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Kathy L. Hensley

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The Admissibility of "Child Sexual Abuse Accommodation Syndrome" in California Criminal Courts

Children have been used for the sexual gratification of adults throughout history.¹ Widespread public acknowledgment and concern over this societal atrocity, however, is relatively new. Recent public awareness has been accompanied by a dramatic increase in the number of reported incidents of child sexual abuse.²

Children are protected from sexual abuse by criminal and civil statutes in every state.³ The increase in reported incidents has resulted in a surge of criminal and civil cases dealing with child sexual abuse. The nature of child sexual abuse, however, makes criminal prosecution extremely difficult.⁴ A prosecutor often is faced with the frustration of proving a case with no corroborative evidence, no witnesses, and a victim who is reluctant or unable to testify against the defendant.⁵ To combat these evidentiary problems, prosecutors have sought to introduce expert testimony to establish that the child victim is suffering from "child sexual abuse accommodation syndrome" (CSAAS). Evidence concerning CSAAS has been introduced to prove that sex-

1. See L. DeMAUSE, *THE HISTORY OF CHILDHOOD* 43-51 (1974). "Growing up in [ancient] Greece and Rome often included being used sexually by older men. . . . Boy brothels flourished in every city. . . ." *Id.* at 43. "Intercourse with castrated children was often spoken of as being especially arousing, castrated boys were favorite 'voluptates' in imperial Rome, and infants were castrated 'in the cradle' to be used in brothels by men who liked buggering young castrated boys." *Id.* at 46. "Even [with] the Jews, . . . the penalty for sodomy with children over nine years of age was death by stoning, but copulation with younger children was not considered a sexual act, and was punishable only by a whipping, 'as a matter of public discipline.'" *Id.* at 45 (citations omitted).

2. T. DRABEC, *PROSECUTION OF CHILD SEXUAL ABUSE: THE SECONDARY TRAUMA OF THE COURT* 2 (1985).

3. AMERICAN BAR ASSOCIATION, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* 1 (1981) [hereinafter cited as *Legal Issues and Approaches*]. California has enacted several statutes to protect children from sexual abuse. See, e.g., CAL. PENAL CODE §261.5 (crime for person to commit sexual intercourse with female under 18 years of age); CAL. PENAL CODE §285 (crime for person to commit incest); CAL. PENAL CODE §288 (crime for person to commit lewd or lascivious acts with a child under the age of 14); CAL. WELF. & INST. CODE §300 (child whose home is an unfit place by reason of neglect, cruelty, depravity, or physical abuse may be adjudged to be a dependent child of the court).

4. Comment, *The Sexually Abused Infant Hearsay Exception: A Constitutional Analysis*, 8 J. JUV. L. 59, 59 (1984).

5. Comment, *Evidentiary Problems in Criminal Child Abuse Prosecution*, 63 GEO. L.J. 257, 259 (1974).

ual abuse has occurred⁶ and to bolster the victim's credibility.⁷ CSAAS includes five categories which represent the similar psychological symptoms displayed by sexually abused children.⁸ The categories are: 1) secrecy; 2) helplessness; 3) entrapment and accommodation; 4) delayed, unconvincing disclosure; and 5) retraction.⁹

One of the first California cases to address the admissibility of CSAAS involved a 1984 juvenile dependency hearing.¹⁰ The court in *In re Cheryl H.*¹¹ allowed a psychiatrist to testify that the victim's conduct was typical of conduct exhibited by other young children who had been sexually abused and that, in her opinion, the child had been sexually molested.¹² At a dependency hearing a determination that a minor is a dependent child of the court must be established by proof that would be admissible in civil trials.¹³ Rulings on the admissibility of evidence must comply with the rules prescribed by the California Evidence Code.¹⁴ Accordingly, the court in *Cheryl H.* found expert opinion testimony that a child victim was sexually abused was a proper subject for expert testimony under California Evidence Code section 801.¹⁵

In a criminal case the following year, however, the court did not adhere to the holding in *Cheryl H.* The court in *People v. Roscoe*¹⁶ held inadmissible a clinical psychologist's testimony that a fifteen-year-old boy was the victim of child molestation.¹⁷ In a footnote, the court added that less strict rules of admissibility apply in non-criminal cases and cited *Cheryl H.* as an example.¹⁸

6. See, e.g., *People v. Payan*, 173 Cal. App. 3d 27, 32, 220 Cal. Rptr. 126, 128 (1985), modified, 174 Cal. App. 3d 73b (1985); *In re Cheryl H.*, 153 Cal. App. 3d 1098, 1110, 200 Cal. Rptr. 789, 795 (1984); *State v. Kim*, 645 P.2d 1330, 1333-34 (Hawaii 1982).

7. See, e.g., *Payan*, 173 Cal. App. 3d at 33, 220 Cal. Rptr. at 128; *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795; *Smith v. State*, 688 P.2d 326, 327 (Nev. 1984).

8. See Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 INT'L J. OF CHILD ABUSE & NEGLECT 177 (1983).

9. *Id.* at 181.

10. A juvenile dependency hearing is held pursuant to WELF. & INST. CODE section 300. This section provides that under certain conditions, such as an unfit home, the juvenile court may adjudge the child to be a dependent of the court. WELF. & INST. CODE §300. Although the court in *Cheryl H.* did not mention the term "CSAAS" or even "syndrome," the expert testimony described characteristics of abused children that were identical to the elements in CSAAS. See *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795.

11. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

12. *Id.* at 1109-10, 200 Cal. Rptr. at 795.

13. CAL. WELF. & INST. CODE §355. See *In re Amanda I.*, 166 Cal. App. 3d 248, 259, 212 Cal. Rptr. 317, 325 (1985).

14. CAL. WELF. & INST. CODE §355.

15. CAL. EVID. CODE section 801 sets forth the standards for the admissibility of expert opinion testimony. See *infra* note 118 and accompanying text (Section 801 stated in full).

16. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

17. *Id.* at 1100, 215 Cal. Rptr. at 50.

18. *Id.* at 1100 n.4, 215 Cal. Rptr. at 50 n.4.

The court, however, in the most recent California criminal case to address the admissibility of CSAAS, *People v. Payan*,¹⁹ allowed testimony concerning CSAAS to be admitted. The expert's testimony served both to bolster the credibility of the three victims and to diagnose the children as victims of sexual molestation.²⁰ Although the court admitted evidence regarding CSAAS for both credibility and diagnostic purposes under the factual circumstances of the particular case, the ultimate holding limited the admissibility of CSAAS to credibility purposes only.²¹ The court added that the holding did not imply that CSAAS was necessarily always admissible in child sexual abuse prosecutions.²² Instead of clarifying what circumstances warrant admission of CSAAS, the court provided trial courts with very few guidelines by which to determine whether to admit or exclude evidence concerning CSAAS.²³

This comment contends that CSAAS is properly admissible in criminal cases to bolster a victim's credibility and to establish that a child has been sexually abused. To explain why testimony concerning CSAAS is often essential, the evidentiary problems in child sexual abuse cases will be discussed.²⁴ Before expert testimony on CSAAS can be introduced into evidence, the testimony must first meet the requisite standards for admissibility.²⁵ Thus, statutes and case law that specify standards of admissibility for expert opinion testimony will be analyzed.²⁶ Next, CSAAS will be compared to analogous expert testimony previously allowed in California criminal courts.²⁷ Finally, relevant case law on CSAAS will be reviewed.²⁸ This comment will conclude that case law should be interpreted to support the argument for the admissibility of CSAAS in California criminal courts.²⁹ An

19. 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (1985), *modified*, 174 Cal. App. 3d 73b.

20. *Id.* at 33-34, 220 Cal. Rptr. at 128.

21. The court stated,

We do hold that, as presented in the instant case, the subject of sexual abuse in children, especially children of the age herein, is a proper subject for expert testimony to aid the jury's understanding of factors which influence a child's behavior as well as in explaining the significance of particular medical findings or lack thereof.

Id. at 40, 220 Cal. Rptr. at 133.

22. *Id.*

23. See *infra* notes 251-270 and accompanying text.

24. See *infra* notes 81-110 and accompanying text.

25. Expert testimony on CSAAS must meet the prerequisite standards for both expert testimony and scientific evidence, and the testimony cannot create a substantial danger of undue prejudice. See *infra* notes 115-117 and accompanying text.

26. See *infra* notes 115-167 and accompanying text.

27. See *infra* notes 171-204 and accompanying text.

28. See *infra* notes 205-270 and accompanying text.

29. *Id.*

evaluation of whether CSAAS is admissible requires an understanding of what symptoms the syndrome encompasses.

CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

Child sexual abuse can occur in two distinct types of cases. The first type of case involves child rape during which the victim is violently attacked by a stranger.³⁰ The child usually receives some form of physical injury, and occasionally the child is murdered.³¹ While not rare, these brutal attacks comprise only a small percentage of child sexual assaults.³² The second type of case involves repeated sexual abuse by a family member or an adult with whom the child has a trusting relationship.³³ CSAAS describes the behavior of victims in the latter situation.³⁴

A clinical study by Dr. Roland C. Summit of large numbers of sexually abused children and their parents³⁵ revealed a typical behavior pattern or "syndrome"³⁶ among the victims.³⁷ Commentators and courts have given these common psychological symptoms various labels.³⁸ This comment will use the phrase "child sexual abuse accommodation syndrome" (CSAAS).

30. Wells, *Child Sexual Abuse Syndrome; Expert Testimony: To Admit or Not to Admit*, 57 FLA. B. J. 672, 673 (1983).

31. *Id.* See, e.g., *People v. Frank*, 38 Cal. 3d 711, 700 P.2d 415, 214 Cal. Rptr. 801 (1985) (child victim brutally sexually molested and then murdered).

32. Wells, *supra* note 30, at 673. An intensive three year study of child sexual abuse in New York City revealed that the offender was a total stranger in less than 23 percent of the cases studied. The remainder of the cases involved a relative, neighbor, friend, or person in the community with whom the child had frequent contact. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 FED. PROB. 15, 17 (Sept. 1971).

33. Wells, *supra* note 30, at 673. See, e.g., *In the Matter of Mary P.*, 701 P.2d 681, 682 (Kan. 1985) (two young children sexually molested by babysitter); *State v. A.D.M.*, 701 P.2d 999, 999 (Mont. 1985) (five year old girl sexually abused by father); *Smith*, 688 P.2d at 326 (young girl sexually assaulted by the man with whom her mother was living); *People v. Reid*, 475 N.Y.S.2d 741 (Supp. 1984) (girl sexually abused by neighbor).

34. See Wells, *supra* note 30, at 674.

35. Dr. Summit does not indicate the exact number of children studied. He does indicate, however, that clinical studies of "large numbers of children and their parents in proven cases of sexual abuse" were conducted and that the validity of the syndrome was tested over a four year period. See Summit, *supra* note 8, at 179-80. The syndrome was derived from the "collective experience of dozens of sexual abuse treatment centers in dealing with thousands of reports or complaints of adult victimization of young children." *Id.* at 190.

36. A "syndrome" is formally defined as a group of symptoms or signs typical of a disease, disturbance, or condition. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2320 (1976).

