Note

EXPERT TESTIMONY: SEEKING AN APPROPRIATE ADMISSIBILITY STANDARD FOR BEHAVIORAL SCIENCE IN CHILD SEXUAL ABUSE PROSECUTIONS

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INTRODUCTION

"Mary," a fourteen-year-old child of divorce, frantically phones her mother one night to report that her father has "made a pass" at her. Mary begs her mother to take her from her father's house. Alarmed, Mary's mother drives to the house and takes Mary away. Later that night, Mary discusses the incident with her mother and grandmother, though now, she downplays the incident. Mary explains that she merely got "spooked" by her father's behavior and insists that he did not assault her.

A few days later, Mary's grandmother takes Mary to her father's house to retrieve her belongings. While at her father's house, Mary says to her grandmother: "By the way, Grandma, that mess the other night, . . . I made a mountain out of a molehill. My dad didn't do anything to me." During the next few months, Mary continues to see her father occasionally, but she is never alone with him.

One year later, Mary's English teacher assigns her students the task of keeping a journal. One of Mary's journal entries describes the incident at her father's house. The journal entry reveals much more than just a "pass." Mary writes in her journal that her father forced her to have sexual intercourse with him. The journal entry also describes other instances of molestation and rape. Before entering this account in her journal, Mary told only her boyfriend that she had engaged in intercourse with her father.

When confronted with Mary's allegations, Mary's father denies her story completely. He admits to having kissed Mary and to having

asked her to join him in bed, but he insists that these overtures were merely "games" intended to reveal whether his daughter was sexually active.

Thereafter, the local prosecutor charges Mary's father with first degree criminal sexual conduct. At the trial, the prosecution presents Mary as the first witness. She again recounts the story of intercourse, molestation, and rape that appeared in her journal. On cross examination, the defense attempts to discredit Mary's allegations by suggesting that her behavior has been inconsistent with that of a true child abuse victim. The defense suggests that Mary's behavioral patterns show that she could not be a victim of sexual abuse by her father and concentrates its attack on four specific aspects of Mary's behavior: (1) the delayed disclosure of the intercourse; (2) the way in which Mary revealed the incident; (3) Mary's initial tendency to deny the fact of intercourse; and (4) Mary's continued desire and willingness to see her father. Furthermore, the defense seizes upon Mary's inability to remember her conversations with others about the incident. Finally, the defense attempts to make Mary's allegations appear retaliatory by recounting the bitterness of the divorce between Mary's parents and by noting that earlier entries in Mary's journal reveal that she was upset with her father because of the divorce.

This tale about "Mary" essentially tells a very real story—a story that led to the conviction of a father for the sexual abuse of his daughter in *People v. Beckley*.[1] In *Beckley*, the testimony of the victimized daughter was necessary to obtain the conviction. But perhaps even more crucial to the prosecution's case was the "expert" testimony of a certified social worker. To rebut the defense's attack on the veracity of the daughter's story, the prosecutor in *Beckley* presented a social worker who testified that inconsistencies in allegations of abuse, like the inconsistencies in the daughter's story, do not necessarily show that the allegations are lies.[2] In *Beckley*, the social worker testified that inconsistent stories may, in fact, be an attempt by a victim to minimize the event.[3] In the end, the social worker's testimony probably ensured that the jury did not misjudge the daughter's post-incident behavior. Without the social worker's testimony, the story told by the victim in *Beckley*, like the stories of so many vic-

1. 456 N.W.2d 391, 393-94 (Mich. 1990).
2. *See id.* at 394.
3. *See id.*

tims of child sexual abuse, would probably have appeared quite unreliable to the average lay juror or judge.

The *Beckley* prosecution highlights a serious problem in our nation's courts. Although the Michigan court permitted the social worker's expert opinion in the *Beckley* case,[4] courts in several other states would not have allowed such testimony into evidence. If the crime had occurred just a few hundred miles away in Kentucky, the social worker would not have been allowed to testify because the courts of that state do not allow social scientists to offer expert scientific testimony.[5] Thus, in a Kentucky courtroom, the only support for the accusation would have been the belated and inconsistent story of the victim. Without the social worker's testimony to help explain the victim's behavior, in all likelihood a Kentucky prosecutor would have been unable to obtain a conviction.

What may be most curious about the drastically different approaches of Michigan and Kentucky courts to testimony like that offered by the social worker in *Beckley* is that the different approaches are *not* the result of facially different rules of evidence. In fact, the states have substantially the same written rules of evidence, modeled on the Federal Rules of Evidence, for relevancy and expert testimony.[6] The disparity in outcomes stems not from the rules themselves, but from the courts' very different interpretations of those rules. For example, Michigan's supreme court has recognized a need for expert explanation of the "seemingly inconsistent responses" evoked in a child who has been the victim of sexual abuse,[7] while Kentucky's highest court has remained steadfast in its assertion that the jury is fully capable of understanding the reactions of the child

4. *See id.* at 409 (allowing expert testimony to rebut an inference that certain behavior of complainants is not uncharacteristic of child sexual abuse victims).

5. *See, e.g.*, Newkirk v. Commonwealth, 937 S.W.2d 690, 693 (Ky. 1996) (holding that social science expert testimony is only probative on the issue of the complainant's credibility and, therefore, is inadmissible because "there is no such thing as expertise in the credibility of children").

6. In fact, Kentucky's and Michigan's rules of evidence for relevancy and scientific evidence are virtually identical. For the rules concerning relevancy, compare KY. R. EVID. 401-403 with MICH. R. EVID. 401-403. For the rules for scientific evidence, compare KY. R. EVID. 702 with MICH. R. EVID. 702.

7. *Beckley*, 456 N.W.2d at 400-02 (holding that social science expert testimony is relevant under MICH. R. EVID. 401-402 and that the evidence is therefore admissible because it "assists the trier of fact" under MICH. R. EVID. 702).

without explanatory testimony from an expert.[8] Furthermore, the court in Michigan has found that expert testimony is relevant and admissible because of the "uniqueness of a child victim's reaction,"[9] while Kentucky's court has insisted that such expert testimony is not helpful and, therefore, not relevant.[10] Though courts in both states are skeptical of expert testimony from social scientists,[11] Kentucky's court has taken the absolute position of excluding any expert testimony of the sort offered in *Beckley*.

The divergent positions of these two jurisdictions provide but one example of the difficulty state courts face when dealing with expert testimony from social scientists. This Note explores how courts treat social science expert testimony in prosecutions of child sexual abuse. Part I considers the special characteristics of child sexual abuse prosecutions that create a need for social science testimony.[12] Part II explains the different types of testimony which might be offered in response to that need. Next, Part III examines the various rules of evidence and how some state courts apply these rules to the testimony of social scientists. Part IV uses an analysis of a few particular jurisdictions, including Michigan and Kentucky, to illustrate how varying approaches often determine the success or failure of child sexual abuse prosecutions. Finally, the Conclusion asserts that the most appropriate treatment of this expert testimony is found in jurisdictions that differentiate between social science expertise and

8. *See Newkirk*, 937 S.W.2d at 695-96 (citing KY. R. EVID. 403 as support for the proposition that social science expert testimony "lack[s] relevancy and invade[s] the province of the jury by expressing an opinion on the ultimate issue of guilt or innocence").

9. *Beckley*, 456 N.W.2d at 404.

10. *See Newkirk*, 937 S.W.2d at 695.

11. *See, e.g.*, *Newkirk*, 937 S.W.2d at 690-91 ("[T]his Court has repeatedly expressed its distrust of expert testimony which purport[s] to determine criminal conduct based on a perceived psychological syndrome." (footnote omitted)); *Beckley*, 456 N.W.2d at 404 n.47 (recognizing that expert testimony based on syndromes is "still in its embryonic stage" and that as more information about victim behavior comes to light "there is the possibility that syndrome testimony will become a more reliable source of evidence").

12. This Note will not discuss the issue of prosecuting child sexual abuse cases where the prosecution has been delayed because of suppressed memories that surface during adulthood. Allegations of abuse based on repressed memories create an entirely new and distinct set of problems for prosecutors. For a discussion of the issues surrounding repressed memories of child sexual abuse, see generally MARK PENDERGRAST, VICTIMS OF MEMORY: SEX ABUSE ACCUSATIONS AND SHATTERED LIVES (2d ed. 1996); Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 L. & PSYCHOL. REV. 103 (1998); Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 L. & SOC. INQUIRY 653 (1997).

other forms of scientific expertise and that treat social science expertise according to an appropriately tailored standard.

I. THE DIFFICULTY WITH CHILD SEXUAL ABUSE PROSECUTIONS

The National Center on Child Abuse and Neglect defines child sexual abuse as "contacts or interactions between a child and an adult when the child is being used as an object of gratification for adult sexual needs or desires."[13] The spectrum of such abusive conduct ranges from indecent exposure and sexually explicit verbal abuse to forcible rape.[14] Though it is possible to catalog the types of abuse young victims may endure, it is impossible to know precisely how many victims there are in the United States. According to some studies, the *reported* incidence of child sexual abuse ranges from 3% to 15% for boys and from 12% to 38% for girls.[15]

The sexual abuse of children is not merely a social problem in this country; it is criminal behavior. Because of the varying ways to define child sexual abuse, it is rare for a state to maintain separate provisions which criminalize these acts.[16] Rather, most states address the problem of child sexual abuse under the traditional framework of rape and sexual assault laws.[17] The officials prosecuting child sexual

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13. DEPARTMENT OF HEALTH & HUMAN SERVS., SEXUAL ABUSE OF CHILD: SELECTED READINGS 1 (1980). There are many ways to define child sexual abuse. For additional definitions, see Donald C. Bross, *Terminating the Parent-Child Legal Relationship as a Response to Child Sexual Abuse*, 26 LOY. U. CHI. L.J. 287, 287 (1995) (defining child sexual abuse as involving "sexual contact with children whose consent is inadequate or impossible, who lack equality, who are coerced, or who are not protected from inappropriate sexual contact"); James O. Hacking, III, Comment, *Won't You Be My Neighbor?: Do Community Notification Statutes Violate Sexual Offenders' Rights Under the Constitution's Ban on the Passage of Ex Post Facto Laws?*, 41 ST. LOUIS U. L.J. 761, 800 & n.313 (1997) (noting a lack of consensus on a precise definition of child sexual abuse and offering several different definitions).

14. *See* Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 429 n.1 (1985).

15. *See* Sanford N. Katz, *Foreword* to INTERVENING IN CHILD SEXUAL ABUSE 1, 4 (Kathleen Murray & David A. Gough eds., 1991) ("Since people may be reluctant to admit to having been victims of [sexual] abuse, the actual percentages may be much higher.").

16. Michigan comes close to having such a provision. *See* MICH. COMP. LAWS § 750.520b-c (1991) (combining into a single statute the criminalization of varying degrees of sexual conduct depending upon the age and mental capacity of the victim, the familial and authoritative relationship between the perpetrator and the victim, and the nature of the sexual conduct).

17. *See, e.g.*, CAL. PENAL CODE § 261.5(b) (West Supp. 1999) (defining sexual intercourse with a person under 18 as a form of statutory rape); KY. REV. STAT. ANN. § 510.110 (Banks-Baldwin 1997) (treating child sexual abuse as a category of general abuse and assault); 18 PA. CONS. STAT. ANN. § 3122.1 (West Rev. Supp. 1998) (defining sexual intercourse with another person who is less than 16 years of age as statutory sexual assault).

abuse, however, face almost insurmountable hurdles because of the very nature of this crime.

Child sexual abuse cases are not easy to prosecute.[18] For one thing, it is often difficult for outsiders even to determine whether this form of abuse has occurred. Like other types of child abuse, this type most often occurs in private, away from potential eyewitnesses,[19] and more often than not, the perpetrator of child sexual abuse is a member of the victim's family.[20] Child sexual abuse is also difficult to prove because sexual abusers of children rarely leave physical evidence of their crime.[21] Instead of bruises or physical scars, child sexual abusers usually leave their victims wracked with varying degrees of psychological and emotional trauma.[22]

A child-victim of sexual abuse, like "Mary," who has no other eyewitnesses or physical evidence to corroborate her allegations, must rely on her own story to prove the abuse. Child sexual abuse cases often boil down to a high stakes game of "he said, she said." In such cases, a defendant's primary defense might be to attack the credibility of the victim's story.[23] When combined with the "beyond a reasonable doubt" standard, the child-victim and her story are likely to lose this contest.

