

## NOTE

### Where Do We Go From Here? A Modern Jurisdictional Analysis of Behavioral Expert Testimony in Child Sexual Abuse Prosecutions

*Due to the extraordinary difficulty of proving child sexual abuse cases, because of the environment in which they occur, courts should welcome reliable evidence that will aid the jury in understanding this awful crime; on the other hand, our justifiably zealous urge to punish those who commit such appalling acts ought not to entice us to use evidence that can have an impact on the minds of the jury far disproportionate to its foundation in science.<sup>1</sup>*

#### I. INTRODUCTION

In the past few decades, the number of reported cases of child sexual abuse in the United States has increased at a rate of approximately 2300%.<sup>2</sup> While unique evidentiary issues are present in numerous areas of the law, the growing number of child sexual abuse cases presents distinct problems to prosecutors.<sup>3</sup> Unlike most criminal cases, physical evidence or eyewitnesses infrequently support child sexual abuse prosecutions, often leaving prosecutors with only a young child to convince a jury that the defendant committed a crime.<sup>4</sup> These problems came to the forefront of public attention in the mid-1980's, when group sexual abuse cases involving large numbers of children forced the issue

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1. *Toro v. State*, 642 So. 2d 78, 83 (Fla. Dist. Ct. App. 1994).

2. Lynn M. Marshall, Note, *Hutton v. State: Whose Rights are Paramount, the Defendant's or the Child Victim's?*, 27 U. BALT. L. REV. 291, 292 (1997) (highlighting prevalence of child sexual abuse in context of discussing Post Traumatic Stress Disorder). Documented cases of child sexual abuse increased from 6,000 to 432,000 over a fifteen-year span from 1976 through 1991. *Id.* at 291.

3. See Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2028 (1994) (detailing challenges young child victims create for prosecutors in sexual abuse cases).

4. See generally Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933, 937-38 (1999) (stating prosecutors face "almost insurmountable hurdles" due to nature of child sexual abuse). Such abuse often occurs in private, away from potential eyewitnesses. *Id.* at 938. It is the "he said, she said" nature of the crime that makes the child likely to lose at trial. Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 159 (1998) (noting children's fright and anxiety results in inability to give clear testimony); Steele, *supra*, at 938.

to become “something of a national obsession.”<sup>5</sup>

As the prosecution of child sexual abuse cases became more prevalent, legislatures and courts around the country implemented various tools to counteract the difficulties child sexual abuse victims faced in the criminal system.<sup>6</sup> In addition to developments such as closed-circuit testimony for child witnesses, the use of behavioral science expert testimony in child sexual abuse cases emerged as one of the leading subjects of debate and confusion among the judiciary.<sup>7</sup> Such testimony most often involves a psychologist or social worker offering a profile of the behavior and characteristics frequently present in sexually abused children.<sup>8</sup> The rationale behind such testimony is to offer a context in which the jury can understand the victim’s behavior, and also to correct any flawed beliefs average jurors may hold regarding the reaction and response of a typical child sexual abuse victim.<sup>9</sup>

In light of the particular issues surrounding child sexual abuse prosecutions, many courts embrace this type of testimony in an effort to reinforce the typically weak testimony of the child victim.<sup>10</sup> Other jurisdictions, however, limit or entirely exclude this social framework testimony, out of concern it will

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5. Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 429 n.3 (1985) (identifying increased television and print media attention on sexual abuse issue).

6. See N.J. STAT. ANN. § 2A:84A-32.4 (West 2004) (permitting children to testify via closed-circuit television in certain cases); *Idaho v. Wright*, 497 U.S. 805, 818-22 (1990) (setting forth constitutional standards for hearsay exceptions allowing admission of children’s statements). In *Idaho v. Wright*, the United States Supreme Court relaxed a state standard that governed the admissibility of out-of-court child statements, thereby making it easier for prosecutors to meet certain requirements toward the admission of child hearsay. 497 U.S. at 822-23.

7. See Dione Marie Enea, Comment, *Justice for Our Children: New Jersey Addresses Evidentiary Problems Inherent in Child Sexual Abuse Cases*, 24 SETON HALL L. REV. 2030, 2048-53 (1994) (outlining courts’ initial concerns regarding behavioral expert testimony). Specifically, many courts narrow the admissibility issue around Child Sexual Abuse Accommodation Syndrome (CSAAS), which purportedly represents the characteristics professionals commonly observe in child sexual abuse victims. *Id.* at 2049; see also Dirk Lorenzen, *Special Topics in the Law of Evidence: The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1033-34 (1988) (noting difficulty in objectively applying evidentiary principles due to unpleasant characteristics of child sexual abuse); *infra* note 8 and accompanying text (defining behavioral science expert testimony).

8. See generally Elizabeth Trainor, Annotation, *Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case*, 85 A.L.R.5th 595 (2001) (outlining methods experts use to offer both general and particularized testimony regarding child victims). Trainor reports that although the terminology of experts may differ in that some may not even refer to any type of specific “syndrome,” a common language generally exists to facilitate this analysis of child sexual abuse. *Id.* at 608-09.

9. See *Frenzel v. State*, 849 P.2d 741, 748-49 (Wyo. 1993) (reasoning testimony corrects and dispels myths public may hold concerning victim’s post-abuse behavior). *But see* *People v. Peterson*, 537 N.W. 857, 875 (Mich. 1995) (Cavanagh, J., dissenting) (highlighting danger of unfair prejudice resulting from juror misuse of expert testimony); Cohen, *supra* note 5, at 456 (stating profile testimony should be inadmissible regardless of strong policy of protecting children).

10. See generally *State v. Middleton*, 657 P.2d 1215 (Or. 1983) (explaining rationale behind testimony helping jury make informed decision). The Supreme Court of Oregon in *Middleton* noted that “explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness’s credibility.” *Id.* at 1220.

impermissibly infringe on a defendant's right to have a jury determine his or her credibility.<sup>11</sup> The variability of approaches utilized by these jurisdictions reflect the countervailing policies and evidentiary conflicts involved in such a topic, where the rights of children to have a jury understand their often confusing and misleading behavior clashes with the rights of defendants to have a jury be the sole fact finder on all issues in a particular case.<sup>12</sup>

This Note will examine the history and conditions surrounding the admissibility of behavioral expert testimony in child sexual abuse cases.<sup>13</sup> Although the Note will focus briefly on the history regarding this evidentiary issue, a more substantive discussion will concentrate on the current state of the law in North Carolina, Pennsylvania, and Massachusetts, which represent the spectrum of state approaches to accommodating the unique evidentiary issues in child sexual abuse cases.<sup>14</sup> By exploring the steps various states take to ensure some evidentiary support for children in these cases, this Note will reveal the disservice other jurisdictions provide to children by refusing to admit this testimony in any manner at all.<sup>15</sup> Finally, this Note will contend that Massachusetts' position consistently represents a middle ground between the competing policies, and should serve as a model for other jurisdictions struggling over whether to admit behavioral expert testimony in child sexual abuse cases.<sup>16</sup>

## II. HISTORY

Child sexual abuse has been, and is currently, a distinct area of social concern that has captured the attention of the legal community.<sup>17</sup> The heightened judicial involvement in this area began in the early 1980's, as increased media attention and elevated public awareness pushed an increasing

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11. See Lisa Askowitz, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecution: Pennsylvania Takes it to the Extreme*, 47 U. MIAMI L. REV. 201, 207 (1992) (summarizing position of numerous courts holding testimony impermissibly usurps jury's role in determining credibility).