37. See Summit, *supra* note 8, at 177.

38. See, e.g., *Payan*, 173 Cal. App. 3d at 32, 40, 220 Cal. Rptr. at 128, 133 ("child sexual abuse accommodation syndrome," "child abuse accommodation syndrome," and "child sexual assault syndrome" were all used by the court); *Roscoe*, 168 Cal. App. 3d at 1098, 215 Cal. Rptr. at 49 ("child molest syndrome"); *Bussey v. Commonwealth*, 697 S.W.2d 139, 139 (Ky. 1985) ("child sexual abuse accommodation syndrome"); *State v. Carlson*, 360 N.W.2d 442, 442 (Minn. 1985) ("child sexual abuse syndrome"); *In the Matter of Michael G.*, 492

CSAAS is comprised of one or more of five elements.³⁹ The first two elements are not caused by sexual abuse.⁴⁰ Instead, the elements are inherent in the adult-child relationship⁴¹ and are preconditions to the sexual abuse.⁴² The first element is secrecy. A child who is molested by a trusted adult often is faced with intimidation to keep the molestation a secret.⁴³ The threat may range from a simple order not to tell anybody⁴⁴ to a threat of death if the sexual abuse is revealed.⁴⁵ This atmosphere of secrecy conveys to the child the understanding that the molestation is bad and dangerous, and the child is reluctant to expose the abuse.⁴⁶

The second element of CSAAS is helplessness.⁴⁷ A child is intrinsically powerless.⁴⁸ Children learn at a very early age that adults are authority figures who must be obeyed.⁴⁹ When faced with the sexual advances of a parental figure or a trusted adult, a child often fears punishment or loss of the adult's approval if sexual demands are not met with acquiescence.⁵⁰ Child victims often respond to a sexual confrontation in a different manner than an adult.⁵¹ Instead of resistance, a child often reacts with submission.⁵² Young children are victimized

N.Y.S.2d 993, 995 (Fam. Ct. 1985) ("intrafamilial child sex abuse syndrome"); National Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* 40 (1982) [hereinafter cited as *Recommendations*] ("sexually abused child syndrome"); Summit, *supra* note 8, at 181 ("child sexual abuse accommodation syndrome").

39. These elements are: 1) secrecy, 2) helplessness, 3) entrapment and accommodation, 4) delayed disclosure, and 5) retraction. Summit, *supra* note 8, at 181.

40. *Id.* at 181.

41. *See id.*

42. *Id.*

43. *Id.*

44. *See, e.g., Payan*, 173 Cal. App. 3d at 32, 220 Cal. Rptr. at 127 (defendant told four-year-old girl not to tell her mother).

45. Summit, *supra* note 8, at 181. *See, e.g., People v. Jones*, 155 Cal. App. 3d 153, 174, 202 Cal. Rptr. 162, 173 (1984) (defendant warned eight-year-old child that if she told her mother about the continuing sexual abuse, he would try to kill her); *State v. Haseltine*, 352 N.W.2d 673, 675 (Wis. App. 1984) (defendant threatened sixteen-year-old daughter with death if she told anyone that he had been sexually abusing her).

46. Summit, *supra* note 8, at 181.

47. *Id.* at 182.

48. *Id.*

49. Burgess and Holmstrom, *Accessory-to-Sex: Pressure, Sex, and Secrecy*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 86 (Burgess, Groth, Holmstrom, Sgroi eds. 1978).

50. *Id.* at 86-87. One six-year-old girl acquiesced for six years to the sexual demands of her mother's thirty-year-old boyfriend, who told her, "Good girls do what their Daddy tells them to." *Id.* at 87.

51. One victim writes of the sexual abuse received from her father: "Total detachment became my way of dealing with what went on at night. I would roll into the wall when he came in, pretending to be asleep, trying to be part of the wall." FORTUNE, *SEXUAL VIOLENCE: THE UNMENTIONABLE SIN* 163 (1983) (quoting from B. Myers, *Developmental Disruptions of Victims of Incest and Childhood Abuse*, Mimeographed paper, 5 (1978)).

52. Summit, *supra* note 8, at 183.

more easily than older children because they are less likely to understand that they are being sexually abused.⁵³ In addition, very young children may not have the ability to communicate the abuse to others effectively.⁵⁴

The three remaining elements of CSAAS occur as a direct result of the sexual abuse.⁵⁵ The third element, entrapment and accommodation, occurs after the child fails to seek immediate protection from continued abuse.⁵⁶ Instead, the child learns to adjust to the traumatic situation.⁵⁷ This accommodation can include the development of multiple personalities, altered states of consciousness, self-mutilation, suicidal behavior, promiscuous sexual activity, repeated runaways, aggressive and antisocial behavior, substance abuse, delinquency, depression,⁵⁸ sexual knowledge unusual in a child of the victim's age, atypical and sexually explicit play behavior, and guilt.⁵⁹ A child's outward manifestations of sexual abuse are relied upon heavily by professionals in determining whether the child has been sexually abused.⁶⁰

The fourth element of CSAAS is delayed disclosure.⁶¹ Many cases of sexual abuse are never reported,⁶² and the reports that are made rarely occur immediately after an incident of abuse.⁶³ This delay does not fit societal notions of typical victim behavior.⁶⁴ Moreover, the

53. See, Comment, *supra* note 4, at 59.

54. *Id.*

55. Summit, *supra* note 8, at 181.

56. *Id.* at 184.

57. *Id.*

58. *Id.* at 185.

59. J. Myers, *Legal Response to Child Abuse: In the Best Interest of Children?* 24 J. FAM. L. 146, ____ (1985).

60. See, e.g., *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795 (conduct of three year old victim included placing male doll on top of female doll, placing the penis of the male doll in her mouth and "glassy-eyed, staring ahead compulsively" sucking on the penis, going into a dissociated state or hiding her face whenever the subject of possible molestation was broached, inventing new names for genitalia).

61. Summit, *supra* note 8, at 186.

62. *Id.* at 186. See CHILD ABUSE: GOVERNING LAW & LEGISLATION 106 (I. Sloan ed. 1983) [hereinafter cited as LAW AND LEGISLATION]; Finkelhor, *How Widespread is Child Sexual Abuse*, in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES PUB. NO. 30338, PERSPECTIVES ON CHILD MALTREATMENT IN THE MID '80S, at 18 (1984). Many cases of child sexual abuse are never reported due to the secrecy that surrounds the assault. See *supra* notes 46-49 and accompanying text.

63. Summit, *supra* note 8, at 186. See, e.g., *Mary P.*, 701 P.2d at 682 (two young children who were molested by babysitter reported the assault five to eight months later); *Reid*, 475 N.Y.S.2d at 741 (girl who was sexually assaulted by neighbor waited two months before reporting the abuse); *Kim*, 645 P.2d at 1330 (child who was sexually assaulted by step-father waited a week before reporting the incident). See also, *Matter of Tara H.*, 494 N.Y.S.2d 953, 955 (Fam. Ct. 1985) (sexual abuse not discovered until five-year-old child diagnosed as having infectious gonorrhoea).

64. See Summit, *supra* note 8, at 186.

unexplained delay in disclosure often is used to attack the victim's credibility.⁶⁵

After a child has reported the abuse, the fifth element, retraction, is common.⁶⁶ The events following disclosure often are more traumatic for the child than the abuse.⁶⁷ If the abuser is a family member, the child is often removed from the household.⁶⁸ The rest of the family sometimes accuses the child of lying and blames the child for breaking up the family unit.⁶⁹ The child is put in the position of either maintaining the accusation of abuse and destroying the family or recanting the accusation to keep the household intact.⁷⁰ Retraction is the usual choice.⁷¹

CSAAS describes and explains the most typical reactions of child sexual abuse victims.⁷² These reactions do not conform to the typical adult expectations of how a child should react.⁷³ Dr. Summit found that the behavior pattern adopted out of necessity by a sexually abused child also tends to prevent society from believing the child if the abuse is reported.⁷⁴ CSAAS was developed to provide an explanation for the victims' seemingly peculiar behavior and to help diagnose and treat these victims.⁷⁵ In addition, Dr. Summit expressed the hope that increased awareness of CSAAS would lead to greater support for child victims of sexual abuse within the criminal justice system.⁷⁶ The admission of expert testimony concerning CSAAS would help challenge established myths and stereotypes surrounding child victims of sexual abuse.⁷⁷ Expert testimony explaining the peculiar behavior of a child

65. *Id.*

66. *Id.* at 188. *See, e.g., State v. Middleton*, 657 P.2d 1215, 1216 (Or. 1983) (child who was sexually assaulted by her father reported the attack but recanted the story before the trial).

67. Summit, *supra* note 8, at 186.

68. *Id. See, e.g., A.D.M.*, 701 P.2d at 999 (child sexually abused by father was removed from her home and placed in foster care); *State v. Love*, 350 N.W.2d 359, 360 (Minn. 1984) (child sexually molested by father was separated from her family and put in foster home).

69. Summit, *supra* note 8, at 188.

70. *Id. See, e.g., Love*, 350 N.W.2d at 360 (victim who accused her father of sexually molesting her later told her mother that her accusation was untrue, but the court found she made the retraction because she did not want anyone to get hurt).

71. *See* Summit, *supra* note 8, at 188.

72. *Id.* at 180.

73. *Id.* at 177.

74. *Id.* at 179.

75. *See id.*

76. *Id.* at 179-80. Summit wrote,

The purpose of this paper [on child sexual abuse accommodation syndrome] then is to provide a vehicle for a more sensitive, more therapeutic response to legitimate victims of child sexual abuse and to invite more active, more effective clinical advocacy for the child within the family and within the systems of child protection and criminal justice.

Id.

77. Summit stated, "Application of the syndrome tends to challenge entrenched myths

victim would increase the credibility of the child and would aid the trier of fact in determining whether sexual abuse occurred.⁷⁸ Evidence of CSAAS would not only be helpful but also necessary, especially in light of the difficulties of proof in child sexual abuse cases.

EVIDENTIARY PROBLEMS IN CHILD SEXUAL ABUSE CASES

The phrase "child sexual abuse" covers a broad spectrum of acts including fondling or manual play, oral copulation, sodomy, rape, and incest.⁷⁹ Although every state has laws against child sexual abuse,⁸⁰ the crime often lacks direct evidence.⁸¹ As a result, child sexual abuse is one of the most difficult offenses to prove.⁸²

The sexual offender is often a relative or a trusted adult with whom the child spends time alone.⁸³ Eyewitnesses to the molestation are therefore rare.⁸⁴ In addition, sexual abuse is typically a nonviolent crime.⁸⁵ Children who are abused by a trusted adult usually are manipulated psychologically⁸⁶ and do not resist their abusers.⁸⁷ Physical injury can provide valuable medical evidence of the sexual abuse, but this evidence often is lacking because the abuse is committed without force.⁸⁸ Furthermore, the sexual abuse may involve an act other than penetration of the vagina or anus.⁸⁹ Crimes such as petting, fondling

and prejudice, providing credibility and advocacy for the child within the home, the courts, and throughout the treatment process." *Id.* at 177.

78. *Id.*

79. DeFrancis, *supra* note 32, at 17; *see also*, LEGAL ISSUES AND APPROACHES, *supra* note 3, at 1.

80. LEGAL ISSUES AND APPROACHES, *supra* note 3, at 1.

81. Comment, *supra* note 5, at 259; Comment, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745 (1983) [hereinafter cited as Comment, *A Comprehensive Approach*].

82. *See* Comment, *supra* note 5, at 259-60. *See also* Comment, *supra* note 4, at 59.