The problems with prosecuting child sexual abuse cases are increased by the fact that most children fail to report sexual abuse.[24]

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18. The story of "Mary" illustrates just some of the problematic characteristics of child sexual abuse. In this case, the alleged abuser was a family member—her father. Also, the abuse left no physical evidence and occurred in private. And finally, Mary only reluctantly (and inconsistently) recounted the abuse months later.

Although rape and sexual assault cases present similar issues, like those relating to physical evidence, memory and recantation, the discussion here is limited to child sexual abuse. This limitation in topic is helpful because a discussion of rape and sexual assault in general necessitates a discussion of consent and evidence related to that issue; the minority of the child necessarily removes the possibility of consent to the behavior.

19. *See* Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2033 (1994); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 3-4 (1989); Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 158 (1988).

20. *See* Dwight M. Wells, *Expert Testimony: To Admit or Not to Admit*, 57 FLA. B.J. 673, 673 (1983).

21. *See* Myers et al., *supra* note 19, at 34-36. Where the sexual abuse results in physical trauma, the symptoms are clear, and a medical diagnosis is regularly obtained. *See id.* at 38-51.

22. *See id.* at 52-54.

23. *See id.* at 89.

24. *See* David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77

More importantly, if they do, it is common to have a significant lapse in time between the actual occurrence and the ultimate reporting of the abusive incident by the child.[25] Even then, the child may not include details of all of the abusive conduct in her initial revelation.[26] Furthermore, children often recant or alter their allegations of abuse.[27]

Delay and recantation are particularly common in cases of intrafamily abuse.[28] In these situations, the delay may be encouraged by "long-standing active or passive family collusion and support"[29] aimed at avoiding disclosure for fear that public revelation of the abuse will result in social rejection, economic disaster, a general breakdown of the family unit, or the incarceration of the accused.[30] Similarly, recantation may follow an allegation of intrafamily abuse if the child witnesses extensive damage wreaked upon her family as a result of her revelation.[31]

The delays, half-truths, and recantations that often characterize a child's allegation of abuse are open to attack by a defendant.[32] The defendant may attempt to demonstrate that a child's delay or incomplete disclosure is evidence of untruth or that a recantation after the initial allegation demonstrates the untrustworthiness of the child.[33] The conflict between the adult's version and the child-victim's version of an event may suggest to jurors a misrecollection or fabrication

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J. CRIM. L. & CRIMINOLOGY 1, 60-61 (1986); Diane E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133, 142 (1983); Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 186 (1983).

25. *See* Myers et al., *supra* note 19, at 86-87; Summit, *supra* note 24, at 186.

26. *See* Myers et al., *supra* note 19, at 87 ("When disclosure occurs, the child may refrain from telling the entire story, and may reveal a little at a time to 'test the waters' and see how adults react.").

27. *See* Summit, *supra* note 24, at 188.

28. *See* Wells, *supra* note 20, at 673.

29. C. Henry Kempe, *Sexual Abuse, Another Hidden Problem: The 1977 C. Anderson Aldrich Lecture*, 62 PEDIATRICS 382 (1978), *reprinted in* CHILD ABUSE: COMMISSION AND OMISSION 97, 99 (Joanne V. Cook & Roy T. Bowles eds., 1980).

30. *See* DAVID P. H. JONES, INTERVIEWING THE SEXUALLY ABUSED CHILD 9 (1992); Kempe, *supra* note 29, at 99.

31. *See* Summit, *supra* note 24, at 188.

32. *See, e.g.*, Steward v. State, 652 N.E.2d 490, 494 (Ind. 1995) (taking judicial notice of the weakness of victim testimony).

33. *See, e.g.*, People v. Matlock, 395 N.W.2d 274, 277 (Mich. Ct. App. 1986) (recognizing that the complainant's delay in disclosing the abuse be attacked by the defendant and, therefore, holding that expert testimony may be used to explain such delays).

of the story on the part of the child.[34] All of these commonly held notions and misperceptions help defendants win the battle of "he said, she said."

The difficulty, however, in prosecuting cases of child sexual abuse goes beyond problems of delayed reporting, inconsistent recollection, or recantation. Even in the absence of these issues, the defense may use the mere fact of the child's age or immaturity to portray the child as intrinsically less trustworthy than the adult defendant.[35] Even when a child is capable of testifying in court,[36] she will rarely be a good witness by traditional standards.[37] Both "developmentally and psychologically," a child is, at best, a less than ideal witness: she is frequently "unable to give consistent, spontaneous, and detailed reports of her sexual abuse."[38] In addition, the victim is likely to develop a "fear [for her] safety, fear of future sexual abuse, feelings of depression or anxiety, embarrassment at peers' knowledge of happenings, and a negative view of sex," all of which can handicap her "ability to give clear and consistent testimony."[39] The combination of these factors can result in a witness who appears frightened, anxious, and unwilling to testify.[40] The jury, in turn, may be less likely to find such a child credible.

Aside from the potential weakness of accusatory testimony and the absence of corroborative evidence, prosecutors of child sexual abuse cases also face the judicial system's longstanding mistrust of sexual abuse allegations.[41] For example, the 1970 edition of Professor Wigmore's treatise on evidence cautioned that "[n]o judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and

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34. *See, e.g.*, People v. Roscoe, 215 Cal. Rptr. 45, 49 (Ct. App. 1985) (recognizing a need for expert testimony regarding the credibility of victims as a class, but limiting that testimony to situations where a credibility gap exists between the defendant and the child-victim).

35. *See* Myers et al., *supra* note 19, at 92.

36. There are many reasons why children may be incapable of giving testimony. *See generally* John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 59-77 (1996) (discussing issues related to a child's memory, suggestibility, emotional capacity, and understanding of the legal system in the context of the child testifying at trial).

37. *See* Askowitz & Graham, *supra* note 19, at 2033.

38. Serrato, *supra* note 19, at 159.

39. State v. Snapp, 715 P.2d 939, 942 (Idaho 1986) (summarizing expert testimony about common emotional reactions).

40. *See* Serrato, *supra* note 19, at 159.

41. *See* Cohen, *supra* note 14, at 431.

testified to by a qualified physician."[42] This comment reflects the judicial attitude toward female sex abuse victims generally:[43] where the allegation is one of sexual abuse, there is an increased likelihood that the story was fabricated.[44] In light of this history of mistrust of female sex crime victims,[45] it is questionable whether the "playing field" for the prosecution of sex offenses committed against children is a level one at all.

II. THE USE OF SOCIAL SCIENCE TESTIMONY IN CHILD SEXUAL ABUSE CASES

The combination of the often confusing behavior exhibited by victims and the prejudices held by the general public can lead juries in child sexual abuse cases to doubt that the child has been truthful.[46] To prevent this occurrence, prosecutors frequently attempt to provide alternate explanations for the unusual behavior exhibited by alleged victims of child sexual abuse.[47] Prosecutors might offer expert

42. 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 460 (James H. Chadbourne ed., rev. ed. 1970).

43. *See* JOHN E.B. MYERS, CHILD WITNESS: LAW AND PRACTICE § 4.21, at 173-74 (1987); Myers et al., *supra* note 19, at 109; Serrato, *supra* note 19, at 174-75.

44. *See, e.g.*, People v. Russell, 443 P.2d 794, 802 (Cal. 1968) (approving the use of expert testimony that questions the credibility of the child-victim despite probable flaws in the expert's analysis).

45. *See* Janine Benedet, *Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law*, 3 MICH. J. GENDER & L. 125, 173 (1995) (discussing how Title VII's proscription of sex discrimination in employment includes a presumption that the plaintiff welcomed sexual harassment); David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1207 n.81 (1997) (explaining how distrust of women claiming to have been raped has been incorporated into certain evidentiary rules); Kathleen F. Ciarney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Reform Movement*, 69 ST. JOHN'S L. REV. 291, 291-93 (1995) (noting the common assumption that women make false accusations of rape and have duties to prevent rapes from occurring). *See generally* SUSAN ESTRICH, REAL RAPE 42-56 (1987) (describing the history of corroboration requirements and the relevancy of women's sexual history for rape charges).

46. *See, e.g.*, People v. Peterson, 537 N.W.2d 857, 870 (Mich. 1995) (taking judicial notice of the fact that there are "common misperceptions regarding the behavior of the victim on which a jury may draw an incorrect inference"); Steward v. State, 652 N.E.2d 490, 494 (Ind. 1995) (noting the weaknesses commonly found in victim testimony and the likely interpretation by the jury). *But see* Commonwealth v. Dunkle, 602 A.2d 830, 838 (Pa. 1992) (finding no need for an expert explanation of the victim's behavior).

47. *See Steward*, 652 N.E.2d at 496-99 (citing cases from 13 jurisdictions considering the admission of expert testimony offered to explain inconsistencies and recantations in child sexual abuse claims); Hutton v. State, 663 A.2d 1289, 1296 (Md. 1995) (citing cases from 14 jurisdictions which permit the admission of post-traumatic stress disorder evidence "as rebuttal evidence to refute defense contentions that the victim's behavior is inconsistent with that of a person who has been sexually abused or raped").

testimony from psychiatrists, psychologists, and social workers who have experience dealing with sexually abused children.[48] These experts can be useful to the prosecution because they can explain the possible reasons for the behavior of the alleged victim, thereby suggesting to the jury that the child's seemingly incongruous behavior may not, in fact, show that she is not telling the truth.[49] Ultimately, the testimony of a psychiatrist, psychologist, or social worker may be crucial in a prosecution because, regardless of the legitimacy of her story, the victim might never be believed by a jury without explanatory testimony from a social science expert.[50]

A. The Type of Social Science Testimony Offered

Prosecutors often rely upon child sexual abuse experts who have derived their expertise from a combination of scholarly training, personal interaction with abused and non-abused children, and a familiarity with the research and conclusions of similarly trained peers.[51] In general, these experts are likely to offer their testimony in order to provide a context in which a child's behavior may be rationally attributed to factors other than dishonesty.[52] To that end, experts often rely upon a "syndrome" framework to help explain a victim's behavior.[53]

In child sexual abuse prosecutions, social scientists frequently testify about the typical responses to sexual abuse.[54] This type of evi-

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48. *See, e.g.*, *Hutton*, 663 A.2d at 1291 (noting that the prosecution called a clinical social worker and a psychologist during its case in chief).

49. *See Steward*, 652 N.E.2d at 496 ("The reliability of syndrome evidence . . . is generally accepted for purposes of helping the jury to understand that a complainant's reactions are not atypical of a young sexual assault victim.").

50. *See infra* Part II.B (discussing the reasons which underlie the introduction of expert testimony in child sexual abuse prosecutions).

51. *See* Myers et al., *supra* note 19, at 11-12.

52. *See* Cohen, *supra* note 14, at 441.

53. Syndrome has been defined generally as "a group of signs and symptoms, that collectively indicate or characterize a disease, psychological disorder, or another abnormal condition." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1821 (3d ed. 1992). The seemingly insignificant disjunctive "indicate *or* characterize" is actually quite significant in the evidentiary context because, most frequently, in the field of child sexual abuse, the syndrome is used as a *therapeutic* tool, meaning it describes rather than indicates. *See* Myers et al., *supra* note 19, at 67. In this context, mental health professionals employ a syndrome to explain and understand a child's unusual behavior rather than to establish the fact of abuse. *See id.*

54. *See Steward*, 652 N.E.2d at 492-98 (summarizing the state-by-state treatment of expert testimony given in child sexual abuse prosecutions).

dence is commonly introduced by a social worker or psychologist who, certified as an expert, offers a "profile" of behavior that is frequently observed in sexually abused children.[55] This "profile" typically consists of a list of emotions, thoughts, and behaviors that include "'a sense of danger,' sleep disturbance, [a] decrease in occupational function (*i.e.* going to school), . . . decreased interest in events or activities in general, irritability, anger, poor concentration, hypervigilance and exaggerated startle response (*i.e.* jumping when someone walk[s] up behind her and touche[s] her)," as well as eating disorders, regression (such as bed wetting), and sexual behavior (such as excessive masturbation).[56] The list of reactions used in profile testimony is frequently accumulated as a result of the expert's own repeated interaction with abused children,[57] or borrowed from the scholarship of social scientists who have organized the symptoms into a "syndrome."[58]

Syndrome evidence in child sexual abuse cases often reflects the work of Dr. Roland J. Summit, who identified and defined Child Sexual Abuse Accommodation Syndrome (CSAAS).[59] In 1983, Dr. Summit formulated CSAAS as a tool to assist mental health professionals in dealing with abused children.[60] He offered the syndrome as a "'common language' for the professionals working to protect sexually abused children."[61] Dr. Summit's theory identifies five characteristics commonly observed in sexually abused children: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, con-

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55. *See, e.g.*, *id.* at 495 (listing a number of cases from other jurisdictions where such an introduction occurred); People v. Peterson, 537 N.W.2d 857, 860 (Mich. 1995) (describing the testimony of an expert who offered "the profile of a sexual abuse victim").