12. *Id.* at 239 (recognizing prejudicial effects of expert testimony in child sexual abuse prosecutions). Askowitz acknowledges the balance courts must strike between the remarkable benefits to the overall search for truth such testimony can offer, and the legitimate concerns over defendants' rights. *Id.*

13. See *infra* Parts II and III intro. (summarizing legal history of social science testimony in child sexual abuse cases).

14. See *infra* Part III.A-C (discussing various state approaches).

15. See *infra* Part III.A-C (describing different viewpoints and arguing overly restrictive jurisdictions fail to adequately protect child witnesses); *infra* notes 77-79 and accompanying text (same).

16. See *infra* Part IV (analyzing varying approaches and contending Massachusetts' middle ground position best).

17. 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) (offering definition of child sexual abuse); Steele, *supra* note 4, at 937 (describing sexual abuse of children as both criminal behavior and social problem). Experts often define 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." Bross, *supra*, at 287.

number of child sexual abuse cases into the legal system.<sup>18</sup> The increase in reports of sexual abuse highlighted the unique evidentiary problems present in prosecuting such cases.<sup>19</sup> As a result, judiciaries across the country slowly took steps in the early to mid 1980's to address concerns over the transition from the world of a child victim to the world of the legal courtroom.<sup>20</sup>

Over the past twenty-five years, America's criminal justice system has embraced extensive legal reform regarding child sexual abuse, particularly in the area of prosecutorial use of social framework behavioral testimony.<sup>21</sup> Reacting to the public's mentality that something needed to be done concerning child sexual abuse, courts sought to formulate appropriate responses to public pressure and, as a result, repeatedly admitted behavioral testimony in prosecutions.<sup>22</sup> Notwithstanding the historical legal framework already in place, the increasing public focus on protecting children pushed courts to procure further types of evidentiary support for child victims.<sup>23</sup>

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18. See *supra* note 2 and accompanying text (describing increase in number of child sexual abuse reports and prosecutions); see also Durcanin, *Sex Abuse Conviction Rate Drops in County*, MONTGOMERY J., June 20, 1985, at 1 col. 1 (discussing changing societal perceptions in child sexual abuse). In one county, the reported number of cases filed in the first half of 1985 equaled the number filed in all of 1984. Durcanin, *supra*, at 1 col. 1.

19. See Lorenzen, *supra* note 7, at 1038 (noting peculiar nature of issues arising in cases involving child sexual abuse).

20. See Lorenzen, *supra* note 7, at 1033 (discussing special problems with child victims and prosecutions of sexual abuse cases). In particular, often child victims are not credible witnesses, possessing characteristics of shyness, aggressiveness, or an inability to discern fantasy from truth. *Id.* Moreover, friends or family members may easily pressure children to retract statements and allegations, especially those allegations implicating friends or family members, or otherwise delay disclosure for various reasons. *Id.* These important and distinctive evidentiary issues often drive the outcome of a case because the result usually turns on the testimony of the alleged victim as compared to that of the alleged perpetrator. *Id.*; see also Serrato, *supra* note 4, at 161 (explaining difficulty with child witnesses recalling dates, times, frequencies of events). Serrato reiterates that the average juror easily and quite often misreads any inconsistency, confusion, or indecisiveness by the child witness as representative of a lack of credibility. Serrato, *supra* note 4, at 162.

21. See NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOC., PAPERS FROM A NATIONAL POLICY CONFERENCE ON THE LEGAL REFORM IN CHILD SEXUAL ABUSE CASES (J. Bulkley ed., 1985) (discussing influential legal factors involved in handling child sexual abuse prosecutions); Trainor, *supra* note 8, at 595 (addressing movement towards expert testimony started in 1983 by article on CSAAS). CSAAS often stands as a backdrop for this type of behavioral testimony and focuses on five specific characteristics commonly observed in sexually abused children. Trainor, *supra* note 8, at 595; see also *infra* notes 36-38 and accompanying text (providing background of CSAAS).

22. See Askowitz & Graham, *supra* note 3, at 2028-29 (noting increased public attention to problem of child sexual abuse). This strong public push suffered a backlash that originated from the belief that courts and prosecutors should not ignore the rights of defendants even in light of the purported epidemic of child sexual abuse. *Id.*; Enea, *supra* note 7, at 2032 (providing example of state's attempt to address special problems in child sexual abuse prosecutions). In response to increased reports of sexual abuse, New Jersey permitted use of closed circuit television testimony to allow children to testify outside of the courtroom. Enea, *supra* note 7, at 2032. Additionally, New Jersey represents one of many states that enacted a statutory hearsay exception directed almost exclusively toward sexual abuse victims' out-of-court statements. *Id.* at 2038; see also Judy Yun, Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1751-52 (1983) (recognizing need to protect children from trauma resulting from process of testifying in court).

23. DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR 3 (1998)

Expert testimony about sexual abuse is not a controversial issue in the legal community; courts almost universally allow medical or scientific experts to testify as to physical markings or forensics involved in a particular case.<sup>24</sup> The manner and circumstance in which courts permit not only physical testimony but behavioral social testimony in cases involving children, however, sparks considerable debate over what role these types of psychological experts should occupy in child sexual abuse prosecutions.<sup>25</sup>

The controversy surrounding the use of behavioral testimony to identify, explain, and analyze common characteristics of child victims consistently involves a variety of issues among jurisdictions.<sup>26</sup> Most notably, the question of whether such testimony improperly invades the province of the jury to act as sole finder of credibility and fact invokes a substantial amount of the discussion and debate among courts and attorneys.<sup>27</sup> It is important to understand

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(claiming hysterical atmosphere led to outbreak of false accusations, commonly referred to as "sex accuse"); DEBRA WHITCOMB, U.S. DEP'T OF JUSTICE, *WHEN THE VICTIM IS A CHILD* 27-29 (1985) (describing accommodations and other protections for child witnesses). Many jurisdictions have modified their courtroom procedures in an effort to make the setting more comfortable for victims. WHITCOMB, *supra*, at 27-29.

24. See, e.g., *Eze v. Senkowski*, 321 F.3d 110, 115-16 (2d Cir. 2003) (describing common practice of experts testifying to physical state of victims); *State v. Morel*, 676 A.2d 1347, 1353-56 (R.I. 1996) (upholding decision allowing expert testimony on statistical significance of DNA analysis in sexual assault case); *People v. Culton*, 14 Cal. Rptr. 2d 189, 191-92 (Cal. Ct. App. 1992) (permitting expert testimony regarding physical abnormalities and symptoms in alleged child victims).

25. See Ronald J. Allen & Joseph S. Miller, *The Expert as Educator: Enhancing the Rationality of Verdicts in Child Sex Abuse Prosecutions*, 1 PSYCHOL. PUB. POL'Y & L. 323, 325 (1995) (noting controversies around uses and abuses of such testimony likely to continue); see also David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 6 (1986) (recognizing confusion among courts regarding admissibility of psychological evidence concerning child complainants). But see Cohen, *supra* note 5, at 456 (arguing psychological expert testimony lacks precision and confuses jury).