83. Comment, *A Comprehensive Approach*, *supra* note 81, at 1750.

84. DeFrancis, *supra* note 32, at 17; Comment, *supra* note 4, at 59-60. *See, e.g., Kim*, 645 P.2d at 1330 (thirteen-year-old complainant sexually assaulted by stepfather was the only witness to the attack). Eyewitnesses to sexual attacks on adults, as well as children, are usually nonexistent. *See* Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. UNIV. L. REV. 417, 422 (1984) [hereinafter cited as Comment, *Expert Testimony on RTS*].

85. Comment, *A Comprehensive Approach*, *supra* note 81, at 1745.

86. Berliner, Blick, & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 171 (1981). The child often will succumb due to the strong desire to not displease the adult, whom the child likes and trusts, even though the child may find the requested sexual act unpleasant. DeFrancis, *supra* note 32, at 18. In addition, the adult's position of authority carries a subtle threat that the child will be punished for refusing to participate in the sexual activity. *Id.*

87. Comment, *A Comprehensive Approach*, *supra* note 81, at 1750.

88. Berliner, Blick, & Bulkley, *supra* note 86, at 171.

89. *See, e.g., People v. Dunnahoo*, 152 Cal. App. 3d 561, 567, 199 Cal. Rptr. 796, 798

or oral copulation usually do not involve forceful physical contact and do not leave physical scars.⁹⁰ A lapse of time between the sexual abuse and disclosure may also contribute to the lack of medical evidence.⁹¹ Many cases of abuse occur repeatedly over a period of years.⁹² Often, by the time the abuse is reported or discovered, any trace of physical evidence has disappeared.⁹³

The absence of direct evidence often forces the prosecutor to rely primarily upon the child's testimony as evidence.⁹⁴ To testify, a child must first be found competent by the court.⁹⁵ Cases in which young victims are held incompetent because of their inability to communicate effectively must be dismissed unless additional evidence of the crime exists.⁹⁶ Even if the child is found competent, the legal process often is so traumatic and embarrassing that the child is inhibited from testifying.⁹⁷ At times the child simply refuses to testify.⁹⁸

Child victims mature enough to take the witness stand often are subjected to cross-examinations that confuse or intimidate them. Children may be impeached more easily than adults,⁹⁹ and the defense

(1984) (defendant directed two five-year-old girls to masturbate each other and forced them to engage in oral copulation of his penis to ejaculation); *Matter of S.L.T.*, 697 P.2d 472, 473 (Mont. 1985) (father molested fifteen-year-old daughter by fondling her breasts and rubbing the inside of her thighs); *Hall v. State*, 692 S.W.2d 769, 770 (1985) (defendant held two young girls on his lap while he rubbed between their legs and made them touch his penis). Actual penetration of the vagina or anus often leaves valuable evidence of the abuse. *See, e.g.*, In the *Matter of Michael G.*, 492 N.Y.S.2d 993, 994 (Fam. Ct. 1985) (anus of 3 year old victim looked like "a piece of raw meat"); *Hancock v. State*, 706 P.2d 1164, 1172 (Alaska App. 1985) (defendant penetrated vagina of child victim with an object that became implanted and required surgery for removal); *State v. Love*, 350 N.W.2d at 360-61 (hymen of 11-year-old victim was not intact, and vaginal opening was larger than normal for a child of victim's age).

90. Comment, *A Comprehensive Approach*, *supra* note 81, at 1750.

91. *See* Berliner, Blick, & Bulkley, *supra* note 86, at 171.

92. LEGAL ISSUES AND APPROACHES, *supra* note 3, at 3. *See, e.g.*, *Haseltine*, 352 N.W.2d 673 (defendant repeatedly had sexual intercourse with his daughter over a two year period).

93. LEGAL ISSUES AND APPROACHES, *supra* note 3, at 16.

94. Comment, *Defendants' Rights in Child Witness Competency Hearings*, 69 MINN. L. REV. 1377, 1377 (1985). Relying solely on a child's testimony may be fatal to the prosecutor's case because children generally produce unreliable evidence. Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 J. L. REFORM 131, 137 (1981). Children have a subjective sense of time, an inaccurate memory, and a limited ability to communicate, all of which tend to get worse when the child is placed under pressure. *Id. See, e.g.*, *State v. Myers*, 359 N.W.2d 604, 607 (Minn. 1984) (child victim could not conceptualize the difference between sexual penetration and contact).

95. The court has discretion to determine whether a child is capable of accurately observing and communicating past events. LEGAL ISSUES AND APPROACHES, *supra* note 3, at 15. A child must also be able to understand the necessity of telling the truth. *Id.* at 15. *See* CAL. EVID. CODE §710 (requirement that every testifying witness take oath).

96. *See* Comment, *supra* note 94, at 1380.

97. Berliner, Blick, & Bulkley, *supra* note 86, at 166.

98. Prager, "Sexual Psychopathy" and Child Molesters: *The Experiment Fails*, 6 J. Juv. L. 49, 72 (1972).

99. Comment, *Liberalization in the Admissibility of Evidence in Child Abuse and Child*

attorney often is successful in bringing out discrepancies and contradictions in the testimony of the child.¹⁰⁰ In addition, the child's testimony will be compared to the testimony of the accused.¹⁰¹ If the offender has a good reputation in the community, juries are more likely to believe the adult than the child, especially if little corroborating evidence is available.¹⁰²

In addition to the lack of direct evidence, the prosecutor is faced with pervasive myths about child sexual abuse.¹⁰³ Society has many preconceived ideas about how a victim should look and act.¹⁰⁴ If a child victim fails to meet these expectations, the child's report of sexual abuse often is discredited.¹⁰⁵ For example, the child's report of abuse may be discredited due to a failure to resist the abuse,¹⁰⁶ the lack of physical injury,¹⁰⁷ the delay in reporting the assault,¹⁰⁸ a retracted accusation,¹⁰⁹ or behavior that does not reflect the trauma expected of a sexually abused child.¹¹⁰

The attorney representing the accused usually will try to undermine the child victim's credibility by focusing upon contradictory responses to the sexual abuse.¹¹¹ To rebut this attack on the victim's credibility¹¹² and to prove that sexual abuse actually occurred,¹¹³ prosecutors recently

Molestation Cases, 7 J. Juv. L. 205, 210 (1983).

100. See DeFrancis, *supra* note 32, at 16. See also, *People v. Jones*, 155 Cal. App. 3d 153, 167, 202 Cal. Rptr. 162, 168 (1984). The court in *Jones* stated,

It is clear that [the victim] became easily confused and her testimony was contradictory upon cross-examination. However, the witness was only 12 years old. She alleged that she had been sexually involved with [defendant] since the age of six, and there had been many instances of sexual intercourse. It would be surprising if a defense attorney, skilled in the art of cross-examination . . . could not hopelessly confuse an already traumatized 12-year-old child under these circumstances.

Id.

101. Berliner, Blick, & Bulkley, *supra* note 86, at 166.

102. *Id.* at 166; Summit, *supra* note 8, at 178.

103. Wells, *supra* note 30, at 673.

104. See Summit, *supra* note 8, at 177.

105. Wells, *supra* note 30, at 673.

106. See, e.g., *People v. Blodgett*, 176 Cal. App. 3d 108, 113-14, 221 Cal. Rptr. 704, 706 (1985) (eleven-year-old girl admitted that she "kind of" let defendant tie her to a bed with socks before he sexually assaulted her, and that on four or five later occasions she also allowed the defendant to tie her down).

107. See, e.g., *Payan*, 173 Cal. App. 3d at 32, 220 Cal. Rptr. at 128 (doctor found no physical damage to the anuses of two child victims but said this finding was not inconsistent with "slow and gentle" sodomy).

108. See, e.g., *Reid*, 475 N.Y.S.2d at 741 (child waited two months before reporting the sexual assault by a neighbor).

109. See, e.g., *Middleton*, 657 P.2d at 1216 (child recanted story of sexual abuse by her father before the trial).

110. Wells, *supra* note 30, at 673.

111. J. Myers, *supra* note 59, at ____.

112. See, e.g., *Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126; *Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789; *Smith*, 688 P.2d 326.

113. See, e.g., *Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126; *Cheryl H.*, 153 Cal. App.

have tried to introduce evidence of CSAAS at trial.¹¹⁴ Expert testimony on CSAAS helps to dispel myths surrounding child sexual abuse and aids juries in understanding why child victims react to abuse in a manner contrary to typical expectations of society.

PREREQUISITES TO ADMISSIBILITY OF CSAAS

Before the prosecution can introduce expert testimony concerning CSAAS as evidence in a criminal case, the testimony on the syndrome must meet the standards of admissibility. The evidence must satisfy the requirements for both expert testimony¹¹⁵ and scientific evidence.¹¹⁶ In addition, the evidence cannot create a substantial danger of undue prejudice against the defendant.¹¹⁷

A. Expert Testimony

The governing standard for expert opinion testimony in California is codified in Evidence Code section 801.¹¹⁸ Section 801 sets forth several requirements for admissibility of an expert's opinion. First, the subject of the testimony must be beyond common experience to

3d 1098, 200 Cal. Rptr. 789; *Kim*, 645 P.2d 1330.

114. Many cases have allowed experts to testify concerning the typical behavior of sexually abused children. See, e.g., *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795; *Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804; *Myers*, 359 N.W.2d at 608-09; *Middleton*, 657 P.2d at 1220-21; *Kim*, 647 P.2d at 1333-34. Relatively few cases have labelled the evidence as CSAAS or any other form of syndrome. This comment views the lack of formal label as a mere technicality and will treat evidence concerning an element of CSAAS as evidence of CSAAS, regardless of the lack of formal terminology used by the court.

115. CAL. EVID. CODE §801.

116. See *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144, (1976); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See generally Comment, *Expert Testimony on RTS*, *supra* note 84, at 429-56 (in-depth discussion on the parallel admissibility requirements for rape trauma syndrome).

117. CAL. EVID. CODE §352.

118. California Evidence Code section 801 provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Id. Federal Rule of Evidence 702 similarly states that an expert may testify in the form of an opinion if the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702 is less stringent than Evidence Code section 801 because the subject does not have to be "sufficiently beyond common experience." See, FED. R. EVID. 702; CAL. EVID. CODE § 801.

the extent that the opinion would assist the trier of fact.¹¹⁹ Second, the expert must have sufficient knowledge, skill, or experience upon which to base the opinion.¹²⁰ Finally, the basis for the opinion must be of a type that reasonably may be relied upon by an expert in forming an opinion on the subject of the testimony.¹²¹

California courts have found that the subject of child sexual abuse concerns knowledge sufficiently beyond common experience that the opinion of an expert would be of assistance to the trier of fact.¹²² Expert testimony regarding child sexual abuse, therefore, meets the first requirement under Evidence Code section 801. The requirement that an expert must have sufficient knowledge, skill, or experience is not difficult to satisfy. The expert merely must be qualified in the field of child sexual abuse.¹²³

Unfortunately, courts have not clarified what is necessary to meet the final requirement of a proper basis for opinion testimony concerning CSAAS.¹²⁴ Only two California cases have addressed the issue of what constitutes a proper basis for an expert opinion that a child victim has been sexually abused.¹²⁵ The expert in the first case, *Cheryl H.*, based her opinion on the conduct of the child during play therapy.¹²⁶ The court held that the information obtained by the expert

119. CAL. EVID. CODE §801(a).

120. *Id.* §801(b).

