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# ADMISSIBILITY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES IN CALIFORNIA: RETIRE *KELLY-FRYE* AND RETURN TO A TRADITIONAL ANALYSIS

*Linda E. Carter\**

## I. INTRODUCTION

Cases involving child sexual abuse frequently include expert testimony. The cases may be civil or criminal. Civil cases arise as dependency or neglect cases in juvenile court or as child custody or daycare license-revocation proceedings.<sup>1</sup> Criminal cases arise when the abuser is prosecuted under a criminal statute.<sup>2</sup> Experts, such as psychiatrists, psychologists, or social workers, are called to the stand to help the factfinder determine if the abuse occurred. The type of testimony may vary. The expert, for example, may testify that the child was sexually molested, that the child's symptoms are consistent with the behavior of sexually abused children or with the child sexual abuse accommodation syndrome (CSAAS),<sup>3</sup> or that sexually abused children in general respond with certain behaviors.

One of the major challenges to expert testimony on child sexual abuse is whether such testimony must meet the *Kelly-Frye* standard of admissibility<sup>4</sup> and, if so, whether that standard is satisfied. The *Kelly-Frye* standard requires that a new scientific technique invoked by the expert be generally accepted within the relevant scientific community.<sup>5</sup>

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1. See, e.g., *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987) (daycare license revocation proceeding); *In re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1st Dist. 1987) (dependency proceeding).

2. See, e.g., *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985) (prosecution under California Penal Code section 288a(b)(2), oral copulation with a person under 16, and section 286(b)(2), sodomy with a person under 16).

3. See *infra* notes 105-06 and accompanying text.

4. Under the *Kelly-Frye* standard, a new scientific technique must be generally accepted within the relevant scientific community in order to be admissible. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976). For a discussion of the development of the *Kelly-Frye* standard, see *infra* notes 23-53.

5. *Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148 (1976).

The standard has proved problematic. The courts of appeal in California are struggling with the following issues: Whether the methodology of the experts in child sexual abuse cases constitutes a "new scientific technique;" whether it makes a difference if the expert testifies on the basis of a "syndrome" or merely states a clinical opinion that the child was abused; and whether *Kelly-Frye* should apply if the expert speaks only in generalized terms, without reference to the specific child in the case.

There is presently little guidance from the California Supreme Court on the applicability of *Kelly-Frye* to expert testimony in child sexual abuse cases. The courts of appeal have looked to decisions from the supreme court that analyze the applicability of the *Kelly-Frye* test to other forms of expert testimony. The appellate courts, however, are faced with difficult questions regarding the purpose of the *Kelly-Frye* rule and its applicability in the child sexual abuse context.

This Article explores the California Supreme Court decisions on the *Kelly-Frye* standard and its application by the courts of appeal to expert testimony in child sexual abuse cases. The first section presents an overview of the evidence rules on experts and the development of the *Kelly-Frye* standard. The second section analyzes decisions applying *Kelly-Frye* to psychological<sup>6</sup> testimony. The third section explores the conflicting decisions by the courts of appeal on the applicability of *Kelly-Frye* to expert testimony in cases of child sexual abuse. An alternative standard for admissibility of expert testimony, the "traditional or relevancy analysis," is explained in the fourth section. The final section proposes that the California courts adopt a modified traditional analysis using evidentiary rules on expert testimony and relevance. This approach would provide a coherent theoretical framework for testing the admissibility of expert testimony on child sexual abuse and other areas of expertise. Both the viability of the *Kelly-Frye* test and the mechanics of the alternative proposed are analyzed in the context of California evidence law, including the probable impact of Proposition 8, the Truth-in-Evidence Initiative, upon the standards.<sup>7</sup> The Article concludes with a comparison of the traditional analysis with a *Kelly-Frye* analysis in two areas already addressed by the California Supreme Court—rape trauma syndrome and eyewitness identification—and in the uncharted area of child sexual abuse.

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6. The term "psychological" is used in this Article to describe testimony relating to mental and behavioral traits or manifestations. The testimony is typically that of psychiatrists, psychologists, or social workers.

7. CAL. CONST. art. I, § 28. For the text of the provision, see *infra* text accompanying note 290.

## II. OVERVIEW OF THE FOUNDATION REQUIRED FOR EXPERT TESTIMONY

The proponent of expert testimony must lay a foundation before the expert will be permitted to testify.<sup>8</sup> This foundation consists of demonstrating that the topic is a proper subject for expert testimony, that the witness qualifies as an expert, and that, if the testimony is based on a novel scientific test or principle, it is generally accepted in the relevant scientific community.<sup>9</sup> Evidence codes typically contain the proper subject and expert qualification requirement.<sup>10</sup> Evidence codes also generally provide rules on the appropriate bases of the opinion.<sup>11</sup> The California Evidence Code follows this pattern.<sup>12</sup> The requirement of general acceptance of a scientific principle, however, is ordinarily a judicially created rule. The *Kelly-Frye* test in California is an example of a non-codified, judicially developed rule. This section reviews the pertinent California Evidence Code provisions in the first subpart; the second subpart discusses the development of the *Kelly-Frye* test.

### A. California Evidence Code Requirements for Expert Testimony

The test for determining whether the subject of proposed expert testimony is a proper one for expert opinion is stated in Evidence Code section 801.<sup>13</sup> That section provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is (a) related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ."<sup>14</sup> Thus, expert opinion must be more than merely relevant.<sup>15</sup> It must also assist the trier of fact because the topic is one about which most people would not be knowledgeable. If the trier of fact could make the appropriate interpretations and conclusions on its own, the expert testimony is not admissible.<sup>16</sup> This rule reflects the preference for factual, rather than

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8. See CAL. EVID. CODE § 801 (West 1966).

9. See *id.* §§ 801, 720.

10. See, e.g., FED. R. EVID. 702.

11. See, e.g., FED. R. EVID. 703.

12. CAL. EVID. CODE §§ 720, 801 (West 1966).

13. *Id.* § 801.

14. *Id.*

15. Relevance is established by merely demonstrating that the evidence has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." CAL. EVID. CODE § 210.

16. See, e.g., *Westbrooks v. State*, 173 Cal. App. 3d 1203, 1210, 219 Cal. Rptr. 674, 678 (2d Dist. 1985) (no need for expert testimony that highway not dangerous where jurors could easily reach conclusion on basis of facts such as presence of flares and sheriff's vehicle).

opinion, testimony<sup>17</sup> and the policy to let the factfinder resolve all possible issues. It is feared that the authority of an expert may preempt deliberation on the issue by the trier, particularly a jury.<sup>18</sup>

An expert must also be qualified. Qualifications are governed by section 720(a) which provides that "a person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."<sup>19</sup> The type of background necessary to qualify as an expert is thus quite broad. The rule liberally permits credentials other than academic degrees to satisfy the qualification requirement.

Admissibility of expert testimony is also subject to rules regulating acceptable bases for the opinion. Section 801(b) states the general rule that the expert may base an opinion on personal knowledge or facts made known to him.<sup>20</sup> Although the facts themselves may be inadmissible in evidence, they can still form a basis for an opinion if they are "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject . . . ."<sup>21</sup> This rule allows great latitude to the expert and tries to conform legal admissibility to the world of the expert's field.<sup>22</sup> Experts thus may well rely on inadmissible hearsay statements, for example, or on facts told to the expert by the attorneys.

This codified approach to the subject matter, qualification, and ba-

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17. In development of the common law of evidence, there was a preference for "fact" rather than "opinion." See, e.g., 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 375 (1977).

18. See *People v. McDonald*, 37 Cal. 3d 351, 362, 368, 690 P.2d 709, 716, 720, 208 Cal. Rptr. 236, 243, 247 (1984), where the trial court found expert testimony on eyewitness identification would invade the province of the jury, but the California Supreme Court held that such testimony would assist the jury. A concern with preempting the trier from deciding the factual issues was also the root of the traditional rule that the expert could not express an opinion on the "ultimate issue." See D. LOUISELL & C. MUELLER, *supra* note 17, at § 394. This rule has been abandoned in modern codes such as California's. See CAL. EVID. CODE § 805 (West 1966).

19. CAL. EVID. CODE § 720.

20. *Id.* § 801(b). Section 801(b) provides that the expert's opinion must be based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

21. *Id.*

22. *Id.* However, California Evidence Code sections 803 and 804 further regulate the bases of expert opinion. Section 803 provides for exclusion of the entire expert opinion or part of the basis of the opinion if the basis is improper. *Id.* § 803. Section 804 provides for cross-examination, if the person is available, of anyone whose opinion or statement is relied upon by the expert. *Id.* § 804.

ses-of-opinion requirements contrasts with the test developed through case law for the admissibility of testimony based on a scientific principle. That test is the subject of the next subpart.

### *B. The Development of the Kelly-Frye Test*

In 1923, the Circuit Court of Appeals for the District of Columbia decided *Frye v. United States*.<sup>23</sup> The court ruled inadmissible the results of a test performed on a precursor to the polygraph. In now-famous language, the court stated:

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.<sup>24</sup>

As a consequence of this case, the *Frye* test has become part of the foundation that must be laid by the proponent of scientific evidence. The proponent must demonstrate that the scientific principle, discovery, methodology or technique is generally accepted in the relevant scientific community.<sup>25</sup> Ordinary evidence must merely have a tendency to prove or disprove a consequential fact in the cause of action.<sup>26</sup> As explained, more is demanded of a new scientific principle. Thus, the test is, in essence, a heightened standard for admissibility.

In California, the *Frye* test was used<sup>27</sup> prior to the 1976 case of *People v. Kelly*.<sup>28</sup> Since 1976, the test's applicability to novel scientific evidence has come to be known in this state as the *Kelly-Frye* test. The *Kelly* case involved voiceprint analysis.<sup>29</sup> The California Supreme Court

23. 293 F. 1013 (D.C. Cir. 1923).

24. *Id.* at 1014.

25. See, e.g., *People v. Kelly*, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (California's formulation of *Frye* test).

26. See CAL. EVID. CODE § 210 (West 1966) (" 'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."); FED. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ").

27. See cases cited in *Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148.

28. 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

29. *Id.* at 27-28, 549 P.2d at 1242, 130 Cal. Rptr. at 146.

held inadmissible voiceprint analysis because the proponent of the evidence had failed to establish general acceptance of the technique in the relevant community.<sup>30</sup> Since *Kelly*, the California Supreme Court has applied the test to situations involving psychological testimony based on techniques such as hypnosis<sup>31</sup> and rape trauma syndrome.<sup>32</sup>

The test has required further interpretation. One issue is whether there must be general acceptance of the theory itself or just the application of that theory. For example, there may be general acceptance that systolic blood pressure is affected by deception, but not that the polygraph measures deception. Or the reverse may be true; the test measures deception, but there is no agreement on the theory explaining the result.<sup>33</sup> Compulsive gambling provides another example from the realm of psychology. There may be general agreement on the existence of a compulsive gambling disorder, but not that the disorder could cause one to do something criminal such as evading taxes.<sup>34</sup> Another psychological example is rape trauma syndrome cases. There may be general acceptance of a pattern of behaviors for rape victims, but not that rape trauma syndrome indicates that the victim was raped.<sup>35</sup>

Another issue involving the interpretation of the *Kelly-Frye* test is the meaning of "general acceptance." Is it a head-counting function? Does it mean that the technique is accepted by more than half of the experts in a given field? The term escapes precise definition.<sup>36</sup> Choosing the "relevant scientific community" also is subject to debate and manipulation. For example, if one polls all certified polygraph examiners, one might find general acceptance of the use of polygraphs to determine whether a person is lying. On the other hand, if one polls a wider "community," such as polling those in all of the psychological disciplines, it is less likely there will be general acceptance of the polygraph test.<sup>37</sup>

A further difficult issue, especially with respect to psychological testimony, is what constitutes a new scientific principle or discovery. For example, the court in *Kelly* stated that the test applied to a "novel

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30. *Id.* at 40-41, 549 P.2d at 1251, 130 Cal. Rptr. at 155.

31. *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

32. *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

33. See Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1211-15 (1980).

34. *United States v. Shorter*, 618 F. Supp. 255, 260 (D.D.C.), *aff'd*, 809 F.2d 54 (D.C. Cir. 1985), *cert. denied*, 108 S. Ct. 71 (1987) (general acceptance existed regarding the disorder, but not that disorder was linked to failure to pay taxes).

35. See *Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. But see *State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982).

36. For a discussion of the varied definitions, see Giannelli, *supra* note 33, at 1210-11.

37. See *id.* at 1209.

method of proof"<sup>38</sup> or to a new "technique."<sup>39</sup> It has been applied to new "techniques" such as "lie detectors, 'truth serum', Naline testing, experimental systems of blood typing, 'voiceprints', identification by human bite marks, microscopic analysis of gun shot residue . . . hypnosis, . . . and . . . rape trauma syndrome."<sup>40</sup>

Despite the foregoing interpretational quandaries, courts cling tenaciously to the *Kelly-Frye* standard. Several reasons are typically advanced to justify the rule. First, there is a fear that the trier of fact will accord a scientific test an "'aura of certainty'" which does not permit them to assess adequately the reliability of a novel technique or process.<sup>41</sup> Thus, scientific tests should meet a high standard of reliability before they are put into evidence. Second, the *Kelly-Frye* standard largely removes from the judge the determination of the reliability of a new process and places it in the hands of the scientific community.<sup>42</sup> The appropriate scientific community has more knowledge of the particular scientific principles than an average judge. The system thus relies upon the expertise of the relevant scientific community, rather than relying upon individual judges to make determinations in highly technical scientific fields. This promotes consistency in decisions on the admissibility of evidence,<sup>43</sup> since individual judges are more likely to differ in their assessment of the reliability of scientific evidence than is the relevant scientific community as a whole. Additionally, the test further ensures that the opposing side will have access to experts who can critique the proponent's evidence.<sup>44</sup> This serves to preserve a balance in our adversary system.

The proponent of the scientific evidence bears the burden to demonstrate general acceptance. The burden of establishing general acceptance within the relevant scientific community may be met by calling witnesses who are experts in the field to attest to the scientific test's acceptance.<sup>45</sup> Typically, the expert will testify that the process or technique is generally acceptable. The courts take a conservative approach in determining

38. *Kelly*, 17 Cal. 3d at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148.

39. *Id.* at 32, 549 P.2d at 1245, 130 Cal. Rptr. at 149.

40. *People v. McDonald*, 37 Cal. 3d 351, 373, 690 P.2d 709, 724, 208 Cal. Rptr. 236, 251 (1984).

41. *Kelly*, 17 Cal. 3d at 32, 549 P.2d at 1245, 130 Cal. Rptr. at 149 (citing *Huntingdon v. Crowley*, 64 Cal. 2d 647, 656, 414 P.2d 382, 390, 51 Cal. Rptr. 254, 262 (1966)).

42. *Id.* at 31, 549 P.2d at 1244, 130 Cal. Rptr. at 148.

43. *Id.*, 549 P.2d at 1244-45, 130 Cal. Rptr. at 148-49.

44. *Id.*, 549 P.2d at 1244, 130 Cal. Rptr. at 148.

45. See McCord, *Syndromes, Profiles and other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 ORE. L. REV. 18 (1980); MCCORMICK ON EVIDENCE § 206, at 634-37 (3d ed. 1984).



whether experts' testimony is sufficient. One witness' testimony is unlikely to satisfy the burden of establishing general acceptance.<sup>46</sup> Evidence of a "typical cross-section of the scientific community" is more desirable.<sup>47</sup> The *Kelly* court noted that the proponent's expert is unlikely to be impartial on the issue of the reliability of the process or technique where the expert has relied on it for his or her testimony.<sup>48</sup> Consequently, the expert called to testify to an opinion on a crucial issue in the case, such as whether the blood sample matches the accused's or whether the victim was abused, cannot by him or herself establish the general acceptance of the scientific technique underlying the opinion. Supplemental evidence is needed, such as other witnesses, literature in the field describing studies on the reliability of the scientific technique,<sup>49</sup> or citations to judicial opinions where the particular type of expert testimony was found to be generally accepted.<sup>50</sup>

Despite the complexity of its application, the *Kelly-Frye* test is firmly rooted in California. The addition of Proposition 8, the "Truth-in-Evidence" measure,<sup>51</sup> to the California Constitution raises questions, however, about the continued viability of the test.<sup>52</sup> The supreme court could in the future interpret the Truth-in-Evidence provision to eliminate the *Kelly-Frye* test. Nevertheless, the courts of appeal almost uniformly continue to wrestle with whether the test applies to expert testimony on child sexual abuse. Thus, it is important to examine the test's application in child sexual abuse cases. The next section provides the background of California Supreme Court cases that have addressed the applicability of the *Kelly-Frye* test to psychological testimony generally. It is followed by an examination of the test's application to psychological testimony in child sexual abuse cases.

### III. APPLICATION OF THE *KELLY-FRYE* TEST TO PSYCHOLOGICAL TESTIMONY

The problems in applying the *Kelly-Frye* test to new scientific techniques<sup>53</sup> are exacerbated when the technique in question relates to mental health. If the technique involves a physical process, such as hypnosis or

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46. *Id.* at 37, 549 P.2d at 1248, 130 Cal. Rptr. at 152.

47. *Id.*

48. *Id.* at 38, 549 P.2d at 1249, 130 Cal. Rptr. at 153.

49. *See, e.g., Bledsoe*, 36 Cal. 3d at 241 n.4, 681 P.2d at 294 n.4, 203 Cal. Rptr. at 453 n.4.

50. *Id.* at 248-49, 681 P.2d at 299, 203 Cal. Rptr. at 458.

51. CAL. CONST. art. I, § 28.

52. *See infra* notes 290-308 and accompanying text for a discussion of the possible effects of Proposition 8 on the *Kelly-Frye* test.

53. *See supra* notes 33-40 and accompanying text.

administering truth serum, the courts generally subject the process to the *Kelly-Frye* test.<sup>54</sup> The more difficult cases are those where the opinion is dependent upon a set of newly identified principles or symptoms. The identification of new principles or symptoms has given rise to various "syndromes" and "profiles" in the psychological literature.<sup>55</sup> There is disagreement among courts whether syndromes and profiles are subject to a general acceptance standard and, if so, whether that standard is satisfied.<sup>56</sup>

The California Supreme Court has applied the *Kelly-Frye* test to psychological testimony selectively. Although *Kelly-Frye* applies to psychological as well as physical evidence, an expert's "personal opinion" is not subject to the test<sup>57</sup> since personal opinion is not novel scientific evidence. In addition, the court has indicated that some forms of expert testimony may be "factual" and thus not be subject to any of the expert "opinion" rules, including the *Kelly-Frye* test.<sup>58</sup> The court has held, however, that *Kelly-Frye* did apply to expert testimony on rape trauma syndrome.<sup>59</sup> The distinction between scientific evidence, which is subject to *Kelly-Frye*, and personal opinion or factual testimony, which need not meet *Kelly-Frye*, can be ephemeral.