26. See *United States v. Bighead*, 128 F.3d 1329, 1329-31 (9th Cir. 1997) (discussing issues surrounding federal admissibility of testimony on common characteristics of child victims); David Glasgow & Richard P. Bentall, *What do Expert Witnesses in Child Sexual Abuse Think They are Doing?: "Diagnosis" and the Sexually Accurate Doll "Test" as Professional Myths*, 11 LIVERPOOL L. REV. 43, 43 (1989) (investigating confusion regarding inconsistencies of child abuse experts); Robert Mosteller, *Is the Jury Competent? Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 LAW & CONTEMP. PROBS. 85, 96-103 (1989) (discussing controversial evidentiary use of general conclusions from social science research). Although this Note does not address the role of such testimony under the Federal Rules of Evidence, the federal helpfulness standard governing admissibility of expert testimony and the *Frye* standard exemplify a point of contention regarding whether the characteristics of child victims are already within the knowledge of the average juror, and are thus an invalid subject for expert testimony. Mosteller, *supra*, at 1330-31; see also Henry F. Fradella et al., *The Impact of Daubert on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 405 (2003) (recognizing federal pattern of admitting behavioral testimony in sexual abuse cases as non-scientific). In the federal system, courts routinely view such testimony similarly to Rape Trauma Syndrome, considering both not just good social science, but more importantly, as sound public policy. Fradella, *supra*, at 405.

27. Cohen, *supra* note 5, at 429 (pointing out courts may have been overly accommodating regarding admissibility of expert testimony). Defense advocates primarily stress that because a documented and reliable profile of a sexual abuse victim does not exist, all expert testimony on the subject prejudices defendants by confusing and misinforming the jury. *Id.* at 431. Furthermore, opponents of the admissibility of behavioral expert testimony note that such testimony possesses an "aura of special reliability and trustworthiness" that

precisely what this type of testimony entails in order to fully comprehend the different approaches to the problem, and to appreciate the ongoing debate within the judiciary.<sup>28</sup>

### III. THE BASIS AND FORM OF BEHAVIORAL EXPERT TESTIMONY: GENERAL PRINCIPLES

Prosecutors use expert testimony in child sexual abuse trials as a tool to explain the behaviors and characteristics of child sexual abuse victims.<sup>29</sup> Offered in a variety of ways, the singular purpose of this testimony is to support sometimes weak or unbelievable testimony of young child witnesses.<sup>30</sup> Two types of traditional psychological expert testimony most commonly occur in child sexual abuse cases: general testimony describing frequently shared behaviors among sexually abused child victims, and particularized testimony regarding specific connections between a general profile and the individual

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would essentially create a competition among experts. *Id.* at 432; *see also* State v. Middleton, 657 P.2d 1215, 1219 (Or. 1983) (recognizing expert testimony may tend to depict witness as truthful or untruthful). An additional concern of those opposed to the use of such testimony involves the evaluation of credibility; defense attorneys often claim behavioral experts impermissibly bolster credibility, thereby allowing improper comments on the child victim's truthfulness. *Middleton*, 657 P.2d at 1221. *But see* State v. Myers, 359 N.W.2d 604, 609-10 (Minn. 1984) (stating nature of child sexual abuse puts ordinary juror at disadvantage); Askowitz, *supra* note 11, at 232 (noting myths and stereotypes surrounding child sexual abuse and need to aid juror understanding). The *Myers* court followed the trend favoring admissibility in the early 1980s and concluded "the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child." 359 N.W.2d at 610.

28. *See* Josephine Bulkley, *Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, 18 (1985) (discussing lack of generally accepted principles regarding child sexual abuse); McCord, *supra* note 25, at 6 (noting need for in-depth analysis of topic to understand contradictory approaches). The lack of a solid functional definition of child sexual abuse and the debate over how the use of an expert abuse diagnosis fits into a legal setting are at the foundation of the lack of uniformity across jurisdictions. McCord, *supra* note 25, at 6.

29. *See* McCord, *supra* note 25, at 9 (detailing purpose behind expert diagnosis of child sexual abuse). The theory of proof concerning the testimony is that an abused child displays unique characteristics that an expert can identify to support the contention that sexual abuse did in fact occur. *Id.*; *cf.* Cohen, *supra* note 5, at 429-30 (expressing skepticism over whether such testimony describes an accurate or reliable victim profile). Despite concern surrounding the risk of an abstract and overly broad summary of victim behavior, most commentators recognize the general policy in favor of counteracting some of the difficulties a child victim witness poses in the legal system. Cohen, *supra* note 5, at 456; *see also* Serrato, *supra* note 4, at 159-61 (recognizing children often appear frightened, anxious, and unwilling to testify). *But see* Wallace J. Mlyniec & Michelle M. Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims Be Accomplished Without Endangering the Defendant's Constitutional Rights?*, 40 U. MIAMI L. REV. 115, 116 (1985) (speculating procedures protecting children, although commendable, may jeopardize traditional trial practice).

30. *See* Trainor, *supra* note 8, at 595 (addressing circumstances under which courts may admit CSAAS testimony in sexual abuse prosecutions). Courts usually consider an expert's knowledge, experience, training, and skill before allowing such testimony. *Id.* Many judges adhere to a fairly liberal approach when deciding who they permit to testify; for instance, due to the unique nature of child sexual abuse, some jurisdictions have held that police officers, counselors, and other advocates are all qualified experts. *Id.*; *see also* Hall v. State, 611 So. 2d 915, 920 (Miss. 1992) (determining pediatrician, social worker, and therapist qualified to testify regarding CSAAS).

child witness.<sup>31</sup> Although some jurisdictions observe additional situation-specific instances in which they will allow such testimony, the debate over general educational testimony versus particularized testimony provides a framework from which to understand the constant disparities among courts.<sup>32</sup>

General educational testimony regarding common behavioral traits of sexually abused children is a widely used prosecutorial tool.<sup>33</sup> Arising out of concern over juror misconception regarding how child victims should behave, advocates utilize expert testimony to provide possible reasons for the actions of a supposed victim.<sup>34</sup> By suggesting that the child victim's seemingly odd behavior does not necessarily reveal untruthfulness, experts provide the jury with a social science explanation as to why a child may have acted in a way inconsistent with the average juror's expectation of how a child victim of sexual abuse should behave.<sup>35</sup>

Many behavioral science experts refer to this form of general background testimony as Child Sexual Abuse Accommodation Syndrome (CSAAS).<sup>36</sup> CSAAS encompasses the customary approach of this general testimony by

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31. See Trainor, *supra* note 8, at 595 (pointing out differences between two types of expert testimony in child sexual abuse cases); Telephone Interview with Wendy Demchick-Alloy, Chief of Sex Crimes Unit, Montgomery County District Attorney's Office, Pa. (Oct. 3, 2003) (discussing various aspects of issues surrounding testimony in child sexual abuse cases). Ms. Demchick-Alloy commented on her knowledge of the general versus particularized testimony and reiterated the range of viewpoints prosecutors take towards both. Telephone Interview with Wendy Demchick-Alloy, *supra*.

32. See Serrato, *supra* note 4, at 163-64 (summarizing spectrum of ways courts admit child sexual abuse testimony). For example, the admissibility of behavioral testimony following range from refuting a defense attack on a child's credibility to explaining the veracity of a specific child witness. *Id.* at 163. Many jurisdictions have attempted to limit the admissibility of this social framework testimony to instances where prosecutors use it to rehabilitate a victim's testimony following allegations of inconsistency and untruthfulness by the defense. *Id.*; see also Enea, *supra* note 7, at 2050 (providing example of one state's effort to clarify precisely when its courts will permit testimony).