121. *Id.*

122. *Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804 (testimony that a sexually molested child had great difficulty talking about sexual indiscretions with an adult); *Cheryl H.*, 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 800 (testimony that the child victim had been sexually abused). Berliner, Blick, & Bulkley, *supra* note 86, at 169. Most jurors do not possess sufficient knowledge about the characteristics and dynamics of child sexual abuse, especially when the abuse is within the family. *Id.*

123. *See, e.g., Payan*, 173 Cal. App. 3d at 34, 220 Cal. Rptr. at 128 (a licensed physician who was a founding member and past director of the sexual assault response team, who participated in formulating the protocol for rape and sexually abused victims at the University of Southern California Women's Hospital, and who had attended seminars of long-term effects of child abuse and molestation and the sexual abuse syndrome qualified as an expert); *Roscoe*, 168 Cal. App. 3d at 1095, 215 Cal. Rptr. at 46 (the expert was a clinical psychologist); *Cheryl H.*, 153 Cal. App. 3d at 1109, 200 Cal. Rptr. at 795 (the expert was a psychiatrist appointed by the court); *Myers*, 359 N.W.2d at 607 (a clinical psychologist was allowed to testify as an expert); *Middleton*, 657 P.2d at 1217-18 (a juvenile counselor for the county and a child protective social worker both qualified as experts). Under California Evidence Code section 405, a judge must find more true than not true that a witness qualifies as an expert. *See*, CAL. EVID. CODE §405. Once this standard is met, the question of credibility is left up to the jury, and the opposing counsel is free to discredit the witness. *Id.*

124. *See* Comment-Law Revision Commission, CAL. EVID. CODE §801 (West 1966) (the nature of the matter upon which an expert may base his opinion varies from case to case).

125. *See Payan*, 173 Cal. App. 3d at 32, 39, 220 Cal. Rptr. at 128, 133; *Cheryl H.*, 153 Cal. App. 3d at 1117-18, 200 Cal. Rptr. at 800-01.

126. 153 Cal. App. 3d at 1110, 200 Cal. Rptr. at 795 (child victim played with male and female dolls in a manner similar to other sexually abused children, and the child used words and demonstrated anxiety symptoms characteristic of children who have been sexually abused).

during therapy was a proper and sufficient basis for an opinion within the meaning of California Evidence Code section 801.¹²⁷ The second case, *Payan*, involved an expert who based her opinion on a review of police reports, medical reports, and the preliminary hearing transcript.¹²⁸ The court held that the basis for the opinion was proper.¹²⁹ Instead of applying a rigid standard, the courts appear to use a case by case analysis of whether the basis for the opinion is reliable enough to meet the standard of section 801. Once the witness and general subject matter meet the standards of admissibility for expert testimony, the next hurdle is the admissibility of CSAAS.

B. Satisfying the Kelly-Frye Test

Evidence based upon a new scientific method of proof is admissible only upon a showing that the procedure generally has been accepted as reliable in the scientific community in which the method was developed.¹³⁰ This standard of admissibility is known in California as the *Kelly-Frye* rule.¹³¹ Difficulty arises, however, in analyzing whether CSAAS meets the definition of a scientific method of proof.¹³²

127. *Id.*

128. 173 Cal. App. 3d at 32, 220 Cal. Rptr. at 127.

129. *Id.* at 39, 220 Cal. Rptr. at 132 (the court noted that an expert opinion may be based on hearsay or the reports and opinions of other physicians).

130. *People v. McDonald*, 37 Cal. 3d 351, 372, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984); *People v. Kelly*, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976); *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

131. *Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148; *Frye*, 293 F. at 1014.

132. Courts that have admitted expert testimony on the elements of CSAAS without labeling the elements as part of a "syndrome" have not discussed the *Kelly-Frye* rule. See, e.g., *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795 (a psychiatrist testified that the conduct exhibited by the victim was typical of conduct exhibited by other young children who had been sexually abused, but the court did not address the *Kelly-Frye* standard); *Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804 (two police officers testified that a sexually molested child has difficulty talking to an adult about the sexual abuse, but no mention was made of the *Kelly-Frye* standard). For examples of courts in other states admitting testimony on sexual abuse without addressing the *Kelly-Frye* test, see *Middleton*, 657 P.2d at 1216 (expert witness testified concerning the typical reaction of a child victim of familial sexual abuse and whether the victim reacted in a typical manner when she later made inconsistent statements); *Myers*, 359 N.W.2d at 608-09 (expert permitted to describe characteristics or traits typically observed in sexually abused children and to identify those characteristics which the victim had exhibited); *Kim*, 645 P.2d at 1333-34 (expert testified concerning the common emotional reactions frequently found in victims and which of these reactions were experienced by the child in the present case); *Matter of S.L.T.*, 697 P.2d at 473-74 (court admitted a psychological evaluation which indicated that the victim exhibited the characteristics of a sexually abused child); *State v. Pettit*, 675 P.2d 183, 185 (Or. App. 1984) (expert testified concerning the general characteristics of victims of sexual abuse). The only California case that has used the terminology of a syndrome ("child sexual abuse accommodation syndrome") handled the issue of whether the *Kelly-Frye* rule should apply by stating that the rule has never been applied to expert medical

If CSAAS is not considered a scientific method of proof, then the *Kelly-Frye* standard does not have to be satisfied for admissibility.¹³³

If California courts eventually label CSAAS as a scientific method of proof, CSAAS should be admissible under the *Kelly-Frye* test. Courts have considered several factors in determining whether evidence regarding a new scientific technique should be admitted or excluded.¹³⁴ These factors include the number of articles written on the subject,¹³⁵ the number of cases that have admitted testimony based on the new theory,¹³⁶ the amount of research conducted by others in the field,¹³⁷ and testimony by others in the field on whether the theory has gained general acceptance.¹³⁸

CSAAS meets all of these factors for admissibility. First, although CSAAS is a relatively new concept,¹³⁹ the syndrome has been the topic

testimony. *Payan*, 173 Cal. App. 3d at 36, 220 Cal. Rptr. at 130. The court in *Payan* was following the precedent that the California Supreme Court set in *People v. McDonald*. *Id.* See *McDonald*, 37 Cal. 3d at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251. The court in *McDonald* stated, "We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness." *Id.* The courts in *McDonald* and *Payan* appear to have either overlooked or discounted the application of the *Kelly-Frye* rule to expert psychiatric testimony concerning rape trauma syndrome. *People v. Bledsoe*, 36 Cal. 3d 236, 245-51, 681 P.2d 291, 297-301, 203 Cal.Rptr. 450, 456-60 (1984) (application of *Kelly-Frye* rule to expert psychiatric testimony concerning RTS). Other state courts also have analyzed rape trauma syndrome under the *Frye* test. See, e.g., *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982); *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982). *People v. Shirley*, 31 Cal. 3d 18, 53, 641 P.2d 775, 795, 181 Cal.Rptr. 243, 264 (1982). The California Supreme Court addressed the question of whether the *Frye* standard was appropriate in determining the admissibility of "hypnotically aided recall" by stating, "[W]e do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility." *Id.* Courts have appeared reluctant to address directly the issue of whether CSAAS is a method of scientific proof. The determination of whether CSAAS is actually scientific evidence is beyond the scope of this comment. The *Kelly-Frye* rule establishes a higher standard of admissibility for scientific evidence than nonscientific evidence. This comment will address this higher standard. If CSAAS is admissible under the *Kelly-Frye* test, then the syndrome is also admissible if the test does not apply.

133. See, e.g., *Payan*, 173 Cal. App. 3d at 36, 220 Cal. Rptr. at 130 (court distinguished expert medical testimony from the meaning of scientific evidence under the *Kelly-Frye* rule and did not apply the *Kelly-Frye* rule to expert testimony regarding CSAAS); *McDonald*, 37 Cal. 3d at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51 (court found that expert testimony concerning eyewitness identification was not scientific evidence and thus held that the *Kelly-Frye* rule did not apply).

134. See Comment, *The Expert as Educator: A Proposed Approach to the Use of Battered Woman Syndrome Expert Testimony*, 35 VAND. L. REV. 741, 749 (1982).

135. See *U.S. v. Stifel*, 433 F.2d 431, 441 (1970).

136. See *U.S. v. Baller*, 519 F.2d 463, 465-66 (1975).

137. See *U.S. v. Brown*, 557 F.2d 541, 557 (1977).

138. See *Payan*, 173 Cal. App. 3d at 33, 220 Cal. Rptr. at 128.

139. S. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families*, in LEGAL REPRESENTATION OF THE MALTREATED CHILD, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN (1979) (the first mention of CSAAS). Summit, *supra* note 8 (published in 1983).

of a number of articles.¹⁴⁰ Second, many courts have admitted testimony concerning the behavior of children who have been sexually abused, even though this behavior was not formally labelled as a syndrome.¹⁴¹ Furthermore, the only California court to label the victim's behavior as a syndrome admitted the testimony about CSAAS into evidence.¹⁴² Third, much research has been conducted on sexually abused children.¹⁴³ Although the common characteristics of sexually abused children are not usually labeled as a syndrome, they generally fit under the elements of CSAAS.¹⁴⁴ Finally, although the issue of CSAAS has been addressed as a syndrome in only one California case,¹⁴⁵ the psychiatrist in that case testified that the syndrome was a "widely recognized and accepted medical diagnosis."¹⁴⁶ These four factors establish that CSAAS generally is accepted as reliable in the field of child sexual abuse and meets the standard for admissibility under the *Kelly-Frye* rule.¹⁴⁷

C. Potential Danger of Undue Prejudice

Satisfying the *Kelly-Frye* standard, however, does not guarantee admissibility. Testimony concerning CSAAS may be excluded if the probative value is substantially outweighed by substantial danger of undue prejudice.¹⁴⁸ Courts must balance the reasons for exclusion against

140. See, e.g., Summit, *supra* note 8; S. Mele-Sernovitz, *supra* note 139; Kempe and Helfer, BATTERED CHILD SYNDROME (1974); Berliner, Blick, & Bulkley, *supra* note 86; *Recommendations*, *supra* note 38, at 40-41; J. Myers, *supra* note 59.

141. See, e.g., *Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804; *Cheryl H.*, 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 799-800; *Kim*, 645 P.2d at 1338; *Myers*, 359 N.W.2d at 609-10; *Middleton*, 657 P.2d at 1220-21.

142. See *Payan*, 173 Cal. App. 3d at 37-40, 220 Cal. Rptr. at 131-33.

143. See *Legal Issues and Approaches*, *supra* note 3; Summit, *Recognition and Treatment of Child Sexual Abuse*, in PROVIDING FOR THE EMOTIONAL HEALTH OF PEDIATRIC PATIENT (C. Hollingsworth, ed. 1983); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, in CHILD ABUSE & NEGLECT 133-46 (1983); Finkelhor, *supra* note 62.

144. Berliner, Blick, & Bulkley, *supra* note 86, at 171-72 (lists characteristics that are identical to CSAAS: lack of force and physical injury, delayed disclosure, isolation from peers, promiscuity, retraction, and inconsistent statements).

145. *Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126.

146. *Id.*, at 33, 220 Cal. Rptr. at 128. Dr. Summit stated that "the syndrome has elicited strong endorsements from experienced professionals and from victims, offenders, and other family members." See Summit, *supra* note 8, at 180.

147. The lack of scientific certainty does not deprive the medical opinion of evidentiary value. *People v. Jackson* 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971).