56. Toro v. State, 642 So. 2d 78, 79 (Fla. Dist. Ct. App. 1994).

57. *See, e.g.*, *Peterson*, 537 N.W.2d at 860 (describing an expert's testimony that her experience in treating about 100 children enabled her to verify the claims of an alleged victim).

58. *See, e.g.*, People v. Beckley, 456 N.W.2d 391, 394 (Mich. 1990) (permitting expert testimony that "the bulk of psychiatric literature suggests that victims of sexual abuse exhibit certain patterns of behavior"). Several studies discuss the symptoms of child sexual abuse. *See* Christine Adams-Tucker, *Proximate Effects of Child Sexual Abuse in Childhood: A Report on 28 Children*, 139 AM. J. PSYCHIATRY 1252, 1254 (1982); Marcellina Mian et al., *Review of 125 Children 6 Years of Age and Under Who Were Sexually Abused*, 10 CHILD ABUSE & NEGLECT 223, 226 (1986); Carl M. Rogers & Tremaine Terry, *Clinical Intervention with Boy Victims of Sexual Abuse*, *in* VICTIMS OF SEXUAL ABUSE AND AGGRESSION 91, 93-97 (Irving Stuart & Joanne G. Greer eds., 1984); Summit, *supra* note 24, at 181-88.

59. *See* Summit, *supra* note 24, at 181.

60. *See id.* at 191.

61. Myers et al., *supra* note 19, at 67 (describing Summit's accommodation syndrome).

flicted, and unconvincing disclosure; and (5) retraction.[62] These characteristics are behavioral coping mechanisms that emerge because the child is "fearful, tentative and confused about the nature of the continuing sexual experience and the outcome of disclosure."[63] CSAAS does not prove abuse because it assumes that the abuse occurred.[64] Nonetheless, CSAAS is helpful in identifying common responses to child sexual abuse and in establishing reasons for the behavior of child sexual abuse victims.[65]

Social scientists and courts also rely upon another syndrome label, Child Sexual Abuse Syndrome (CSAS). Unlike CSAAS, CSAS is not a theory attributable to a particular psychologist or psychological study. Rather, it is an amalgam of the personal experience of a given expert combined with what the expert knows of empirical studies and explanatory theories (such as Dr. Summit's CSAAS).[66] CSAS is merely the label some courts and experts apply to the generalized laundry list of behaviors which are commonly observed in abuse victims.[67] For example, in *Steward v. State*,[68] the Indiana Supreme Court explained, "[o]ur discussion today encompasses not only CSAAS but also similar descriptions of 'typical' behavior profiles or patterns, whether or not termed 'syndromes,' all of which we shall refer to

62. *See* Summit, *supra* note 24, at 181. The first two stages establish a child's potential to become a victim of sexual abuse. *See id.* Stage 1 is secrecy, an element inherent in the abusive adult-child relationship. *See id.* The offender makes it clear to the child that it would be bad and dangerous for the child to tell anyone about the sexual abuse. *See id.* Stage 2 is helplessness, the absence of power a child has in a relationship with a parent or trusted adult. *See id.* at 182-83.

Stages 3 through 5 occur as a result of abuse. *See id.* at 184-88. In Stage 3, the child, faced with continuing helpless victimization, learns that she must accept her situation if she is to survive it. *See id.* at 184. To facilitate this acceptance, the child may develop accommodation mechanisms including self-hate, multiple personalities, alternate states of consciousness, self-mutilation, promiscuous sexual activity, projection of rage, and substance abuse. *See id.* at 185.

Stage 4 is "delayed, confused and unconvincing disclosure" of the abuse. *Id.* at 186. Stage 5 is retraction of the accusation. *See id.* at 188. The child may reverse her accusation because the offender and other family members influence her to make family life return to normal. *See id.* "[T]his simple lie carries more credibility than the most explicit claims of incestuous entrapment . . . [and] confirms adult expectations that children cannot be trusted." *Id.*

63. *Id.* at 178.

64. *See* Myers et al., *supra* note 19, at 66-67.

65. *See id.*

66. *See supra* notes 59-65 and accompanying text (discussing CSAAS).

67. *See* Askowitz & Graham, *supra* note 19, at 2036 ("Under the guise of the child sexual abuse syndrome, courts often admit all expert testimony that is even minimally relevant to whether the child has been abused."); *id.* at 2068-69.

68. 652 N.E.2d 490 (Ind. 1995).

generally as 'child sexual abuse syndrome.'"[69] Pennsylvania's supreme court did the same when it lumped all testimony concerning the behavioral patterns of sexually abused children under the label CSAS.[70]

Post-traumatic stress disorder (PTSD)[71] is a syndrome that might be included in the profile offered by an expert in a child sexual abuse

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69. *Id.* at 493.

70. *See* Commonwealth v. Dunkle, 602 A.2d 830, 832 (Pa. 1992) (noting that Child Sexual Abuse Syndrome is also referred to as Sexually Abused Child Syndrome, Child Abuse Syndrome, and Child Sexual Abuse Accommodation Syndrome).

71. The American Psychiatric Association characterizes post-traumatic stress disorder as having the following diagnostic criteria:

> A. The person has been exposed to a traumatic event in which both the following were present:
>
> (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
>
> (2) the person's response involved intense fear, helplessness, or horror. . . .
>
> B. The traumatic event is persistently reexperienced in one (or more) of the following ways:
>
> (1) recurrent and intrusive distressing recollections of the event . . . .
>
> (2) recurrent distressing dreams of the event. . . .
>
> (3) acting or feeling as if the traumatic event were recurring . . . .
>
> (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
>
> (5) physiological reactivity on exposure to internal or external cues . . .
>
> C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
>
> (1) efforts to avoid thoughts, feelings, or conversations associated with the trauma
>
> (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
>
> (3) inability to recall an important aspect of the trauma
>
> (4) markedly diminished interest or participation in significant activities
>
> (5) feeling of detachment or estrangement from others
>
> (6) restricted range of affect . . .
>
> (7) sense of foreshortened future . . .
>
> D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
>
> (1) difficulty falling or staying asleep
>
> (2) irritability or outbursts of anger
>
> (3) difficulty concentrating
>
> (4) hypervigilance
>
> (5) exaggerated startle response
>
> E. Duration of disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

prosecution.[72] Because evidence of PTSD is admissible in other contexts,[73] prosecutors of child sexual abuse cases might attempt to capitalize on PTSD's legacy of admissibility by offering testimony which refers explicitly to PTSD.[74] In such a case, the expert would explain the elements of the disorder and then match those elements to a child's behavior.[75]

Alternatively, the expert can implicitly incorporate PTSD into the profile—without attaching the specific label of PTSD—by comparing the complaining child's behavior with that of known child abuse victims.[76] PTSD, unlike CSAAS, neither presumes nor concludes that the source of any child's behavior is sexual abuse.[77] Rather, the syndrome is "merely a therapeutic tool" that "assumes the presence of a stressor and then attaches a diagnosis to the child's reactions to it."[78] Furthermore, because PTSD may appear as a result of virtually any traumatic event, the syndrome does not give any emphasis to particularly sexual forms of acting out, which makes the symptomatic behavior more easily attributable to alternative stressors.[79]

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV 427-29 (4th ed. 1994).

72. *See, e.g.*, Hutton v. State, 663 A.2d 1289, 1301 (Md. 1995) (admitting PTSD for context only); State v. Alberico, 861 P.2d 192, 213 (N.M. 1993) (admitting PTSD evidence); State v. Henry, 495 S.E.2d 463, 469 (S.C. Ct. App. 1997) (admitting PTSD diagnosis); *see also* Askowitz & Graham, *supra* note 19, at 2046 ("In many child sexual abuse prosecutions, prosecutors offer expert PTSD-based testimony that the child complainant's behavior is consistent with being sexually abused.").

73. For example, PTSD is often admitted in rape prosecutions to rebut a defense contention of consent. *See, e.g.*, State v. Marks, 647 P.2d 1292, 1299 (Kan. 1992) ("An examination of the [scientific] literature clearly demonstrates that the so-called 'rape trauma syndrome' [a subset of PTSD] is generally accepted to be a common reaction to sexual assault.").

74. *See, e.g.*, *Hutton*, 663 A.2d at 1294-95 (noting the prosecution's contention that the PTSD evidence should be admissible because "some courts have found the evidence scientifically reliable").

75. *See, e.g.*, *id.* at 1292.

76. *See* Askowitz & Graham, *supra* note 19, at 2046.

77. *See Hutton*, 663 A.2d at 1295 (noting that "causes other than sexual abuse may trigger PTSD").

78. Askowitz & Graham, *supra* note 19, at 2046 (footnote omitted).

79. *See id.* at 2046.

B. The Underlying Purpose of Expert Testimony

Behavioral science testimony, like that described in Section II.A, provides a prosecutor with an invaluable opportunity to fortify the typically weak testimony of the victim. Indeed, much of what has been learned about children's reactions to abuse by behavioral scientists who work with abuse victims may run counter to the intuition of the average juror.[80] The introduction of the expertise of psychiatrists, psychologists, and social workers, therefore, provides a means of correcting the unfounded prejudices that may exist in the minds of some jurors. But behavioral science evidence can go further than merely correcting erroneous beliefs; it may provide a context in which a victim's behavior can be rationalized and understood. Perhaps most importantly, the knowledge of a behavioral scientist can be used to rebut defense assertions that delay or inconsistencies in a victim's story are indicia of fabrication.[81]

Because the defense may try to capitalize on juror misperceptions, a direct attack on the credibility of the accusing child creates a ripe environment for a prosecutor to introduce rebuttal testimony from a behavioral scientist. Most jurisdictions permit at least some form of rebuttal testimony.[82] However, a prosecutor may not want to wait for an attack on the victim's credibility before introducing behavioral science testimony. The prosecutor may attempt to present behavioral science evidence as "anticipatory rebuttal" to the expected attack.[83] Anticipatory rebuttal evidence, like rebuttal evi-

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80. *See* Myers et al., *supra* note 19, at 89.

81. *See id.*

82. *See* Steward v. State, 652 N.E.2d 490, 496 (Ind. 1995) (listing cases in numerous jurisdictions which have allowed expert testimony to rebut claims by the defense that the child's behavior is inconsistent with the claim of abuse).