The supreme court recognized the applicability of the *Kelly-Frye* test to psychological processes in *People v. Shirley*.<sup>60</sup> In *Shirley*, the court held that hypnotically refreshed testimony was subject to the *Kelly-Frye* rule and failed the test of being generally accepted within the relevant scientific community.<sup>61</sup> The State had argued that the *Kelly-Frye* rule was limited to a new technique involving physical evidence.<sup>62</sup> The court rejected this argument, stating:

Nor are those techniques necessarily limited to manipulation of

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54. See, e.g., *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (hypnosis); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (hypnosis); *Cain v. State*, 549 S.W.2d 707 (Tex. Crim. App.), cert. denied, 434 U.S. 845 (1977) ("truth serum" test).

55. See McCord, *supra* note 45; MCCORMICK ON EVIDENCE § 206, at 634-37 (3d ed. 1984).

56. Compare *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982) (testimony that victim suffering from syndrome admitted where consent defense) with *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (testimony that victim suffering from syndrome inadmissible to show rape occurred).

57. *People v. McDonald*, 37 Cal. 3d 351, 372-73, 690 P.2d 709, 723-24, 208 Cal. Rptr. 236, 250-51 (1984).

58. *Id.*

59. See *Bledsoe*, 36 Cal. 3d at 248-49, 681 P.2d at 299-300, 203 Cal. Rptr. at 458-59.

60. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

61. *Id.* at 54, 66, 641 P.2d at 796, 804, 181 Cal. Rptr. at 265, 272-73.

62. *Id.* at 52, 641 P.2d at 795, 181 Cal. Rptr. at 263-64.

physical evidence: we do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility. In either case, the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods.<sup>63</sup>

Despite the broad language of *Shirley*, the court has exempted the "personal opinion" of a psychological expert from the *Kelly-Frye* requirements. In *People v. McDonald*,<sup>64</sup> the court distinguished an expert's personal opinion from scientific evidence.<sup>65</sup> The court stated that the *Kelly-Frye* rule did not apply, for example, to expert medical testimony, including expert psychiatric testimony.<sup>66</sup> The court reasoned that the purpose of imposing the *Kelly-Frye* rule did not exist when the testimony was personal opinion because jurors are naturally more skeptical toward an expert's verbal opinion than they are toward machine-processed evidence, which exudes an "aura of infallibility."<sup>67</sup>

In *McDonald*, the court held *Kelly-Frye* inapplicable to expert opinion testimony describing the general principles of perception, memory, and recall of eyewitnesses.<sup>68</sup> The court also noted that the same was true for psychiatric opinion testimony regarding a description of an unusual mental illness called "Munchausen's syndrome by proxy" which had arisen in an earlier court of appeal case.<sup>69</sup> On the other hand, the court included rape trauma syndrome in its list of "novel devices or processes" that must meet the *Kelly-Frye* test.<sup>70</sup> The *McDonald* case thus provides conflicting signals to courts determining whether a new syndrome should be subject to the *Kelly-Frye* test. Moreover, the distinction between personal opinion and scientific evidence ignores the fact that all expert opinion is based on some underlying theory or process. To be consistent, all

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63. *Id.* at 53, 641 P.2d at 795, 181 Cal. Rptr. at 264. Although the *Shirley* court considered the purpose of the *Kelly-Frye* rule in the context of jury trials, the lower courts have found the rule applicable in proceedings before a judge sitting without a jury. See, e.g., *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987); *In re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1987). The concern that the trier will be overwhelmed by the expert testimony is certainly greater when a jury is involved.

64. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

65. *Id.* at 372, 690 P.2d at 724, 208 Cal. Rptr. at 250-51.

66. *Id.* at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251.

67. *Id.* at 372-73, 690 P.2d at 724, 208 Cal. Rptr. at 251.

68. *Id.* at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251.

69. *Id.* See *infra* notes 78-83 and accompanying text for a discussion of the case involving Munchausen's syndrome by proxy.

70. 37 Cal. 3d at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251.

expert testimony must be subjected to a general acceptance standard if the principle it is based on is novel.

The failure of the "personal opinion" categorization to meaningfully differentiate expert opinion from "scientific evidence" may be demonstrated with a typical medical opinion. Suppose an expert testifies that an individual will recover only partial use of an injured arm. That opinion is based on medical principles regarding the usual healing process for bones, muscles, and ligaments. The principles were deduced from studies of individuals with similar injuries involving x-rays and physical examination. It seems unnecessary to subject the expert's opinion that the individual will not regain full use of the arm to a *Kelly-Frye* test because the principles and the methodology involved are so universally accepted. Nevertheless, how many jurors readily understand the biological and chemical principles underlying the expert's opinion? What if an opposing expert disputes the likelihood of irreparable injury on the basis of a new molecular scanning technique or a new theory of regeneration of cells which indicates complete healing could occur? It may be the expert's "personal" opinion that healing will occur, but that opinion is necessarily grounded in scientific principles. A court would undoubtedly subject the new process or theory to a *Kelly-Frye* test. It is unnecessary to subject the first expert's opinion to *Kelly-Frye*, not because the opinion is "personal," but because it is based on well-established principles.

The same reasoning is arguably true for most psychological testimony. When an expert opines that an individual is schizophrenic, for example, the principles underlying the diagnosis as well as the process for arriving at the diagnosis are well-established. The opinion is based on a collection of symptoms that the psychological professions have agreed constitute schizophrenia. The expert probably diagnosed the condition through personally interviewing the individual and through testing, both traditional methods within the psychological profession. However, medical or psychological testimony could be based on either a new principle or a new methodology for determining the diagnosis. What if schizophrenia was instead diagnosed on the basis of the presence of certain substances in the brain? Is the psychiatric opinion that the patient is schizophrenic no longer "personal" and instead "scientific evidence?" It is more logical to recognize that the opinion is now based on a new theory, the presence of specific substances in the brain, rather than the accepted theory of a collection of behavioral symptoms. Both opinions are "personal" and both are based on scientific principles.

The *McDonald* court's distinction between "personal" opinion and

scientific evidence<sup>71</sup> thus fails to provide much guidance in new areas because it merely states the conclusion first. If the opinion is "personal," it is based on accepted principles or methodology. If the opinion involves "scientific evidence," the principles or methodology are new. We are still left with the need to define what constitutes the principles and methodology underlying the expert opinion and whether either is novel.

The California Supreme Court has also distinguished between an expert who gives generalized factual information and one who expresses an opinion on the facts in the case. In the *McDonald* case, for example, the expert intended to testify only to the factors that research has shown affect an eyewitness' perception, memory and recall, without expressing an opinion regarding the witnesses in the particular case.<sup>72</sup> The court questioned whether this type of testimony which repeats the content of research in the field is opinion at all.<sup>73</sup> The court stated that "the contents of eyewitness identification studies reported in the professional literature—their methodology, their data, and their findings—are facts, verifiable by anyone who can read and understand the studies in question."<sup>74</sup> If purely factual, the court noted that the requirement that expert testimony be "beyond the common experience" of the factfinder would not apply.<sup>75</sup> Although the *McDonald* court did not discuss the *Kelly-Frye* test at this juncture, if the testimony was not deemed to be "expert opinion," there would be no scientific process underlying the testimony to analyze under *Kelly-Frye*.<sup>76</sup>

The California Supreme Court has not addressed whether it also would view an expert's testimony as purely factual if the expert described not only the literature in the field, but also analyzed the effect of specific facts in the case. In *McDonald*, for example, the expert intended to comment on factors in the particular case that could have influenced the witnesses, such as the suddenness of the event, the youth of the witnesses, and the difference in race between the witnesses and the defendant.<sup>77</sup> Although the expert still would not have expressed an opinion on the fallibility of the individual witnesses in the case, he would have applied

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71. *Id.* at 372, 690 P.2d at 724, 208 Cal. Rptr. at 250-51.

72. *Id.* at 361-62, 690 P.2d at 716, 208 Cal. Rptr. at 242-43.

73. *Id.* at 366-67, 690 P.2d at 719, 208 Cal. Rptr. at 246.

74. *Id.*

75. *Id.*

76. The *McDonald* court, however, did not pursue this avenue, instead treating the testimony as expert opinion which would have met the requirement that expert opinion testimony be "sufficiently beyond common experience." *Id.* at 369, 690 P.2d at 721, 208 Cal. Rptr. at 248.

77. *Id.* at 362, 690 P.2d at 715, 208 Cal. Rptr. at 243.

the principles from the literature to the facts in the case. The jury would in essence have had the expert's opinion that several factors in the case typically impair identification. The jury would only have had to draw the logical inference that the witnesses' identification was flawed and that the expert probably believed that the identification was impaired. The expert's opinion, both as to the impact of specific facts in the case and his implied opinion regarding the specific witnesses in the case, was thus conveyed to the jury.

A similar situation involving arguably "factual" testimony arose in *People v. Phillips*.<sup>78</sup> In *Phillips*, a psychiatrist expressed an opinion that a hypothetical person exhibiting the same behavior as the defendant had allegedly exhibited "symptoms consistent with Munchausen's syndrome by proxy."<sup>79</sup> The court of appeal treated the testimony as opinion, not as "factual."<sup>80</sup> In fact, the supreme court in *McDonald* cited the testimony as an example of "personal opinion."<sup>81</sup> Although the expert refused to comment on the defendant herself, the impact of his testimony was to lead the jury to draw the inference that this defendant suffered from the syndrome.<sup>82</sup> The effect was the same as in *McDonald*. The express opinion that the behavior in the case fit the syndrome and the implied opinion that, therefore, the defendant suffered from the syndrome, was conveyed to the jury.<sup>83</sup>

Despite the court's view that the *Phillips* testimony was personal opinion, the California Supreme Court has applied the *Kelly-Frye* test to

78. 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1st Dist. 1981).

79. *Id.* at 78, 175 Cal. Rptr. at 709. The syndrome occurs where a person exhibits great care and concern over the illness of another (like a child), but in fact has caused that illness (such as by poisoning the child). *Id.*

80. *Id.* at 82-83, 175 Cal. Rptr. at 711.

81. *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251 (citing *People v. Phillips*, 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1st Dist. 1981)). Although the supreme court in *McDonald* classified the expert's testimony in *Phillips* as personal opinion, the court of appeal covered both alternatives: Either *Kelly-Frye* was not applicable or the syndrome was generally accepted because there was no controversy. On the *Kelly-Frye* issue, the *Phillips* court found that the syndrome was generally accepted in the scientific community on the basis that the evidence was neither based on a new "scientific technique" nor was it the subject of controversy within the appropriate scientific field. *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714. On the latter point, the court analogized to *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971), which involved battered child syndrome. The *Phillips* court borrowed the *Jackson* court's analysis that the syndrome was an "'accepted medical diagnosis,'" made on the basis of uncontroverted research. *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714 (quoting *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (4th Dist. 1971)).

82. *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714.

83. *Id.*

syndrome evidence. In *People v. Bledsoe*,<sup>84</sup> the court referred to its language in *Shirley*, that *Kelly-Frye* could apply to even purely psychological evidence, and subjected rape trauma syndrome to the test's admissibility requirements.<sup>85</sup> The expert in *Bledsoe*, a rape counselor, had given her opinion that the victim was suffering from the syndrome in the state's case-in-chief.<sup>86</sup> The court held that rape trauma syndrome could not meet the general acceptance standard for the purpose of establishing that a rape had in fact occurred.<sup>87</sup> The court noted that the syndrome was instead developed as a therapeutic aid to "help identify, predict and treat emotional problems experienced by the counselors' clients or patients."<sup>88</sup> This distinguished rape trauma syndrome from battered child syndrome, which the court observed was developed specifically to identify children with non-accidental injuries.<sup>89</sup> Unlike rape trauma syndrome as used in the *Bledsoe* case, the use of battered child syndrome in court thus parallels its medical purpose.

The court in *Bledsoe* did condone, however, the use of rape trauma syndrome evidence when a defendant argues that the victim's behavior was inconsistent with being raped.<sup>90</sup> Thus, if the defendant argued that the victim's delay in reporting the rape indicated consent, an expert could testify that such behavior is a typical reaction of rape victims.<sup>91</sup> The court did not discuss the application of *Kelly-Frye* when the syndrome is used for this purpose. The court may have been implying that a rebuttal use of the syndrome that "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims"<sup>92</sup> would satisfy *Kelly-Frye* because such a description of behavior would match the accepted use of the syndrome in practice. Alternatively, the court may have meant that a description of the syndrome would fall within the parameters of the *McDonald* and *Phillips* categories of factual or personal opinion testimony.

The proper application of the *Kelly-Frye* test to a new situation is cloudy at best in light of these decisions from the California Supreme Court. The greatest difficulty in applying these decisions is in defining

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84. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

85. *Id.* at 247 n.7, 681 P.2d at 298 n.7, 203 Cal. Rptr. at 457 n.7. The State apparently conceded that *Frye* was appropriate in the case.

86. *Id.* at 240-44, 681 P.2d at 295-96, 203 Cal. Rptr. at 455.

87. *Id.* at 250-51, 681 P.2d at 301, 203 Cal. Rptr. at 460.

88. *Id.* at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459.

89. *Id.* at 248-51, 249 n.11, 681 P.2d at 299-300, 300 n.11, 203 Cal. Rptr. at 458-60, 459 n.11.

90. *Id.* at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr. at 457-58.

91. *Id.* at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

92. *Id.*

what constitutes a new technique or process that must be subjected to *Kelly-Frye*. On the one hand, *Shirley* indicates that a new process in psychological testimony is subject to *Kelly-Frye*.<sup>93</sup> The *Bledsoe* decision follows this edict in applying *Kelly-Frye* to rape trauma syndrome.<sup>94</sup> On the other hand, factual or personal opinion expert testimony is exempted from *Kelly-Frye* under the *McDonald* rationale.<sup>95</sup> Moreover, even where *Kelly-Frye* applies, the use of expert testimony on rebuttal may either meet the test easily or the test may not apply at all.<sup>96</sup> *Bledsoe* speaks to the issue of the rebuttal use of the testimony, but does not clarify it.<sup>97</sup> As a consequence of these conflicting analyses, it is not surprising that the appellate courts have reached vastly differing conclusions through a variety of rationales when faced with the issue of whether to apply the *Kelly-Frye* test to expert testimony in a new area—child sexual abuse. The next section focuses on decisions from the courts of appeal in child sexual abuse cases.

#### IV. APPLICATION OF THE *KELLY-FRYE* TEST TO EXPERT TESTIMONY ON CHILD SEXUAL ABUSE

Experts, usually psychologists, psychiatrists, or clinical social workers, are frequently called as witnesses when there is an issue whether a child has been abused. Children are often poor witnesses due to their youth, trauma, or intimidation in the courtroom.<sup>98</sup> Because there is typically no physical evidence,<sup>99</sup> the verbal testimony of the child, the expert, and possibly others to whom the child told of the abuse often constitutes the only evidence against the defendant in a criminal proceeding or against the parents in a dependency case. Some forms of expert testimony on sexual abuse are seldom controversial. For example, if the expert testifies to physical manifestations of the abuse, such as injury to the child's genitals, and expresses the opinion that the injury is consistent with sexual abuse, there is little debate that this opinion is safely within the realm of medical knowledge.<sup>100</sup> At the other end of the spectrum, if

93. *Shirley*, 31 Cal. 3d at 53, 641 P.2d at 795, 181 Cal. Rptr. at 264.

94. *Bledsoe*, 36 Cal. 3d at 245-51, 681 P.2d at 296-99, 203 Cal. Rptr. at 456-59.

95. *McDonald*, 37 Cal. 3d at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51.

96. *Bledsoe*, 36 Cal. 3d at 245-51, 681 P.2d at 296-99, 203 Cal. Rptr. at 456-59.

97. *Id.*

98. J. MYERS, CHILD WITNESS LAW AND PRACTICE §§ 4.4, 10.13, 10.43 (1987); Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 175-76 (1986).

99. J. MYERS, *supra* note 98, at §§ 4.4, 10.13, 10.43; Comment, *supra* note 98, at 178-79.

100. See, e.g., *People v. Mendibles*, 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553 (2d Dist. 1988) (not error to admit expert's testimony that scarring in genitals consistent with digital and penile penetration); *In re Katrina L.*, 200 Cal. App. 3d 1288, 247 Cal. Rptr. 751 (1st Dist.



the expert testifies that the child is "believable" or "truthful," the courts will most likely exclude the evidence.<sup>101</sup> The same is true where the expert gives an opinion that the child was abused by a particular person.<sup>102</sup> The courts tend to find that the expert opinion under these circumstances is not helpful to the trier of fact, beyond the expertise of the expert, or based totally on hearsay.<sup>103</sup>

Controversial expert testimony involves opinions on whether the child has been abused based on psychological, rather than physical, evidence. Such expert testimony may be phrased in many ways. The most typical are: (1) "this child is suffering from child sexual abuse accommodation syndrome (CSAAS)" or "this child's behavior (such as a delay in reporting the abuse) is consistent with CSAAS"; (2) "this child's behavior is consistent with children who are sexually abused"; (3) "this child was sexually abused"; and (4) "sexually abused children (without specifying this particular child) exhibit these types of behavior."<sup>104</sup> The last form may arise either in the state's case-in-chief or in rebuttal. The applicability of the *Kelly-Frye* test to these forms of testimony is the most troubling.

The bases of experts' opinions vary. Some experts base their opinion in part on whether the child's behavior is consistent with CSAAS.<sup>105</sup> The five attributes of such children are: "secrecy, helplessness, compartmentalized accommodation (or denial), delayed disclosure and retraction."<sup>106</sup> Other typical bases include interviews with the child,<sup>107</sup>

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1988) (expert testified to physical changes in child's genitalia consistent with penetration). *But see* *People v. Luna*, 204 Cal. App. 3d 726, 250 Cal. Rptr. 878 (5th Dist. 1988) (defendants raised *Kelly-Frye* challenge to expert testimony regarding physical injuries based on examination with a colposcope, but court found *Kelly-Frye* inapplicable).