148. CALIFORNIA EVIDENCE CODE section 352 provides in pertinent part: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will. . . (b) create substantial danger of undue prejudice. . . ." The court in *Payan* noted that the defense counsel made no objection on grounds of Evidence Code section 352, and the court did not address a section 352 argument. *Payan*, 173 Cal. App. 3d at 32 n.3, 220 Cal. Rptr. at 127 n.3. The court in *Roscoe* acknowledged that the

the reasons for admission.¹⁴⁹ Opponents of expert testimony concerning CSAAS will argue that jurors will be so impressed with the witness' aura of expertise they will merely adopt the expert's opinion without independent judgment.¹⁵⁰ The fact-finding function of the jury would be undermined if jurors accepted the expert's opinion as the truth without questioning the validity of the testimony.¹⁵¹

The proper use of expert testimony on CSAAS, however, need not invade the province of the jury. The purpose of expert testimony concerning a victim's credibility¹⁵² is not to substitute the expert's opinion regarding credibility for that of the jury.¹⁵³ Instead, this testimony provides a scientific perspective with which the jury can independently evaluate the victim's testimony and behavior.¹⁵⁴ Opposing counsel can attempt to discredit the expert testimony through cross-examination and can attempt to show possible bias of the expert.¹⁵⁵ The defense also is free to call an expert to counterbalance any aura of expertise the prosecution might have created.¹⁵⁶

In addition, expert testimony on CSAAS is not overly prejudicial to the defendant merely because the testimony coincides with issues to be decided by the trier of fact.¹⁵⁷ Both the California Evidence Code and the Federal Rules of Evidence have abandoned the "ultimate issue" rule, which prohibits opinion testimony from embracing an

defense counsel did not refer specifically to section 352 as a basis for objection. *Roscoe*, 168 Cal. App. 3d at 1100 n.5, 215 Cal. Rptr. at 50 n.5. The court excluded testimony, however, about RTS by motion of the court under this section. *Id.*, at 1100, 215 Cal. Rptr. at 50. The court stated that no obligation exists for a court to reject testimony on its own motion if the defense fails to object under section 352, but this failure to object should not be controlling. *Id.* at 1100 n.5, 215 Cal. Rptr. at 50 n.5.

149. See, CAL. EVID. CODE §352. See *People v. Green*, 27 Cal. 3d 1, 25, 609 P.2d 468, 482, 164 Cal. Rptr. 1, 15 (court held that in a case involving a section 352 motion, the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value).

150. Doyle, *Applying Lawyers' Expertise to Scientific Experts*, 25 WM. & MARY L. REV. 619, 621 (1984).

151. CAL. PENAL CODE §1126 (provides that questions of fact are to be decided by the jury).

152. Expert testimony on CSAAS has been used to bolster the victim's credibility by helping the jury or court to understand the victim's unnatural behavior. See, e.g., *Middleton*, 657 P.2d at 1220-21.

153. *Kim*, 645 P.2d at 1332.

154. *Id.*

155. *Middleton*, 657 P.2d at 1221.

156. While a battle of the experts might result, a potential battle exists whenever an expert is called in any type of case. See generally L. Myers, *The Battle of the Experts: A New Approach to an Old Problem in Medical Testimony*, 44 NEB. L. REV. 539 (1965).

157. CALIFORNIA EVIDENCE CODE section 805 provides: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." Since the trier of fact is free to evaluate and either accept or reject the opinion of the witness, opinion evidence on the ultimate issue does not invade the province of the jury. See *McDonald*, 37 Cal. 3d at 371, 690 P.2d at 722, 208 Cal. Rptr. at 249; *People v. Cole*, 47 Cal. 2d 99, 105, 301 P.2d 854, 857-58 (1956). See also FED. RULE OF EVID. 704.

ultimate issue.¹⁵⁸ Thus, although expert testimony that bolsters the victim's credibility or evidences that the child had been sexually abused encompasses ultimate issues, the testimony is still properly admissible.¹⁵⁹ Proper jury instructions may be given to reduce the weight given to expert opinion testimony¹⁶⁰ and to remind jurors they are the ultimate triers of fact.¹⁶¹

While expert testimony concerning CSAAS may create a danger of prejudice to the defendant, the danger is counterbalanced by the serious need for CSAAS in child sexual abuse cases.¹⁶² The probative value of CSAAS is extremely high.¹⁶³ The nature of child sexual abuse compounds the evidentiary difficulty already present because of the requirement of proving criminal cases beyond a reasonable doubt.¹⁶⁴ The use of CSAAS in criminal cases will help to destroy jurors' misconceptions about child sexual abuse and will increase the accuracy of the fact-finding process.¹⁶⁵ California courts have held that if evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not support the same inference as directly, the testimony must be received absent highly unusual circumstances.¹⁶⁶ In addition, a court outside California has held that when the common experience of the jury may represent a less than adequate foundation for evaluating a witness' credibility, the expert's testimony has greater value and is more likely to be admissible when the probative value of the testimony is weighed against the prejudicial effects.¹⁶⁷ Any danger of undue prejudice to the defen-

158. *See supra* note 157.

159. If the substantive law compels the fact finder to assess how people think and behave in certain situations and psychology can offer information about that thought and behavior, it seems unreasonable to exclude expert evidence that might help the fact finder, forcing untrained jurors to draw conclusions based on untested hunches and intuition.

Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 445 (1985).

160. CALJIC No. 2.80 (4th ed. 1979). "You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable." *Id.*

161. *See Doyle, supra* note 150, at 639. The court in *Payan* admitted evidence of CSAAS and instructed the jury that they ultimately must determine whether the assumed facts were supported by the evidence. *Payan*, 173 Cal. App. 3d at 33, 220 Cal. Rptr. at 128.

162. *See supra* notes 81-110 and accompanying text (discussion of evidentiary problems in child sexual abuse cases).

163. *Id.*

164. *Id.*

165. *See Summit, supra* note 8, at 177.

166. *In re Marianne R.*, 113 Cal. App. 3d 423, 428, 169 Cal. Rptr. 848, 850 (1980); *Kessler v. Gray*, 77 Cal. App. 3d 248, 292, 143 Cal. Rptr. 496, 500 (1978). The evidence must be admitted despite a section 352 objection. *Id.*

167. *Kim*, 645 P.2d at 1337 (Hawaii 1982).

dant does not substantially outweigh the tremendous probative value of testimony concerning CSAAS.¹⁶⁸ Evidence concerning CSAAS, therefore, meets the final standard for admissibility and should be accepted by California criminal courts. California courts already have determined that expert testimony concerning comparable syndromes has met the prerequisite standards for admissibility in criminal cases.

OTHER SYNDROMES ADMISSIBLE IN CALIFORNIA

Several syndromes have been recognized as admissible evidence by criminal courts in the United States.¹⁶⁹ California criminal courts have accepted two syndromes that are closely related to CSAAS as reliable evidence.¹⁷⁰ These two syndromes are the "battered child syndrome"¹⁷¹ (BCS) and "rape trauma syndrome"¹⁷² (RTS).

California courts allow expert opinion testimony concerning BCS to establish that the facial and bodily injuries exhibited by a child are the result of an ongoing pattern of child beating rather than innocent accidents.¹⁷³ The description of BCS includes a child who is usually under three years of age, evidence of bone injuries occurring at different times, subdural hematomas with or without skull fractures, serious injuries without a plausible explanation, the presence of soft tissue injury, and evidence of neglect by the child's caretaker.¹⁷⁴ The admissibility of BCS in California criminal cases was established in *People v. Jackson*.¹⁷⁵ The court in *Jackson* found that BCS was an accepted medical diagnosis¹⁷⁶ and that a doctor's diagnosis that a child was suffering from BCS was not an improper invasion of

168. See *supra* note 148 and accompanying text (California Evidence Code section 352 stated in pertinent part).

169. See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C.App. 1979) ("battered wife" syndrome); *State v. Marks*, 647 P.2d 1292 (Kan. 1982) (rape trauma syndrome); *State v. Loss*, 204 N.W.2d 404 (Minn. 1973) (battered child syndrome).

170. See, e.g., *Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (rape trauma syndrome); *Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (rape trauma syndrome); *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971) (battered child syndrome).

171. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919.

172. *Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45.

173. *Jackson*, 18 Cal. App. 3d at 507, 95 Cal. Rptr. at 921.

174. *Id.* at 506, 95 Cal. Rptr. at 921.

175. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919. California decisions after *Jackson* also have approved the use of BCS. See *People v. Phillips*, 122 Cal. App. 3d 69, 87, 175 Cal. Rptr. 703, 714 (1981); *People v. Ewing*, 72 Cal. App. 3d 714, 717, 140 Cal. Rptr. 299, 301 (1977). Courts in other states have admitted evidence of BCS. See, e.g., *State v. Loss*, 204 N.W.2d 404, 408-09 (Minn. 1973); *People v. Henson*, 304 N.E.2d 358, 363-64 (N.Y. 1973); *State v. Wilkerson*, 247 S.E.2d 905, 912 (N.C. 1978); *State v. Best*, 232 N.W.2d 447, 458 (S.D. 1975).

176. *Jackson*, 18 Cal. App. 3d at 507, 95 Cal. Rptr. at 921.

the province of the jury.¹⁷⁷ California courts have determined that evidence of BCS is not unduly prejudicial to the defendant.¹⁷⁸ No undue prejudice exists because the syndrome merely classifies the child's injuries as nonaccidental without directly identifying who caused the injuries.¹⁷⁹

Although the psychological and emotional damage under CSAAS is different from the physical injuries characteristic of BCS, both syndromes help to establish the existence of some form of child abuse.¹⁸⁰ California criminal courts allow an expert to identify certain physical characteristics exhibited by a child and to opine that the child is suffering from BCS.¹⁸¹ An expert, therefore, also should be able to identify psychological and emotional symptoms that are unique to children who have been sexually abused and to opine that the child is suffering from CSAAS.¹⁸²

Another syndrome, rape trauma syndrome (RTS), has been held admissible only on a limited basis by California criminal courts.¹⁸³ RTS encompasses the typical reactions a rape victim experiences.¹⁸⁴ RTS is an acute stress reaction that occurs after a rape in which the victim is placed in a life threatening situation, experiences shock and panic, and concentrates on staying alive.¹⁸⁵ In contrast to the non-violent crime of child sexual abuse,¹⁸⁶ rape is generally a violent

177. *Id.* at 508, 95 Cal. Rptr. at 922. The jury normally has the responsibility of drawing an inference of nonaccidental injury. Comment, *Evidentiary Problems*, *supra* note 5, at 272.

178. Comment, *Expert Testimony on RTS*, *supra* note 84, at 442.

179. *Id.* In dependency hearings (under Welfare & Institutions Code section 300) a finding of BCS would establish a prima facie case of child abuse, and the burden of proof would shift to the defendant. WELF. & INST. CODE §§355.1-355.6. No statute shifts the burden of proof in criminal cases. Criminal courts have treated evidence of BCS, however, as sufficient to convict the defendant. *See, e.g., Ewing*, 72 Cal. App. 3d at 716, 140 Cal. Rptr. at 300.

180. BCS indicates that a child has received repeated serious injuries by nonaccidental means. *Jackson*, 18 Cal. App. at 506, 95 Cal. Rptr. at 921. The behavior patterns exhibited by a sexually abused child are unique to children who have been subjected to sexual abuse. *Cheryl H.*, 153 Cal. App. 3d at 1117, 200 Cal. Rptr. at 800-01. This behavior is relied upon by professionals as a manifestation of sexual abuse. *See Summit*, *supra* note 8, at 179.

181. *See, e.g., Jackson*, 18 Cal. App. 3d at 506-07, 95 Cal. Rptr. at 920-21; *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714; *Ewing*, 72 Cal. App. 3d at 717, 140 Cal. Rptr. at 301.