83. For example, Michigan's courts have adopted a complex and tenuous rule which draws a fine line between evidence which may be offered as part of the prosecution's case in chief (anticipatory rebuttal) and evidence which is limited to rebuttal. In *People v. Peterson*, 537 N.W. 2d 857 (Mich. 1995), the Michigan Supreme Court stated that the prosecution may present expert testimony in its case in chief "to describe certain behavioral characteristics recognizable in victims of child sexual abuse . . . to generally explain the common postincident behavior of children who are victims of sexual abuse." *Id.* at 868. Furthermore, the prosecutor may comment on the evidence presented so as to "argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id.* However, the expert may not "testify that the particular child-victim's behavior is consistent with that of a sexually abused child" unless the defendant "raises the issue of the particular child-victim's postincident behavior or attacks the child's credibility." *Id.*

California has adopted a rule which permits all admissible expert testimony to be presented as anticipatory rebuttal:

dence, may correct a jury's potential misconceptions as to the expected behavior of an abuse victim or the ability of a child to testify.[84] Even absent any attack on credibility, a behavioral science expert might rely upon a "profile" or "syndrome" allowing a jury to compare the behavior exhibited by the victim with the behavior of other victims of child sexual abuse.[85]

The introduction of social science expert testimony can present a few problems, though. While expert testimony that is offered either to provide a context for the complainant's behavior or to rebut attacks on her credibility can be appropriate, there is a danger that this type of testimony will be inappropriately offered as substantive proof that the alleged abuse occurred. When an expert purports to know whether abuse has or has not occurred, the expert is offering substantive evidence of abuse. Because "it is not possible [for an expert] to 'know' whether a child was abused,"[86] many states have properly refused to admit behavioral science evidence as substantive proof of abuse.[87] This exclusion is proper because "sexual abuse is an event, not a diagnosable disorder."[88]

Because "no symptom or set of symptoms is conclusive proof of sexual abuse," no social science expert can certify that a child's accusations of sexual abuse are true.[89] Thus, testimony relating to the "truth" of the complainant's allegations may also be objectionable because this type of testimony comes too close to predicting or

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> Denying the prosecution the opportunity to introduce [syndrome] testimony as part of its case-in-chief rather than in rebuttal could lead to absurd results . . . . It would be natural for a jury to wonder why the molestation was not immediately reported if it had really occurred. In this case, the jury could further ask why [the complainant] went back to appellant's home a second time after the first molestation. If it were a requirement of admissibility for the defense to identify and focus on the paradoxical behavior, the defense would simply wait until closing argument before accentuating the jurors' misconceptions regarding the behavior. To eliminate the potential for such results, the prosecution should be permitted to introduce properly limited credibility evidence if the issue of a specific misconception is suggested by the evidence.

People v. Patino, 32 Cal. Rptr. 2d 345, 349 (Ct. App. 1994).

84. *See* Myers et al., *supra* note 19, at 89.

85. *See supra* Part II.A (describing possible "profiles" or "syndromes").

86. Myers et al., *supra* note 19, at 70. There is no certain means by which one may make a determination of abuse. Rather "expert testimony on whether abuse occurred rests on assessment of a wide range of information leading to a clinical judgment that sexual abuse is the *most likely* explanation in particular cases." *Id.* (emphasis added).

87. *See Steward*, 652 N.E.2d at 495 ("A significant number of state courts have recognized as a misuse of the syndrome the admission of child sexual abuse syndrome testimony as substantive proof that abuse has been detected in a particular case.").

88. Myers et al., *supra* note 19, at 72.

89. *Id.* at 61.

evaluating the likelihood that the child is telling the truth.[90] Because there are no recognized experts in veracity,[91] any attempt by an expert to quantify the likelihood that a witness is telling the truth would infringe upon the jury's autonomy in evaluating witness honesty.[92]

There is also a danger that a jury may over-value the testimony of the expert and thereby convict the defendant largely because of the expert's generalized testimony about common reactions to abuse. The danger here is that the jury may be improperly influenced by an expert's testimony about common reactions of victimized children and that, in the absence of sufficient testimonial or physical evidence of abuse, the jury may nevertheless conclude that the abuse occurred. The problem of over-reliance can be overcome by "sterilizing" the testimony by limiting the expert's testimony to an objective, rather than subjective, discussion that gives context to the complainant's testimony and to the behavior of abused children as a class.[93]

At its core, the determination that a given use of behavioral science expert testimony is permissible or impermissible can be reduced to the propriety of the use for which the testimony is offered. But even more, the question of whether behavioral science expert testimony is appropriate depends upon the court's application of the rules of evidence which govern that particular jurisdiction.

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90. *See id.* at 121 (noting that a "majority of courts reject expert testimony which comments directly on the credibility of individual children").

91. *See* State v. Moran, 728 P.2d 248, 252 (Ariz. 1986) ("An expert's belief in a witness's credibility 'has never been a permissible subject of expert opinion . . . .'" (quoting MORRIS K. UDALL & JOSEPH M. LIVERMORE, 1 LAW OF EVIDENCE § 22, at 30-31 (2d ed. 1982)); Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 506 (1996) ("[E]xperts cannot yet determine with any certainty who is telling the truth based on demeanor . . . .").

92. Despite the prohibition on expert testimony relating to veracity, prosecutors may still attempt to encroach on the jury's role by introducing statistical evidence which effectively quantifies the likelihood that a child is lying or telling the truth. *See, e.g.*, Wheat v. State, 527 A.2d 269, 271 (Del. 1987). In *Wheat*, the trial court admitted expert testimony that "between thirty percent and forty percent of children recant, alter, or otherwise minimize their original allegations of sexual abuse, but that fewer than five percent recant and maintain the altered statement," and that it is "very uncommon" for a victim's initial account to include all instances and details of abuse. *Id.* at 271. While confirming the validity of the expertise, and recognizing that there is a need to admit expert testimony to explain delays and recantation, the Delaware Supreme Court reversed, refusing to admit the statistical evidence because "the expert was permitted to establish a mathematical standard by which the trier of fact could evaluate the complainant's trial testimony." *Id.* at 274.

93. *See* Myers et al., *supra* note 19, at 91.

III. EXPERT TESTIMONY AND THE RULES OF EVIDENCE

Courts have struggled with the admissibility of expert testimony for many years.[94] The problem stems from a longstanding skepticism and mistrust of expert testimony.[95] In addition, the fact that many types of expert testimony may be offered makes it difficult to establish a single standard of admissibility which treats all forms of expertise fairly.[96] The admissibility of such testimony is therefore governed not only by the general rules of evidence regarding relevancy, probativity, and prejudice, but also by specific rules addressing special issues related to the use of expert testimony.[97] Because of our federal system, the actual rules of evidence vary between federal courts and state courts, and even among the states. Nevertheless, nearly every state has adopted rules of evidence that mirror the framework and general approach of the Federal Rules of Evidence.[98]

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94. *See* David L. Faigmen et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1800 (1994) ("Since the earliest days of the use of expert witnesses, judges (and more recently legislatures) have struggled to design the juridical intersection where law and science cross paths." (footnote omitted)).

95. *See id.* (noting that courts have not met with much success in devising a proper rule that would end the struggle over the admissibility of expert testimony); Lee M. Friedman, *Expert Testimony, Its Abuse and Reformation*, 19 YALE L.J. 247, 247 (1910) ("[T]here is a constant complaining and mistrust on the part of judges, juries and lawyers of the expert witness.").

96. For example, the testimony of a physicist or chemist explaining how or why a spark plug works is far different from the testimony of an auto mechanic regarding normal and abnormal wear on a spark-plug. *See* Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1436 n.6 (11th Cir. 1997), *cert. granted sub nom.* Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998). [A discussion of the Supreme Court's recent disposition of this case has been added to Part III.D.]

97. *See, e.g.*, FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

98. The Uniform Rules of Evidence are almost identical to the Federal Rules of Evidence. *See* FEDERAL RULES OF EVIDENCE app. I, at 277 (West 1998). The states that have adopted the Uniform Rules of Evidence, in whole or in part, include: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See id.* at 278.

A. The General Tests of Relevancy, Probativity, and Prejudice

The Federal Rules of Evidence, like every set of evidentiary rules, attempt to provide a framework in which fairness and efficiency dictate what evidence may be used in the truth-seeking process of litigation.[99] Federal Rule 402 provides for the admission of all relevant evidence[100] as a general matter.[101] Federal Rule 403 tempers the openness of Rule 402's relevancy requirement by excluding relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice."[102]

B. The Rule for Expert Testimony

Rule 403 also addresses the concern that the jury will be misled or distracted by confusing or duplicative evidence.[103] The Rule's concern with possible prejudice encompasses the fear that the jury will

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99. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

100. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

101. *See* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

102. FED. R. EVID. 403. Rule 403 recognizes that evidence which is relevant may nonetheless possess certain risks and disadvantages which justify its exclusion. *See* 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 403.1, at 247 (4th ed. 1996). However, exclusion of relevant evidence under Rule 403 is disfavored and should be "employed sparingly as it is an extraordinary remedy." *Id.* at 248. Furthermore, the objecting party carries the burden of showing the likelihood that the prejudice caused by the evidence will outweigh its probative value. *See id.* at 248-49. When determining the admissibility of evidence under Rule 403, the judge should consider, among other factors, the importance of the fact for which the evidence is being offered, whether the fact for which the evidence is being offered is in dispute, and the potential effectiveness of a limiting jury instruction pursuant to Rule 105. *See id.* at 249-51. Rule 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105.

103. *See* FED. R. EVID. 403 (providing that relevant evidence may also be excluded if its probative value is substantially outweighed by "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); 1 GRAHAM, *supra* note 102, § 403.1, at 259 (suggesting that "the concept of misleading the jury refers primarily to the possibility of the jury overvaluing the probative value of a particular item of evidence for any reason other than the emotional reaction associated with unfair prejudice").

overvalue certain kinds of evidence.[104] When testimony is presented as specialized or scientific expert testimony, the potential for overvaluation is heightened. Whether it is because of "the aura of science" or "the prestige of the expert," the concern is that the jury will give too much weight to the expert testimony even though the underlying scientific basis for that testimony is only moderately helpful.[105] Rule 702 reiterates the balancing inquiry of Rule 403 and requires the expert's evidence to be helpful to the trier of fact.[106] Implicit in Rule 702's helpfulness requirement is the understanding that where the probative value of the evidence is outweighed by its risk of prejudice, the evidence does not assist the trier of fact. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[107]

The United States Supreme Court's seminal interpretation of Rule 702 can be found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[108] In *Daubert*, the Court reaffirmed the role of the trial judge as a "gatekeeper" who is ultimately responsible for preventing the jury from receiving expert testimony based upon "[c]onjectures that are probably wrong."[109] To guide the trial court judge in her gatekeeping duties, the Court attempted to give meaning to the words "scientific" and "knowledge" in Rule 702.[110] Noting that "'scientific' implies a grounding in the methods and procedures of science," and that "'knowledge' connotes more than subjective belief or unsupported speculation," the Court defined four primary inquiries which the trial judge should make to determine whether the expert based his testi-

104. *See* 1 GRAHAM, *supra* note 102, § 403.1, at 259 ("To illustrate, evidence of the results of a lie detector, even where an attempt is made to explain fully the significance of the results, is likely to be overvalued by the trier of fact.").

105. *Id.*; *see also* Commonwealth v. Garcia, 588 A.2d 951, 955 (Pa. Super. Ct. 1991) ("Jurors are human and may be unduly impressed by an expert, his credentials, and ultimately his opinion, 'even though, upon reflection, they would realize that in the particular field under discussion they are as much at home as the expert.'" (citation omitted)).

106. *See* FED. R. EVID. 702.

107. *Id.*

108. 509 U.S. 579 (1993).

109. *Id.* at 597.

110. *See id.* at 589-90. The Court offered no guidance regarding how to evaluate the phrase "technical or other specialized knowledge" found in Rule 702. *See id.* at 590 n.8.

mony on "scientific" knowledge.[111] These inquiries are: (1) whether the scientific theory has been tested; (2) whether it has been subject to peer review and publication; (3) its known potential rate of error; and (4) whether it is generally accepted by the relevant scientific community.[112] Since the Court's decision in *Daubert*, the Rule 702 inquiry applied by lower courts has evolved into "a difficult two-part analysis"[113] that involves an inquiry into the scientific knowledge and method underlying the testimony, as well as a basic inquiry of relevance.[114]

Before the federal courts adopted the current *Daubert* approach to expert testimony, they relied heavily on an influential federal court of appeals decision: *United States v. Frye*.[115] In *Frye*, the court articulated a common law standard different from the Federal Rules-based standard that was later adopted by the Supreme Court in *Daubert*. The "*Frye* test," as it became known, reflects the distress felt by the court over the admission of novel or unproven scientific evidence:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[116]

Though Rule 702 and *Daubert* have since replaced *Frye* as the appropriate standard for expert testimony in federal courts, the *Frye* test has survived in many state courts.[117] Some other state courts, though

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111. *Id.*

112. *See id.* at 593-94.

113. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995).

114. *See id.*

115. 293 F. 1013 (D.C. Cir. 1923).

116. *Id.* at 1014.