33. See Fradella, *supra* note 26, at 405 (stating courts continue to admit behavioral scientist testimony in federal trials); see also Lynne Celandier DeSarbo, *The Danger of Value-Laden Investigation in Child Sexual Abuse Cases: Are Defendants' Constitutional Rights Violated When Mental Health Professionals Offer Testimony Based on Children's Hearsay Statements and Behaviors?*, 2 U. PA. J. CONST. L. 276, 299 (1999) (noting dangerous expansion of areas in which mental health professionals can testify).

34. See Steele, *supra* note 4, at 947 (highlighting need to provide context in order to assist jury in understanding behavior); see also *People v. Payan*, 220 Cal. Rptr. 126, 133 (Cal. Ct. App. 1985) (concluding expert testimony would have aided juror understanding). The *Payan* court, noting that reliance on juror common knowledge would likely have been an inadequate foundation upon which to reach a decision, reiterated the rationale behind general background testimony. 220 Cal. Rptr. at 133.

35. See Lorenzen, *supra* note 7, at 1046 (explaining general testimony on sexual abuse victims presupposes certain assumptions). Such testimony inevitably rests on the notion that a distressing event like sexual abuse results in certain behavior patterns that experts can meaningfully and consistently identify. *Id.*

36. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181-86 (1983) (setting forth basic premises behind theory). Dr. Summit first identified the concept and defined CSAAS as common language in the protection of sexually abused children. *Id.* at 181-85. Many courts and defense advocates, however, stress that Summit did not intend for people to use his theory as a "diagnostic device to show that abuse had, in fact, occurred." *Hall v. State*, 611 So. 2d 915, 919 (Miss. 1992). Consequently, much controversy has ensued regarding the tension between protecting children and preserving the right of defendants not to have an expert testifying to the truth in a particular case. *Id.* at 919.

identifying “behavioral coping mechanisms professionals commonly observe in sexually abused children.”<sup>37</sup> Although some specifically use the syndrome label in their analysis and testimony, it is also common for experts to simply mention the typical characteristics of sexual abuse victims in general, without specifically referring to these behavioral traits as a syndrome.<sup>38</sup>

In contrast to general behavioral testimony, particularized testimony attempts to provide deeper analysis and explicitly connects the general profile to the actual child witness and his or her specific behavior.<sup>39</sup> This form of behavioral testimony generates extensive criticism from opponents who argue it wrongfully exceeds the educational function of general testimony, allowing experts to impermissibly comment on witness credibility and truthfulness.<sup>40</sup> Although many courts do not embrace particularized testimony as readily as general educational testimony, certain jurisdictions allow experts to directly link the actions of a child witness to characteristics of victims in general.<sup>41</sup> Nevertheless, most courts approach this particularized form of behavioral testimony with hesitation, so as to avoid a situation where experts are afforded the opportunity to testify to a child’s truthfulness merely because that child’s behavior matches the common traits of sexually abused children.<sup>42</sup>

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37. Summit, *supra* note 36, at 178 (discussing identification of CSAAS). Specifically, the five characteristics Summit specifies are: (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicted, unconvincing disclosure, and (5) retraction. *Id.* at 181; *see also* State v. Kim, 645 P.2d 1330, 1338 (Haw. 1982) (noting not abuse of discretion to permit expert testimony regarding common emotional reactions of victims). The expert in *Kim* discussed in general terms the fear of safety and embarrassment professionals frequently observe in abuse victims. 645 P.2d at 1338.

38. *See* McCord, *supra* note 25, at 12 (describing implicit comparison made when experts only discuss experiences with sexually abused children).

39. *See* Trainor, *supra* note 8, at 610 (discussing particularized testimony regarding alleged victim’s credibility). *But see* State v. Chamberlain, 628 A.2d 704, 707 (N.H. 1993) (refusing to admit expert testimony linking child to general profile). In *Chamberlain*, the court stressed that the prosecution could not use particularized testimony to prove the defendant did in fact sexually abuse the child, and emphasized the need for courts not to recognize such testimony as a diagnostic device. 628 A.2d at 707.

40. *See* Mosteller, *supra* note 26, at 86-91 (discussing potential juror misuse of social framework testimony in child sexual abuse cases). The objections common among those opposed to the extensive use of such testimony include a concern that jurors will attach too much weight to experts who testify a child’s behavior matches up with that of most other victims. *Id.* at 86. Beyond overvaluation, opponents often stress that framework testimony inevitably favors the prosecution, because courts and professionals eagerly await an opportunity to tackle the national problem of child sexual abuse. *Id.* at 88-90.

41. *See* State v. Hall, 412 S.E.2d 883, 887 (N.C. 1992) (holding expert could compare particular child’s symptoms with those of sexually abused children); State v. Kennedy, 357 S.E.2d 359, 366 (N.C. 1987) (permitting expert to opine victim’s symptoms consistent with sexual or physical abuse). Although the court in *Hall* permitted an expert to testify to the individual child’s behavioral characteristics, the court reiterated that the expert testimony merely served to aid the jury in assessing the complainant’s credibility, and not to directly comment on the witness’ truthfulness. 412 S.E.2d at 887.

42. *See* Michele Meyer McCarthy, Note, *Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome in Kentucky*, 81 KY. L.J. 727, 735 (1993) (noting testimony may interfere with jury’s fact-finding function). This infringement on the jury’s role raises a constitutional concern that, by admitting such testimony, courts deny a defendant the right to a fair trial by jury. *Id.*; *see also* Commonwealth v. Garcia, 588 A.2d 951, 956 (Pa. Super. Ct. 1991) (balancing need for criminal prosecution with policy against testimony enhancing victim credibility); Monique Cirelli, *Expert Testimony in Child Sexual Abuse Cases:*

Despite the inconsistent manner in which jurisdictions across the nation permit these different types of behavioral expert testimony in child sexual abuse cases, most states have developed some type of discernable evidentiary pattern.<sup>43</sup> After a great deal of debate and contention throughout the past few decades, the policies of most states fall into one of three major categories: liberal, conservative, or a middle ground.<sup>44</sup> As the following approaches of three representative states suggest, the level of judicial protection and support for child victims depends upon the general attitude and viewpoint of each state's judiciary.<sup>45</sup>

### A. Liberal Approach

North Carolina provides an example of a state that allows prosecutors great latitude to present behavioral expert testimony in child sexual abuse cases.<sup>46</sup> Following this fairly unreserved approach, the North Carolina judiciary permits expert testimony concerning symptoms and characteristics of sexually abused children.<sup>47</sup> Furthermore, these courts allow evidence that explicitly connects those general characteristics to the child victim in a particular case.<sup>48</sup> Among the reasons North Carolina judges offer in support of broad admissibility is that

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*Helpful or Prejudicial?* People v. Beckley, 8 T. M. COOLEY L. REV. 425, 445-49 (1991) (noting problem of jury relying on expert testimony to improperly bolster credibility).

43. See Michael D. Stanger, *Throwing the Baby Out with the Bathwater: Why Child Sexual Abuse Accommodation Syndrome Should Be Allowed as a Rehabilitative Tool in the Florida Courts*, 55 U. MIAMI L. REV. 561, 569-72 (2001) (observing states respond in different manners to syndrome evidence in child sexual abuse cases). State court approaches range from a very liberal allowance of social science testimony to the most limiting view of admissibility. *Id.* at 569; see also *supra* notes 10-11 and accompanying text (offering example of state response to admission of behavioral evidence).