182. *See Cheryl H.* 153 Cal. App. 3d at 1117, 200 Cal. Rptr. at 800-01 (court allowed the introduction of evidence concerning CSAAS through an analogy of CSAAS and BCS).

183. *See Bledsoe*, 36 Cal. 3d at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr. at 457-58 (RTS may disabuse the jury of widely held misconceptions about rape and rape victims but may not be used to show a rape actually occurred). The court in *Roscoe* narrowly interpreted *Bledsoe* to prohibit expert witnesses from discussing the victim in the case at hand. *Roscoe*, 168 Cal. App. 3d at 1100, 215 Cal. Rptr. at 50. Instead, the expert witness must confine any discussion of RTS to victims as a class, supported by references to literature and experience. *Id.*

184. *See generally*, Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

185. Kilpatrick, Veronen & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 659 (1979). *See Bledsoe*, 36 Cal. 3d at 242, 681 P.2d at 294, 203 Cal. Rptr. at 453.

186. *See, supra* notes 85-88 and accompanying text.

crime.¹⁸⁷ Therefore, the symptoms of RTS generally are distinctly different from CSAAS.¹⁸⁸

Like child sexual abuse, adult rape is surrounded by pervasive myths and stereotypes.¹⁸⁹ RTS, like CSAAS, can help the trier of fact understand the victim's behavior. The court in *People v. Bledsoe*¹⁹⁰ admitted expert testimony on RTS for the purpose of rebutting misconceptions about the presumed behavior of rape victims and, thus, increasing the credibility of the victim.¹⁹¹ By analogy, testimony regarding CSAAS should also be admissible in criminal courts to dispel myths about child sexual abuse and to increase the victim's credibility.

In *Bledsoe*, however, testimony concerning RTS was not admissible for the purpose of showing that the victim actually had been raped.¹⁹² Under current case law, if a defendant entertains a reasonable and bona fide belief that the alleged victim consented to engage in

187. The crime of rape involves an act of sexual intercourse accomplished without the consent of the victim. CAL. PENAL CODE §261. The use of force or fear of immediate and unlawful bodily injury is one of the means by which the perpetrator overcomes the victim's will. CAL. PENAL CODE §261(2). See, e.g., *People v. Reeder*, 152 Cal. App. 3d 900, 908, 200 Cal. Rptr. 479, 485 (1984) (defendant choked victim and told her he would kill her if she did not have sex with him); *People v. Mays*, 17 Cal. App. 3d 641, 643, 95 Cal. Rptr. 190, 191 (1971) (defendant rapist repeatedly hit victim about the face with his fist until victim stopped screaming).

188. RTS involves three phases. See generally Burgess & Holmstrom, *supra* note 184. First is the "disorientation phase" which the victim experiences during the rape and in the hours immediately following the rape. The victim may demonstrate one of two different styles in this immediate impact reaction. In the first style, the victim is obviously agitated and acts fearful and anxious. In the second style, the victim appears very controlled, feelings are masked, and the victim may look very inappropriate for someone who has just been assaulted. The second phase is the "reorganization phase," in which the victim begins to act as if everything is normal. The victim is probably denying the experience to other people but still experiencing very powerful feelings inside. The third phase is the "integration phase," in which the victim suddenly becomes depressed and starts to relive the assault. This phase can occur months or even a year after the sexual assault. At this stage, the victim must resolve feelings she has about herself, the rapist, and the world in general. In addition, rape victims often experience a fear response to all men and a phobia about being alone. *Id.*

189. See, Massaro, *supra* note 159, at 402.

The more common myths include: good women don't get raped; an unwilling woman cannot be raped; all rape victims are attractive, young women; the victim provokes the rape because she wants to be raped or because she puts herself in a dangerous situation; women's sexual fantasies prove they enjoy rape. . . .

Id.

190. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

191. *Id.* at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

192. *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. The Minnesota Supreme Court, like the California Supreme Court in *Bledsoe*, held expert testimony on RTS inadmissible to prove that a rape actually occurred. *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982). The Minnesota court found that RTS was not a scientific indicator that can accurately and reliably determine whether a rape has occurred. *Id.* The Minnesota court recognized, however, that when the alleged victim of a sexual assault is a child or mentally retarded person, expert testimony concerning credibility of a witness should be admitted. *Id.* In a later Minnesota case involving the sexual abuse of a seven-year-old child, the court allowed expert testimony concerning characteristics typically found in sexually abused children to bolster the victim's credibility. *Myers*, 359 N.W.2d at 608-09. The expert testimony in *Myers* did not include an opinion

sexual intercourse, no crime of rape has been committed.¹⁹³ The victim's state of mind is not determinative. A defendant may not be guilty of rape even though the victim might believe in good faith that she did not consent.¹⁹⁴ The court determined that RTS was not developed to discover the truth or accuracy of an alleged rape, but rather the syndrome serves as a therapeutic tool to help identify, predict, and treat emotional problems.¹⁹⁵ The court in *Bledsoe* reasoned that a woman could experience symptoms of RTS even though the crime of rape has not been committed.¹⁹⁶ The court also stated that allowing an expert to testify that an alleged victim is suffering from RTS unfairly prejudices the defendant.¹⁹⁷ The prejudice arises because the use of this scientific terminology might mislead the jury into inferring that the expert believes the victim was actually raped.¹⁹⁸ The court held that even though RTS might be recognized generally by the relevant scientific community, RTS is not relied upon to show that a rape actually occurred and cannot be admitted into court for that purpose.¹⁹⁹

The rationale of the court in *Bledsoe*, however, does not apply to a case involving CSAAS. CSAAS is used in the mental health field to determine if sexual abuse has occurred.²⁰⁰ The use of CSAAS is not limited, like RTS, merely to the treatment of emotional problems.²⁰¹ Unlike RTS, therefore, CSAAS should be admissible to determine whether a child has been sexually abused. In addition, unlike the rape of an adult, consent of the victim is not a defense to sexual acts performed on a child.²⁰² Under the reasoning of the *Bledsoe* court, therefore, CSAAS should be admissible to prove that a child was in fact sexually molested. Unlike RTS,²⁰³ evidence concerning CSAAS

that the child was sexually molested. The court, therefore, did not address the admissibility of that opinion. However, the court said, "The reliability of expert opinion testimony with regard to the existence or cause of the condition goes not to the admissibility of the testimony but to its relative weight." *Id.* at 611. The court then stated that the defendant could attack the expert testimony through cross-examination and the presentation of counter expert witnesses. *Id.*

193. *People v. Mayberry*, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975).

194. *Id.*

195. *Bledsoe*, 36 Cal. 3d at 249-50, 681 P.2d at 300-01, 203 Cal. Rptr. at 459-60.

196. *Id.* at 250 n.12, 681 P.2d at 300 n.12, 203 Cal. Rptr. at 459 n.12.

197. *Id.* at 251 n.14, 681 P.2d at 301 n.14, 203 Cal. Rptr. at 459 n.14.

198. *Id.*

199. *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

200. See Summit, *supra* note 8, at 179.

201. See *supra* notes 75-76 and accompanying text.

202. See, e.g., CAL. PENAL CODE §288a(b)(2) (oral copulation with a person under 16); *Id.* §286(b)(2) (sodomy with a person under 16).

203. See *supra* notes 197-99 and accompanying text (testimony that victim suffers from RTS unfairly prejudices the defendant).

would not be unduly prejudicial to the defendant; the probative value of CSAAS is much higher than that of RTS because of the evidentiary problems involved in child sexual abuse cases.²⁰⁴

An analysis of BCS and RTS, both accepted by California criminal courts, supports the admissibility of testimony regarding CSAAS. Courts that have considered the admissibility of evidence concerning CSAAS often have been guided by case law concerning other syndromes. The first case involving admission of CSAAS by analogy to other syndromes was *In re Cheryl H.*

IN RE CHERYL H.

The leading California case supporting the admissibility of CSAAS is *In re Cheryl H.*²⁰⁵ *In re Cheryl H.* involved a juvenile dependency hearing under Welfare & Institutions Code section 300²⁰⁶ upon allegations that a father had molested his three-year-old-daughter, Cheryl.²⁰⁷ The court-appointed psychiatrist, who had conducted six therapy sessions with Cheryl, testified that in her opinion Cheryl's conduct was typical of conduct exhibited by other young sexually abused children.²⁰⁸ The psychiatrist concluded by stating her opinion that Cheryl had been sexually molested.²⁰⁹ Although the term syndrome was never mentioned, the doctor's testimony covered the symptoms of sexually abused children,²¹⁰ and the admissibility of CSAAS is supported by the holding of the court. Since the expert testimony was not viewed as describing a syndrome or new scientific method of proof, the *Kelly-Frye* standard was not addressed.²¹¹

204. See *supra* notes 81-110 and accompanying text.

205. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

206. WELF. & INST. CODE §300. Section 300 provides in pertinent part:

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(d) whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

Id.

207. 153 Cal. App. 3d at 1108, 200 Cal. Rptr. at 794.

208. *Id.* at 1109-10, 200 Cal. Rptr. at 795.

209. *Id.* at 1110, 200 Cal. Rptr. at 795.

210. The conduct exhibited by Cheryl included: 1) sexually explicit play activity unusual for a three-year-old; 2) going into a "disassociated state" when the subject of molestation was broached; 3) recoiling when her father's name was mentioned; and 4) inventing new names (i.e. "poopoo") for genitalia. *Id.*

211. The *Kelly-Frye* rule generally is not raised by the court if the expert testimony does not describe the characteristics of sexually abused children as a syndrome. See *supra* note 132 and accompanying text.

The court found that the doctor's testimony that Cheryl was sexually abused was a proper subject for expert testimony under Evidence Code section 801 because the subject of sexual abuse was sufficiently beyond common experience that testimony would assist the trier of fact.²¹² The rationale of the court for the admissibility of the doctor's testimony was based largely upon an analogy between the characteristics of sexually abused children and BCS.²¹³ The court recognized the differences between medical testimony about physical characteristics and psychiatric testimony about the victim's post-injury behavior.²¹⁴ The differences were dismissed, however, with the assertion that the victim's behavior appeared to be unique to children subjected to sexual abuse. In addition, the court found that this behavior was as valid an indicia of sexual abuse as the physical characteristics used to diagnose BCS.²¹⁵ The court, however, prohibited any expert opinion testimony that the father was the abuser or that the child lacked the capacity to lie.²¹⁶

The court in *In re Cheryl H.* had no difficulty admitting expert testimony concerning child sexual abuse.²¹⁷ Criminal courts, however, appear to be uncertain as to how to deal with this type of testimony. Case law on the admissibility of CSAAS in criminal proceedings is inconsistent and unclear.

CSAAS IN CALIFORNIA CRIMINAL CASES

A. *People v. Dunnahoo*

People v. Dunnahoo,²¹⁸ decided before *Cheryl H.*, involved the sexual abuse of two five-year-old girls by the man who was responsible for the care of the children.²¹⁹ The court permitted two police officers, qualified as experts in the field of child molestation, to bolster the credibility of the victims by testifying that sexually molested children have great difficulty talking to adults about sexual indiscretions.²²⁰ The girls' hesitant disclosure of the molestation fell under the fourth element of CSAAS, delayed disclosure.²²¹ The court, however, did

212. 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 800. See *supra* note 118 (Evidence Code section 801 set forth in full).

213. 153 Cal. App. 3d at 1116-17, 200 Cal. Rptr. at 800.

214. *Id.* at 1117, 200 Cal. Rptr. at 800.