117. *See, e.g.*, Hadden v. State, 690 So. 2d 573, 577 (Fla. 1997) (reaffirming the use of the *Frye* test as the standard for admitting novel scientific evidence); People v. White, 645 N.Y.S.2d 662, 564 (App. Div. 1996) (holding that the *Frye* test is still applicable in New York, but that it was not necessary in the particular case because the expert testimony was offered to explain symptoms of child sexual abuse generally and not to prove actual abuse); State v. Zeiler, Nos. 33023-3-1, 37181-9-1, 1997 WL 88960, at *1 (Wash. Ct. App. Mar. 3, 1997) (applying *Frye* to sophisticated or technical scientific matters). It seems likely that the *Frye* rule persists largely because it was the "dominant standard for determining the admissibility of novel scientific evidence" for at least 70 years. *Daubert*, 509 U.S. at 585. The rule established in *Frye* is attractive

not bound to do so, have chosen to adopt the standard articulated in *Daubert*.[118] Thus, although the *text* of the various state rules may be nearly identical, the state *approaches* to expert testimony vary widely.

C. The Different "Sciences" and Expert Testimony

Most expert testimony is based on the scientific method. Increasingly, however, experts trained in social science are being used in American courtrooms, and these witnesses do not uniformly rely upon the scientific method as the basis for their testimony.[119] A curious problem arises, then, when expert testimony is not grounded in the scientific method. The problem arises out of the fact that both the *Frye* and *Daubert* approaches to expert testimony are based upon scientific method principles, principles that are not always compatible with social science.

The scientific method has its roots in Newtonian methodology, named for the specific experimental method used by Sir Isaac Newton to derive his laws of mechanics.[120] Newton's scientific method requires a scientist to form a hypothesis and to engage in experimentation or observation in order to affirm or reject the validity of the hypothesis.[121] Newton's systemization of the experimental technique and his standardization of terminology such as "hypothesis" has caused his work to be regarded as "'the model of scientific' research"[122] or, more simply, the scientific method. As a result, some judges are only willing to recognize knowledge as "scientific" if it derives its "validity" from objective techniques.[123] Objectivity, as under-

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because its requirement of "general acceptance" appears to establish a clear and easily followed bright-line rule. However, application of this standard is far from simple. For example, there is no easy way to determine what constitutes "scientific" evidence. *See* Myers et al., *supra* note 19, at 24.

118. *See, e.g.*, State v. Nemeth, 694 N.E.2d 1332, 1339 (Ohio 1998) (evaluating reliability using the four factors designated by *Daubert*); Kelly v. State, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (rejecting *Frye* and applying a standard similar to that later articulated in *Daubert*).

119. *See, e.g.*, United States v. Bighead, 128 F.3d 1329, 1330 (9th Cir. 1997) (treating the testimony of a rebuttal expert in child sexual abuse as specialized knowledge derived from experience, rather than as scientific knowledge).

120. *See* Edward J. Imwinkelried, *The Next Step After* Daubert*: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2276 (1994).

121. *See id.*

122. *Id.* at 2276-77 (quoting 5 THE ENCYCLOPEDIA OF PHILOSOPHY 490-91 (Paul Edwards ed., 1967)).

123. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993).

stood by these judges, requires testing the hypothesis under controlled conditions so that other scientists may replicate the experiments and thereby test the methodology and ascertain a rate of error.[124] The reason for requiring replicability can largely be traced to the concern that the opposing party, through its own expert, should be able to "both identify any obvious errors and replicate the experiment to expose latent deficiencies,"[125] thus reducing the likelihood that false results will be reported and a false hypothesis accepted as proven.

Limiting the definition of "science" to the Newtonian or experimental methodology implicitly creates a second, separate field of knowledge composed of the information gained through observation in the absence of controlled experimentation.[126] Though the conclusions of this other science, or "non-science" as one court has termed it,[127] are not inherently less valid than those of Newtonian science, its basis in subjective observation defies the systematic testing and replicability requirements of Newtonian science.[128] For example, an experienced auto mechanic may possess an abundance of knowledge regarding the markings of normal wear and tear on spark plugs.[129] This knowledge and understanding probably derives from the mechanic's years of experience and observation and not from the practice of testing spark plugs in a laboratory.[130] The mechanic may have no understanding of the general Newtonian principles of physics or chemistry and thus no "scientific" methodology from which he draws his

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124. *See* Imwinkelried, *supra* note 120, at 2280 (noting that if the reliability of scientific research is in question, a second scientist can duplicate the experiment, creating a double-check process usually absent in nonscientific testimony).

125. *Id.* (footnote omitted).

126. *Cf.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1993) (defining "scientific method" as a method of research requiring "the recognition and formulation of a problem, the collection of data through *observation* and if possible experiment, the formulation of hypotheses, and the testing and confirmation of the hypotheses formulated" (emphasis added)).

127. "Non-science" is the term used by the court in *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (11th Cir. 1997), *cert. granted sub nom.* Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998). [A discussion of the Supreme Court's recent disposition of this case has been added to Part III.D.]

128. *See* Myers et al., *supra* note 19, at 20 (observing that judges are more comfortable with medical evidence than behavioral science evidence because medical evidence is based on data verifiable by objective techniques).

129. *See Carmichael*, 131 F.3d at 1436 n.6 (drawing a detailed analogy between a mechanic's analysis of spark plug burns and a tire expert's evaluation of an allegedly defective tire).

130. *See id.*

conclusions, but this expert's experience-based conclusions may be valid nonetheless.[131]

In the same way that an auto mechanic's experience with spark plugs may qualify the mechanic to provide information about wear and tear, the clinical or field experiences of a behavioral scientist, such as a psychiatrist, psychologist, or even a certified social worker, may be useful to a jury in understanding human behavior. Such a behavioral scientist may observe the workings of a child's mind in an attempt to ascertain what kind of damage is present, where it lies, and how it may be repaired.[132]

Because experience-based knowledge is neither created nor tested according to the traditional Newtonian scientific method,[133] it does not easily conform to the standards of *Daubert* or *Frye*,[134] which were created according to a Newtonian science paradigm. Despite the differences in the nature of Newtonian and social science and the incompatibility of the Newtonian standards of both *Daubert* and *Frye* with social science, many courts continue to apply the Newtonian paradigm to social science expert testimony.[135] Not surprisingly, when social science-based testimony is subjected to the *Frye* test or to the *Daubert* factors, that testimony fails either standard.[136] This is so because, according to the Newtonian method, a sound theory will be testable and should show a rate of error.[137] The results of repeated tests and the rate of error for those tests will determine whether the theory is worthy of publication and whether others in the community are willing to accept the theory as the likely truth.[138] Because human behavior is so difficult to replicate, behavioral science theory is fre-

131. *See id.*

132. *See generally* HENRY GLEITMAN, PSYCHOLOGY 772-78 (4th ed. 1995) (describing how psychotherapy may be useful in understanding human behavior).

133. Social scientists, like "hard" scientists, do observe and record patterns of behavior; the difference is the lack of control over all of the variables. *See* JOHN J. SHAUGHNESSY & EUGENE B. ZECHMEISTER, RESEARCH METHODS IN PSYCHOLOGY 10-11 (4th ed. 1997). Certain kinds of social science experiments may be impossible to replicate identically because no two individuals, nor their reactions, are exactly alike. *See id.*

134. *See supra* notes 108-18 and accompanying text (discussing the *Frye* and *Daubert* standards for the admissibility of expert testimony).

135. *See infra* Part IV.A (analyzing the treatment of social science testimony in child sexual abuse prosecutions in Pennsylvania, Kentucky, and South Dakota).

136. *See infra* Part IV.A (discussing the rejection of valid social science expert testimony in child sexual abuse prosecutions in Pennsylvania and Kentucky as well as the South Dakota Supreme Court's inappropriate manipulation of the *Frye* test in order to admit such testimony).

137. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-94 (1993).

138. *See id.*

quently nontestable,[139] making it impossible to calculate rates of error. Furthermore, social science methodology may permit the coexistence of numerous contradictory theories without a requirement that the reliability of one disproves the reliability of another.[140]

The tendency of courts to analyze most expert testimony under Rule 702's "scientific" knowledge provision, and therefore apply some version of *Frye* or *Daubert*, has resulted in a notable failure to treat the expert testimony of behavioral scientists as either "technical" or "specialized" knowledge under the Rule and its state counterparts.[141] Admittedly, many social science conclusions are based upon hypotheses that may be tested and often refuted but that can never be absolutely "proven" through the systematic accumulation of evidence in support of a particular proposition. Social science theories relied upon by behavioral scientists can only suggest the *most logical* conclusion to be drawn from the data.[142] Thus, using the "technical" and "specialized" knowledge provisions of Rule 702 to admit such evidence would be more appropriate because the knowledge is gained from experience and observation rather than from the distinctly Newtonian technique of hypothesis and testing.

D. Recognition of the Problem: the Eleventh Circuit

A federal court of appeals recently recognized the problem of analyzing experience-based expertise within the *Daubert* framework. In *Carmichael v. Samyang Tire, Inc.*,[143] the Court of Appeals for the Eleventh Circuit acknowledged that "'[t]he distinction between scien-

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139. *See* G.C. HELMSTADLER, RESEARCH CONCEPTS IN HUMAN BEHAVIOR 15-16 (1970). Indeed, the only truly "scientific" method of testing whether, for example, a "child abuse syndrome" actually predicts the occurrence of sexual abuse would be to subject children to abuse and compare their reactions to a control group of non-abused children. Obviously such a study would be unethical.

140. For example, multiple theories are accepted as valid in modern psychology, including the Freudian, cognitive, behavioral, and organic theories. *See generally* GLEITMAN, *supra* note 132, at 764-96 (discussing the general premise behind each theory).

141. Recall, "technical" and "specialized" are the other two areas of expertise provided for by FED. R. EVID. 702.

142. *See, e.g.*, Myers et al., *supra* note 19, at 70 (noting that because "it is not possible to 'know' whether a child was abused . . . expert testimony on whether abuse occurred rests on assessment of a wide range of information leading to a clinical judgment that sexual abuse is the most likely explanation in particular cases").

143. 131 F.3d 1433 (11th Cir. 1997), *cert. granted sub nom.* Kumho Tire Co. v. Carmichael, 118 S. Ct. 2339 (1998). [For a discussion of the Supreme Court's recent disposition of this case, see *infra* notes 150-57 and accompanying text.]

tific and non-scientific expert testimony is a critical one.'"[144] Holding that the testimony of an expert in car "tire failure" did not constitute "scientific" testimony under Rule 702, the court identified a separate category of "non-scientific" expert testimony.[145] The court observed that the expert made "no pretense of basing his opinion on any scientific theory" but instead "rest[ed] his opinion on his *experience* in analyzing failed tires."[146] This court's distinction between Newtonian science and experiential expertise is significant not because it was a novel distinction,[147] but because the court directly challenged the ap-

144. *Id.* at 1435 (quoting Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994)).

145. *Id.* at 1436.

146. *Id.* (emphasis added).

147. Other federal courts have recognized the problem with applying *Daubert* to behavioral science testimony. *See, e.g.*, United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997) (holding that an expert's testimony regarding the *modus operandi* of drug traffickers was based on specialized, but not scientific, knowledge); Berry v. City of Detroit, 25 F.3d 1342, 1349-50 (6th Cir. 1994) (noting that *Daubert* principles regarding the admission of scientific evidence do not apply to a deputy sheriff's nonscientific testimony concerning a police shooting). In fact, the United States Court of Appeals for the Ninth Circuit has even ruled on the issue in the context of child sexual abuse prosecutions. *See* United States v. Bighead, 128 F.3d 1329, 1330 (9th Cir. 1997) (per curiam) (stating that "Daubert's tests for the admissibility of expert scientific testimony do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory" in a child sexual abuse prosecution). However, because *Bighead* is a federal case, its influence is likely to be limited in child sexual abuse prosecutions, which arise most frequently in state courts. In a *per curiam* opinion in *Bighead*, the Ninth Circuit held that the admission of expert testimony from a rebuttal witness was proper where the witness had been called after "the victim's ability to recall and to recount the incidents of sexual abuse vigorously had been challenged on cross examination." *Id.* The court held that the testimony was proper because the expert:

> did not testify about the facts of this case, or about the particular victim, whom she never examined. Rather, she testified to about "delayed disclosure" and "script memory" which are typical characteristics she has observed among the more than 1300 persons she has interviewed who say they are victims of child abuse.