101. *See, e.g., People v. Willoughby*, 164 Cal. App. 3d 1054, 210 Cal. Rptr. 880 (5th Dist. 1985); *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. 1984).

102. *See, e.g., In re Heather H.*, 200 Cal. App. 3d 91, 246 Cal. Rptr. 38 (6th Dist. 1988); *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987); *In re Christine C.*, 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1st Dist. 1987); *In re Cheryl H.*, 153 Cal. App. 3d at 1106, 200 Cal. Rptr. at 799.

103. *See, e.g., In re Christine C.*, 191 Cal. App. 3d at 680, 236 Cal. Rptr. at 632 (hearsay problem); *In re Cheryl H.*, 153 Cal. App. 3d at 1119, 1122, 200 Cal. Rptr. at 802 (hearsay problem), 804 (no need to assist trier).

104. *See infra* text accompanying notes 111-241.

105. CSAAS was first described by Dr. Roland Summit in a 1983 article describing the characteristics of the child abuse victims he had treated over a substantial period of time. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 INT'L. J. OF CHILD ABUSE & NEGLECT 177 (1983); *see also Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 306, 239 Cal. Rptr. 422, 427 (1987).

106. Summit, *supra* note 105; *see also Seering*, 194 Cal. App. 3d at 312, 239 Cal. Rptr. at 431.

analysis of the child's reports of abuse,<sup>108</sup> observing the child play with anatomically correct dolls,<sup>109</sup> and the expert's own general knowledge of typical characteristics of sexually abused children.<sup>110</sup>

An analysis of the applicability of the *Kelly-Frye* rule to expert testimony in child sexual abuse cases must consider both the form of the testimony and the bases underlying the opinion. Expert opinion in these cases will be discussed in three categories: (1) application of CSAAS to the specific child in the case; (2) opinion that a specific child was sexually abused without outward mention of CSAAS; and (3) generalized testimony of the characteristics of sexually abused children. Within each category, the existing case law will be described and the effectiveness of a *Kelly-Frye* analysis will be discussed.

#### *A. Opinion That Specific Child Was Abused with an Express Reference to CSAAS*

"Susie is suffering from CSAAS." "Susie's behavior is consistent with CSAAS." "In my opinion, Susie was abused because her behavior is consistent with CSAAS." Testimony such as this which expressly refers to a new syndrome is the most likely to trigger a *Kelly-Frye* analysis. The rationale of *People v. Bledsoe*<sup>111</sup> is directly on point in this circumstance. The syndrome is arguably a new device, method, process, or technique underlying the determination that the child was sexually abused. The rape trauma syndrome in *Bledsoe* was used in precisely this manner. There, the expert testified that the victim suffered from the syndrome.<sup>112</sup> In the case of both CSAAS and rape trauma syndrome, the use of the technical word "syndrome" creates "'an aura of special reliability and trustworthiness'"<sup>113</sup> that the *Kelly-Frye* standard is designed to monitor. Unless a court subjects CSAAS to *Kelly-Frye*, the trier of fact is arguably unable to determine the reliability of the opinion because it is clouded by the impressive language of the syndrome's title.

One court of appeal has applied the *Kelly-Frye* test to an express

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107. *Seering*, 194 Cal. App. 3d at 312, 239 Cal. Rptr. at 431; In re *Cheryl H.*, 153 Cal. App. 3d at 1109-10, 200 Cal. Rptr. at 795.

108. In re *Amber B.*, 191 Cal. App. 3d 682, 685, 236 Cal. Rptr. 623, 626 (1987); In re *Christine C.*, 191 Cal. App. 3d at 679, 236 Cal. Rptr. at 632.

109. In re *Amber B.*, 191 Cal. App. 3d at 685, 236 Cal. Rptr. at 626; In re *Christine C.*, 191 Cal. App. 3d at 679, 236 Cal. Rptr. at 632; In re *Cheryl H.*, 153 Cal. App. 3d at 1109, 200 Cal. Rptr. at 795.

110. *Seering*, 194 Cal. App. 3d at 312, 239 Cal. Rptr. at 431.

111. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

112. *Id.* at 244, 681 P.2d at 296, 203 Cal. Rptr. at 455.

113. *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460 (quoting *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982)).

reference to CSAAS. In *Seering v. California Department of Social Services*,<sup>114</sup> the expert testified in two different forms. First, he stated that it was "his opinion A. had been molested because he viewed her behavior as consistent with the 'child sexual abuse accommodation syndrome.'"<sup>115</sup> Second, he opined that the child had been molested based on his interviews with the child and his own professional experience with abused children.<sup>116</sup> The court viewed the reference to CSAAS as a new "method of proof" analogous to that offered in *Bledsoe*.<sup>117</sup> However, the court found the expert's statements that were based on interviews to be the "personal opinion" of the expert, and therefore not subject to *Kelly-Frye*.<sup>118</sup>

With *Bledsoe* as precedent, the *Seering* court was on solid ground in finding that the *Kelly-Frye* test applied to the expert's CSAAS testimony<sup>119</sup> because the similarity of CSAAS to the rape trauma syndrome of *Bledsoe* is striking. CSAAS was not developed as a forensic, determinative tool.<sup>120</sup> As with rape trauma syndrome, CSAAS serves a clinical purpose. It is descriptive of abused children and is not designed to verify whether the child has been abused.<sup>121</sup> Assuming that the use of the term "syndrome" implies deduction based on a specific scientific process rather than a personal opinion by the expert, the application of *Kelly-Frye* here would seem to fit within the distinction between *Bledsoe* and *McDonald*.<sup>122</sup>

The more difficult issue is whether this use of CSAAS, which triggers a *Kelly-Frye* analysis, is qualitatively different from the testimony of experts on sexual abuse which either avoids the syndrome terminology or describes the syndrome in general terms without reference to the child in the case. The latter two forms of testimony are not as likely to be subjected to a *Kelly-Frye* analysis and, yet, many of the same concerns about overwhelming the trier of fact exist with all three forms of expert testi-

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114. 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987).

115. *Id.* at 306, 239 Cal. Rptr. at 427.

116. *Id.* at 312, 239 Cal. Rptr. at 431.

117. *Id.* at 311, 239 Cal. Rptr. at 430 (citing *People v. Bledsoe*, 36 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982)).

118. *Id.*

119. *Id.*

120. See *infra* notes 387-92 and accompanying text.

121. CSAAS may not even be an appropriate "basis" of an opinion that the child was abused. If its use is descriptive only and not diagnostic, an expert should not rely upon it to determine abuse. See Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, at 92-94 (1989) (on file in Loyola of Los Angeles Law Review Office) (due to be published in Volume 68, *Nebraska Law Review*) [hereinafter Myers].

122. See *supra* notes 93-97 and accompanying text.

mony. The need for a consistent screening approach to all forms of expert testimony on child sexual abuse becomes more apparent in the next section which discusses expert testimony that a child was abused without an express reference to the syndrome.

*B. Opinion That A Child was Abused with No Express  
Reference to CSAAS*

"In my opinion, Amy was sexually abused." This testimony is different in form, and possibly in its basis, from express references to CSAAS. The form of this opinion, a conclusion that a particular child was abused, without reference to methodology, is typical expert testimony. Several California courts of appeal address the admissibility of this testimony.<sup>123</sup> On its face, the testimony appears to be "personal opinion," not "scientific evidence." As personal opinion, *Kelly-Frye* would not apply.<sup>124</sup> However, because it is unknown whether the opinion is reliable,<sup>125</sup> the purposes for using the *Kelly-Frye* test are present. In addition, a distinction between the expert who uses the term "syndrome" and the expert who refrains from uttering the word is often a matter of form, not substance. The form is subject to manipulation. A heightened admissibility standard is thus needed, but, as a consequence of these conflicting principles, the courts of appeal are divided on whether *Kelly-Frye* applies to this testimony. This section first examines the case law from the courts of appeal. It then explores the difficulty of distinguishing scientific evidence from personal opinion or factual testimony in the child sexual abuse context and demonstrates the need for a clearer standard.

Several courts have admitted expert testimony that a particular child was abused without requiring satisfaction of the *Kelly-Frye* test. For example, in *Seering v. California Department of Social Services*,<sup>126</sup> the court held that the expert's opinion that the child had been abused was a personal opinion not subject to *Kelly-Frye*.<sup>127</sup> The expert in *Seer-*

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123. See, e.g., *In re Heather H.*, 200 Cal. App. 3d 91, 246 Cal. Rptr. 38 (6th Dist. 1988); *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987); *In re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1st Dist. 1987); *In re Christine C.*, 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1st Dist. 1987); *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985); *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. 1984).

124. *Seering*, 194 Cal. App. 3d at 314, 239 Cal. Rptr. at 430.

125. Research in the field has just begun to demonstrate that determinations that a child was abused are reliable. See Myers, *supra* note 121, at 104-09.

126. 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987).

127. *Id.* at 311, 239 Cal. Rptr. at 430.

ing phrased his opinion in two ways: (1) the child's behavior was consistent with CSAAS<sup>128</sup> and (2) the child had been sexually abused.<sup>129</sup> Although the opinion with the reference to CSAAS was found to be subject to the *Kelly-Frye* analysis,<sup>130</sup> the court held that the test was inapplicable to the expert's personal opinion that the child had been abused.<sup>131</sup> According to the court, that opinion was not based on CSAAS, but rather was based on the expert's interviews with the child and his knowledge of the behavior of sexually abused children from his clinical experience.<sup>132</sup> Thus, the latter testimony was not subject to a higher standard of admissibility.<sup>133</sup>

Other courts of appeal have held that expert testimony that a child has been sexually abused is admissible without any reference to the *Kelly-Frye* rule. In an early case, *In re Cheryl H.*,<sup>134</sup> decided in 1984, the court approved the admission of testimony that the child's conduct was "typical of conduct exhibited by other young children who had been sexually abused."<sup>135</sup> In *Cheryl H.*, the court's primary concern was with the potentially hearsay basis of the opinion.<sup>136</sup> Once that concern was resolved,<sup>137</sup> the court found no error in admitting the opinion for substantive purposes.<sup>138</sup> The *Cheryl H.* decision did precede *People v. Bledsoe*,<sup>139</sup> which may explain the absence of a *Kelly-Frye* discussion.

Another court, post-*Bledsoe*, admitted similar testimony without analyzing the applicability of the *Kelly-Frye* rule. In *In re Heather H.*,<sup>140</sup>

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128. *Seering*, 194 Cal. App. 3d at 306, 239 Cal. Rptr. at 427; see *supra* note 115 and accompanying text.

129. 194 Cal. App. 3d at 312, 239 Cal. Rptr. at 427.

130. *Id.* at 311, 239 Cal. Rptr. at 430; see *supra* notes 114-18 and accompanying text.

131. 194 Cal. App. 3d at 311, 239 Cal. Rptr. at 430.

132. *Id.* at 313-14, 239 Cal. Rptr. at 431.

133. *Id.* at 314, 239 Cal. Rptr. at 432.

134. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. 1984).

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

136. *Id.* at 1126-32, 200 Cal. Rptr. at 807-11. The opinion that the child had been abused was based on her behavior with dolls and her statements to the expert, both potentially hearsay. *Id.* at 1116, 200 Cal. Rptr. at 800. The court was also concerned with the appropriateness of the expert's opinion that a particular person was the abuser. *Id.* at 1118, 200 Cal. Rptr. at 801. The court discussed whether this opinion would assist the trier of fact as well as hearsay concerns. *Id.* at 1118-26, 200 Cal. Rptr. at 801-07.

137. The court found that the child's behavior with anatomically correct dolls was nonassertive conduct and therefore not hearsay. *Id.* at 1126-28, 200 Cal. Rptr. at 807-08. The child's statements to the expert were nonhearsay circumstantial evidence of the child's state of mind, which was relevant to the determination of whether continued visitation with the abuser was in the best interests of the child. *Id.* at 1128-32, 200 Cal. Rptr. at 808-11.

138. *Id.* at 1118, 1127, 200 Cal. Rptr. at 801, 807.

139. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). *In re Cheryl H.* was decided on March 30, 1984. *Bledsoe* was decided on June 14, 1984.

140. 200 Cal. App. 3d 91, 246 Cal. Rptr. 38 (6th Dist. 1988).

decided in 1988, the court cited only to *Cheryl H.* for support for the admissibility of testimony that the child had been molested.<sup>141</sup> The court ignored both *Bledsoe* and the other cases decided since *Cheryl H.* that had explored the admissibility of the expert testimony using the *Kelly-Frye* test.

Two other courts have also reached the opposite conclusion from *Seering*, applying the *Kelly-Frye* test to expert testimony that a particular child was abused. In *People v. Roscoe*,<sup>142</sup> the court held that the expert's testimony that the victim was molested was inadmissible under the reasoning of *Bledsoe*.<sup>143</sup> In *In re Amber B.*<sup>144</sup> and *In re Christine C.*,<sup>145</sup> the court found that observing doll play and analyzing children's reports of abuse constituted a new scientific method.<sup>146</sup> In *Amber B.* the court directly confronted the issue of whether testimony that a child had been abused was personal opinion or a new scientific method of proof.<sup>147</sup> The court acknowledged the difficulty in determining whether psychological evidence is a novel method of proof.<sup>148</sup> Concluding that a new method was involved with child sexual abuse testimony, the court relied on the rationale for imposing the *Kelly-Frye* rule<sup>149</sup>—whether the trier of fact would be misled by the “aura of infallibility” of the evidence.<sup>150</sup>

The critical question to the *Amber B.* court was would a trier of fact “tend to ascribe an inordinately high degree of certainty to the technique . . . ?”<sup>151</sup> In holding that the methodology used by the expert qualified as “‘a new scientific process operating on purely psychological evidence’”<sup>152</sup> which the California Supreme Court, in *People v. Shirley*,<sup>153</sup> had acknowledged would require a *Kelly-Frye* analysis,<sup>154</sup> the court found that the area of child sexuality was “beyond the scope of critical

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141. *Id.* at 96-97, 246 Cal. Rptr. at 41.

142. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985).

143. *Id.* at 1099-1100, 215 Cal. Rptr. at 49-50.

144. 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1st Dist. 1987).

145. 191 Cal. App. 3d 676, 236 Cal. Rptr. 630 (1st Dist. 1987).

146. *In re Amber B.*, 191 Cal. App. 3d at 691, 236 Cal. Rptr. at 629; *In re Christine C.*, 191 Cal. App. 3d at 679, 236 Cal. Rptr. at 632.

147. *In re Amber B.*, 191 Cal. App. 3d at 687, 236 Cal. Rptr. at 626.

148. *Id.* at 690, 236 Cal. Rptr. at 628. The court aptly referred to this issue as “elusive” and commented that “one of the recognized weaknesses of the *Kelly-Frye* test is the difficulty in defining what types of evidence should be classified as scientific.” *Id.*

149. *Id.*, 236 Cal. Rptr. at 629.

150. *Id.*

151. *Id.* at 691, 236 Cal. Rptr. at 629.

152. *Id.* (quoting *People v. Shirley*, 31 Cal. 3d 18, 53, 723 P.2d 1354, 1374-75, 181 Cal. Rptr. 243, 264 (1982)).

153. 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982).

154. *Shirley*, 31 Cal. 3d at 53, 641 P.2d at 795, 181 Cal. Rptr. at 264.

analysis by the average lay person."<sup>155</sup> Because of the lack of understanding by laypersons of this area, the court found that the expert's testimony would be given an "aura of infallibility" and that triers of fact could not bring a "healthy skepticism" to their analysis of the expert's opinion.<sup>156</sup> The *Christine C.* opinion relied upon the reasoning of the *Amber B.* court.<sup>157</sup>

The courts of appeal have therefore taken differing approaches. Is one approach, or result, more appropriate than another under the standards set forth in the California Supreme Court decisions? The *Cheryl H.* and *Heather H.* approach of ignoring the *Kelly-Frye* test<sup>158</sup> only arguably reaches the right result in admitting the expert testimony if the conclusion is correct that the testimony is personal opinion. The *Seering* and *Amber B./Christine C.* courts were more forthright in facing the issue.<sup>159</sup> When the expert testifies that the child has been molested, is the expert's testimony personal opinion or a novel method of proof? Should the answer depend upon the basis of the opinion? If the basis is observation of play with anatomically correct dolls, is there a reason to apply *Kelly-Frye* that does not exist if the basis is interviews and observation of other behaviors? Is there a reason to distinguish an opinion explicitly stated to be based on CSAAS from one based on CSAAS but where the witness does not reveal his or her reliance on the syndrome? Would it be better to analyze the testimony by looking to the purpose of the *Kelly-Frye* rule? These issues are considered next.

On the surface, an opinion that a child has been abused, without use of the term "syndrome," would appear to be "personal opinion" and not expert testimony based on a novel method of proof. Following the rationale of *People v. McDonald*,<sup>160</sup> the "aura of infallibility" which attaches to a scientific technique does not exist where the expert merely states his or her own opinion.<sup>161</sup> It is arguable that, as in *McDonald*, the triers of fact, especially jurors would be able to view such personal opin-

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155. *In re Amber B.*, 191 Cal. App. 3d at 691, 236 Cal. Rptr. at 629.

156. *Id.*

157. *In re Christine C.*, 191 Cal. App. 3d at 679-80, 236 Cal. Rptr. at 632. A federal court has relied on *In re Amber B.* and *In re Christine C.* to hold *Frye* applicable to an opinion based on anatomical dolls. In *United States v. Gillespie*, 852 F.2d 475 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that the use of anatomically correct dolls in arriving at an opinion that the child had been abused by a man rather than a woman constituted a novel scientific technique. *Id.* at 480-81. See also *In re Christie D.*, 206 Cal. App. 3d 469, 253 Cal. Rptr. 619 (5th Dist. 1988).