215. *Id.*

216. *Id.* at 1121-23, 200 Cal. Rptr. at 803-05.

217. *Id.* at 1116, 200 Cal. Rptr. at 799.

218. 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (1984).

219. *Id.* at 567, 199 Cal. Rptr. at 798.

220. *Id.* at 577, 199 Cal. Rptr. at 804.

221. See *supra* notes 61-65 and accompanying text.

not address CSAAS when discussing the admissibility of the testimony. The evidence was held admissible under Evidence Code section 801. The subject of child molestation, especially the sensitivities of the victims, was found to be knowledge sufficiently beyond common experience so that the opinion of an expert would help the trier of fact.²²² The court in *Dunnahoo* easily admitted evidence concerning child sexual abuse by disposing of the issue of admissibility in one sentence.²²³ Obstacles to admissibility of this evidence in criminal courts has arisen, however, when this evidence has been associated with the word "syndrome."

B. *People v. Roscoe*

*People v. Roscoe*²²⁴ was decided after *Cheryl H.* but resulted in an inconsistent holding. *Roscoe* involved the molestation of a fifteen-year-old boy by a neighbor with whom the boy had developed a relationship of trust and growing friendship.²²⁵ The trial court allowed a clinical psychologist, who had spent over fifteen sessions with the victim, to give a diagnosis of the boy as a victim of child molestation.²²⁶ Although the sexual crime was committed without force or violence against a child by a trusted adult and the victim exhibited some of the elements of CSAAS,²²⁷ the appellate court chose to analyze the doctor's testimony under the doctrine of RTS.²²⁸ The court found the expert's diagnosis of the boy as a victim of child molestation to be inadmissible under *Bledsoe*.²²⁹ In addition, the court limited the admissibility of RTS to credibility purposes by prohibiting any discussion of the victim in the case at hand.²³⁰

In a footnote, the court added that less strict rules of admissibility apply when child abuse is an issue in noncriminal cases, such as

222. 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804.

223. *Id.*

224. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985).

225. *Id.* at 1095, 215 Cal. Rptr. at 47.

226. *Id.* at 1098, 215 Cal. Rptr. at 49.

227. When the victim was first questioned by a police officer, he denied even knowing the defendant. Later, he admitted knowing the defendant but denied any sexual contact. Finally, he admitted some sexual contact but, due to shame and embarrassment, did not reveal the full extent of the sexual exploits. *Id.* at 1096, 215 Cal. Rptr. at 47. The behavior of the victim indicated two characteristics of CSAAS: delayed disclosure and inconsistent statements. See *supra* notes 41-46 and 61-65 and accompanying text (discussion of secrecy and delayed disclosure).

228. *Roscoe*, 168 Cal. App. 3d at 1098, 215 Cal. Rptr. at 49. Although the expert witness did not describe the victim's conduct as exemplifying RTS, the court stated that the reasoning behind RTS "seems to apply to diagnosis as a victim of child molestation." *Id.*

229. *Id.* at 1100, 215 Cal. Rptr. at 50.

230. *Id.*

Welfare and Institutions Code section 300 dependency proceedings.²³¹ The footnote then acknowledged that in a Welfare and Institutions Code section 300 case, an opinion could be given that the particular child had suffered abuse and cited *Cheryl H.*²³²

The holding in *Cheryl H.*, however, was not limited expressly to noncriminal cases. The court in *Cheryl H.* found that expert opinion testimony that the victim was sexually abused was a proper subject for expert testimony within the meaning of Evidence Code section 801.²³³ Section 801 applies to both criminal and civil cases.²³⁴ The court in *Roscoe*, however, indicated that a different standard for admissibility of evidence applies to criminal and noncriminal cases.²³⁵ Thus, the *Roscoe* court implied that expert testimony concerning CSAAS would not meet the standard for admissibility in a criminal case even though the testimony met the prerequisites for admissibility in a noncriminal case.²³⁶

Criminal actions and dependency proceedings have different purposes, but they raise similar constitutional concerns for protecting the rights of the parties.²³⁷ A criminal action is brought to punish violations of the law.²³⁸ Because a defendant's liberty can be denied, the court must be careful not to violate the defendant's right to due process.²³⁹ The ultimate concern in a juvenile dependency proceeding, in contrast to criminal trials, is the best interests of the child rather than the discipline of the abusive parent.²⁴⁰ Juvenile courts, however, have recognized the importance of safeguarding the right of parents to have children and to retain custody of those children as one of the liberties protected by due process.²⁴¹ The court must be careful not to encroach upon the due process right of parents and defendants in both juvenile dependency proceedings and criminal actions,

231. *Id.* at 1100 n.4, 215 Cal. Rptr. at 50 n.4.

232. No other case was cited by the court. *Id.*

233. 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 799.

234. California Evidence Code section 300 provides in pertinent part, "Except as otherwise provided by statute, [the California Evidence Code] applies in every action before the Supreme Court or a court of appeal, superior court, municipal court, or justice court. . . ." California Evidence Code section 801 contains no language which limits the applicability of the section in criminal or civil cases. *See supra* note 118 (text of California Evidence Code section 801 set forth in pertinent part).

235. 168 Cal. App. 3d at 1100 n.4, 215 Cal. Rptr. at 50 n.4.

236. *See id.*

237. *See infra* notes 242-45 and accompanying text.

238. Recommendations, *supra* note 38, at 10.

239. *Id.*

240. LEGAL ISSUES AND APPROACHES, *supra* note 3, at 6.

241. *In re La Shonda B.*, 95 Cal. App. 3d 593, 599, 157 Cal. Rptr. 280, 283 (1979); *Lois R. v. Sup. Ct.*, 19 Cal. App. 3d 895, 901, 97 Cal. Rptr. 158, 163 (1971).

respectively. Therefore, even though the purpose of a juvenile dependency hearing is different from the purpose of a criminal trial, the constitutional rights of the person accused of sexual abuse must still be protected by the court when evidence is admitted against the accused.

Although lower standards of admissibility exist for certain types of evidence in juvenile hearings,²⁴² courts have required proof that a minor is a dependent child of the court to be established by evidence that is legally admissible in civil trials.²⁴³ The statutory phrase "legally admissible in civil trials" only refers to evidence admissible in a civil case without the additional statutes governing the admission of evidence in juvenile proceedings.²⁴⁴

The California Evidence Code applies equally in both criminal and civil cases unless the Code expressly states otherwise.²⁴⁵ Evidence Code section 801 has been utilized extensively by the courts in both criminal and civil cases.²⁴⁶ The holding of *Cheryl H.* that expert testimony diagnosing a victim as sexually abused was a proper subject for expert testimony under Evidence Code section 801²⁴⁷ should apply to expert testimony in criminal as well as noncriminal cases. In addition, the court in *Dunnahoo* has stated that evidence concerning the subject of child molestation is admissible under Evidence Code section 801. The most recent California criminal case to address the admissibility of CSAAS has agreed with *Dunnahoo*.

C. *People v. Payan*

In *People v. Payan*,²⁴⁸ the court admitted expert testimony on CSAAS. Both CSAAS and RTS, however, were discussed inter-

242. See, e.g., CAL. WELF. & INST. CODE §281 (juvenile court authorized to receive and consider the reports and recommendations of the probation officer in determining any matter involving the custody, status, or welfare of a minor); *Id.* §355 (for purposes of determining whether the minor is a person described by section 300, any matter or information relevant and material to the circumstances may be received by the juvenile court as an exception to the hearsay rule).

243. *Id.* §355. Section 355 provides that proof by a preponderance of evidence, legally admissible in the trial of civil cases, must be adduced to support a finding that the minor is a person described by section 300. *Id.* See *Amanda I.*, 166 Cal. App. 3d at 259, 212 Cal. Rptr. at 325 (1985).

244. *Amanda I.*, 166 Cal. App. at 259, 212 Cal. Rptr. at 325.

245. For example, California Evidence Code section 801 has been applied equally in criminal and noncriminal cases. See *infra* note 246 and accompanying text.

246. See, e.g., *Jackson*, 18 Cal. App. 3d at 506-07, 95 Cal. Rptr. at 920-21 (criminal case in which expert gave opinion testimony that child suffered from BCS); *Neumann v. Bishop*, 59 Cal. App. 3d 451, 463, 130 Cal. Rptr. 786, 794 (1976) (civil case in which physician gave expert opinion testimony concerning plaintiff's present condition of health).

247. 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 799.

248. 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (1985), *modified*, 174 Cal. App. 3d 73b.

changeably by the court, and the rationale supporting the holding is unclear. *Payan* involved a defendant charged with the sexual molestation of three small girls, including the defendant's own daughter.²⁴⁹ A doctor, who qualified as an expert on child sexual abuse, testified concerning the elements of CSAAS and offered an opinion, based upon a review of police and medical reports and preliminary hearing transcripts, that the three children had been sexually abused.²⁵⁰ The trial court instructed the jury that the expert witness did not personally interview the children, that her opinion was based solely upon the records she reviewed, and that the jury ultimately must determine whether the assumed facts were supported by the evidence.²⁵¹

Although the court admitted both the testimony about the elements of CSAAS and the opinion that the children were sexually abused, the holding was limited. The court stated that sexual abuse of children, especially children of the age in the case,²⁵² was a proper subject for expert testimony to help the jury understand a child victim's behavior and the significance of any medical findings.²⁵³ Therefore, the court limited the admissibility of CSAAS to the purpose of increasing credibility. The reasoning in support of this narrow holding is unclear and provides very few guidelines for trial courts to follow in determining whether to admit or exclude CSAAS.

The court of appeal in *Payan* stated that the issue before the court was whether testimony concerning sexually abused children is admissible.²⁵⁴ In addition, the court clearly differentiated between the purposes behind CSAAS and RTS.²⁵⁵ The court, however, equated CSAAS

249. *Id.* at 31-32, 220 Cal. Rptr. at 127.

250. *Id.* at 33-34, 220 Cal. Rptr. at 128.

251. *Id.* at 33, 220 Cal. Rptr. at 128.

252. *Id.* at 40, 220 Cal. Rptr. at 133.

The children involved in this case were four, four, and seven years of age at the time of the sexual assaults. *Id.* at 31-32, 220 Cal. Rptr. at 127. Sexual abuse of young children creates greater evidentiary problems for prosecutors, and thus the need for the admission of CSAAS is greater than if the abuse involves an older child. *See supra* note 58 and accompanying text. The symptoms of CSAAS, however, can be experienced by both older and younger children. *See, e.g., Roscoe*, 168 Cal. App. 3d at 1095, 215 Cal. Rptr. at 47 (fifteen-year-old child exhibited symptoms of CSAAS); *Cheryl H.*, 153 Cal. App. 3d at 1108-10, 200 Cal. Rptr. at 794-95 (three-year-old child displayed symptoms of CSAAS). A discussion of the cut-off age at which CSAAS is no longer admissible is beyond the scope of this comment. This comment proposes, however, that the age of the child should be merely one factor to consider by a court in determining the probative value of CSAAS.

253. 173 Cal. App. 3d at 40, 220 Cal. Rptr. at 133.

254. For example, the court stated, "We believe there are important factors in favor of admitting expert testimony on the issue of sexual abuse in children." *Id.* at 37, 220 Cal. Rptr. at 131.