Id. According to the court, the expert did not present "scientific testimony," so her testimony did not need to be evaluated under *Daubert*. *See id.* at 1330-31. The court held instead that because the expert's testimony was based on her own observations "from many years experience interviewing many, many persons," the expert had presented "specialized knowledge, not scientific knowledge." *Id.* (citing United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997). The court also rejected the contention that the testimony was improper. The court stated that, although "the expert referred in passing to 'studies, literature and specific syndromes' . . . , [h]er opinion was based on her own observations." *Id.* (citation omitted). Lastly, the Ninth Circuit justified its holding with the assertion that the expert testimony was highly probative and did not constitute "improper buttressing" of the victim's testimony. *Id.* at 1331. Though *Bighead* deals precisely with the problem presented by this Note, it probably will not be of much use in combating the problem addressed by this Note. The relatively recent nature of the opinion, its brevity (it was *per curiam*), and its failure to attract the attention of the Supreme Court are likely to prevent the case from having much influence in state courts.

plicability of the *Daubert* criteria to "nonscientific" expertise.[148] Though the Eleventh Circuit did not purport to create a new standard for "non-scientific" expert testimony that would apply in lieu of *Daubert*, the Supreme Court's grant of certiorari presents the possibility that the Court will devise a more appropriate standard by which federal courts, and possibly some state courts, can analyze such knowledge.[149]

[Just prior to publication, the Supreme Court reversed the ruling of the Eleventh Circuit.[150] The Court rejected the Eleventh Circuit's distinction between "scientific" and "non-scientific" expert testimony[151] and refused to create a new standard of admissibility for non-

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148. *Cf.* United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996) (holding that for the panel to rule on the issue of admissibility, it had to "be confident that the district court applied the *Daubert* framework"); Sorenson v. Robert B. Miller & Assocs., Inc., Nos. 95-5085, 95-5086, 1996 WL 515351, at *2 (6th Cir. Sept. 10, 1996) (noting only that the difference between scientific expert testimony and other forms of expert testimony "is sometimes overlooked" when courts rely on *Daubert*).

The inquiry advocated by the Eleventh Circuit echoes the approach Michigan adopted in *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990). *See infra* notes 211-20 and accompanying text (discussing the holding in *Beckley*). Generally, that approach sees the judge's gatekeeping role as limited to insisting that evidence "assist the trier" of fact and be more probative than prejudicial. *See Beckley*, 456 N.W.2d at 399.

149. Although the *Carmichael* court recognized the inappositeness of Newtonian-based gatekeeping standards to experience-based expert testimony, it did not entirely reject the concept of judicial "gatekeeping" of expert testimony. *See Carmichael*, 131 F.3d at 1436-37 (stating that on remand the district court should still determine the reliability and relevancy of the proffered expert testimony). In addition to reasserting the role of judicial gatekeeping, the *Carmichael* court also reasserted the role of the adversarial process in keeping unreliable evidence away from the jury:

> Although the Court's analysis in *Daubert* may suggest reliability issues for district courts to consider as they determine whether proffered evidence is sufficiently reliable for admission under Rule 702, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'"

Id. at 1435 (citing United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir.1996) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993))). By declining to propose either a *Frye*-like rule by which all expert testimony is to be tested or a *Daubert*-like list of evaluative factors according to which the reliability of nonscientific expert testimony must be tested, the Eleventh Circuit seems to have retreated altogether from the idea of a "test" for the validity of the evidence and has focused, instead, upon the underlying goal of Rule 702. *See id.* at 1435-37.

150. *See* Kumho Tire Co. v. Carmichael, No. 97-1709, 1999 WL 152455, at *15 (U.S. Mar. 23, 1999).

151. *Compare id.* at *8 (stating that the language of FED. R. EVID. 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge"), *with Carmichael*, 131 F.3d at 1435 (drawing a distinction between "scientific" and "non-

Newtonian expertise.[152] Instead, the Court held that "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[153] Relying upon its previous holding in *Daubert*, the Court reiterated that a trial court "may," rather than *must*, rely upon one or more of the specific factors "mentioned" in the *Daubert* decision.[154] And though it refused to distinguish "technical" and "other specialized" knowledge from "scientific" knowledge, the Court reminded the district court that it has "the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."[155]

The Court's failure to recommend or create any additional factors which might be better suited for evaluating the reliability of non-Newtonian knowledge[156] does not, in itself, sound the death knell for the development of a more appropriate admissibility standard for expertise based on non-Newtonian knowledge. The Court has reaffirmed the wide latitude federal district courts have to develop their own standards for admitting expert testimony. Moreover, state courts, where child sexual abuse prosecutions arise most frequently, remain free to adopt their own approaches. Rather than subjecting all expert testimony to Newtonian-based analysis, state courts may draw from the differing approaches of the Eleventh Circuit in *Carmichael* and the Supreme Court in *Kumho Tire*. Indeed, even those state courts that have heretofore categorically applied the *Daubert* factors to all expert testimony might reconsider their approaches to social science expert testimony in light of Justice Scalia's reminder that the *Daubert* factors, with their Newtonian underpinnings, are "not holy writ."[157]]

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scientific" expert testimony).

152. *See Kumho Tire Co.*, 1999 WL 152455, at *9 (concluding that the general principles already set out in *Daubert* apply to all expert testimony).

153. *Id.* at *4 (quoting FED. R. EVID. 702). The Court did concede that "the Court in *Daubert* referred only to scientific knowledge." *Id.* at *8 (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 n.8 (1993)).

154. *Id.* at *4 (noting that "the test of reliability [in *Daubert*] is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case").

155. *Id.* at *4.

156. Instead of defining any new factors to be considered by lower courts, the Court emphasized that the *Daubert* factors were meant to be "helpful, not definitive" and therefore "do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Id.* at *10.

157. *Id.* at *15 (Scalia, J., concurring).

IV. STATE PARADIGMS IN ACTION

The judiciary's failure to consistently recognize the fundamental differences between Newtonian science and social science, combined with its further reluctance to consider the standards by which nonscientific, experience-based expert testimony should be judged, has led to inconsistent treatment of such evidence in different jurisdictions.[158] Some states, like many federal courts, have attempted to pigeonhole behavioral science into the category of "scientific" knowledge in order to use the established *Daubert* or *Frye* body of law as a test for admissibility.[159] Behavioral science offered in child sexual abuse prosecutions frequently is treated as if it were Newtonian science.[160] As Section III.C explains, however, such treatment is inappropriate.[161]

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158. *See* Carmichael v. Samyang Tire Inc., 131 F.3d 1433, 1435 (11th Cir. 1997) ("[A] scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion."); United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996) ("Social science in general, and psychological evidence in particular, have posed both analytical and practical difficulties for courts attempting to apply Rule 702 and *Daubert*."); Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994) ("The courts have had a difficult time in appropriately cabining the opinion testimony of 'scientific' experts. . . . It would appear obvious, however, that evidentiary problems are exacerbated when courts must deal with the even more elusive concept of non-scientific expert testimony."); Sorenson v. Robert B. Miller & Assocs., Nos. 95-5085, 95-5086, 1996 WL 515351, at *2 (6th Cir. Sept. 10, 1996) ("As this Court has recognized, however, *Daubert* is only of limited help in assessing technical or experiential expertise."). *Compare* Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (rejecting the proposition that *Daubert* is inapplicable to nonscientific testimony because "experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique"), *with* Tyrus v. Urban Search Management, 102 F.3d 256, 263-64 (7th Cir. 1996) (holding that *Daubert* shall be applied to social science-based testimony when the testimony is grounded in a particular methodology).

159. *See infra* Part IV.A (discussing the absolutist approaches of Pennsylvania, Kentucky, and South Dakota).

160. *See, e.g.*, People v. Housley, 8 Cal. Rptr. 2d 431, 435-39 (Ct. App. 1992) (applying *Frye* to the opinion of a psychologist); Hadden v. State, 690 So. 2d 573, 577-81 (Fla. 1997) (same); Newkirk v. Commonwealth, 937 S.W.2d 690, 695 (Ky. 1996) (applying *Daubert* to the opinion testimony of a psychiatrist); Hutton v. State, 663 A.2d 1289, 1296 n.10 (Md. Ct. Spec. App. 1995) (applying *Daubert* to all scientific testimony, including opinion testimony given by psychologists); State v. Cressey, 628 A.2d 696, 698 (N.H. 1993) (applying *Frye* and declining to rule on whether or not *Daubert* will change the standard for scientific evidence in New Hampshire in a challenge to testimony given by an expert in psychology and child sexual abuse); Davenport v. State, 806 P.2d 655, 659-60 (Okla. 1991) (applying a *Frye*-like standard to opinion testimony given by a psychologist); Commonwealth v. Dunkle, 602 A.2d 830, 832-36 (Pa. 1992) (applying *Frye* to testimony given by an expert in child sexual abuse); State v. Schimpf, 782 S.W.2d 186, 194 (Tenn. 1989) (applying a state-law test which includes a *Frye*-type element to opinion testimony given by a psychologist); Frenzel v. State, 849 P.2d 741, 747 (Wyo. 1993) (applying a test which analyzes the "scientific basis" of the evidence to opinion testimony given by a psychologist); *see also* Sciscoe v. State, 606 So. 2d 202, 204 (Ala. 1992) (applying the *Frye*

The inability of experience-based behavioral science testimony to "pass" the *Frye* or *Daubert* test has caused some jurisdictions to adopt reactionary and overly restrictive gatekeeping practices that exclude virtually all social science-based testimony in child sexual abuse prosecutions.[162] Of the jurisdictions applying *Frye*, Pennsylvania has taken the most restrictive position—it refuses to admit expert testimony concerning symptomology or syndrome evidence for any purpose.[163] Kentucky, which applies *Daubert*, has adopted the same absolutist position as Pennsylvania.[164] In contrast, a few jurisdictions, such as California, Florida, Michigan, and Texas have adopted a more pragmatic position that ignores the standards for "scientific" evidence and focuses instead upon a Rule 401 relevancy inquiry and a Rule 403 prejudice versus probativity inquiry.[165]

A. Absolutist Approaches

At least three jurisdictions have taken highly restrictive approaches to behavioral science evidence.[166] These jurisdictions' courts are unyielding in their adherence to Newtonian-based paradigms de-

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test to the opinion testimony of an expert in "child sexual abuse intervention," though recognizing that the great need for the testimony requires more of a balancing inquiry); Goodson v. Mississippi, 566 So. 2d 1142, 1144-48 (Miss. 1990) (reciting a *Frye*-type rule and applying it to the opinion testimony of an expert in child sexual abuse, though recognizing the need to treat social science distinctly).

161. The result of this inappropriate treatment is a hodgepodge of approaches to the introduction of behavioral science expert testimony. A discussion of the judicial treatment of expert testimony of the kind described in Part II can be confusing. First, not all of the states have published an opinion on the issue. Second, comparison between states can be difficult because not all of the states have adopted rules of evidence modeled after the federal rules, although a majority have done so. *See supra* note 98. Among the states that do in fact follow the general standard of Federal Rule 702, many of the states that still apply *Frye* have not ruled on the issue since the 1993 *Daubert* decision. *See, e.g.*, *Cressey*, 628 A.2d at 698 (applying *Frye* to determine the admissibility of expert qualifications and reliability and declining to state whether the holding in *Daubert* will affect the *Frye* standard). And even where a state has made a post-*Daubert* ruling on the issue, it is difficult to predict whether the state will continue to adhere to *Frye*, will follow the federal application of *Daubert*, or will devise a wholly new standard of admissibility.

162. *See, e.g.*, *Newkirk*, 937 S.W.2d at 696 (excluding all behavioral science testimony in child sexual abuse prosecutions); *Dunkle*, 602 A.2d at 836 (same).

163. *See Dunkle*, 602 A.2d at 836.

164. *See Newkirk*, 937 S.W.2d at 695-96.

165. *See* People v. Harlan, 271 Cal. Rptr. 653, 656 (Ct. App. 1990); *Hadden*, 690 So. 2d at 577-80; People v. Beckley, 456 N.W.2d 391, 404 (Mich. 1990); Frohne v. State, 928 S.W.2d 570, 574-75 (Tex. 1996).