44. See Askowitz & Graham, *supra* note 3, at 213-17 (discussing nationwide case law trends regarding different approaches to admissibility); Stanger, *supra* note 43, at 569 (2001) (explaining decisions rest upon spectrum ranging from most liberal acceptance of testimony to most restrictive); Rosemary L. Flint, Note, *Child Sexual Abuse Accommodation Syndrome: Admissibility Requirements*, 23 AM. J. CRIM. L. 171, 173-174 (1995) (examining lack of consistency among courts and corresponding favored policies).

45. See Meredith F. Sopher, Note, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 635-36 (1994) (concluding system cannot effectively handle child sexual abuse cases without restructuring to meet particular needs); see also *supra* notes 11-12 and accompanying text (discussing balance between defendants' rights and search for truth for child sexual abuse victims).

46. See *Hall*, 412 S.E.2d at 887-90 (referencing different areas in which North Carolina permits psychological expert testimony). The *Hall* court noted that in North Carolina, the admissibility of this form of behavioral expert testimony is comparably broad in other areas such as post traumatic stress syndrome and rape trauma syndrome. *Id.* at 889.

47. See *State v. O'Connor*, 564 S.E.2d 296, 297 (N.C. Ct. App. 2002) (permitting expert testimony in child sexual abuse prosecutions); see also *State v. Stancil*, 559 S.E.2d 788, 789 (N.C. 2000) (reiterating state's continuous stance authorizing profile testimony on sexually abused children). Although the *Stancil* court followed North Carolina's expansive precedent, it noted that notwithstanding such leniency, courts should not admit testimony that abuse has in fact occurred because such testimony would represent an invalid opinion on a victim's credibility. 559 S.E.2d at 789.

48. *O'Connor*, 564 S.E.2d at 297 (recognizing North Carolina judiciary's willingness to allow testimony beyond only children in general).

the testimony, if the jury believes it, can assist in jurors' understanding and assessment of a child's credibility, upon which the outcome of this type of case often rests.<sup>49</sup>

North Carolina courts repeatedly articulate that although this testimonial evidence may lend support to the victim's credibility, that fact alone does not render it inadmissible.<sup>50</sup> In supporting this reasoning, courts in other jurisdictions that have since adopted a more liberal view offer various rationales for accepting this purported impermissible infringement on the jury's role to determine credibility.<sup>51</sup> North Carolina courts continue to follow this liberal reasoning, as most notably the state's highest court commented that the majority of testimony, regardless of its form, in some manner usually tends to support or question the credibility of a particular witness.<sup>52</sup> Consequently, courts such as those in North Carolina refuse to exclude particularized testimony of behavioral experts solely because it could affect the jury's view of the child.<sup>53</sup>

### B. Conservative Approach

In contrast to the foregoing position, Pennsylvania represents a restrictive position on the admissibility of behavioral expert testimony in child sexual abuse cases.<sup>54</sup> In accordance with this perspective, courts in Pennsylvania do

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49. See *State v. Kennedy*, 357 S.E.2d 359, 367 (N.C. 1987) (explaining reasoning behind permitting qualified testimony about typical victim characteristics); see also *McCarthy*, *supra* note 42, at 745-46 (referencing juror misunderstanding over children's actions compared with other crime victims). Similar to North Carolina's position, supporters of broad admissibility rely on potential juror misunderstanding as evidence that expert psychological testimony helps, rather than frustrates, the overall judicial truth finding process. *McCarty*, *supra* note 42, at 745-46.

50. See *Kennedy*, 357 S.E.2d at 367 (suggesting most testimony, regardless of expertise level, lends support to credibility).

51. See *Commonwealth v. Baldwin*, 502 A.2d 253, 257 (Pa. Super. Ct. 1985) (noting psychological testimony does not impermissibly invade jury's prerogative to determine credibility). Representing the former view of Pennsylvania courts, the *Baldwin* court stated that "expert testimony cannot invade the province of the jury unless the jury is instructed that it must agree with the expert's assessment." *Id.*

52. See *Kennedy*, 357 S.E.2d at 367 (offering justification for admissibility in light of potential affect on jury). But see Robert H. King Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?*, 53 OHIO ST. L.J. 49, 95 (1992) (expressing concern over various courtroom practices adversely affecting presumption of innocence). Some commentators disagree with the approach in *Kennedy*, and refute this argument with the notion that such testimony comes close to infringing on the constitutional presumption of defendants' innocence. King, *supra*, at 95. These opponents note the high risk the practice utilized by courts such as those in North Carolina pose regarding factors that may influence a jury's deliberation and ultimate decision. *Id.*

53. See *supra* note 50 and accompanying text (suggesting ongoing inevitable effect of most experts on juror credibility determinations). Courts in other states likewise note that behavioral testimony is not testimony that indicates a child witness is telling the truth, but rather stands as another form of evidence to support the child's credibility in the prosecution's effort to prove abuse occurred. *State v. Stowers*, 690 N.E.2d 881, 883 (Ohio 1998) (refuting argument regarding particularized testimony implying expert believes child victim's testimony).

54. See *Steele*, *supra* note 4, at 962 (describing Pennsylvania judiciary's position as absolutist in its

not permit prosecutors to offer expert testimony in any manner regarding behavioral patterns of child sexual abuse victims.<sup>55</sup> The continuous skepticism that the Pennsylvania judiciary holds in its approach to this topic evinces its consistent concerns regarding the evidentiary value of diagnostic syndrome testimony, and reveals its position that such testimony amounts to an unsupportable behavioral profile.<sup>56</sup>

The primary explanation judges in Pennsylvania offer in defense of this restrictive position is that there is no need for any expert to explain child behavior to a jury, much less relate that explanation to a specific witness.<sup>57</sup> Relying on the longstanding principle that expert testimony is inadmissible when an issue is within the bounds of common knowledge, numerous courts in the state have concluded that characteristics of an alleged child victim of sexual abuse are within the ordinary experience of the average juror.<sup>58</sup> Although the Pennsylvania judiciary acknowledges the growing and disturbing problem of child sexual abuse in America, the state's position is clear that allowing an expert to testify about behavioral patterns, even if only in general terms with no specific connection to the child victim, constitutes grounds for reversible

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approach to behavioral science evidence). Kentucky's judiciary also takes an extremely conservative approach in this area, prompting numerous commentators to accuse the state of possessing "tunnel vision" due to its refusal to admit such testimony even in some limited form. *Id.* The Kentucky approach suggests a general distrust for syndrome evidence, reflected in one court's refusal to admit CSAAS testimony and statement that such testimony would be "utterly immaterial to any aspect of the case . . . and nothing more than a theoretical discussion." *Newkirk v. Kentucky*, 937 S.W.2d 690, 693 (Ky. 1996).