158. See *supra* notes 134-41 and accompanying text.

159. See *supra* notes 126-33 and 144-57 and accompanying text.

160. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

161. *Id.* at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251.

ion with a "healthy skepticism" which obviates the need to invoke *Kelly-Frye* to protect them from being overwhelmed by scientific evidence.<sup>162</sup>

On the other hand, there seems little logic in labeling syndrome testimony as a new "process" while labeling a new diagnosis based on a collection of symptoms "personal opinion." For example, in *McDonald*, the court viewed Munchausen's syndrome by proxy as a "diagnosis of an unusual form of mental illness" and not as a new method for diagnosing a mental illness.<sup>163</sup> If Munchausen's had truly been a new identification of a mental illness,<sup>164</sup> it would be no different from using CSAAS as a diagnostic device.<sup>165</sup> Even assuming the word "syndrome" was eliminated from Munchausen's, the collection of a new group of symptoms could be said to constitute a novel "theory" upon which the expert was basing an opinion. The new theory or method should then be subjected to a *Kelly-Frye* analysis. To distinguish the expert who expressly refers to CSAAS from one who concludes a child was sexually abused based on the behavioral reactions of the child elevates form over substance. To avoid *Kelly-Frye*, the expert referring to CSAAS would merely have to modify the testimony to state that in his or her opinion the child was abused in part on the basis of a behavioral pattern of secrecy, helplessness, denial, delayed disclosure, and retraction which, deduced from the expert's clinical experience, typify abused children. These symptoms are, of course, what constitute CSAAS.<sup>166</sup> To apply *Kelly-Frye* only when the word "syndrome" is used is meaningless.

There has also been an attempt to distinguish opinion based on anatomical doll play from opinion based on interviews and clinical experience. Under that distinction, *Kelly-Frye* applies to the first opinion but not to the second. In *Seering*, for example, the court attempted to distinguish the bases in *Amber B.* and *Christine C.* (doll play and interviews) from that employed in *Seering*<sup>167</sup> (interviews and clinical experience). In a virtually inexplicable paragraph, the court stated that it viewed its holding that *Kelly-Frye* was inapplicable "as consistent with the views expressed in *Amber B.* and *Christine C.*," where *Kelly-Frye* was ap-

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162. *Id.*

163. *Id.* at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251.

164. The court in *People v. Phillips*, 122 Cal. App. 3d 69, 86 n.2, 175 Cal. Rptr. 703, 714 n.2 (1st Dist. 1981), noted that Munchausen's syndrome was listed in more recent editions of the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III].

165. See *supra* note 121. The use of CSAAS as a diagnostic tool may be inappropriate under any circumstances.

166. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 INT'L J. OF CHILD ABUSE & NEGLECT 177 (1983); see *supra* notes 105-06 and accompanying text.

167. *Seering*, 194 Cal. App. 3d at 310-11, 239 Cal. Rptr. at 430.



plied.<sup>168</sup> The court probably was distinguishing between the use of anatomically correct dolls as a new method of proof requiring a *Kelly-Frye* analysis, and a clinical judgment based only upon experience and verbal interviews which would be exempt from *Kelly-Frye*.<sup>169</sup>

There is some appeal to this distinction. Doll play is arguably more like putting the child through a "machine" and noting the result than other observations of behavior by the expert. It is easily tagged as a "process" or "method" for determining abuse. The doll play observations could also be viewed as creating more of an "aura of infallibility" than an opinion that the child was abused based on statements and other behaviors of the child. However, the expert's analysis of the child's statements and other nonverbal behaviors is also a "method" for determining abuse. The critical question is whether the opinion of abuse is reliable, regardless of the bases for the opinion. If the opinion is unreliable, the dangers associated with scientific evidence exist. Moreover, if *Kelly-Frye*'s heightened admissibility standard applies only to the opinion that the child was abused based on doll play, the expert can once again manipulate the testimony to be a "personal opinion."

One court tried to overcome the arbitrariness of the personal opinion-scientific evidence distinction by applying *Kelly-Frye* if the testimony exuded an "aura of infallibility" such that the trier of fact would "tend to ascribe a high degree of certainty to the technique."<sup>170</sup> The court admi-

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168. *Id.* at 314, 239 Cal. Rptr. at 432.

169. It is also possible that the court was expressing its consistency with the "view" in *Amber B.* that there is a distinction between personal opinion and a new scientific method even though the court did not agree with the result reached in *Amber B.* and *Christine C.* The *Seering* court stated, for example:

Although the court in *Amber B.* and *Christine C.* . . . spoke broadly in terms of subjecting psychological or psychiatric analyses of a child's reports of sexual abuse to the *Kelly-Frye* test of admissibility, it appears to us from a reading of those cases, including the distinction made between an expert's own personal opinion and an opinion based upon a scientific method of proof, that the court intended to subject expert opinion testimony to the *Kelly-Frye* rule only when the opinion was based upon a new method of proof of fact rather than being a personal opinion based upon the expert's own experience.

*Id.*

It seems unlikely, however, that the *Seering* court disagreed with the application of *Kelly-Frye* in *Amber B.* and *Christine C.* in light of language earlier in the opinion. The court stated that the expert's opinion based on CSAAS "is sufficiently analogous to the methods of proof relied upon in *Bledsoe*, *Amber B.*, and *Christine C.* to require that it be subjected to the *Kelly-Frye* standard of admissibility." *Id.* at 311, 239 Cal. Rptr. at 430. The court subjected the opinion based on CSAAS to a *Kelly-Frye* analysis. See *supra* notes 114-22 and accompanying text. Thus, the court must be distinguishing *Seering* from *Amber B.* and *Christine C.* on the basis that in the latter two cases play with anatomically correct dolls was a basis of the expert's opinion.

170. In re *Amber B.*, 191 Cal. App. 3d at 691, 236 Cal. Rptr. at 629.

rably attempted to determine if there was a need for a heightened admissibility standard instead of applying a rote test.<sup>171</sup> Although the approach of looking to the purpose of the *Kelly-Frye* rule does create a rational conceptual theme, the "aura of infallibility" language would cause confusion under existing case law. For example, the court in *Amber B.* found that childhood sexuality was a subject that the trier of fact could not easily analyze, requiring a heightened standard of admissibility for expert testimony.<sup>172</sup>

In contrast, the California Supreme Court viewed expert eyewitness identification testimony in *McDonald* as a topic that jurors could analyze with "healthy skepticism."<sup>173</sup> Is there more mystique in childhood sexuality than in the functioning of the human brain? This aura of infallibility approach will either lead to some very arbitrary distinctions or to applying *Kelly-Frye* to most psychological testimony. Where the basis of most psychological testimony is a subjective evaluation of the verbal and nonverbal behavior of an individual, the trier of fact may seldom be faced with unraveling the mysteries of a machine. And yet, the typical jury will possess very little ability to question critically an expert's judgment that an individual suffers from a disorder (like Munchausen's) with which he or she has no familiarity.

The real problem is that the *Kelly-Frye* standard does not fit psychological testimony. The language of *Kelly-Frye*—a technique, process, device, or novel method of proof<sup>174</sup>—does not readily describe new diagnoses in the psychological field. Even the language of *Frye* itself—a new principle or discovery<sup>175</sup>—seems to imply the physical sciences. A more helpful analysis would determine whether there is a reason to subject the opinion evidence in question to heightened scrutiny before it is admitted and, if it should be, what standards should be applied to that type of expert testimony.

### C. General Behavior Patterns of Sexually Abused Children

"Children who have been abused will often delay in reporting the incident to an adult." "When very young children describe or demonstrate intercourse, they probably learned it from experience and not from

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171. *Id.*

172. *Id.* at 691, 236 Cal. Rptr. at 629; see *supra* text accompanying notes 150-56.

173. *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251; see *supra* note 67 and accompanying text.

174. See *supra* notes 53-97 and accompanying text.

175. See *supra* note 24 and accompanying text.

age-appropriate sex exploration."<sup>176</sup> Generalized testimony by an expert in this form as *rehabilitative* evidence<sup>177</sup> is the least likely type of expert testimony to trigger a *Kelly-Frye* debate. The courts primarily rely upon the *People v. Bledsoe*<sup>178</sup> dictum that approved the use of rape trauma syndrome characteristics to combat "widely held misconceptions about rape and rape victims."<sup>179</sup> By analogy, the use of CSAAS or typical symptoms to rebut common misconceptions about child abuse victims is arguably appropriate. There is also support in the *McDonald* case.<sup>180</sup> A mere description of the research in the field is possibly not an "opinion" at all, but factual. If the testimony does not constitute an opinion, none of the rules on expert opinion testimony, including the *Kelly-Frye* standard, would apply.<sup>181</sup> An analogy to the *McDonald* court's alternative theory, that the expert's description of the literature and evaluation of factors affecting child abuse victims in the particular case is "personal opinion" rather than scientific evidence,<sup>182</sup> similarly would render the *Kelly-Frye* test inapplicable.<sup>183</sup>

There are serious theoretical problems, however, in excluding generalized testimony for a *nonrehabilitative* purpose<sup>184</sup> unless *Kelly-Frye* has been applied. The courts of appeal that have excluded such testimony have almost unanimously relied upon *Bledsoe*.<sup>185</sup> They have valiantly

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176. This example paraphrases the expert testimony in *In re Amber B.*, 191 Cal. App. 3d 682, 685, 236 Cal. Rptr. 623, 625 (1st Dist. 1987).

177. Evidence serves a rehabilitative function when its purpose is to restore a witness' credibility which has come under attack. A witness' credibility can be challenged either on cross-examination of that witness or through direct testimony by witnesses called by the opposing party. The rehabilitative evidence is consequently appropriate at several phases of the proceeding. If, for instance, the victim in a criminal case, called during the state's case-in-chief, is impeached on cross-examination by the defense, the state would be entitled to rehabilitate her by her own testimony on redirect, by calling another witness during its case-in-chief, or by calling another witness in its rebuttal to the defense's case-in-chief.

178. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

179. *Id.* at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

180. 37 Cal. 3d 351, 366, 690 P.2d 709, 719, 208 Cal. Rptr. 236, 246 (1984).

181. *Id.*

182. *Id.* at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251.

183. See *supra* notes 64-67 and 74-77 and accompanying text regarding the *McDonald* court's reasoning why *Kelly-Frye* does not apply to personal opinion.

184. If testimony is not rehabilitative, it must be probative of one of the essential elements of the cause of action, such as whether the child was in fact abused.

185. See, e.g., *People v. Jeff*, 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (5th Dist. 1988); *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988); *In re Sara M.*, 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (3d Dist. 1987). But see *People v. Gray*, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (2d Dist. 1986). *Gray* is the lone exception. There the court noted the similarity between the generalized testimony on child sexual abuse and the generalized testimony in *McDonald*. *Id.* at 219, 231 Cal. Rptr. at 661. The *Gray* court additionally found *Kelly-Frye* inapplicable because the testimony was rehabilitative and thus, according to

attempted to be consistent with the dictum of *Bledsoe* that the syndrome testimony is admissible because it rehabilitates the victim after an attack by the defense.<sup>186</sup> These courts consequently have distinguished between generalized testimony on traits of abused children offered to rebut a challenge to the child's credibility and generalized testimony offered for the purpose of inferring that the child has been abused. The distinction, which results in excluding the testimony from the case-in-chief unless it has a rehabilitative function, is only valid, however, if the *Kelly-Frye* standard is applicable.

This section first discusses case law from the courts of appeal, and then the rationale for admitting generalized testimony for a rehabilitative purpose. Next, the theoretical difficulties under current California law in excluding generalized testimony for a nonrehabilitative purpose are analyzed; the discussion explores whether such testimony is "factual," "personal opinion," or "scientific evidence." The section concludes that the distinctions under existing law obscure the critical question of whether the judge should screen the evidence for reliability before its introduction.

### 1. The decisional law

The courts considering the issue have prohibited under *Kelly-Frye* generalized testimony offered in the prosecution's case-in-chief before a rehabilitative purpose exists.<sup>187</sup> The courts equate this testimony to an opinion that a particular child was abused. Moreover, the opinions barred have included syndrome and nonsyndrome testimony. For example, in *People v. Jeff*,<sup>188</sup> the prosecution first elicited a description of the victim's behavior and statements from a lay witness.<sup>189</sup> The prosecution then called an expert to verify that typical victims respond to abuse with the same reactions as the actual victims exhibited.<sup>190</sup> The expert testified both in terms of the syndrome and in nonsyndrome terms about typical behavior patterns of abused children, such as having nightmares.<sup>191</sup> Reversing the conviction, the court found this testimony inconsistent with

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the court, fell within the parameters outlined in *Bledsoe*. *Id.* at 218, 231 Cal. Rptr. at 661. See *infra* notes 213-18 and accompanying text for a discussion of *Gray*.

186. See *Bledsoe*, 36 Cal. 3d at 249-51, 681 P.2d at 299-301, 203 Cal. Rptr. at 459-60.

187. See, e.g., *People v. Jeff*, 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (5th Dist. 1988); *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988); *In re Sara M.*, 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (3d Dist. 1987).

188. 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (5th Dist. 1988).

189. *Id.* at 319, 251 Cal. Rptr. at 140-41. The court noted that most of this testimony was probably inadmissible hearsay. *Id.* at 339, 251 Cal. Rptr. at 153.

190. *Id.* at 320-21, 251 Cal. Rptr. at 140-41.

191. *Id.* at 338-39, 251 Cal. Rptr. at 153.

the rehabilitative purpose condoned in *Bledsoe* and its progeny.<sup>192</sup> The court viewed this testimony as an opinion that the specific child "fits the mold" of a sexually abused child.<sup>193</sup> The court found this to be thinly disguised testimony that the particular victim was abused, which runs afoul of *Bledsoe*.<sup>194</sup>

Another court of appeal, in *In re Sara M.*,<sup>195</sup> similarly found that *Kelly-Frye* would preclude introducing generalized syndrome testimony in the state's case-in-chief.<sup>196</sup> The court determined that this use of descriptive testimony was introduced for the purpose of demonstrating that the particular child had been abused<sup>197</sup> and could not withstand a *Kelly-Frye* challenge.<sup>198</sup>

In *People v. Bowker*,<sup>199</sup> another court of appeal held that generalized syndrome testimony used to imply that the victim had been abused did not meet *Kelly-Frye*.<sup>200</sup> The *Bowker* court interpreted *Bledsoe* as prohibiting syndrome testimony where it is used as a "predictor" of child abuse.<sup>201</sup> The court noted that the danger of jury misuse of the testimony might even be greater where generalized testimony is presented rather than an opinion directly stating the expert's view of the specific child.<sup>202</sup> In particular, the court noted that, although the expert spoke in

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192. *Id.* at 337-38, 251 Cal. Rptr. at 152-53.

193. *Id.* at 338, 251 Cal. Rptr. at 153.

194. *Id.*

195. 194 Cal. App. 3d 585, 239 Cal. Rptr. 605 (3d Dist. 1987).

196. *Id.* at 592, 239 Cal. Rptr. at 609.

197. *Id.*, 239 Cal. Rptr. at 610. The court stated that, on the basis that the introduction of the evidence in the state's case-in-chief and the state's "contention on appeal that a psychologist may testify that the child was sexually abused and exhibits behavior consistent with children who have been sexually abused, . . . the purpose of the evidence with reference to the child molest syndrome tendered in the court below was to show that this child had been sexually abused." *Id.*

198. *Id.* at 594, 239 Cal. Rptr. at 611.

199. 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988).

200. *Id.* at 395, 249 Cal. Rptr. at 892. The court ultimately held, however, that the error was harmless. *Id.*

201. *Id.* at 393, 249 Cal. Rptr. at 891.

202. The court stated:

While the impropriety [in using CSAAS as a predictor] is clearest where the expert's testimony applies the CSAAS theory to the facts of the case and concludes that the victim was molested, it is also present where the expert gives "general" testimony describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused. In fact, there may be more danger where the application is left to the jury because the jurors' education and training may not have sensitized them to the dangers of drawing predictive conclusions. The expert may be aware that although victims of child abuse generally exhibit a particular type of behavior, that behavior is also found in significant numbers of children who have not been molested. The jury may not be similarly cognizant.

*Id.*

general terms, his factual examples were analogous to the facts pertaining to the victims in the case.<sup>203</sup> This testimony created a " 'scientific' framework"<sup>204</sup> for the jury. All the jurors had to do was to plug in the facts of the case.<sup>205</sup>

On the other hand, some courts of appeal have admitted generalized testimony with a *rehabilitative* purpose without so much as a discussion of *Kelly-Frye*.<sup>206</sup> The *Bowker* court indicated that generalized testimony would be admissible in those situations where the jury is likely to assume a " 'myth' or 'misconception' "<sup>207</sup> about the child's testimony, such as assuming no abuse where a child delays in reporting the abuse or recants.<sup>208</sup> In *People v. Roscoe*,<sup>209</sup> the court similarly indicated that generalized testimony regarding typical behaviors of victims of sexual abuse, used as rehabilitation, would be admissible on the basis of *Bledsoe* without an independent discussion of *Kelly-Frye*.<sup>210</sup> These courts appear to

203. *Id.* at 394, 249 Cal. Rptr. at 892.

204. *Id.* at 394.

205. *Id.*

206. See *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988); *In re Sara M.*, 194 Cal. App. 3d 585, 591, 239 Cal. Rptr. 605, 609 (3d Dist. 1987); *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985).

207. *Bowker*, 203 Cal. App. 3d at 394, 249 Cal. Rptr. at 891.

208. *Id.* at 394, 249 Cal. Rptr. at 892. A concurring judge would have found that the testimony did serve a rehabilitative purpose even though offered in the state's case-in-chief because the child had testified inconsistently. *Id.* at 401 & n.3, 249 Cal. Rptr. at 896 & n.3 (Benke, J., concurring).

209. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985).

210. *Id.* at 1099-1100, 215 Cal. Rptr. at 49-50 (citing *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)). The court rejected an argument, however, that testimony regarding a specific victim should be admissible to rehabilitate. *Id.* The court viewed the issue of whether the rehabilitative testimony had to be generalized or could be victim-specific as an open question after *Bledsoe*. *Id.* at 1099, 215 Cal. Rptr. at 49 (citing *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)).

More recently, in *People v. Luna*, 204 Cal. App. 3d 726, 250 Cal. Rptr. 878 (5th Dist. 1988), the court of appeal specifically approved use of generalized CSAAS testimony in the prosecution's case-in-chief. Although there is insufficient information in the case to tell if the testimony served a rehabilitative purpose even though introduced in the case-in-chief, the court viewed the testimony on symptoms exhibited by sexual abuse victims in general as an application of the dictum in *Bledsoe*. *Id.* at 736-37, 250 Cal. Rptr. at 883. This would indicate that the court found the testimony to be rehabilitative in nature.