166. *See Newkirk*, 937 S.W.2d at 695-96; *Dunkle*, 602 A.2d at 834-35; State v. Bachman, 446 N.W.2d 271, 276 (S.D. 1989).

spite the non-Newtonian nature of the evidence.[167] Although the courts in both Pennsylvania and South Dakota have addressed the issue within *Frye*'s common law Newtonian paradigm, the two states have reached opposite results: Pennsylvania's courts exclude this type of testimony while South Dakota's courts allow it.[168] In contrast, Kentucky's highest court purports to apply a more modern standard based on the logic of the Federal Rules but still refuses to acknowledge the distinction between Newtonian and non-Newtonian based knowledge.[169] The result of Kentucky's tunnel vision with regard to behavioral science testimony in child sexual abuse prosecutions is a flat refusal to consider any non-Newtonian expert testimony. Together, these three jurisdictions—Pennsylvania, Kentucky, and South Dakota—illustrate how a rigid application of *Frye* and/or *Daubert* standards to behavioral science expert testimony can lead to inconsistent outcomes, some of which are overly restrictive. These absolutist approaches result in either a total rejection of useful and proper testimony or a blanket acceptance of the testimony justified by an outcome-oriented misapplication of the *Frye* or *Daubert* standards.

1. *Pennsylvania.* In *Commonwealth v. Dunkle*,[170] the Pennsylvania Supreme Court applied the state's common law rules of evidence (rather than a statutory set of rules) and determined that all behavioral science expert testimony offered in child sexual abuse prosecutions is inadmissible.[171] In *Dunkle*, the court examined expert testimony that related the behavioral patterns of sexually abused children to the framework of CSAS.[172] Despite the fact that the expert in that case did not attempt to "relate any of her testimony to the child in question,"[173] the court applied *Frye*, which is Pennsylvania's standard of admissibility for expert scientific testimony.[174] The court

167. *See Newkirk*, 937 S.W.2d at 695-96; *Dunkle*, 602 A.2d at 832; *Bachman*, 446 N.W.2d at 276.

168. *Compare Dunkle*, 602 A.2d at 835 (excluding behavioral science testimony), *with Bachman*, 446 N.W.2d at 276 (admitting behavioral science testimony).

169. *See Newkirk*, 937 S.W.2d at 696.

170. 602 A.2d 830 (Pa. 1992).

171. *See id.* at 836.

172. *See id.* at 832-36.

173. *Id.* at 831.

174. Although Pennsylvania has no codified rule of evidence which governs the admissibility of expert testimony, it has long been faithful to the *Frye* standard. *See* Commonwealth v. Topa, 369 A.2d 1277, 1281 (Pa. 1977) ("Admissibility of the evidence depends upon the *general* acceptance of its validity by those scientists active in the field to which the evidence belongs.");

applied this standard to the testimony regarding CSAS on the rationale that the "syndrome is an attempt to construct a diagnostic or behavioral profile about sexually abused children."[175] Predictably, CSAS failed to meet *Frye*'s general acceptance criterion.[176] But the court proceeded beyond an analysis of mere reliability and concluded that the expert's listing of behavioral patterns was not even relevant because the patterns could neither be identified as "abuse-specific" nor limited expressly to sexually abused children.[177]

In addition, the court reviewed the admissibility of testimony concerning delays and omissions in reporting child sexual abuse.[178] Again, the Pennsylvania court applied the *Frye* standard and further articulated a requirement that the subject matter of the expert testimony must provide information "beyond the knowledge or experience of the average layman."[179] The *Dunkle* court then ruled that the testimony offered to explain delays and inconsistencies was not helpful to the jury because the reasons offered by the expert for delays or inconsistencies "are easily understood by lay people and do not require expert analysis."[180]

Commonwealth *ex rel.* Riccio v. Dilworth, 115 A.2d 865, 866-67 (Pa. Super. Ct. 1955). The *Frye* standard continues to be the applicable standard of admissibility in Pennsylvania for expert scientific testimony. *See* Blum v. Merrell Dow Pharm., Inc., 705 A.2d 1314, 1325 (Pa. Super. Ct. 1997):

> Therefore, the gatekeeping role of the court, far from detracting from the jury's function, is in fact essential to it: scientific methodology and conclusions must initially be scrutinized by the court to ensure that what might appear to the jury to be science is not in fact speculation in disguise. Properly supported scientific evidence, however complex, can then reach the jury for its consideration, while material whose complexity merely hides its unreliability is winnowed out. This is, in essence, the teaching of Frye, and that teaching remains valid.

Id.

175. *Dunkle*, 602 A.2d at 832.

176. *See id.* at 832-36.

177. *See id.* at 832-34.

178. *See id*. at 836-38.

179. *Id.* at 836; *see also* FED. R. EVID. 702 advisory committee's note ("When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time." (citation omitted)).

180. *Dunkle*, 602 A.2d at 836. Three justices dissented from the *Dunkle* majority because they disagreed with the contention that the jury did not need the assistance of expert testimony to fully understand the child's behavior. *See id.* at 839-40 (McDermott, J., dissenting in part); *id*. at 844 (Larsen, J., dissenting, Papadakos, J., joining). They argued instead that the subject of child sexual abuse was "shrouded in myth and shame . . . about which the average citizen/juror knows little or nothing" and that it was, therefore, an error to "completely rule[] out the use of expert testimony." *Id.* at 840 (Larsen, J., dissenting). Notably, the disagreement between the majority and dissent was based not on an interpretation of a legal standard but on the judicial perception of the needs and experiences of the lay members of society who comprise the jury.

2. *Kentucky.* In a similar vein, Kentucky's supreme court has also adopted an approach that excludes behavioral science testimony in child sexual abuse cases. Kentucky's decision in *Newkirk v. Commonwealth*[181] to follow the lead of Pennsylvania is particularly interesting because, unlike Pennsylvania, Kentucky's code of evidence mirrors the Federal Rules and does not rely solely upon the common law.[182]

In *Newkirk*, the testimony presented by the prosecution's expert included only a general list of common reactions and symptoms of abuse that were not classified as a particular syndrome[183] and an explanation of the "'phenomenon' of recantation"[184] which was not directly applied to the case.[185] Despite the fact that the expert did not offer any direct testimony about whether the complainant had been abused,[186] the Kentucky court refused to admit the testimony because, in the court's view, the testimony amounted to an inappropriate diagnostic use of CSAAS.[187] Though the *Newkirk* court asserted that CSAAS, offered for any use, would fail to meet the standards set forth in either *Frye* or *Daubert*, the court ultimately excluded the evidence on the grounds that it was not even relevant under Rule 403 of the Kentucky Rules of Evidence.[188]

The Kentucky court's holding resulted from the majority's failure to distinguish between the various uses for which expert testimony can be offered.[189] The three dissenting judges in *Newkirk* best summarized the majority's failure:

> Unfortunately, the majority opinion fails to distinguish between the general prohibition of the admissibility of expert testimony relating

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181. 937 S.W.2d 690 (Ky. 1996).

182. *See id.* at 695-96.

183. *See id.* at 691; *see also supra* Part II.A (describing the types of social science testimony offered).

184. *Newkirk*, 937 S.W.2d at 691 (quoting the unpublished opinion of the trial court).

185. *See id.* at 693-96.

186. *See id.* at 691. Even with the possibility of a limiting instruction that the "evidence was for 'the limited purpose of explaining the psychological dynamics surrounding a recantation following an accusation of sexual abuse,'" the court would not admit any of the expert testimony offered by the prosecution. *Id.* (quoting the trial court).

187. *See id.* (discussing Bussey v. Commonwealth, 697 S.W.2d 139, 141 (Ky. 1985), in which the court concluded that CSAAS "was not generally accepted in the medical community, and that the expert was unable to connect the victim's symptoms with the [defendant] rather than some other person").

188. *See id.* at 695.

189. *See id.* at 697.

> to CSAAS and rebuttal testimony regarding the phenomenon of recantation. . . . "This witness is being called to testify for the limited purpose of explaining the psychological dynamics surrounding a recantation following an accusation of the sexual abuse. This evidence is not offered for the purpose of proving whether [the victim] was or was not sexually abused."[190]

Notwithstanding the absence of any prosecution attempt to present social science testimony that diagnosed the complainant as abused,[191] a majority of the court in *Dunkle* excluded all testimony regarding commonly observed behavior in abused children.[192] The majority justified its rejection of syndrome testimony in part by stating that "the overwhelmingly persuasive nature of such testimony" might effectively dominate the jury's decisionmaking process.[193] Again, the application of the rigid gatekeeping tests (*Frye*/*Daubert*), which insist that if the science is not Newtonian it is not relevant, led to a rejection of otherwise useful expert testimony that would not have intruded upon the jury's realm of determining credibility.

3. *South Dakota.* On the other end of the spectrum, the South Dakota Supreme Court in *State v. Bachman*[194] used the reasoning endorsed by the *Dunkle* dissenters.[195] Despite a heavy reliance upon the language of *Frye*, the court in *Bachman* held that expert testimony "concerning traits and characteristics typically found in sexually abused children, characteristics or emotional conditions

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190. *Id.* (Willett, Special Justice, dissenting) (quoting the trial court).

191. *See id.* ("Before beginning the substance of his testimony the child psychiatrist made clear to the jury that he had not treated the victim and that he was not there to give an opinion on whether or not she had been abused.").

192. *See id.*

193. *Id.* at 691. Because of its effects on admissibility, it is important to note additionally here that the Kentucky Rules of Evidence differ slightly from the Federal Rules of Evidence in that Kentucky has not adopted the equivalent of Federal Rule 704, which overrules the common law prohibition against expert testimony expressing an opinion on the ultimate issue in the case. *See id.* at 694.

194. 446 N.W.2d 271 (S.D. 1989).

195. *Compare id.* at 274-77 (asserting that expert testimony in a child sexual abuse prosecution can help the jury to understand matters that are normally beyond a "layman's breadth of knowledge." *Id.* at 275), *with* Commonwealth v. Dunkle, 602 A.2d 830, 839-40 (Pa. 1992) (McDermott, J., dissenting in part) (arguing that not allowing expert testimony "trivializes an entire field of clinical psychology" because it assumes that jurors understand why victims omit details), *and id.* at 844 (Larsen, J. dissenting, Papadakos, J., joining) (arguing that without an expert's explanation of child sexual abuse, jurors might infer from certain actions of the victim that he or she is not credible).

observed in the victims, and opinion testimony that the victim's allegations were truthful" should be admissible.[196] Although the holding in *Bachman* was expressly based upon the court's determination that the expert testimony "[met] the requirements of the Frye test," the opinion does not make any citations to direct evidence of general acceptance.[197] Rather, the only justification for the court's position appears to be that the jury may not be able to understand the "puzzling aspects" of an abused child's conduct without the assistance of expert testimony.[198]

B. Modifying Traditional Gatekeeping Tests

The Kentucky and Pennsylvania courts began with two assumptions that necessarily colored their subsequent analyses. First, these two jurisdictions assumed that the expert's testimony must be treated as "scientific" testimony when analyzing the reliability of the expertise.[199] Second, both courts refused to recognize a need to correct misperceptions about a child's reaction to sexual abuse which may be common among lay-people.[200] Although South Dakota's court allowed the testimony, the approach of that state's courts is equally lamentable because the court improperly applied the traditional tests. At least four jurisdictions that follow codes of evidence equivalent to the Federal Rules have parted company with Pennsylvania, Kentucky, and South Dakota and have recognized that behavioral science testimony is unlike other scientific evidence.[201] These four jurisdic-

196. *Bachman*, 446 N.W.2d at 276.

197. *Id.*

198. *Id.* ("Background data providing relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children." (quoting State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984))).

199. *See* Newkirk v. Commonwealth, 937 S.W.2d 690, 693 (Ky. 1996) ("[T]his Court has not accepted the view that the CSAAS or any of its components has attained general acceptance in the scientific community justifying its admission into evidence."); *Dunkle*, 602 A.2d at 832 ("The existence of [CSAS] as either a generally accepted diagnostic tool or as relevant evidence is not supportable.").

200. *See Newkirk*, 937 S.W.2d at 696 ("While . . . a child may be timid and halting, we entrust to the wisdom of the twelve men and women who comprise the jury the responsibility to sort between the conflicting versions of the events and arrive at a proper verdict."); *Dunkle*, 602 A.2d at 837 ("[T]he reasonable explanations for why children do not come forward are well within the range of common experience; reasons that are understood by the jury.").