55. See Patricia A. Korey, *Rehabilitative Expert Testimony in Child Sexual Abuse Cases: The Supreme Court of Pennsylvania Shuts the Door on Effective Prosecutions*, 66 TEMP. L. REV. 589, 589 (highlighting landmark case holding testimony inadmissible in child sexual abuse cases). Until the early 1990s, Pennsylvania agreed with other states in permitting prosecutors to admit expert testimony to assist the jury in understanding the specific type of crime and unique victim. *Id.*

56. See *Commonwealth v. Dunkle*, 602 A.2d 830, 836 (Pa. 1992) (expressing doubt concerning use of profiles to obtain a conviction). In its landmark ruling, the *Dunkle* court contrasted testimony over the behavioral patterns of sexually abused victims with the so-called battered child syndrome. *Id.* at 835-36. The court explained that testimony on battered children was admissible because the diagnostic traits were specific to physically abused children and not too general. *Id.* at 836. In contrast, the court deemed behavioral testimony regarding sexually abused children as impermissible because it was not "explicit, probative and relevant." *Id.*

57. See *Dunkle*, 602 A.2d at 836-37 (explaining characteristics of children's behavior commonly understood). For example, the court identifies various examples of behavior that do not need expert analysis, such as children not always coming forward and being embarrassed and scared they are damaged. *Id.* at 836. The *Dunkle* court also noted that the prosecutor was able to elicit testimony involving these characteristics directly from the child as a witness, thereby making the need for expert testimony much less apparent. *Id.* at 838. *But see id.* at 839 (McDermott, J., dissenting) (noting *Dunkle* decision failed to provide prosecutors with means to deflect defense attacks on child victim's credibility).

58. See *Commonwealth v. Balodis*, 747 A.2d 341, 345 (Pa. 2000) (stressing expert testimony only necessary for subjects requiring special knowledge, skill, or intelligence). The *Balodis* court reiterated Pennsylvania's ongoing policy concern regarding the potential consequences of extending social science syndrome testimony. *Id.* at 345-46. For instance, the judiciary expressed concern that, if courts permitted testimony as to the veracity of classes of people, purported experts would likely testify as to the veracity of elderly and various ethnic groups. *Id.* at 345. This would potentially encourage jurors to defer to experts in assessing the truthfulness of classes of people instead of individual witnesses. *Id.* at 346.

error.<sup>59</sup>

The argument of the Pennsylvania courts that such testimony infringes on the jury's right to determine credibility is intimately connected to the notion that the subject of child behavior falls within the common knowledge of most jurors.<sup>60</sup> Long noted by opponents of the liberal view of admissibility, many Pennsylvania judges argue that the jury's role as sole fact finder may potentially clash with behavioral experts who, supporters argue, impermissibly assist the jury in determining the truthfulness of child witnesses.<sup>61</sup>

### C. Middle Ground Approach

The general principles governing the admissibility of behavioral testimony in child sexual abuse cases in Massachusetts form a distinction between general and particularized testimony.<sup>62</sup> Unlike Pennsylvania courts, the Massachusetts judiciary possesses the discretion to permit prosecutors to admit expert testimony for the sole purpose of explaining the general conduct of child sexual abuse victims to the jury.<sup>63</sup> Accordingly, Massachusetts courts refuse to allow experts to link their generalized opinions specifically to the experience of the

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59. See *Dunkle*, 602 A.2d at 838 (expressing awareness over "plague" of child abuse in society). The *Dunkle* majority reiterated the view of opponents of the use of social science testimony, who warn against a disregard of long-standing evidentiary principles merely to obtain a higher rate of conviction. *Id.* The court stressed that shortcuts in the courtroom are not permissible regardless of "how noble the purpose." *Id.*; see also Stanger, *supra* note 43, at 563 (warning against abrogating fundamental evidentiary canons in response to increasing prevalence of abuse).

60. See *Commonwealth v. Gallagher*, 547 A.2d 355, 358 (Pa. 1988) (emphasizing credibility determination based on ordinary life experiences and natural tendencies rather than expert assistance). The Pennsylvania judiciary often instructs jurors to consider a child's age and circumstances surrounding an incident, and case law suggests that the instructions sufficiently guide juries to adequately assess credibility without expert assistance. *Dunkle*, 602 A.2d at 837. Additionally, most Pennsylvania courts rely on the premise that sexual abuse syndrome is not specific enough to one group to be reliable, noting some research indicates children react to sexual abuse in very diverse ways. *Id.* at 832-33; see also Laura Etlinger, *Social Science Research in Domestic Violence Law: A Proposal to Focus on Evidentiary Use*, 58 ALB. L. REV. 1259, 1279 (1995) (summarizing obstacles involved in social science methodology resulting in unreliable legal evidence); *supra* notes 25-26 and accompanying text (discussing various rationales, including lack of general scientific acceptance, for rejecting social science testimony).

61. See *Cirelli*, *supra* note 42, at 445-49 (discussing problems of juror deference to expert testimony and improper bolstering of witness credibility); see also Kim Wessel, *Child Sex-Abuse Prosecutors Decry Ban on Expert Testimony; Kentucky is One of Three States With Prohibition*, COURIER-J. (Louisville), Aug. 21, 2000, at A1 (recognizing Kentucky's view of entrusting jurors to arrive at proper verdict without experts). It is Kentucky's position that allowing expert testimony regarding classifications and syndromes results in the removal of the jury from its historic function of assessing credibility. Wessel, *supra*, at A1.

62. See *Commonwealth v. Federico*, 683 N.E.2d 1035, 1040 (Mass. 1997) (allowing general expert testimony to assist jury in understanding lack of physical evidence of abuse); *Commonwealth v. Dockham*, 542 N.E.2d 591, 597 (Mass. 1989) (setting forth Massachusetts rule regarding admissibility of behavioral testimony in child sexual abuse cases).

63. See *Commonwealth v. Deloney*, 794 N.E.2d 613, 620 (Mass. App. Ct. 2003) (holding court will usually allow testimony not focusing on specific child witness); see also Allen, *supra* note 25, at 326-28 (discussing ongoing debate over education and deference relating to expert testimony).

actual child victim in a particular case.<sup>64</sup>

Furthermore, Massachusetts provides a safeguard by granting the trial judge the discretion to exclude testimony that, although not explicitly linking general characteristics to the child witness, nevertheless constitutes “impermissible vouching.”<sup>65</sup> Massachusetts courts reserve this precaution for instances when an expert’s testimony extends beyond a description of general behavioral principles to assist the jury, but falls short of particularized testimony directly linking the description to the individual witness.<sup>66</sup> Massachusetts courts find that in some situations, the general testimony intending to educate and inform can potentially nonetheless evolve into “profile” testimony implicitly signaling an expert’s belief that the child was sexually abused.<sup>67</sup>

The Massachusetts judiciary allows such testimony only after it concludes that the testimony may potentially assist the jury in deciding an issue that the court deems to lie beyond the realm of common knowledge.<sup>68</sup> In focusing on the educational role of an expert, Massachusetts courts facilitate the admission of general behavioral characteristics without allowing reference or comparison to the specific victim.<sup>69</sup> The Massachusetts judiciary agrees, to some extent, with the liberal view that information regarding typical symptoms of sexually

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64. See *Commonwealth v. LaCaprucia*, 671 N.E.2d 984, 986 (Mass. App. Ct. 1996) (explaining explicit link of expert opinion to experience of child witness amounts to impermissible vouching). Although courts clearly refuse to admit particularized testimony linking general traits to particular child witnesses, the judiciary nevertheless recognizes that the “line between the two is not easily drawn.” *Commonwealth v. Richardson*, 667 N.E.2d 257, 262 (Mass. 1996).