It is also interesting to note that the court in *Luna* viewed the expert as giving generalized testimony when he described typical symptoms, even though the same expert had also testified that the specific victim in the case had physical trauma consistent with abuse. *Id.* Although concerned about the possibility that the jury would assume the expert was discussing the specific victim when he subsequently gave the generalized testimony, the court thought that the jury had been adequately advised that the generalized testimony did not indicate an opinion on the victim. *Id.* The court did suggest, however, that, in a similar situation in the future, the expert should testify in two segments. *Id.* at 737, 250 Cal. Rptr. at 884. In order to help differentiate the purposes of each part of his testimony, he should give his victim-specific testi-

assume that CSAAS or other generalized testimony is generally accepted within the relevant scientific community as was rape trauma syndrome in *Bledsoe*.<sup>211</sup>

Two courts of appeal have specifically found that the *Kelly-Frye* test does not apply to generalized testimony on sexual abuse offered to rehabilitate the victim.<sup>212</sup> In *People v. Gray*,<sup>213</sup> for example, the court held the *Kelly-Frye* test inapplicable to testimony describing CSAAS factors in general.<sup>214</sup> The expert's testimony arose after evidence was admitted that the child had delayed in reporting the abuse and had then failed to immediately disclose all the sexual episodes when she did report the abuse to an adult.<sup>215</sup> The court analogized to the personal opinion testimony on eyewitness identification in *McDonald*<sup>216</sup> and to the language in *Bledsoe*<sup>217</sup> on rebutting misconceptions. The court held *Kelly-Frye* inapplicable where the evidence was not introduced to prove that sexual abuse occurred to the particular victim.<sup>218</sup>

## 2. Rehabilitative use of generalized testimony

In holding generalized testimony admissible for rehabilitative purposes, the appellate courts are consistent with the result suggested by the *Bledsoe* dictum. The generalized testimony about either CSAAS characteristics or simply typical behavior of abused children is analogous to the testimony about rape victim characteristics which the *Bledsoe* court suggested would be appropriate rehabilitative evidence.<sup>219</sup> The courts have not, however, spelled out their rationale for admitting such testimony—is it personal opinion, factual, or scientific evidence that meets *Kelly-Frye*?

Generalized testimony for a rehabilitative purpose is probably admissible under all three conceptual approaches. If reciting literature is

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mony and be subject to cross-examination on it and then he should give his generalized testimony with cross-examination following. *Id.*

211. 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

212. *People v. Gray*, 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (2d Dist. 1986); *People v. Dunnahoo*, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (2d Dist. 1984).

213. 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (2d Dist. 1986).

214. *Id.* at 219-20, 231 Cal. Rptr. at 661-62; *see also Dunnahoo*, 152 Cal. App. 3d at 577, 199 Cal. Rptr. at 804 (two police officers qualified as experts on child molestation and court approved their testimony that children delay in reporting abuse solely under California Evidence Code section 801).

215. *Gray*, 187 Cal. App. 3d at 218, 231 Cal. Rptr. at 660-61.

216. *Id.* at 219-20, 231 Cal. Rptr. at 661-62.

217. *Id.* at 219, 231 Cal. Rptr. at 661 (citing *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984)).

218. *Id.* at 219-20, 231 Cal. Rptr. at 661-62 (citing *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)).

219. *See supra* notes 91-92 and accompanying text.

viewed as factual, then no restrictions on expert testimony would apply and the evidence would be readily admissible.<sup>220</sup> If the testimony is expert opinion, but personal, *Kelly-Frye* is inapplicable and the testimony must merely assist the trier of fact in understanding the behavior at issue in the case.<sup>221</sup> If the testimony is scientific evidence, therefore subject to *Kelly-Frye*, it may well meet that standard as did the rehabilitative testimony in *Bledsoe*.<sup>222</sup> There probably is general acceptance of CSAAS or of its typical characteristics for the purpose of explaining a child's delay in reporting or retracting.<sup>223</sup>

### 3. Nonrehabilitative use of generalized testimony

The difficult question arises when generalized testimony is introduced to support the inference that the child was abused in the case-in-chief. This testimony probably cannot meet the *Kelly-Frye* standard.<sup>224</sup> Thus, the courts of appeal are correctly applying the *Kelly-Frye* test when they exclude the testimony.<sup>225</sup> However, is it appropriate to apply *Kelly-Frye*? If the generalized testimony is personal opinion, there is no need to apply *Kelly-Frye* because under the *McDonald* reasoning the trier of fact can be skeptical of the testimony.<sup>226</sup> We once again are faced with the dilemma of whether the testimony is more like the eyewitness identification testimony in *McDonald* or like the rape trauma syndrome testimony in *Bledsoe*.<sup>227</sup> Presumably, if the syndrome term is used, the testimony would trigger *Kelly-Frye* as in *Bledsoe*.<sup>228</sup> However, if the expert testifies to characteristics of abused children without using the syndrome, the testimony is analogous to the generalized testimony in *McDonald* which was not subjected to *Kelly-Frye*.<sup>229</sup> If the generalized

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220. *McDonald*, 37 Cal. 3d at 361-67, 690 P.2d at 715-19, 208 Cal. Rptr. at 242-46.

221. See *supra* notes 64-67 and accompanying text.

222. *Bledsoe*, 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

223. CSAAS was developed as a description of abused children. See *supra* notes 105-06 and accompanying text. However, even the description is criticized as being based on the assumption that the children were abused. See *infra* notes 390-91 and accompanying text.

224. See *infra* notes 387-95 and accompanying text.

225. *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988); *In re Sara M.*, 194 Cal. App. 3d 213, 231 Cal. Rptr. 605 (3d Dist. 1987); see *supra* notes 193-205 and accompanying text.

226. *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251; see *supra* notes 64-67 and accompanying text.

227. *Bledsoe*, 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457; see *supra* notes 84-88 and accompanying text.

228. *McDonald*, 37 Cal. 3d at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51; *Bledsoe*, 36 Cal. 3d at 246, 681 P.2d at 298, 203 Cal. Rptr. at 457.

229. *McDonald*, 37 Cal. 3d at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-52; see *supra* notes 72-75 and accompanying text.



testimony is personal opinion, there is no reason to exclude the evidence from the case-in-chief on the basis of expert opinion rules.<sup>230</sup> The *Bowker, Roscoe/Jeff* and *Sara M.* courts would thus be in error. Treating the generalized testimony as personal opinion, however, triggers the same criticism that applies to opinions that a particular child was abused—form is elevated over substance if only syndrome testimony is excludable.<sup>231</sup>

Alternatively, the *Kelly-Frye* test could be unnecessary because the generalized testimony might be factual, not opinion. For example, the expert may just be describing the literature when he or she states that the literature says children delay in reporting abuse. The *McDonald* court toyed with the possibility that the expert testimony on eyewitness identification was a factual description.<sup>232</sup> As fact, instead of opinion, the evidence does not have to meet the proper-subject test for expert testimony of being beyond the common experience of the trier of fact.<sup>233</sup> If the testimony is viewed as factual, there would be no basis under the rules on expert testimony, including *Kelly-Frye*,<sup>234</sup> to exclude it from the case-in-chief.

However, labeling generalized expert testimony as factual is illogical. The use of the expert to recite literature implies that the expert believes that the literature is correct. The use of a psychological expert on CSAAS implies that, in the expert's opinion, abused children do delay in reporting abuse or recant their assertions. The "factual" nature of the testimony is thus deceptive—its purpose is to convey what the expert thinks.

Moreover, testimony by someone with expertise is critical. If it were not critical, all that is needed is someone who has read the literature and

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230. It has been argued, however, that the nonrehabilitative use of the generalized testimony does not "assist the trier" under California Evidence Code section 801 because the opinion is designed solely to indicate the child is credible, a function typically left to jurors and considered inappropriate for expert opinion. See, e.g., *Roscoe*, 168 Cal. App. 3d at 1099-1100, 215 Cal. Rptr. at 49-50; 3 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND STATE COURTS ¶ 702[02], at 109 (Supp. 1988). It has also been argued that an entirely hearsay basis of the opinion is not a basis "reasonably relied upon" by such experts pursuant to section 801(b). See CAL. EVID. CODE § 801(b) (West 1966). The testimony could run afoul of other evidence rules as well. For instance, the use of the expert testimony may be impermissible bolstering of the victim's credibility in the case-in-chief, even if expert testimony on credibility was appropriate.

231. See *supra* notes 163-66 and accompanying text.

232. See *McDonald*, 37 Cal. 3d at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.

233. *Id.*

234. These rules would include not only the subject-matter rule discussed in *McDonald*, but also the qualifications requirement and the *Kelly-Frye* rule. See *supra* text accompanying notes 14-22.

who can repeat it. What would be the result if the proponent called a high school student to read the literature on eyewitness identification or CSAAS? Surely there is a reason why the proponent of the evidence calls an expert. If there had been a challenge to the expert's qualifications in *McDonald*, it seems unlikely that the court would have waived the requirement that a qualified expert testify, even where the testimony was descriptive, despite the fact that the evidence rule regulating experts refers only to expert "opinion."<sup>235</sup> The eyewitness identification expert was well-qualified.<sup>236</sup> This intuitive need to present a qualified expert for descriptive testimony further indicates that such testimony needs to be regulated as much as opinion testimony.

In addition, as noted by the *Jeff*, *Bowker* and *Sara M.* courts, the purpose of generalized testimony without a rehabilitative purpose in the case-in-chief is to imply that the particular child was abused.<sup>237</sup> This suggests that the inference with regard to the particular child takes the generalized testimony out of the realm of factual testimony and into the realm of opinion. The message is conveyed to the trier of fact that this expert must think that, if the child has the characteristics described, the child was abused. This would be particularly true if the expert testified to characteristics of importance in the particular case. However, a similar inference must necessarily have been suggested in *McDonald* as well. The reason to introduce the eyewitness identification testimony in the defense's case-in-chief was to trigger an inference that the state's witnesses suffered from one or more defects in perception.<sup>238</sup> In fact, the expert in *McDonald* would have commented on facts directly pertaining to the case at hand.<sup>239</sup> The *McDonald* court did not address the ramifications of its "factual-opinion" distinction because it relied on the alternative theory that the testimony was personal opinion.<sup>240</sup> Assuming the *McDonald* court would have alternatively admitted the eyewitness identification testimony as factual, it is virtually impossible to reconcile the

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235. See CAL. EVID. CODE §§ 801, 805 (West 1966).

236. *McDonald*, 37 Cal. 3d at 361, 690 P.2d at 715; 208 Cal. Rptr. at 242.

237. See *Jeff*, 204 Cal. App. 3d at 337-39, 251 Cal. Rptr. at 152-54; *Bowker*, 203 Cal. App. 3d at 391-94, 249 Cal. Rptr. at 889-91; In re *Sara M.*, 194 Cal. App. 3d at 592, 239 Cal. Rptr. at 610.

238. *McDonald*, 37 Cal. 3d at 361, 690 P.2d at 715, 208 Cal. Rptr. at 242.

239. *Id.* at 362, 690 P.2d at 716, 208 Cal. Rptr. at 243.

240. *Id.* at 367-73, 690 P.2d at 719-24, 208 Cal. Rptr. at 246-51. The court found that, assuming the testimony was opinion, the subject matter was "'sufficiently beyond common experience,'" *id.* at 369, 690 P.2d at 721, 208 Cal. Rptr. at 248, and that *Kelly-Frye* was inapplicable to "personal opinion." *Id.* at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51.

admission of factual testimony with the exclusion of the generalized testimony in the state's case-in-chief in child sexual abuse cases.

Focusing on the purposes of the *Kelly-Frye* rule<sup>241</sup> would provide a first step towards a sound analytical basis for the admission of generalized testimony about child abuse victims. It is possible under this approach to reach the same conclusion as the courts of appeal: generalized testimony serving a rehabilitative purpose is admissible, but precluded when introduced for a nonrehabilitative purpose. One would argue that there is less of an "aura" or tendency to overweight the expert's testimony when it is explaining a behavior under attack, such as a delay in reporting abuse, than when it is introduced to directly infer a child was abused. In the nonrehabilitative situation, the trier of fact might be inclined to find abuse because an expert is describing symptoms of abused children which are identical to the behavior of the child in the case. The expert assumes a determinative role. In a rehabilitative posture, on the other hand, the trier of fact might be more likely to view the expert's testimony in a supportive, rather than determinative light. The primary evidence of abuse would not be the expert, but other lay witnesses. The expert's purpose in rebutting specific misconceptions would be more limited than when testimony is offered solely for the purpose of inferring abuse.

Although the approach of looking to the purposes of the *Kelly-Frye* rule is more meaningful than a personal opinion-scientific evidence analysis, it is still an incomplete analysis. One of the primary reasons to admit rehabilitative evidence is the need for the evidence. In a typical criminal setting, the prosecution needs to counter a defense argument, such as a delay in reporting indicates no abuse occurred, that appeals to common sense but is a misunderstanding of the psychological dynamic of abuse. The concern with confusion of the trier of fact by expert testimony is less significant when the defense has triggered the need for the testimony. Thus, the *Kelly-Frye* test is too limited for two reasons. First, a need for heightened scrutiny by the judge may exist whether the expert's testimony is technically personal opinion rather than scientific evidence. Second, there are other factors important to a determination of admissibility other than the general acceptance of the principle or method, such as the need for the testimony in a particular trial. The next section presents an alternative to the *Kelly-Frye* test that is designed to remedy these problems; the final section then evaluates the helpfulness of the new approach in resolving admissibility issues.

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241. See *supra* notes 23-32 and accompanying text.

V. AN ALTERNATIVE TO THE *KELLY-FRYE* TEST

This section proposes adoption of the traditional or "relevancy" test as an alternative to the *Kelly-Frye* test.<sup>242</sup> It is the most comprehensive and workable alternative and courts have recently begun to apply it.<sup>243</sup>

A number of persuasive writers espouse a traditional analysis in lieu of *Kelly-Frye*.<sup>244</sup> To adopt a traditional analysis is to abandon *Kelly-Frye* as a mandatory requirement for admissibility.<sup>245</sup> Instead, under a traditional analysis, admissibility is determined under usual evidentiary methods. The relevance or probativeness of the evidence is first assessed.<sup>246</sup> Because an expert witness is involved, it must also be determined if the

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242. Many other alternatives have been proposed as well. See McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986). Professor McCord has proposed an analysis using more generalized factors than the traditional analysis discussed here. His analysis consists of four factors: necessity, reliability, understandability and importance. *Id.* at 31. As with relevancy analysis, these factors are analyzed by the court to determine if the expert testimony will "assist" the jury. *Id.*

The necessity factor is broken down into four "sub-inquiries." *Id.* These are: (1) whether the matter is beyond common knowledge; (2) whether the testimony is needed to counter irrational prejudices in ordinary jurors' minds; (3) whether the testimony is needed because particular facts in the case were emphasized by the opponent and thus need explanation; and (4) whether the testimony is needed to counter jury instructions that perhaps reinforce or overemphasize unfounded beliefs. *Id.* The reliability factor is essentially the *Frye* test. It looks to the general acceptance of the expert's conclusion and the error rate of the technique. *Id.* at 31-32.

The understandability factor copes with the problem of jurors being overwhelmed by an aura of infallibility. *Id.* McCord proposes five "sub-inquiries": (1) how much the testimony is out of the common experience of jurors; (2) the "clarity and simplicity" of the conclusions; (3) the availability of a pool of experts for the opponent; (4) availability of literature that the opponent can study; and (5) the likelihood of overwhelming the jury with the testimony. *Id.* at 32-33. The importance factor looks to whether the testimony is dispositive of the cause of action. *Id.* at 33. The more important the testimony is to the case, the more dangerous the testimony if it scores low on the other factors. *Id.*

See also Giannelli, *supra* note 33, at 1247. Professor Giannelli has criticized the relevancy approach as too leniently admitting scientific evidence. He expressed concern that the value of *Frye* not be lost—that there be adequate safeguards "against the misuse of unreliable novel scientific evidence." *Id.* at 1245. He proposed that the *Frye* test be modified to incorporate a burden-of-proof standard. In particular, he proposed that in criminal cases, the proponent meet a preponderance standard. *Id.* at 1248. In his view, the *Frye* standard is inappropriately a substantive standard, rather than being couched in traditional burden-of-proof terms. *Id.* at 1247. See also *Proposals for a Model Rule on the Admissibility of Scientific Evidence*, 26 JURIMETRICS 236 (E. Berjuoy ed. 1986).

243. See cases cited in 3 WEINSTEIN & BERGER, *supra* note 230, ¶ 702[03], at 702-37 n.6.

244. See, e.g., C. MCCORMICK, EVIDENCE § 203 (3d ed. 1984); McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879 (1982); 3 J. WEINSTEIN & M. BERGER, *supra* note 230, at ¶ 702[03].

245. See, e.g., McCormick, *Scientific Evidence*, *supra* note 244, at 885-86.

246. This determination is the basic test for relevant evidence. FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966). See *supra* note 15.

expert's testimony will assist the trier of fact.<sup>247</sup> Specific factors guide this determination.<sup>248</sup> The probative value is then weighed against the probative dangers, such as the potential to confuse or mislead the jury.<sup>249</sup> The *Kelly-Frye* standard itself—general acceptance within the relevant scientific community—is considered as one factor in the “helpfulness” analysis.<sup>250</sup> Those advocating this analysis have identified other factors that could be considered in determining the admissibility of the evidence. Two such proposals are discussed below. The description of the proposals is followed by two examples of cases which applied a traditional analysis.

Weinstein and Berger have proposed that the following factors be considered in determining whether expert testimony based on novel scientific evidence will assist the trier of fact:

- (1) The technique's general acceptance in the field;
- (2) The expert's qualifications and stature;
- (3) The use which has been made of the technique;
- (4) The potential rate of error;
- (5) The existence of specialized literature;
- (6) The novelty of the invention; and
- (7) The extent to which the technique relies on the subjective interpretation of the expert.<sup>251</sup>

These factors play a role in balancing the probative value and prejudicial dangers of the evidence. This balancing function is also an integral part of the standard of “assisting the trier of fact”<sup>252</sup> which is embodied in the specific rule governing the proper subject areas of expert testimony.<sup>253</sup> A

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247. This determination is the standard for admissibility of any expert testimony. See FED. R. EVID. 702; CAL. EVID. CODE § 801 (West 1966).

248. These factors are not codified, but have been proposed to serve a screening function similar to the *Kelly-Frye* test.

249. This is the balancing under the generalized rule regarding probative value and probative dangers. See FED. R. EVID. 403; CAL. EVID. CODE § 352. Section 352 of the California Evidence Code provides:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

250. See *infra* notes 251 and 259 and accompanying text for a listing of these factors.

251. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41 to 42; see also *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984).

