN633]. *See* State v. Cavallo, 88 N.J. 508, 518-20, 443 A.2d 1020, 1025 (1982).

68 Neb. L. Rev. 1

END OF DOCUMENT