65. *Richardson*, 667 N.E.2d at 262 (stating testimony unfairly related implicitly to victim’s credibility as expert perceived it). Although it did not find the error prejudicial, the *Richardson* court applied the safeguard by refusing to approve testimony that went beyond educational background information, even if the expert did not explicitly link her opinion to the witness. *Id.* at 262-63.

66. See *id.* at 262 (providing example of third category of testimony falling between general and explicit particularized); *Commonwealth v. Rather*, 638 N.E.2d 915, 919 (Mass. App. Ct. 1994) (demonstrating narrow line between proper and improper expert testimony).

67. See *Rather*, 638 N.E.2d at 919-20 (offering example of expert endorsing witness credibility without specific comment). In cases where the expert has observed or examined the victim, refers to him or her during testimony, and also gives an opinion, some Massachusetts courts suggest the jury may believe that the witness is commenting on the credibility of the particular victim. *Id.* at 920. Therefore, in order to avoid this situation from occurring, some courts highlight the benefits of using only those experts with no prior relationship with the victims or their families. *Id.*

68. See *LaCaprucia*, 671 N.E.2d at 986 (suggesting general expert testimony helpful because topic often beyond scope of jurors’ knowledge). Courts are primarily concerned with preventing a jury from unfairly imposing normal standards in evaluating a child’s behavior. *Flint*, *supra* note 44, at 184 (discussing concern over juror misconception and misunderstanding in child sexual abuse cases); see also *Commonwealth v. Mamay*, 553 N.E.2d 945, 951 (Mass. 1990) (discussing general social framework testimony in context of assisting jury with rape trauma syndrome).

69. See *Mosteller*, *supra* note 26, at 128 (stating juror misinformation provides need for educational role of expert testimony); see also *Commonwealth v. Deloney*, 794 N.E.2d 613, 621-22 (Mass. App. Ct. 2003) (holding testimony comparing actions of child victims to norm of child victims inadmissible). In a recent Massachusetts decision, the *Deloney* court reiterated that courts do not convict people of crimes on the basis of statistics and models, and likewise should not determine whether a person has suffered as a victim on the same basis. 794 N.E.2d at 622.

abused children is beyond the common knowledge of jurors.<sup>70</sup> The courts also recognize, however, that an explicit linking of the expert opinion to the experience of the witness likely intrudes upon the jury's province to assess the child's credibility.<sup>71</sup> Consequently, Massachusetts permits broad testimony of an informative nature to assist jurors, yet draws the line when such testimony reaches the point of substantially influencing the jury's decision about whom to believe.<sup>72</sup>

#### IV. ANALYSIS

Overly liberal or restrictive jurisdictions should follow Massachusetts' method regarding the admission of behavioral expert testimony in child sexual abuse cases.<sup>73</sup> Unlike the conservative approach adopted by Pennsylvania, the Massachusetts standards governing admissibility allow courts to balance the need to assist juries in understanding common characteristics of child victims with the obligation to provide defendants a fair trial where the fact finder is the sole assessor of credibility.<sup>74</sup> Furthermore, the Massachusetts approach should serve as a model for liberal jurisdictions because the Massachusetts rules grant child victims the protection states such as North Carolina stress as paramount.<sup>75</sup> Moreover, the Massachusetts position allows for judicial discretion in determining when inferential comments on witness' credibility usurp the fundamental role of the jury in a criminal case.<sup>76</sup>

The restrictive approach of Pennsylvania fails to adequately provide special safety measures necessary to protect the legal interests of child victims.<sup>77</sup> Due to unique problems associated with prosecuting and obtaining convictions in child sexual abuse cases, it is imperative that courts take specific measures to ensure that the disadvantages plaguing child victims in the courtroom do not

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70. See *supra* note 68 and accompanying text (providing example of view involving supplementing gaps in juror knowledge); see also Flint, *supra* note 44, at 180-81 (noting juries often react with disbelief to children's behavior because it contradicts generally held expectations); *supra* notes 48-49 and accompanying text (discussing liberal view of admissibility in light of juror misunderstandings).

71. See *supra* notes 57-59 and accompanying text (reiterating Pennsylvania's narrow view on protecting jury's role in criminal process).

72. See *supra* notes 63-67 and accompanying text (discussing Massachusetts' approach to distinguishing between types of behavioral expert testimony).

73. See *supra* Part III.A-C (discussing advantages and disadvantages of various jurisdictional approaches).

74. See *supra* Part III.C (setting forth Massachusetts' position on admissibility of behavioral testimony in child sexual abuse cases).

75. See *supra* notes 48-49, 68, 70 and accompanying text (describing need for expert testimony due to juror misunderstanding).

76. See *supra* notes 65-67 and accompanying text (referencing Massachusetts' judicial safeguards ensuring no intrusion on jury's function).

77. See *supra* notes 54-61 and accompanying text (describing Pennsylvania's restrictive ban on all behavioral expert testimony in child sexual abuse cases); see also Steele, *supra* note 4, at 963, 972 (describing and criticizing absolutist approach of Pennsylvania judiciary for its failure to protect children).

jeopardize the fairness of the proceeding.<sup>78</sup> Although the Pennsylvania judiciary purportedly bars behavioral expert testimony in order to protect the integrity of the system, the judicial system's reliability is actually disintegrated in these cases because prosecutors do not have the tools necessary to educate the jury and rehabilitate child witnesses following attack by defense counsel.<sup>79</sup>

On the other end of the spectrum, states that utilize a liberal approach similar to the policy of North Carolina afford too much protection to child sexual abuse victims at the expense of defendants' constitutional rights.<sup>80</sup> Even in light of the horrific nature of these crimes, judiciaries must not abandon fundamental principles of the legal system and allow experts to comment directly on a child's credibility.<sup>81</sup> By permitting the admission of particularized testimony, liberal jurisdictions risk that courts will allow prosecutors to present questionable social science generalizations to jurors as proven theory in support of a child witness.<sup>82</sup> Notwithstanding the importance of educating jurors on subjects that rest outside the scope of ordinary experience, allowing experts to directly comment on whether a victim fits a profile gives experts a central role in shaping credibility that courts should instead reserve solely for the jury.<sup>83</sup>

The Massachusetts judiciary's approach during the past few years has established a structure to effectively govern the admissibility of behavioral expert testimony in child sexual abuse cases.<sup>84</sup> Massachusetts' middle ground position serves as a foundation upon which other states should base their respective positions due to its success in striking a balance between the

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78. See *supra* notes 3-4 and accompanying text (outlining special considerations in child abuse cases and potential need for judicial adjustment).

79. See *supra* note 59 and accompanying text (referencing *Dunkle* reasoning regarding maintenance of longstanding structure in legal system); see also Enea, *supra* note 7, at 2054-55 (noting evidentiary issues and related reforms in child sexual abuse cases are problematic). Enea notes that, in order to protect the truth-seeking role of the trial, courts may utilize numerous measures that adequately counteract concern over the nature and reliability of expert social science evidence regarding child victims. Enea, *supra* note 7, at 2055.

80. See *supra* notes 46-53 and accompanying text (explaining approach of North Carolina judiciary); see also Dally, *supra* note 29, at 134 (advocating improved procedures to protect children instead of infringement on defendants' constitutional rights).

81. See *supra* note 59 and accompanying text (summarizing one court's view recognizing severity of problem, yet warning against disruption of evidentiary principles). But see *supra* note 45 and accompanying text (noting system must be restructured to meet unique needs of child victims).