252. Weinstein and Berger state that “the relevance and prejudice analyses implicated in [FRE] 702's helpfulness standard must be utilized.” 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41. In particular, the authors refer to “the degree to which the jurors might be over-impressed by the aura of reliability surrounding the evidence.” *Id.* ¶ 702[03], at 702-42.

253. See, e.g., FED. R. EVID. 702.

more general evidence rule also allows the court to exclude any evidence that is substantially more prejudicial than probative.<sup>254</sup> Weinstein and Berger view this balancing approach as giving the court more flexibility than the rigid *Kelly-Frye* test.<sup>255</sup> They also consider this approach more in keeping with the Federal Rules of Evidence.<sup>256</sup> The rules reflect a general policy that favors admissibility of evidence. Moreover, in their view, the rules, which do not refer to any *Kelly-Frye* standard, were intended to abandon the *Kelly-Frye* restriction.<sup>257</sup>

Justice Mark McCormick of the Iowa Supreme Court has also advocated substituting a traditional analysis for *Kelly-Frye*.<sup>258</sup> He has proposed eleven factors for courts to consider under both the "helpfulness to the trier of fact" standard for expert testimony and the general balancing of probative value and prejudicial dangers:

- (1) the potential error rate in using the technique;
- (2) the existence and maintenance of standards governing its use;
- (3) presence of safeguards in the characteristics of the technique;
- (4) analogy to other scientific techniques whose results are admissible;
- (5) the extent to which the technique has been accepted by scientists in the field involved;

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254. *Id.* at 403. Weinstein and Berger also refer specifically to the probative dangers identified in Federal Rule of Evidence 403, such as "[c]onfusion of the jury, and the inordinate consumption of trial time . . . ." 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-43.

To the extent that Federal Rule of Evidence 702 (equivalent to California Evidence Code section 801) embodies a balancing test of probative value and probative dangers, it overlaps with the more generalized rule. *See* FED. R. EVID. 702, 403; CAL. EVID. CODE §§ 801, 352. The analysis could differ, however, because the burden of establishing the prerequisites to expert testimony falls on the proponent of the evidence, *IMWINKELRIED, EVIDENTIARY FOUNDATIONS* 136-37 (1980), while under both Federal Rule of Evidence 403 and California Evidence Code section 352 the burden of demonstrating prejudice which outweighs probative value is placed on the opponent of the evidence. FED. R. EVID. 403; CAL. EVID. CODE § 352.

255. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-44.

256. *See generally* FED. R. EVID.

257. *Id.* at 702-36. Weinstein and Berger state that "Rule 702's failure to incorporate a general scientific acceptance standard, and the Advisory Committee Note's failure to even mention the *Frye* case, must be considered significant. The silence of the rule and its drafters may arguably be regarded as tantamount to an abandonment of the general acceptance standard." *Id.* Compare Giannelli, *supra* note 33, in which the author cites arguments that the Federal Rules retained *Frye*, *id.* at 1228-29 (citing legislative history), as well as arguments that the Federal Rules rejected *Frye*. *Id.* at 1230-31 (citing language of rules). The California Evidence Code similarly does not codify a general scientific acceptance standard.

258. *See* McCormick, *Scientific Evidence*, *supra* note 244, at 905.

- (6) the nature and breadth of the inference adduced;
- (7) the clarity and simplicity with which the technique can be described and its results explained;
- (8) the extent to which the basic data are verifiable by the court and jury;
- (9) the availability of other experts to test and evaluate the technique;
- (10) the probative significance of the evidence in the circumstances of the case; and
- (11) the care with which the technique was employed in the case.<sup>259</sup>

Justice McCormick believes that a traditional analysis using these factors will adequately meet the concerns that have prompted courts to use the *Kelly-Frye* test: a uniformity in decisions; protecting the jury from unreliable scientific evidence; and assuring a pool of experts exists for the opponent.<sup>260</sup> The traditional analysis, in his view, additionally permits the use of factors that directly relate to the particular scientific evidence and permits judges to evaluate the admissibility of the evidence with legal concepts with which they have some familiarity.<sup>261</sup>

Extensive criticism of *Kelly-Frye* has initiated a trend away from the restrictions of the *Kelly-Frye* test.<sup>262</sup> Decisions from both the United States Court of Appeals for the Third Circuit and from the courts of Oregon provide good examples of courts substituting a traditional analysis for the *Kelly-Frye* rule.

In *United States v. Downing*,<sup>263</sup> the Third Circuit, in a case involving expert eyewitness identification testimony, expressly rejected *Kelly-Frye*<sup>264</sup> and adopted a traditional analysis.<sup>265</sup> The court outlined its analysis under Federal Rule of Evidence 702 which states the helpfulness requirement of all expert testimony.<sup>266</sup> Specifically, the court set forth a three-part analysis pursuant to Rule 702 consisting of:

- (1) the soundness and reliability of the process or technique used in generating the evidence;

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259. *Id.* at 911-12.

260. *Id.* at 909-11.

261. *Id.* at 916.

262. See cases cited in 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03]; Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 264-67 (1981).

263. 753 F.2d 1224 (3d Cir. 1985).

264. *Id.* at 1232.

265. *Id.* at 1237.

266. *Id.* at 1237-42 (citing FED. R. EVID. 702); see also CAL. EVID. CODE § 801.

- (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury; and
- (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case.<sup>267</sup>

In addition, the *Downing* court required that Federal Rule 403's balancing of probative value and prejudicial dangers also be conducted, even though it overlapped with the analysis under Rule 702.<sup>268</sup> The court reasoned that Rule 403 embodied additional concerns that could lead to excluding evidence that might otherwise meet the Rule 702 test. For example, the court noted that the availability of other evidence to establish the critical issue other than the proffered expert testimony might convince a court to exclude the expert testimony.<sup>269</sup> The court remanded the case to the trial court to apply the analysis.<sup>270</sup> On remand, the trial court excluded the evidence.<sup>271</sup>

In a polygraph case, *State v. Brown*,<sup>272</sup> the Oregon Supreme Court also adopted a traditional analysis approach.<sup>273</sup> The *Brown* court specifically adopted Weinstein and Berger's seven factors as part of the analysis of the probative value of the testimony.<sup>274</sup> The court was careful to state, however, that other factors could be important and referred to Justice McCormick's eleven factors.<sup>275</sup> The court proceeded to apply Weinstein and Berger's seven factors to the polygraph evidence.<sup>276</sup> Although concluding that the polygraph had probative value and would be helpful to the trier of fact under the relevance and expert testimony rules,<sup>277</sup> the court ultimately rejected the admission of the polygraph evidence under the general rule for balancing probative value and prejudicial dangers.<sup>278</sup> In particular, the court was concerned that the jury would give undue

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267. *Downing*, 753 F.2d at 1237.

268. *Id.* at 1242-43.

269. *Id.* at 1243.

270. *Id.* at 1244.

271. See 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-37 n.7.

272. *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984).

273. *Id.* at 408, 687 P.2d at 754.

274. *Id.* at 417, 687 P.2d at 759.

275. *Id.* at 417-18 n.5, 687 P.2d at 759-60 n.5.

276. *Id.* at 422-38, 687 P.2d at 762-72.

277. *Id.* at 438, 687 P.2d at 772.

278. *Id.* at 442, 687 P.2d at 775. The *Brown* court also found, as an alternative ground for excluding the evidence, that the polygraph results were an impermissible comment on the truthfulness of the witness. *Id.* at 442, 687 P.2d at 775. The court noted that the polygraph examiner did not know the witness well enough to qualify giving his opinion on the truthfulness of the witness and that a statement of truthfulness on one occasion constituted an impermissible specific instance of truthfulness. *Id.* at 443, 687 P.2d at 775.



weight to the results, that there were too few polygraph experts to provide an adequate pool of experts, and that trials would devolve into time-consuming battles of experts.<sup>279</sup>

Using a traditional analysis, which specifically applies factors such as Weinstein and Berger's, thus provides flexibility and guidance. Courts can fashion the pertinent factors to the particular area of expertise. At the same time, the specified factors provide a structure to guide the courts' assessment of the evidence. Most importantly, the screening function of the court is preserved. Moreover, the courts' role is not dependent upon the applicability of the troublesome *Kelly-Frye* standard. The final section proposes that California courts adopt a traditional analysis in child sexual abuse cases.

#### VI. A BETTER APPROACH TO ADMISSIBILITY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES IN CALIFORNIA

This section proposes that California courts adopt a modified traditional analysis approach to admission of expert testimony in child sexual abuse cases. The first subsection discusses the need to abandon the *Kelly-Frye* test. The impact of Proposition 8, the Truth-in-Evidence initiative, is explored in the second subsection. The third subsection sets forth reasons for adopting a traditional analysis. The final subsection applies the proposed analysis to rape trauma syndrome, eyewitness identification testimony, and finally, to child sexual abuse expert testimony.

##### A. Time to Abandon Kelly-Frye

The *Kelly-Frye* test should be abandoned in child sexual abuse cases. As the cases from the courts of appeal demonstrate, it is an intellectual nightmare to attempt to determine whether an expert's testimony is a new scientific technique.<sup>280</sup> Moreover, the California Supreme Court has eliminated the *Kelly-Frye* requirement in areas where evidence is unreliable by distinguishing between factual and opinion testimony<sup>281</sup> and between personal opinion and scientific evidence.<sup>282</sup> The concurring judge in *People v. Bowker*<sup>283</sup> aptly described the state of the law:

Despite a plethora of case authority and textual materials on the subject, *Kelly-Frye* remains an elusive and inconsistently

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279. *Id.* at 439-42, 687 P.2d at 773-75.

280. See *supra* notes 53-71 and accompanying text.

281. See *supra* notes 72-83 and accompanying text.

282. See *supra* notes 64-70 and accompanying text.

283. 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (4th Dist. 1988).

applied component in evidentiary law. It has variously been defined as a test applicable to "scientific evidence" rather than "expert medical opinion" [*McDonald*<sup>284</sup>], "new scientific process operating on purely psychological evidence" [*Shirley*<sup>285</sup>], expert medical opinion used to enhance the truth-finding process rather than to rehabilitate a victim [*Bledsoe*<sup>286</sup>], and any new scientific methods of proof "to which fact finders would tend to ascribe an inordinantly high degree of certainty" [*Ambler B.*<sup>287</sup>]. It is amazing any trial court can determine what the test is and on what evidentiary basis it rests, let alone apply it.

The results of applying *Kelly-Frye* are unpredictable because of confusing and conflicting standards in its application. The concurring judge quoted above in *Bowker*, for example, would have found *Kelly-Frye* inapplicable to the generalized CSAAS testimony at issue because it was "expert medical opinion" under *People v. McDonald*,<sup>288</sup> while the majority, relying on *People v. Bledsoe*, held it inadmissible under *Kelly-Frye*.<sup>289</sup>

### B. The Impact of Proposition 8

Another issue is whether Proposition 8,<sup>290</sup> the Truth-in-Evidence

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284. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

285. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

286. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

287. 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1st Dist. 1987).

288. *Bowker*, 203 Cal. App. 3d at 399, 249 Cal. Rptr. at 895 (Benke, J., concurring) (citing *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984)).

289. *Id.* at 396, 249 Cal. Rptr. at 892 (Benke, J., concurring) (citing *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1987)).

290. CAL. CONST. art. I, § 28. This subsection discusses the possible impact of Proposition 8, the Truth-in-Evidence provisions of the 1982 amendment to the California Constitution on the continued viability of the *Kelly-Frye* standard. The impact is presently uncertain. At the time this Article was going to press, the California Supreme Court decided the case *People v. Harris*, 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 352 (1989). The court held, *inter alia*, that Proposition 8 did not eliminate the *Kelly-Frye* test. *Id.* at 1094, 767 P.2d at 649, 255 Cal. Rptr. at 382. The polygraph evidence in question was found to be appropriately excluded under that standard. *Id.* at 1094-95, 767 P.2d at 649-50, 255 Cal. Rptr. at 382-83. The court based its conclusion on the theory that a scientific technique that is not generally accepted within the relevant scientific community is unreliable and, therefore, irrelevant. *Id.* See *infra* notes 305-306 and accompanying text for a discussion of the merits of this rationale. Although the impact of Proposition 8 will thus not contribute to the need for a new analytical approach to expert testimony, the major arguments for abandoning *Kelly-Frye* and substituting a traditional analysis, as discussed in this Article, are unaffected. The confusion in the applicability of *Kelly-Frye* and its inadequacy as an effective screening device for unreliable expert testimony remain pressing issues, as exemplified by the child sexual abuse area. Thus, even though Proposition 8 has not affected the status of the *Kelly-Frye* test, there is a need to adopt a more workable, comprehensive approach to determine the admissibility of expert testimony on child sexual abuse.

provision of the California Constitution, has already eliminated the *Kelly-Frye* test in criminal cases. Adopted in 1982, the initiative provides:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.<sup>291</sup>

On its face, Proposition 8 would limit the exclusion of expert testimony of any kind to an analysis of relevance under California Evidence Code section 210<sup>292</sup> and a balancing of probative value and prejudicial dangers under section 352.<sup>293</sup> The provision contains no exception for expert testimony on any issue. Since *Kelly-Frye* imposes a standard of admissibility higher than mere relevance on certain testimony, it conflicts with the statute. Moreover, Proposition 8 arguably supersedes the "helpfulness" requirement of section 801.<sup>294</sup> The Assembly Committee on Criminal Justice recognized the potential impact of Proposition 8. In its analysis of the initiative, the Committee noted that polygraph and voiceprint evidence, both of which were held inadmissible by courts invoking *Kelly-Frye*, were "likely to be made admissible . . ."<sup>295</sup> The Attorney General's Guide to Proposition 8<sup>296</sup> similarly acknowledges that any exclusion of expert testimony, previously barred by section 801, would have to be based on section 352 concerns.<sup>297</sup> The Guide states that "[e]xpert testimony on a subject of common experience would be relevant, but excludable under Evidence Code section 352 on the ground that its admission would necessitate undue consumption of time."<sup>298</sup>

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291. *Id.*

292. CAL. EVID. CODE § 210 (West 1966); see *supra* note 26 for text of rule.

293. *Id.* § 352. See *supra* note 249 for text of rule.

294. The "helpfulness" requirement is phrased as whether the subject matter "is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" in California. CAL. EVID. CODE § 801 (West 1966). See also CALIFORNIA LEGISLATURE ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8: THE CRIMINAL JUSTICE INITIATIVE (1982) [hereinafter ANALYSIS OF PROPOSITION 8].

295. ANALYSIS OF PROPOSITION 8, *supra* note 294, at 12.

296. ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8 (1982).

297. *Id.* at 4-15.

298. *Id.*

The Guide further takes the position that the *Kelly-Frye* concerns would be subsumed under section 352.<sup>299</sup> It anticipates, however, that the same evidence excluded by *Kelly-Frye* would be excluded through section 352.<sup>300</sup>

The California legislature was apparently concerned about the likely impact of Proposition 8 on the *Kelly-Frye* test as well. In 1983, it passed Evidence Code section 351.1<sup>301</sup> which provides for the exclusion of polygraph evidence in criminal cases unless stipulated to by all parties.<sup>302</sup> This provision is necessary to ensure the exclusion of polygraphs if *Kelly-Frye* is eliminated by Proposition 8. The legislature was not willing to take a chance on the interpretation of Proposition 8.

Is it possible that *Kelly-Frye* has survived as a judicially created test even after Proposition 8? The California Supreme Court has yet to decide the issue. *Kelly-Frye* cases decided by the court after Proposition 8 either involved pre-Proposition 8 proceedings or a Proposition 8 issue was not raised by the parties.<sup>303</sup> The lower courts, coping with expert testimony in child sexual abuse cases, have continued to decide whether *Kelly-Frye* applies without considering whether Proposition 8 has affected the viability of the test.<sup>304</sup>

If the *Kelly-Frye* test has survived Proposition 8, it must come under the rubric of relevancy or balancing of probative value and prejudicial dangers. Thus, one argument in favor of the continued existence of the

299. *Id.* at 4-46 to 4-47.

300. *Id.*

301. CAL. EVID. CODE § 351.1 (West Supp. 1988).

302. *Id.*

303. Thus, in neither *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), nor *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), did the court address the effect of Proposition 8 on the applicability of the *Kelly-Frye* test. *See also* *People v. Poggi*, 45 Cal. 3d 306, 323-24, 753 P.2d 1082, 1092-93, 246 Cal. Rptr. 886, 897 (1988) (no error to admit expert testimony on serological tests on *Kelly-Frye* basis where defendant failed to object on that ground at trial and record was insufficient for court to determine what tests were conducted); *People v. Guerra*, 37 Cal. 3d 385, 411-13, 690 P.2d 635, 652-53, 208 Cal. Rptr. 162, 178-79 (1984) (hypnotically refreshed testimony, which court found did not satisfy *Kelly-Frye* in *People v. Shirley*, still fails to have general acceptance).

The California Supreme Court will soon have a chance to decide the effect of Proposition 8 on the *Kelly-Frye* test. In *People v. Cooper*, Crim. No. 24552 (Cal. Sup. Ct. filed May 5, 1987), the state suggested that Proposition 8 eliminates the *Kelly-Frye* test and argued strenuously that it is time to turn to an alternative such as a relevancy analysis. *See* Respondent's Brief at 299-317, *People v. Cooper*, Crim. No. 24552. Arising in the context of a murder prosecution, the *Kelly-Frye* issue involves the typing of blood stains through electrophoresis, the same technique that was at issue in *Brown*. *See also* *People v. Harris*, Crim. No. 23805 (Cal. Sup. Ct. filed June 24, 1984) (defense argued polygraph admissible because no *Kelly-Frye* obstacle).

304. *See supra* notes 53-97 and accompanying text.

test would be that unreliable evidence is irrelevant under section 210.<sup>305</sup> This argument is persuasive only if one assumes that a scientific technique that is not generally accepted is necessarily unreliable. However, a newly discovered scientific technique, which has yet to achieve general acceptance, may be reliable. Moreover, the standard under section 210 is quite low threshold.<sup>306</sup> A scientific technique, such as a voiceprint analysis, might have *some* tendency to establish the identity of the voice even though the probative value of the analysis as conclusive is low due to problems with its reliability. The other possibility is to implicitly incorporate the *Kelly-Frye* test into section 352.<sup>307</sup> This is a more plausible theory. Courts would find that unless the scientific technique is generally accepted, prejudicial dangers do substantially outweigh probative value. It would constitute an interpretation of section 352, but would not run counter to Proposition 8. Incorporating *Kelly-Frye* into section 352, however, does not solve the problems in applying the test to a new area.