255. The court noted that CSAAS was used to clinically diagnose sexually abused children,

with RTS²⁵⁶ and analyzed the current law on RTS.²⁵⁷

The court drew a comparison between the case at bar and *Roscoe*, in which expert testimony on RTS had been disallowed.²⁵⁸ Instead of distinguishing the two cases on the basis that *Roscoe* involved RTS, the court focused on the fact that in *Roscoe* the expert had counselled the victim, while in *Payan* the expert had not had any therapeutic contact with the victims.²⁵⁹ The *Payan* court emphasized that the expert was not a therapist under a professional duty to help the victim.²⁶⁰ Under the logic of the court, any duty to help the victim would prevent the therapist from forming an objective opinion of whether the victim was sexually assaulted.²⁶¹ The court concluded by stating that a trial court might refuse to admit the testimony of an expert witness whose only contact with an alleged victim was in a therapeutic setting.²⁶² This statement ignores the previous differentiation by the court between the purposes of RTS and CSAAS.²⁶³ RTS was not developed to determine the truth of an allegation of rape.²⁶⁴ Courts, therefore, have not allowed a therapist who has counselled the victim to testify that the victim suffered from RTS. In contrast to RTS, CSAAS was developed to help professionals determine whether a child had been sexually abused.²⁶⁵ Any therapeutic contact between the expert and the abused child, therefore, logically would help the expert in diagnosing the child as sexually abused. Therapeutic contact between the expert and the child should be viewed by courts as a positive factor in the admission of testimony about CSAAS.²⁶⁶

The court in *Payan* looked to *Roscoe*, a case involving the admissibility of RTS, for the correct scope of admissibility for CSAAS.²⁶⁷

rather than being used merely as a "therapeutic tool." *Id.* at 34, 220 Cal. Rptr. at 129. In *Bledsoe*, the court rejected expert testimony that a complaining witness was suffering from RTS primarily because the syndrome was developed as a "therapeutic tool" to treat patients and not to accurately diagnose rape victims. *Bledsoe*, 36 Cal. 3d at 249-50, 681 P.2d at 300-01, 203 Cal. Rptr. 459-60.

256. While several symptoms overlap, rape and child sexual abuse involve very different factors, and CSAAS should not be confused with RTS. *See supra* notes 30-78 and accompanying text (discussion of CSAAS); *supra* notes 183-188 and accompanying text (discussion of RTS).

257. *See Payan*, 173 Cal. App. 3d at 34-37, 220 Cal. Rptr. at 128-31 (discussion of RTS).

258. *Id.* at 36, 220 Cal. Rptr. at 130.

259. *Id.* at 36, 220 Cal. Rptr. at 130.

260. *See id.*

261. *Id.*

262. *See id.* at 40, 220 Cal. Rptr. at 133.

263. *See id.* at 34, 220 Cal. Rptr. at 129; *see supra* note 255 and accompanying text.

264. *Bledsoe*, 36 Cal. 3d at 249-50, 681 P.2d at 300-01, 203 Cal. Rptr. 459-60.

265. *See supra* note 75 and accompanying text.

266. *Cf. Hall v. State*, 692 S.W.2d 769, 771 (Ark. App. 1985) (defendant objected to expert testimony regarding child sexual abuse on the basis that the testimony should be confined to the specific case at hand rather than to generalities).

267. The *Payan* court, quoting *Roscoe*, stated,

Although the *Payan* court admitted expert opinion testimony that the children were sexually abused, this decision was based upon the careful admonishments given to the jury by the trial court.²⁶⁸ The appellate court stated in dicta that the better practice might be to restrict the expert's testimony to a discussion of victims as a class and to prohibit any opinions on whether the prosecuting witness was in fact molested.²⁶⁹

By applying the judicial standards of admissibility for RTS to CSAAS, the *Payan* court overlooked the important distinguishing factors of each syndrome. While at first glance RTS and CSAAS appear similar because both syndromes deal with sexual assault, the two actually are quite different²⁷⁰ and should not be treated interchangeably.

CSAAS AND SCOPE OF ADMISSIBILITY

The evidentiary problems in child sexual abuse cases often thwart the successful prosecution of legitimate charges of sexual abuse.²⁷¹ Expert testimony concerning CSAAS, however, should not be admissible in every case involving child sexual abuse. CSAAS represents the common characteristics of children who have been sexually abused by a relative or other trusted adult.²⁷² Children who are violently attacked by strangers might exhibit some of the symptoms of CSAAS.²⁷³ A violent attack, however, usually leaves physical evidence of the sexual assault.²⁷⁴ In addition, the child victim of a sexual assault by a stranger does not encounter the familial pressures not to testify or to recant

[E]xpert testimony authorized by *Bledsoe* to permit rehabilitation of a complainant's credibility is limited to a discussion of victims as a class, supported by a reference to literature and experience (such as an expert normally relies upon) and does not extend to discussion and diagnosis of the witness in the case at hand.

Payan, 173 Cal. App. 3d at 36, 220 Cal. Rptr. at 130.

268. See *supra* note 251 and accompanying text (jury instructions given by the court).

269. *Payan*, 173 Cal. App. 3d at 40, 220 Cal. Rptr. at 133.

270. See *supra* notes 39-71 and accompanying text (discussion of the elements of CSAAS); see *supra* note 188 and accompanying text (discussion of RTS symptoms).

271. See *supra* notes 81-114 and accompanying text.

272. See *Summit*, *supra* note 8, at 180.

273. For example, delayed disclosure is common in both rape and child sexual abuse cases. *Delia S. v. Torres*, 134 Cal. App. 3d 471, 476, 184 Cal. Rptr. 787, 790 (1982) (victim told no one of the rape for almost two months because she was ashamed, humiliated, and frightened); see *supra* notes 61-65 and accompanying text (discussion of delayed disclosure in child sexual abuse cases).

274. See, e.g., *Frank*, 38 Cal. 3d at 719, 700 P.2d at 417, 214 Cal. Rptr. at 803 (physical evidence of violent sexual attack on two-year-old child included the following: the child's nipples had been pinched and partially pulled away from her body, the entrance to her vagina was torn and the hymen broken, her vaginal area contained sperm, her anus exhibited evidence of trauma indicating that a foreign object had been inserted there).

the accusation of sexual abuse.²⁷⁵ Thus, the need for expert testimony concerning CSAAS is much less in a violent than in a nonviolent assault. Expert testimony on CSAAS should be limited to cases in which the victim has been sexually abused by a relative or other trusted adult in a nonviolent manner.²⁷⁶

Evidence concerning CSAAS should be admissible in criminal courts for two purposes: to bolster the credibility of the victim and to prove that a victim was sexually molested. The trier of fact may have certain erroneous expectations regarding the behavior of sexually abused children.²⁷⁷ Expert testimony concerning the typical characteristics of sexually abused children will eliminate these erroneous expectations and provide the trier of fact with the necessary background to analyze the credibility of the child victim.²⁷⁸ The courts in *Cheryl H.*, a non-criminal case, and *Payan*, a criminal case, both have held that expert testimony on CSAAS is admissible to bolster the credibility of the victim by helping the jury to understand the behavior of a child victim.²⁷⁹

In addition, the court in *Cheryl H.* held that expert testimony concerning CSAAS was properly admissible to prove that sexual abuse actually occurred.²⁸⁰ This purpose should be a permissible basis for the introduction of CSAAS in criminal, as well as noncriminal, cases.²⁸¹ As in *Cheryl H.* the court in *Payan* permitted expert testimony on CSAAS to establish that sexual abuse had occurred.²⁸² Admissibility for this reason, however, was based upon the particular circumstances in the case.²⁸³ The *Payan* court in dicta limited the introduction of expert testimony concerning CSAAS to credibility purposes only.²⁸⁴ The rationale of the court, however, was based upon case law con-

275. Legal Issues and Approaches, *supra* note 3, at 4. See *supra* notes 66-71 and accompanying text.

276. Courts have applied RTS to cases that involve child rape by a stranger. See, e.g., *Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (14-year-old girl raped).

277. See *supra* notes 103-10 and accompanying text.

278. *Summit*, *supra* note 8, at 177.

279. *Cheryl H.*, 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 799-800; *Payan*, 173 Cal. App. at 40, 220 Cal. Rptr. at 133.

280. *Cheryl H.*, 153 Cal. App. 3d at 1116, 200 Cal. Rptr. at 799-800.

281. See *supra* notes 233-47 and accompanying text.

282. 173 Cal. App. 3d at 31-32, 220 Cal. Rptr. at 127.

283. The court stated, "Although the better practice might be to . . . forbid opinion on whether the prosecuting witness was in fact molested, we find no error in the instant case because of the careful admonishments given by the trial court." *Id.* at 40, 220 Cal. Rptr. at 133. See *supra* note 251 and accompanying text (discussion of jury instructions given by the trial court).

284. 173 Cal. App. 3d at 40, 220 Cal. Rptr. at 133.

cerning RTS.²⁸⁵ CSAAS, however, is distinguishable from RTS.²⁸⁶ The rationale for excluding expert testimony concerning RTS as proof of rape is inapplicable to cases involving child sexual abuse.²⁸⁷

In addition, evidence of BCS has been held admissible by California criminal courts as proof that a child was physically abused.²⁸⁸ Although the physical injuries that characterize BCS are more readily identifiable than the psychological factors that comprise CSAAS, both BCS and CSAAS set forth unique identifying characteristics for different forms of child abuse.²⁸⁹

The court in *Cheryl H.* concluded that the behavior shown by a sexually abused child was as valid an indicia of abuse as the physical characteristics used to diagnose BCS.²⁹⁰ A medical diagnosis is based on probability, and the lack of scientific certainty does not deprive a medical opinion of evidentiary value.²⁹¹ By analogy to BCS, expert testimony concerning CSAAS should be admissible in criminal courts as proof that a child was sexually abused.

CONCLUSION

The nature of child sexual abuse creates many impediments to the detection and prosecution of criminal cases. Prosecutors often are confronted with the evidentiary problems of a lack of corroborative evidence and a victim who is unwilling or unable to testify. Expert testimony concerning CSAAS will help alleviate these problems and will provide valuable and necessary information to enable the trier of fact to judge credibility and to determine if sexual abuse has occurred.

California courts have determined that child sexual abuse is a proper subject for expert testimony under California Evidence Code section 801. In addition, although CSAAS is a relatively recent concept, the syndrome has sufficient support in the area of child abuse to establish reliability under the *Kelly-Frye* standard. In cases riddled with evidentiary problems, expert testimony concerning CSAAS contains great probative value and is not unduly prejudicial to the defendant. The

285. *See id.* at 36-37, 220 Cal. Rptr. at 130-31.

286. *See supra* notes 39-71 and accompanying text (discussion of CSAAS); *supra* note 188 and accompanying text (discussion of RTS).

287. *See supra* notes 192-204 and accompanying text.

288. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919. *See supra* note 174 and accompanying text (symptoms of BCS).

289. *See supra* notes 214-15 and accompanying text.

290. *Cheryl H.*, 153 Cal. App. 3d at 1117, 200 Cal. Rptr. at 800.

291. *Id.*

evidentiary problems associated with the prosecution of child sexual abuse create strong policy arguments for the admissibility of CSAAS. The high probative value of CSAAS necessitates the admissibility of expert testimony, especially when other evidence of the abuse is scarce. In addition, analogies to similar syndromes admissible in California criminal courts support the admissibility of CSAAS. CSAAS should be admissible to bolster the victim's credibility and to prove that a victim was sexually molested. Expert testimony concerning CSAAS will contribute to a greater number of successful prosecutions of child molesters without encroaching upon the rights of defendants.

Kathy L. Hensley