82. See Cohen, *supra* note 5, at 456 (summarizing views regarding unreliability and danger of prejudice testimony on typical victim characteristics). Reflecting the position of many opponents of liberal admissibility of behavioral expert testimony, Cohen postulates that courts should generally exclude such testimony notwithstanding the interest in protecting children due to its tendency to mislead jurors. *Id.* at 432; see also Askowitz, *supra* note 11, at 208 (noting study of child abuse relatively new, with theories often lacking empirical support).

83. See Cirelli, *supra* note 42, at 445-49 (addressing issue of experts participating too extensively in trials due to juror deference); see also McCarthy, *supra* note 42, at 735 (recognizing potential for experts to impermissibly influence jurors).

84. See *supra* Part III.C (describing Massachusetts' standards for admissibility of behavioral expert testimony).

countervailing public policies at play in these unique cases.<sup>85</sup> Massachusetts judges, as well as other commentators, consistently recognize that behavioral testimony in child sexual abuse cases stands as a problem that will be neither easily solved by courts or social scientists, nor ever free from controversy.<sup>86</sup> Nonetheless, by extracting the most important considerations inherent in both the overly restrictive approach and the exceedingly liberal viewpoint, Massachusetts endeavors to achieve fair and equitable results for both sides in an adversarial system facing a challenging and emotional issue.<sup>87</sup>

Massachusetts' approach affords child victims the necessary protections that restrictive jurisdictions fail to offer as a result of their complete ban on behavioral expert testimony.<sup>88</sup> By allowing generalized testimony, courts in Massachusetts permit prosecutors to use valuable evidence to help rehabilitate and contextualize a child victim's testimony.<sup>89</sup> In light of the focus on educating the jury without infringing on its sole duty to determine credibility, the Massachusetts approach allows jurors to only hear general background information.<sup>90</sup> Consequently, by refusing to allow experts to take the additional step of connecting the witness to the general educational testimony, this approach addresses the concern of the Pennsylvania courts that such testimony may infringe upon the jury's role.<sup>91</sup> Although it is likely no standard will alleviate all concerns regarding what facts a jury ultimately considers, the Massachusetts approach comes closest to ensuring that a jury will not defer to an expert's opinion in deciding whether a particular victim fits the profile of a common victim.<sup>92</sup> Instead, Massachusetts' standard helps to guarantee that only the jury, after listening to general information on common characteristics of these unique victims, will make the final decision as to whether to believe

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85. See Askowitz, *supra* note 11, at 239 (advocating search for balance between protecting children and addressing concerns over expert testimony); see also Sopher, *supra* note 45, at 663 (predicting demise of some jurisdictional approaches while advocating systemic reform).

86. See *supra* note 25 and accompanying text (discussing ongoing controversy and confusion over admissibility standards of child abuse expert testimony); see also *Commonwealth v. Richardson*, 667 N.E.2d 257, 262 (Mass. 1996) (noting fine line between different types of expert testimony in child sexual abuse case).

87. See *supra* Part III.C (explaining how Massachusetts' approach falls between full admissibility and absolute prohibition).

88. See *Korey*, *supra* note 55, at 608-09 (noting other states' approaches can offer guidance to jurisdictions like Pennsylvania). By obtaining a better framework within which to deal with this problem, states with absolute bans on behavioral testimony could help child witnesses whose credibility is vulnerable to misunderstanding by providing them with indirect support. *Id.*

89. See *supra* note 68 and accompanying text (explaining Massachusetts' reasoning in support of admissibility of general testimony).

90. See *supra* note 65 and accompanying text (discussing hesitancy of Massachusetts' courts to allow testimony exceeding educational and informational role); see also *Allen*, *supra* note 63, at 328 (stressing expert testimony seeking to educate jury can help enhance rationality).

91. See *supra* notes 67-70 and accompanying text (discussing Massachusetts' rationale for refusing to admit particularized testimony).

92. See *State v. Kennedy*, 357 S.E.2d 359, 367 (N.C. 1987) (noting likelihood of testimony supporting credibility in some manner); *supra* notes 63-67 and accompanying text (explaining Massachusetts' reasoning behind exclusion of particularized testimony and related judicial safeguards).

that the defendant sexually abused the child.<sup>93</sup>

Additionally, in contrast to the liberal view of jurisdictions such as North Carolina that allow both generalized and particularized testimony, Massachusetts' refusal to permit particularized testimony gives defendants the crucial and indispensable right to have a jury decide their fate.<sup>94</sup> The most commendable feature of Massachusetts' admissibility standards is the additional discretion courts provide trial judges for use as a safeguard in preventing those forms of generalized testimony which, while otherwise admissible, come too close to particularized testimony that impermissibly infringes upon the jury's role.<sup>95</sup> By not allowing experts to directly comment on credibility, Massachusetts balances defendants' rights with the desire for testimony that, although helpful, remains an unclear social theory that should not serve as the basis for a jury's conviction in such a horrific crime.<sup>96</sup> Massachusetts rightfully refuses to grant experts in these cases an inappropriately large amount of influence in the litigation process, and thus creates a workable balance by only allowing such testimony in general and informative terms.<sup>97</sup>

#### V. CONCLUSION

The standards for admissibility of behavioral expert testimony in Massachusetts provide defendants and child victims with a balanced approach to the resolution of a delicate and controversial legal issue. Reported cases of child sexual abuse in America have escalated within the past few decades, and unfortunately will likely continue to plague both the public and the judicial system. As a result, jurisdictions cannot continue to ignore the special needs of child victims, particularly in light of the increasingly significant role victims play in sexual assault prosecutions. Massachusetts recognizes the unique problems child victims and their prosecutorial advocates face, and thus tailors its admissibility guidelines to provide necessary protections without ignoring the basic tenets of the legal system and the protections to which defendants are similarly entitled.

There is perhaps nothing worse than the sight or thought of a vulnerable and

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93. See *supra* notes 63-67 and accompanying text (summarizing Massachusetts judiciary's decision to exclude particularized testimony and leave final decision making to jurors).

94. See McCarthy, *supra* note 42, at 746 (stressing need for testimony not unfairly prejudicial to defendants); see also *supra* note 64 and accompanying text (noting Massachusetts' effort to avoid experts impermissibly vouching for witness credibility).

95. See *supra* notes 65-67 and accompanying text (detailing Massachusetts' safeguard allowing judges to omit general testimony implicitly commenting on credibility).

96. See *supra* notes 91-93 and accompanying text (summarizing benefits of Massachusetts' middle ground position); see also Askowitz, *supra* note 11, at 208 (reiterating lack of solid support for social science theories present in behavioral expert testimony).

97. See *supra* Part III.C (setting forth Massachusetts' approach balancing liberal and conservative positions).

confused child victim testifying in a sexual abuse prosecution, only to be questioned, disbelieved, and even mocked by defense counsel. While courts should not abandon constitutional principles such as a defendant's right to an impartial jury, modern judiciaries must recognize the potential and even probable damage that may result from failing to provide child victims with any additional support. If states follow the lead of jurisdictions such as Massachusetts and balance the rights of children with those of defendants regarding admissibility of behavioral testimony, both sides to these troubling cases will benefit from an improved sense of justice and renewed focus on the search for truth.

*Dyane L. Noonan*