### C. Rationale for Adopting a Traditional Analysis

Given that Proposition 8 may have superseded the *Kelly-Frye* test and that the test is almost impossible to apply coherently, why not simply admit all relevant expert testimony? Is there any need for a heightened admissibility standard? Why not trust the trier of fact to give the evidence the weight it deems appropriate? Scholars and practitioners both value some form of screening by the judge before evidence reaches the jury.<sup>308</sup> A jury may accord too much weight to an expert's testimony because of his or her impressive qualifications without evaluating its reliability.<sup>309</sup> This concern has left *Kelly-Frye* alive, despite its ineptness. Justice will not be served if the judgment of the trier of fact is clouded by expert credentials or a scientific "aura." Furthermore, if the scientific evidence is novel, the opponent of the evidence will not be able to counter it competently, leaving the trier uneducated and also creating an imbal-

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305. See CAL. EVID. CODE § 210.

306. *Id.*

307. See *id.* § 352.

308. See, e.g., the discussion in *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 188, 230-33 (1983) [hereinafter *Symposium*], a conference sponsored by the American Bar Association. See also *supra* note 242. Although it could be argued that *Kelly-Frye* should not apply in civil cases, see, for example, discussion in *Symposium, supra*, at 275, the California Courts of Appeal have not held that the nature of the case matters. See, e.g., *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987) (day-care license revocation proceeding); *In re Amber B.*, 191 Cal. App. 3d 682, 236 Cal. Rptr. 623 (1st Dist. 1987) (dependency proceeding).

309. See *Symposium, supra* note 308, at 230-33; McCormick, *Scientific Evidence, supra* note 244, at 915.

ance in the adversary system.<sup>310</sup>

Although criticized as being too lenient in admitting scientific evidence,<sup>311</sup> a traditional evidence analysis containing specific guiding factors would serve as a better screening function than a pure *Kelly-Frye* analysis, and cope with the potential effects of Proposition 8. It would permit a level of judicial screening consistent with a recognition of the greater use of expert testimony today.

The definitional problems in applying the *Kelly-Frye* test are less important in a traditional analysis because the standards that would be applied are whether the evidence assists the trier of fact and whether the probative value outweighs the probative risks.<sup>312</sup> Thus, whether the evidence is truly a "test" or "technique" is less of an issue because all expert testimony must assist the trier of fact.<sup>313</sup> Factors specifically relevant to the area of expertise at issue could be developed. Different factors would be applied, for instance, to psychological evidence than to a blood typing technique. Moreover, because "general acceptance" in the "relevant scientific community" is only one possible factor to consider, the definitional quandaries over those terms under the *Kelly-Frye* standard are less significant.

Furthermore, the balancing nature of a relevancy analysis permits judicial screening of evidence in a context familiar to the courts.<sup>314</sup> Courts routinely assess the probative value of evidence against its countervailing risks of prejudicing, confusing or misleading a jury.<sup>315</sup> A traditional analysis permits a court to perform its usual role with respect to scientific evidence as well.

The traditional analysis proposed by Judge Weinstein and Professor Berger and Justice McCormick provides greater guidance to the court than a generalized rule.<sup>316</sup> By specifying factors to be considered, even though no one factor is controlling, courts are forced to approach scien-

310. See, e.g., McCormick, *supra* note 244, at 905.

311. See *Symposium*, *supra* note 308, at 230-33; McCormick, *Scientific Evidence*, *supra* note 244, at 905.

312. See *supra* notes 251-54 and accompanying text.

313. CAL. EVID. CODE § 801(a).

314. Professor Giannelli expressed the concern that the use of a substantive scientific standard places judges in an unfamiliar role. See Giannelli, *supra* note 33, at 1247.

315. Professor McCord's factors, necessity, reliability, understandability and importance, discussed *supra* at note 242, are implicitly assessed in the relevancy analysis. The probative value of the evidence depends upon the need for it and its inherent characteristics, such as reliability. The probative risks include the likelihood of jurors' failing to understand or confusing the issues.

316. Thus, in contrast to Professor McCord's more generalized factors, see *supra* note 242, relevancy analysis provides for greater guidance to the courts.

tific evidence in a systematic fashion. The factors remain flexible, however, allowing for the need to assess different types of expertise in appropriate ways.

Traditional analysis provides for an effective screening of scientific evidence in part because the burden of proof remains on the proponent as it does under a *Kelly-Frye* analysis.<sup>317</sup> The proponent of the evidence must demonstrate that the evidence will assist the trier of fact. The more generalized probative-value-versus-probative dangers rule shifts to the opponent of the evidence the burden of showing the probative value of the evidence is outweighed by its risks.<sup>318</sup> A traditional analysis thus provides for control over the admissibility of scientific evidence in part through the allocation of the burden of proof. Proposition 8 may well dictate that only a form of traditional analysis is appropriate for assessing the admissibility of scientific evidence. If Proposition 8, in this context, preserves only the basic relevancy and probative-value-probative-danger rules, the courts may be forced to abandon *Kelly-Frye*. It would be appropriate, however, for the courts to adopt specific factors to guide the decisions made under those rules. Factors, such as those proposed by Weinstein and Berger, would be helpful in assessing the probative dangers of scientific evidence without creating a rule, such as *Kelly-Frye*, that violates the Evidence Code.<sup>319</sup>

The one questionable aspect of a traditional analysis under Proposition 8 would be allocating the burden of proof. If Proposition 8 has eliminated section 801, which codifies that allocation,<sup>320</sup> there may be no basis on which to justify placing the burden of proof on the proponent. Section 352, the provision on probative value-probative dangers balancing, imposes the burden on the opponent of the evidence.<sup>321</sup>

There are two arguments to retain the burden of proof on the proponent of scientific evidence despite of the implied repeal of section 801. The first is to view the probative value analysis as a function of relevancy. It is the proponent of the evidence who must establish that it has a "ten-

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317. *People v. Kelly*, 17 Cal. 3d 24, 30-31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

318. The evidence is to be excluded pursuant to section 352 only if it is demonstrated that the "probative value is substantially outweighed" by probative dangers. CAL. EVID. CODE § 352 (West 1966). The assumption, therefore, is that the evidence is admissible unless shown otherwise.

319. If the court declines to set specific factors to be considered pursuant to Evidence Code section 352, Professor McCord's four factors would neatly fit within a probative-value and probative-dangers analysis and provide more guidance than section 352's language on its face. See *supra* note 242.

320. CAL. EVID. CODE § 801 (West 1966).

321. See *supra* note 319.

dency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."<sup>322</sup> The problem with this approach is that, when assessed against the factors suggested in the relevancy analysis, the evidence may meet the low section 210 standard even if its probative value is minimal. Relevant evidence may not assist the trier of fact because of various factors, but this determination does not deprive the evidence of its relevance.

The other argument is to interpret section 352 in this context to mean that the probative value of expert testimony is substantially outweighed by probative dangers absent a demonstration that the testimony meets section 801's requirements *and* the factors proposed in the traditional analysis approaches. This appears to be what the Attorney General anticipated would occur as a practical matter. His Guide states that "[w]e may expect . . . that the desire for uniformity emphasized in *Kelly* . . . will lead the trial courts to the same conclusions reached by appellate courts in [the decisions using the *Kelly-Frye* test]."<sup>323</sup>

The burden of proof issue, although problematic, is thus not insurmountable. However, the most important aspect of a traditional analysis, balancing, is easily implemented. A balancing process is already a common element in California in determining the admissibility of psychological evidence.<sup>324</sup> Even in cases that do not employ a *Kelly-Frye* analysis, courts have balanced the probative value and prejudicial dangers of the evidence.<sup>325</sup> The following three cases illustrate how the California courts have applied a balancing test.

In *People v. Murtishaw*,<sup>326</sup> the California Supreme Court found error in the admission of expert testimony that a defendant in a capital case would be likely to be dangerous in the future.<sup>327</sup> The testimony was introduced by the prosecution on the issue of aggravation in the penalty

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322. CAL. EVID. CODE § 210. Because evidence must be relevant to be admissible under section 350, the assumption is that the evidence is not admissible until the proponent demonstrates that the evidence meets the requirements of section 210. *See id.* § 210 (West 1966).

323. ATTORNEY GENERAL'S GUIDE TO PROPOSITION 8, *supra* note 296, at 4-47.

324. *See, e.g.,* *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982); *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985); *People v. Phillips*, 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1st Dist. 1981).

325. *See, e.g.,* *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1982); *People v. Roscoe*, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985); *People v. Phillips*, 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1st Dist. 1981).

326. 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981).

327. *Id.* at 767, 631 P.2d at 466, 175 Cal. Rptr. at 758.



phase of the case.<sup>328</sup> In deciding whether to impose the death penalty, the jury was asked to determine if aggravating circumstances outweighed mitigating circumstances.<sup>329</sup> The court noted that predicting future dangerousness was unreliable.<sup>330</sup> Studies indicated that false predictions were common.<sup>331</sup> The court found it unnecessary to determine if the *Kelly-Frye* test would apply to this testimony because the court had already taken judicial notice that such a prediction was unreliable.<sup>332</sup> The state argued that any problems in prediction should go to the weight of the evidence, not its admissibility.<sup>333</sup> The court acknowledged that the likelihood that the defendant would be violent in the future might be relevant to aggravation, but found that the probative value of the predictive testimony was quite low because of its unreliability.<sup>334</sup> As a consequence of its low probative value, the court found that the prejudicial impact "far outweighed" the probative value of the evidence.<sup>335</sup>

In *People v. Phillips*,<sup>336</sup> a case decided the same month as *Murtishaw*, the court of appeal also referred to section 352's provisions for balancing probative value and prejudicial dangers. In *Phillips*, the court indicated it might have excluded the expert's testimony regarding Munchausen's syndrome by proxy.<sup>337</sup> The court noted that "the probative value of [the expert's] testimony was somewhat speculative, and that it posed some risk of both confusion and prejudice . . ."<sup>338</sup> However, the court found no abuse of discretion by the trial court in admitting the testimony under section 352.<sup>339</sup>

In *People v. Roscoe*,<sup>340</sup> another court of appeal used section 352 as an independent basis on which to exclude expert testimony on the specific child in a sexual abuse case.<sup>341</sup> The court noted that the probative value of the evidence would have been adequately presented by genera-

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328. *Id.* at 773, 631 P.2d at 466, 470, 175 Cal. Rptr. at 758, 762.

329. *Id.* at 773, 631 P.2d at 469-70, 175 Cal. Rptr. at 762; *see also* CAL. PENAL CODE § 190.3 (West 1988).

330. *Murtishaw*, 29 Cal. 3d at 767, 631 P.2d at 466, 175 Cal. Rptr. at 758.

331. *Id.* at 768, 631 P.2d at 466, 175 Cal. Rptr. at 758.

332. *Id.* at 769 n.32, 631 P.2d at 467 n.32, 175 Cal. Rptr. at 759 n.32.

333. *Id.* at 770-71, 631 P.2d at 468, 175 Cal. Rptr. at 760.

334. *Id.* at 773, 631 P.2d at 470, 175 Cal. Rptr. at 762.

335. *Id.*

336. 122 Cal. App. 3d 86, 175 Cal. Rptr. 703 (1st Dist. 1981).

337. *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714; *see supra* text accompanying notes 78-83.

338. *Phillips*, 122 Cal. App. 3d at 87, 175 Cal. Rptr. at 714.

339. *Id.*

340. 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (5th Dist. 1985).

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

lized testimony.<sup>342</sup> The specific references to the victim in the case created too great a prejudicial impact.<sup>343</sup>

A balancing process is thus an integral part of admitting scientific evidence even with the existence of a *Kelly-Frye* test. A change from the *Kelly-Frye* test to a traditional analysis, where the burden of persuasion is on the proponent, would not trigger major changes in the admissibility of expert testimony. As demonstrated in the final section, a traditional analysis would continue to exclude evidence which was excluded under the *Kelly-Frye* test, but would be based directly on all of the important reasons to admit or exclude the testimony. As a result, courts would have meaningful criteria to apply to a new area such as child sexual abuse.

#### D. Application of a Traditional Analysis

The following two subparts compare a *Kelly-Frye* analysis with a relevancy analysis in the areas of rape trauma syndrome, eyewitness identification and child sexual abuse.

##### 1. Rape trauma syndrome and eyewitness identification under a traditional analysis

Using a traditional approach to expert testimony, a proponent of rape trauma syndrome evidence would still face the problem of drawing a conclusion of rape which is unsupported by scientific evidence. As in *People v. Bledsoe*,<sup>344</sup> which applied the *Kelly-Frye* test,<sup>345</sup> an analysis using either Weinstein and Berger's<sup>346</sup> or McCormick's<sup>347</sup> factors should result in exclusion of the expert testimony. The question under the *Kelly-Frye* test was phrased as whether there was general acceptance in the relevant scientific community. Under the Weinstein-Berger and McCormick analyses, general acceptance is only one factor.<sup>348</sup> Thus, applying Weinstein and Berger's list of factors<sup>349</sup> to *Bledsoe* as an example of

342. *Id.*

343. *Id.*

344. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

345. *Id.* at 248-51, 681 P.2d at 297-98, 203 Cal. Rptr. at 456.

346. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41 to 42; *see supra* note 251 and accompanying text.

347. McCormick, *Scientific Evidence*, *supra* note 244, at 905; *see supra* note 259 and accompanying text.

348. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41 to 42; McCormick, *Scientific Evidence*, *supra* note 244, at 905; *see supra* notes 251 and 259 and accompanying text.

349. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41 to 42; *see supra* note 251 and accompanying text. Reference is made to the Weinstein and Berger factors be-

the traditional analysis, one would find:

(1) The technique's general acceptance in the field for determining whether a victim was raped would be very low;<sup>350</sup>

(2) The expert's qualifications and stature would vary, although in *Bledsoe* the expert was only a rape counselor and not a psychologist or psychiatrist;<sup>351</sup>

(3) The use made of the technique was to diagnose and treat patients for stress, not to determine the accuracy of the rape;<sup>352</sup>

(4) The potential rate of error in using the syndrome to determine who had in fact been raped would be indeterminable unless there were studies using some kind of standard for assessing who had been raped. Because the purpose of the counseling is to treat stress, the counselors assume the truth of the victim's statement.<sup>353</sup> Verifying the truth of the rape would be difficult unless a researcher established either investigative standards conducted in essence as a police investigation or, even less reliably, assumed a guilty verdict indicated the truth of the rape;<sup>354</sup>

(5) Specialized literature on the syndrome existed that the opponent could rely on to impeach the expert, although none existed specifically addressing studies attempting to verify the accuracy of determining who had been raped;<sup>355</sup>

(6) The syndrome had been "invented" ten years before *Bledsoe*, so it was not entirely "novel."<sup>356</sup> On the other hand, using the syndrome to permit the conclusion that the victim had been raped would have been novel;

(7) The "technique" clearly relied on the subjective interpretation of the counselor or other expert.<sup>357</sup> This means that it is harder for a jury to assess its reliability.

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cause courts tend to rely on their treatise. Justice McCormick's factors are an excellent source of criteria for relevancy analysis as well.

350. *Bledsoe*, 36 Cal. 3d at 248, 681 P.2d at 299, 203 Cal. Rptr. at 458.

351. *Id.* at 240, 681 P.2d at 293-94, 203 Cal. Rptr. at 452.

352. *Id.* at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.

353. *Id.*

354. The *Bledsoe* court noted that "as far as we are aware, none of the studies has attempted independently to verify the 'truth' of the clients' recollections or to determine the legal implication of the clients' factual accounts." *Id.*, 681 P.2d at 300, 203 Cal. Rptr. at 459.

355. See, e.g., the professional literature referred to in *Bledsoe*. *Id.* at 241 n.4, 243 n.5, 250, 251 n.13, 681 P.2d at 294 n.4, 295 n.5, 300, 301 n.13, 203 Cal. Rptr. at 453 n.4, 454 n.5, 459, 460 n.13.

356. Rape trauma syndrome was first named in 1974. See *id.* at 241 n.4, 681 P.2d at 294 n.4, 203 Cal. Rptr. at 453 n.4.

357. The rape counselor in *Bledsoe*, for example, made the judgment that the victim was in the "reorganization phase" of the syndrome. *Id.* at 242, 681 P.2d at 295, 203 Cal. Rptr. at 454.

Thus, rape trauma syndrome, as used in *Bledsoe*, would not fare well under a traditional analysis. The consequence, exclusion of the testimony, would therefore be the same under either a *Kelly-Frye* or a traditional analysis.

Perhaps a more difficult case would be the eyewitness identification testimony in *People v. McDonald*.<sup>358</sup> In that case, the California Supreme Court did not subject the testimony to a *Kelly-Frye* analysis.<sup>359</sup> However, under a traditional approach, all expert testimony would be subjected to a balancing test. Using the same Weinstein-Berger factors, the testimony in *McDonald* would be treated as follows:

(1) The court cited numerous studies that recognized the impact of the factors the expert intended to discuss on eyewitness identification.<sup>360</sup> This appears to have indicated to the court that there is some degree of acceptance of the technique, as the court merely footnotes the "minority" view that eyewitness identification testimony should not be relied upon.<sup>361</sup> The court further stated that "appellate judges do not have the luxury of waiting until their colleagues in the sciences unanimously agree that on a particular issue no more research is necessary."<sup>362</sup> On the other hand, the court indicated that appellate courts rarely reversed the exclusion of the evidence.<sup>363</sup>

(2) The expert was a psychologist with 20 years of experience in both academia and the practice of psychology. He apparently had impressive credentials, including research and authoring articles on the subject. The state did not challenge his credentials.<sup>364</sup>

(3) The use made of the "technique" was apparently to identify those factors that affected eyewitness identification,<sup>365</sup> which was the same reason the testimony was sought to be introduced in court.<sup>366</sup>

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358. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

359. *Id.* at 372-73, 690 P.2d at 724, 208 Cal. Rptr. at 250-51; see *supra* notes 64-69 and accompanying text.

360. *McDonald*, 37 Cal. 3d at 365, 690 P.2d at 718, 208 Cal. Rptr. at 245.

361. *Id.* at 369 n.15, 690 P.2d at 721 n.15, 208 Cal. Rptr. at 248 n.15.