201. *See* People v. Harlan, 271 Cal. Rptr. 653, 657-59 (Ct. App. 1990) (noting the difference between the procedures used in the physical sciences and the theories that ground the behavioral sciences); Hadden v. State, 690 So. 2d 573, 577-581 (Fla. 1997) (same); People v. Beckley,

tions are more likely to permit appropriate uses of social science expert testimony; they also preserve the integrity of *Frye* and *Daubert* for instances where their application is appropriate.

1. *The First Step: Distinguishing Scientific Testimony from Experience-Based Testimony*. California, Florida, and Texas differ in the first instance from those jurisdictions that apply *Frye* or *Daubert* to behavioral science expert testimony because each of these three jurisdictions has rejected the notion that all social science expert testimony should be treated as "science." Rather, the courts in these states have drawn a distinction between expertise that is based solely upon the experience of the expert and expertise that is based upon experience as well as knowledge of clinical studies performed by third parties.[202] The Florida Supreme Court effectively explained this distinction:

> [T]he *Frye* standard for admissibility of scientific evidence is not applicable to an expert's pure opinion testimony which is based solely on the expert's training and experience. While an expert's pure opinion testimony comes cloaked with the expert's credibility, the jury can evaluate this testimony in the same way that it evaluates other opinion or factual testimony. When determining the admissibility of this kind of expert-opinion testimony which is personally developed through clinical experience, the trial court must determine admissibility on the qualifications of the expert and the applicable provisions of the evidence code. We differentiate pure opinion testimony based upon clinical experience from profile and syndrome evidence because profile and syndrome evidence rely on conclusions based upon studies and tests.[203]

All three jurisdictions rely upon the substantial equivalent of Federal Rule 702 to govern the admission of expert testimony, but only Florida and California courts have continued to use the *Frye* test to inter-

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456 N.W.2d 391, 404 (Mich. 1990) (same); Frohne v. State, 928 S.W.2d 570, 574-75 (Tex. 1996) (same).

202. *See Harlan*, 271 Cal. Rptr. at 657-58 (holding that the *Kelly*/*Frye* test for expert testimony about a new scientific technique does not apply to evidence derived from an expert's clinical experience); *Hadden*, 690 So. 2d at 580 (differentiating between "pure opinion testimony based upon clinical experience" and "profile and syndrome evidence" that relies on studies and tests); *Frohne*, 928 S.W.2d at 574-75 (contrasting novel scientific evidence with testimony based on an expert's years of experience in working with sexually abused children).

203. *Hadden*, 690 So. 2d at 579-80 (citations omitted).

pret their Rule 702-like provisions.[204] The courts of both of these states have concluded that the first-hand nature of the psychologist's or social worker's social science expertise removes the testimony from the category of "new scientific technique" that would otherwise require the application of *Frye*.[205] And although Texas courts purportedly adhere to *Daubert*'s interpretation of Rule 702, they too have determined that experience-based testimony does not constitute a "novel scientific theory" (a phrase borrowed from *Frye*) and should not be treated as such.[206]

The distinction made in these three states is significant in that these state courts have recognized a difference between "scientific" and "technical" or other "specialized" knowledge and, therefore, have recognized a difference in the analysis or "test" for admission that should be applied. The approach of these courts presents one model for the treatment of non-Newtonian evidence: courts should limit testimony to first-hand knowledge. This approach, however, is not wholly satisfactory because it has the potential to exclude a substantial amount of credible second-hand published data which may not qualify as Newtonian science.[207]

2. *One Step Further: Distinguishing Social Science from Newtonian Science.* Like the courts in California, Florida and Texas, the Supreme Court of Michigan has made the important realization that knowledge and expertise gained through observation rather than through controlled scientific experimentation cannot be analyzed ac-

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204. *See* FLA. R. EVID. 702; *Hadden*, 690 So. 2d at 579-80; *Harlan*, 271 Cal. Rptr. at 657-68 (applying its "*Kelly*/*Frye*" general acceptance test and stating that a "person may testify as an expert if he or she has the 'special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.'" (quoting CAL. EVID. CODE § 720, California's equivalent to FED. R. EVID. 702).

205. *Harlan*, 271 Cal. Rptr. at 657; *see also Hadden*, 690 So. 2d at 579-80 ("[T]he *Frye* standard for admissibility of scientific evidence is not applicable to an expert's pure opinion testimony which is based solely on the expert's training and experience.").

206. *Frohne*, 928 S.W.2d at 574. Having removed social science expert testimony from the strict confines of "scientific" analysis, all three jurisdictions have found the testimony relevant because they, unlike Kentucky and Pennsylvania, have recognized the need to rebut juror misconceptions about the victim's behavior. *Id.* at 574-75 (quoting Cohn v. State, 849 S.W.2d 817 (Tex. Crim. App. 1993)); *accord Harlan*, 271 Cal. Rptr. at 658; *Hadden*, 690 So. 2d at 580.

207. For example, this approach would exclude any testimony offered by an expert that referred to CSAAS or PTSD because these syndromes reflect the research and observations of other experts.

cording to the criteria for Newtonian knowledge.[208] However, Michigan's highest court has gone beyond this realization and has recognized the potential validity of more than just first-hand information. It has distinguished the methods of behavioral scientists and Newtonian scientists and recognized the legitimacy of each:

> "Psychologists, when called as experts, do not talk about things or objects; they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather they speak of the whole person." Thus, it is difficult to fit the behavioral professions within the application and definition of *Davis*/*Frye*.[209]

The Michigan court recognized that behavioral science testimony is unlike other forms of scientific testimony and therefore cannot be tested by the same standard.[210]

Thus, while Michigan can be grouped with California, Florida, and Texas in that it refuses to treat the testimony at issue as traditional "scientific testimony," the Michigan approach goes one step further. The Michigan court realized in *Beckley* that there are "fundamental differences between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences."[211]

Lacking an interpretation of Rule 702 which is appropriate to behavioral science testimony, the Michigan court instead relied upon the balancing inquiry of Rules 401, 402, and 403.[212] These rules require that the evidence be relevant, in that it can assist the trier of

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208. *See* People v. Beckley, 456 N.W.2d 391, 404 (Mich. 1990) ("[T]here is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.").

209. *Id.* (quoting Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1046-48 (1988)). The *Davis*/*Frye* test takes its name from *People v. Davis*, 72 N.W.2d 269 (Mich. 1955) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and requires the proponent of the evidence to show that "the scientific principle or technique has gained such general acceptance within the scientific community as to render the technique or principle reliable." *Beckley*, 456 N.W.2d at 403.

210. *See Beckley*, 456 N.W.2d at 404.

211. *Id.*

212. *See id.* ("[A]dmissibility of the expert testimony, under the limitations set forth in this opinion [rejecting *Davis*/*Frye*], is an effort to accommodate the uniqueness of the child-victim's reactions while at the same time avoiding undue reliance on such testimony.").

fact,[213] and that the probative value of the evidence outweigh any accompanying prejudice.[214] On the basis of a "general test of relevancy," Michigan's court disagreed with the courts of Pennsylvania and Kentucky and concluded that expert testimony would be helpful and appropriate because the average juror is sufficiently inexperienced and uninformed regarding common responses to sexual abuse.[215] The decision of Michigan's court was proper in light of the strong possibility of lay misconception, the difficulties presented by child witnesses, the usual lack of physical evidence, and the societal bias against rape and abuse victims.[216]

The Michigan Supreme Court ultimately asserted that behavioral science testimony is "safe" from undue reliance when its use is limited to cases where the behavior of the victim is at issue.[217] In practice, experts are limited to testimony which "rebut[s] an inference that specific behavioral patterns attributed to the victim are not uncharacteristic of the class of child sexual abuse victims."[218] The expert may also testify regarding common traits and characteristics of sexually abused children but may not make reference to a "fixed set of behaviors constituting a 'syndrome.'"[219] The exclusion of the term "syndrome" was meant to remove the danger of jury confusion and overvaluation of the expert's testimony.[220] A more recent Michigan Supreme Court decision, *People v. Peterson*,[221] affirmed the result in *Beckley* and clarified that the prosecution need not wait for an explicit attack on the complainant's credibility to present expert testi-

213. *See id.* at 400-01 ("This uniqueness [of the victim's reactions to a sexual assault] puts the evidence beyond the jury's ability to properly evaluate the facts in issue absent expert testimony.").

214. *See supra* notes 99-102 and accompanying text (discussing Federal Rules of Evidence 402 and 403, which served as the templates for Michigan's own Rule 402 and Rule 403).

215. *Compare Beckley*, 456 N.W.2d at 400-01 (asserting that "the findings of professional research suggest that there are many seemingly inconsistent responses to the trauma of [sexual abuse] which require some further form of explanation"), *with* Commonwealth v. Dunkle, 602 A.2d 830, 837-38 (Pa. 1992) (asserting that the jury's outside experience will provide a reasonable explanation for why children are reluctant to reveal the abuse), *and* Newkirk v. Commonwealth, 937 S.W.2d 690, 696 (Ky. 1996) (asserting that expert testimony is not needed because the jury is capable of looking beyond the easy excuses provided by the defendant which contrast with the weakness of the victim's testimony to arrive at an appropriate verdict).

216. *See Beckley*, 456 N.W.2d at 400-02.

217. *See id.* at 404.

218. *Id.* at 409.

219. *Id.*

220. *See id.* at 408.

221. 537 N.W.2d. 857 (Mich. 1995).

mony from a behavioral scientist but may instead present an explanation of the "commonality seen in victims of child sexual abuse" during its case in chief.[222]

The Michigan court has taken the view that the nature of behavioral science testimony is not so complex that jurors will be unable to comprehend the "technical" details that underlie the explanation of probable victim responses.[223] Consequently, there is no real need to mandate general acceptance of this type of expert testimony as a means of ensuring that the underlying scientific method is sound; the jury can readily comprehend the method of the behavioral scientist.[224] The Michigan approach calls for a balance between the need to explain the child-victim's reaction and the fact that there is a limit to the helpfulness of behavioral science evidence. With this balancing method, Michigan has departed from the more rigid standards set forth in either *Frye* or *Daubert* when considering behavioral science evidence and has moved to a pragmatic and rational standard which examines, on a case-by-case basis, the evidence and the use for which it has been offered.

CONCLUSION

There is something unsettling about the fact that some courts find that the societal misperceptions about child sexual abuse must be corrected while others profess doubt over the existence of any such misperceptions. Even more disturbing is the effect that these differing attitudes have on child sexual abuse prosecutions which rely on child-victim testimony—like the story about "Mary" in the Introduction. The heart of the problem seems to rest in the convoluted approaches taken by various jurisdictions: some strictly apply *Frye* or *Daubert*, treating the expert testimony as a hard science; some apply a Rule 702 "helpfulness" standard, implying that the expert testimony falls within the category of "specialized or other technical information"; and still others apply only a basic Rule 403 relevancy inquiry to determine whether the evidence adds anything helpful in the search for the truth. These disparate approaches are sure to lead to

222. *Id.* at 870. Diagnostic use of CSAS or CSAAS does not even merit consideration under this new standard, because it fails to meet the basic relevancy standard; employment of these syndromes as detectors of abuse voids any probative value the syndrome may have had, because professionals summarily reject this use as improper. *See id.*

223. *See Beckley*, 456 N.W.2d at 400-01.

224. *See id.* at 402.

disparate results, and yet, each court maintains that its approach is the right one.

The compelling circumstances of child sexual abuse prosecutions demonstrate that the jurisdictions which do not distinguish between Newtonian science and other forms of expertise have not, in fact, found the right solution. The failure to make such a distinction leads to an absolute ban on clearly useful and relevant testimony in Pennsylvania and Kentucky or, as in South Dakota, to a distortion of *Frye* and *Daubert* so that such evidence may be introduced. Whether or not the more pragmatic approach of Michigan is ultimately correct is a determination best left to each jurisdiction. At the least, however, such an approach has the benefit of balancing the jury's right to evaluate credibility with the usefulness of social science theory of child behavior, while at the same time preserving the strict standards of *Frye* and *Daubert* for application in the appropriate (read: Newtonian science) context.