362. *Id.*

363. *Id.* at 365, 690 P.2d at 718, 208 Cal. Rptr. at 245. The *McDonald* court noted, however, that

the virtual unanimity of appellate decisions [which find no error in excluding the testimony] may well be misleading. . . . [A]ppellate courts ordinarily confront the issue only when the testimony has been *excluded*; and in all such cases appellate courts tend to affirm, because of the deference traditionally accorded to discretionary rulings of trial courts.

*Id.* at 365 n.10, 690 P.2d at 718 n.10, 208 Cal. Rptr. at 245 n.10.

364. *Id.* at 361, 690 P.2d at 715, 208 Cal. Rptr. at 242.

365. See, e.g., *id.* (reference to studies regarding eyewitness identification).

366. *Id.* The expert's testimony was intended "to inform the jury of various psychological

(4) The potential rate of error was not too significant because there was no conclusion that the witnesses in the specific case were impaired in their identification. The testimony was general only, describing the types of factors that could affect identification.<sup>367</sup> The possibility that these factors could affect identification had been verified in the studies the court referred to in (1).

(5) Specialized literature did exist, both pro and con.<sup>368</sup> Thus, the opponent would have had this as a resource for impeachment of the expert.

(6) Most of the literature had apparently been published since 1978.<sup>369</sup> The case reached the California Supreme Court in 1984. The identification of the factors influencing eyewitnesses thus was relatively "novel," although established enough to have a body of literature.

(7) The "technique" of merely identifying factors that influence eyewitness identifications is not particularly a subjective judgment by the expert, unlike the situation where the expert might state that a particular witness was in fact mistaken because of certain factors.

The testimony in *McDonald* would thus fare much better under a traditional analysis than the testimony in *Bledsoe*. On balance, because no one factor is considered controlling, the testimony should probably be deemed to assist the trier of fact. However, a traditional analysis also requires a balancing under Rule 352. How important is the evidence to the proponent? Is there any other evidence that could satisfy the purpose of presenting the expert testimony? In *McDonald*, the court noted that the main issue in the case was the identity of the murderer.<sup>370</sup> The prosecution's case consisted of seven eyewitnesses, six of whom identified the defendant.<sup>371</sup> They did not have any other evidence that tied the defendant to the murder.<sup>372</sup> The defendant called six alibi witnesses.<sup>373</sup> The court viewed the issue of the accuracy of the eyewitnesses' identification of the defendant as "both critical and closely balanced."<sup>374</sup> Although the court stated that such expert testimony would not always be neces-

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factors that may affect the reliability of eyewitness identification, and to 'help to counter some common misconceptions' about the process." *Id.*

367. *Id.* at 361-62, 690 P.2d at 715-16, 208 Cal. Rptr. at 242-43.

368. *Id.* at 365, 369 n.15, 690 P.2d at 718, 721 n.15, 208 Cal. Rptr. at 245, 248 n.15.

369. *Id.* at 365, 690 P.2d at 718, 208 Cal. Rptr. at 245 ("over 85% of the entire published literature has surfaced since 1978," (quoting Wells & Loftus, *Eyewitness Research: Then and Now*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 3 (1985))).

370. *Id.* at 355, 690 P.2d at 711, 208 Cal. Rptr. at 238.

371. *Id.*

372. *Id.* at 360, 690 P.2d at 714, 208 Cal. Rptr. at 241.

373. *Id.* at 355, 360, 690 P.2d at 711, 714, 208 Cal. Rptr. at 238, 241.

374. *Id.* at 376, 690 P.2d at 726, 208 Cal. Rptr. at 253.

sary,<sup>375</sup> it found that it was prejudicial error to exclude it in *McDonald* because of the importance of the issue.<sup>376</sup> Thus, the expert testimony in *McDonald* would also have survived a section 352 analysis.

## 2. Child sexual abuse expert testimony under *Kelly-Frye* and traditional analysis

Unlike rape trauma syndrome and eyewitness identification expert testimony, the California Supreme Court has yet to provide any guidance on the applicability of the *Kelly-Frye* test to child sexual abuse expert testimony. The issue is not readily resolved.<sup>377</sup> However, in this section, the probable outcome under *Kelly-Frye* is analyzed as well as the probable outcome under a traditional analysis.

The critical issue for the courts of appeal has been whether the *Kelly-Frye* test applies. If the test applies, the routine outcome is that the expert testimony on child sexual abuse either did not meet the general acceptance standard<sup>378</sup> and/or the case was remanded for failure to require a *Kelly-Frye* foundation.<sup>379</sup> The usual outcome if the test does not apply is to admit the testimony. Thus, in *In re Cheryl H.*,<sup>380</sup> where the court never directly discussed the applicability of *Kelly-Frye*, the court concluded that an expert's opinion that the child had been abused was admissible.<sup>381</sup> Similarly, in *Seering v. California Department of Social Services*,<sup>382</sup> the court found that the same form of testimony did not trigger *Kelly-Frye* and therefore would be admissible.<sup>383</sup> The same result was reached in *People v. Gray*,<sup>384</sup> where the expert testified to general characteristics.<sup>385</sup>

On the other hand, applying *Kelly-Frye* will generally lead to the

375. *Id.* at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

376. *Id.* at 376, 690 P.2d at 726, 208 Cal. Rptr. at 253.

377. See *supra* notes 93-97 and accompanying text.

378. See, e.g., *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 313, 239 Cal. Rptr. 422, 431 (1st Dist. 1987) ("We conclude on the basis of the record before us that the Department has not met its burden of demonstrating general acceptance of CSAAS in accordance with the *Kelly-Frye* standard of admissibility."); *In re Sara M.*, 194 Cal. App. 3d 585, 593, 239 Cal. Rptr. 605, 610 (3d Dist. 1987) ("The evidence adduced at the jurisdictional hearing fails to meet [the *Kelly-Frye*] standard.").

379. See, e.g., *In re Amber B.*, 191 Cal. App. 3d 682, 691, 236 Cal. Rptr. 623, 629 (1987) ("The trial court therefore erred when it failed to require a showing of general acceptance in the relevant scientific community in accordance with *Kelly-Frye*").

380. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. 1984).

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

382. 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1st Dist. 1987).

383. *Id.* at 314, 239 Cal. Rptr. at 432.

384. 187 Cal. App. 3d 213, 231 Cal. Rptr. 658 (2d Dist. 1986).

385. *Id.* at 218-19, 231 Cal. Rptr. at 661.

exclusion of child sexual abuse expert testimony. The courts have noted that there are no studies in the field demonstrating a general acceptance of the conclusion that a child has been sexually abused based on either CSAAS<sup>386</sup> or on other methodologies such as doll play.<sup>387</sup> Nor is the syndrome recognized in DSM-III or by any psychological professional association.<sup>388</sup> One court noted that the characteristics were developed on the basis of an "assumption the children studied were in fact molested."<sup>389</sup> This means there is no control group from which to distinguish the characteristics of those children who have been abused.<sup>390</sup> Further, the syndrome or description by Dr. Summit was developed for treatment purposes like the rape trauma syndrome and not for the purpose of determining actual abuse.<sup>391</sup> Another typical criticism is that the proponent of the testimony has only his or her one expert testify to the validity of the technique.<sup>392</sup> The courts are hesitant to find that *Kelly-Frye* is met on the basis of the word of one expert who is not a disinterested witness.<sup>393</sup> Given the state of the research in the area of child sexual abuse, it is unlikely that in the near future either the syndrome or the opinion that a particular child was abused will satisfy a *Kelly-Frye* analysis.

Would expert testimony on child sexual abuse satisfy a traditional

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386. See *Seering*, 194 Cal. App. 3d at 313, 239 Cal. Rptr. at 431. But see *Myers*, *supra* note 121, at 106-09 (recent studies described which attempt to validate diagnosis of abuse).

387. In *re Amber B.*, 191 Cal. App. 3d at 691, 236 Cal. Rptr. at 629 (citing *People v. Shirley*, 31 Cal. 3d 18, 53, 723 P.2d 1354, 1374-75, 181 Cal. Rptr. 243, 265 (1982)), involving a methodology of observing the child in doll-play and analyzing the child's reports of the incidents, the court concluded that *Kelly-Frye* applied where a new scientific methodology involved only psychological evidence. However, the court did not reach the issue of whether *Kelly-Frye* could be met. The court remanded the case because the trial court failed to require a showing that this methodology was generally accepted by the scientific community. *Id.* However, there are very few studies in this area. See, e.g., *In re Sara M.*, 194 Cal. App. 3d at 593, 239 Cal. Rptr. at 610-11 (experts "knew of no studies comparing the reactions of children known to be molested with those who claimed to be molested or with those who were not molested"); *Seering*, 194 Cal. App. 3d at 313, 239 Cal. Rptr. at 431 (expert unable "to cite any specific studies or published reports demonstrating general acceptance of CSAAS in the relevant scientific community for the purpose of establishing the occurrence of sexual abuse"). Such studies are beginning to be conducted, however, and may eventually establish the reliability of behavior with dolls as a predictor of child abuse. See *Myers*, *supra* note 121, at 106-09.

388. See *In re Sara M.*, 194 Cal. App. 3d at 589, 593, 239 Cal. Rptr. at 608, 610. There is now a DSM III-R, published in 1987, which also does not list CSAAS. AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed.-Revised 1987); see also *Seering*, 194 Cal. App. 3d at 313, 239 Cal. Rptr. at 431-32.

389. *In re Sara M.*, 194 Cal. App. 3d at 593, 239 Cal. Rptr. at 611.

390. See *id.* at 589, 593, 593 n.7, 239 Cal. Rptr. at 608, 610-11, 611 n.7.

391. *Id.* at 593, 239 Cal. Rptr. at 611.

392. See, e.g., *Seering*, 194 Cal. App. 3d at 313, 239 Cal. Rptr. at 431-32.

393. *Id.*

analysis? Using Weinstein and Berger's seven factors,<sup>394</sup> the following analysis would take place:

(1) The technique would probably be found not to be generally accepted in the field, at least for the purpose of determining whether a child had been abused.<sup>395</sup> Like rape trauma syndrome, however, the description of the characteristics might well be generally accepted as typical observed behavior of sexually abused children.<sup>396</sup>

(2) The experts in most of the cases are well-qualified and highly regarded psychologists and psychiatrists who have worked extensively with sexually abused children.<sup>397</sup>

(3) The use made of the "technique" is varied. It is used forensically to help police and prosecutors determine if a child has been abused.<sup>398</sup> There is also a therapeutic purpose in treating a child experiencing stress that is not dependent on the truth of the child's assertions.<sup>399</sup>

(4) The discovery of a potential rate of error is in its infancy. One main criticism mentioned above is the absence of a control group of children who have not been abused to determine the validity of ascribing Summit's characteristics to abused children.<sup>400</sup> There similarly is little, if any, research verifying the accuracy of an opinion that a particular child was abused that is based on interviews and/or doll play.<sup>401</sup>

(5) The literature is not abundant at this time,<sup>402</sup> consequently, opposing counsel is at a disadvantage.

394. 3 J. WEINSTEIN & M. BERGER, *supra* note 230, ¶ 702[03], at 702-41 to 42; *see supra* note 251 and accompanying text.

395. *See supra* notes 385-93 and accompanying text.

396. *See, e.g., Gray*, 187 Cal. App. 3d at 217, 231 Cal. Rptr. at 659 (defense expert "testified that child abuse accommodation syndrome is not a generally accepted syndrome but acknowledged that delayed reporting is not unusual in child molestation cases"). It makes sense that the description would achieve general acceptance, unlike the conclusion that a particular child had been abused, since the function in therapy would be to describe the child's symptoms in order to determine the best treatment. It is thus more consistent with clinical practice than is forensic diagnosis.

397. *See, e.g., Seering*, 194 Cal. App. 3d at 311-13, 239 Cal. Rptr. at 430-31 (Dr. Corwin, a psychiatrist, worked with Dr. Summit at UCLA and headed a "task force for interviewing sexually abused children"); *In re Sara M.*, 194 Cal. App. 3d at 588-89, 239 Cal. Rptr. at 607-08 (experts were both clinical psychologists). *But see People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (2d Dist. 1984) (police officers experienced in child molestation cases allowed to testify as experts on behavior).

398. *See supra* testimony discussed in text accompanying note 125.

399. *See In re Sara M.*, 194 Cal. App. 3d at 593, 239 Cal. Rptr. at 611.

400. *See supra* notes 385-86 and accompanying text.

401. *See supra* notes 385-86 and accompanying text.

402. *See supra* notes 385-86 and accompanying text. *But see* studies discussed in Myers, *supra* note 121, at 106-09.



(6) There is novelty in diagnosing that a child is sexually abused or exhibits certain symptoms of child abuse.<sup>403</sup> On the other hand, diagnosing a stress reaction after a traumatic event is not unduly novel.<sup>404</sup> The question is whether stress reaction analysis specifically applied to children constitutes a more novel technique or approach.

(7) The determination that a particular child was abused depends upon the subjective interpretation of the expert.<sup>405</sup> The simple description of characteristics or explanation of behaviors is not as subjective.

The outcome of the traditional analysis depends upon whether the expert testifies generally about sexually abused children or a specific child. Testimony about a specific child fares badly under all of Weinstein and Berger's factors except for the stature-of-the-expert factor.<sup>406</sup> Generalized testimony, on the other hand, may survive analysis under several factors: as a descriptive technique, it arguably has general acceptance—it matches the use to which it is put in practice, it has little error potential, and it is less subjective than a diagnosis of a particular child's condition. This generalized testimony, analogous to the eyewitness identification testimony of *McDonald*,<sup>407</sup> would thus be more acceptable at this stage of the traditional analysis than testimony about a specific child.

The Weinstein and Berger factors pertain to the probative value of the evidence. It is still necessary to address the probative dangers of the generalized testimony.<sup>408</sup> How strong is the need for the evidence? Is there other evidence that explains the child's reactions? Have any of the child's behaviors been challenged? How confusing or misleading is the testimony? Can the trier of fact be skeptical or will it be overwhelmed by the testimony?

Individual cases will differ. The stage of the proceedings at which

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403. The cases have primarily arisen in the 1980's. See, e.g., early California cases: *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2d Dist. 1984); *People v. Dunnahoo*, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (2d Dist. 1984). Note, too, that Dr. Summit's article identifying CSAAS was written in 1983. See Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1, 45-55 (1984) for a discussion of the legal approach to sexual abuse from an evolving emphasis on treatment (as opposed to punishment) through the 1970's to a return to an emphasis on punishing offenders in the 1980's.

404. See discussion of post-traumatic stress disorder in DSM-III *supra* note 164, at 236-39.

405. The expert is relying upon his or her own judgment. There is no hard evidence, such as a blood test, that would objectify the process.

406. See *supra* note 251 and accompanying text.

407. See *McDonald*, 37 Cal. 3d at 361-63, 367-69, 690 P.2d at 715-17, 720-21, 208 Cal. Rptr. at 242-44, 247-48.

408. See *supra* text accompanying note 249.

the evidence is offered as well as the development of the evidence in the case impacts on its acceptability. The strongest need for the generalized testimony would probably exist in a situation where the opponent has challenged the child's behavior, such as proposing that, because the child retracted her story at an earlier point, she is lying now about the abuse. The expert's explanation of why sexually abused children will often retract allegations of abuse would assist the trier's understanding of this counterintuitive concept. This parallels the use of rape trauma syndrome approved in *Bledsoe*<sup>409</sup> and conforms with the use of eyewitness identification testimony in *McDonald*.<sup>410</sup> If such generalized testimony is offered prior to such a challenge, there is considerably less need for the expert testimony. Under those circumstances, the arguments that an expert's testimony may be less probative and may tend to awe the trier of fact would be stronger. Despite the fact that the testimony is general in form, the trier is still being asked to draw the inference from the expert's testimony that the child was abused when the evidence is offered without a rehabilitative purpose.<sup>411</sup>

This result, admitting rehabilitative generalized testimony by an expert on child sexual abuse, is quite possibly the result the California Supreme Court would reach under an analysis of the *Kelly-Frye* standard. The traditional approach, however, would require less tortured logic. The courts would not have to make the distinction between a scientific technique and personal opinion or between a factual description and an opinion. The discrepancies that exist now among the courts of appeal over the application of *Kelly-Frye* would be minimized.

## VII. CONCLUSION

A traditional analysis would provide a uniform approach to the admissibility of expert testimony. Courts would continue to reach different conclusions about the admissibility of expert testimony on child sexual abuse through balancing the probative value and probative dangers of the evidence. Different results are to be expected because the need for the

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409. See *Bledsoe*, 36 Cal. 3d at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr. at 457-58 (rape trauma syndrome admissible only "to rebut misconceptions about presumed behavior of rape victims," not to prove that rape occurred).

410. See *McDonald*, 37 Cal. 3d at 361-63, 690 P.2d at 715-17, 720-21, 208 Cal. Rptr. at 242-44, 247-48 (general testimony regarding effects of psychological factors on eyewitness testimony admissible).

411. If expert testimony about a particular child surmounted the Weinstein and Berger factors, a similar argument could be made that the probative value of testimony about a specific child is outweighed by the prejudicial impact. See *People v. Roscoe*, 168 Cal. App. 3d 1093, 1100, 215 Cal. Rptr. 45, 50 (5th Dist. 1985).

testimony will vary in individual cases. The important conceptual change is that the applicable analytical framework would be consistent in all cases.

Under a *Kelly-Frye* analysis, the admissibility of expert testimony in child sexual abuse cases is unpredictable. Moreover, the form of the expert's testimony is arbitrary and subject to manipulation. The form may control its admissibility, rather than its substance and its context.<sup>412</sup>

Under a traditional approach, it would not matter whether the expert testified that the child suffered from CSAAS, was sexually abused without ever mentioning CSAAS, or generally described characteristics of abused children. Each form of testimony would be subjected to an analysis of specific factors that reflect the probative value and probative danger of that testimony. The variance in admissibility would be due to the legitimate balancing of probative value and probative dangers in the case before the court. The traditional approach, through expert and relevancy rules, would bring coherency to what now is a chaotic state of law.

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412. See, e.g., *Seering v. California Dept. of Social Servs.*, 194 Cal. App. 3d 298, 311, 239 Cal. Rptr. 422, 430 (1st Dist. 1987) (expert's "personal opinion" that child was abused not subject to *Kelly-Frye* and therefore admissible, but same expert's opinion that victim's behavior was consistent with CSAAS subject to *Kelly-Frye* and therefore inadmissible). See also *supra* notes 163-66 and accompanying text.