

SEX ABUSE VALIDATION TESTIMONY: RIPE FOR A *FRYE* CHALLENGE

MAX R. SELVER[∞]

I. INTRODUCTION

New York Family Courts routinely admit “validation testimony” in cases involving allegations of child sexual abuse. Validation testimony consists of a mental health professional’s opinion that a child’s behavior is consistent with the occurrence of sexual abuse, and is often accompanied by a diagnosis that the child suffers from Child Sexual Abuse Syndrome (“CSAS” or “SACS”) or Child Sexual Abuse Accommodation Syndrome (“CSAAS”).

Since the development of these theories in the 1980s, mental health experts have concluded that they lack scientific merit. A treatise synthesizing the literature on the subject explains that “[t]here is no psychological symptom or set of symptoms observed in all or even a majority of sexually abused children,” and “[t]here is no sexually abused child syndrome that detects or diagnoses child sexual abuse.”¹ Accordingly, several state high courts have found validation testimony to be inadmissible under their standards for admitting expert testimony.²

Surprisingly, no New York court has ever scrutinized validation testimony under *Frye v. United States*³—the state’s standard for admitting expert testimony. The standard requires scientific theories to have gained general acceptance in the relevant scientific community to be admissible.⁴ As a result, parents in New York Family Courts regularly face the prospect of erroneous findings of guilt in maltreatment cases, the stigma of being labeled sex abusers, and, most gravely, having their children removed from their care on the basis of scientifically unsupported evidence. The total absence of scientific support for validation testimony makes its continued use in New York Family Courts inconsistent with *Frye* and especially concerning when a parent’s right to care for his or her own children is at stake.

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1. JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 6.09 (5th ed. 2011).

2. See *Hadden v. State*, 690 So. 2d 573 (Fla. 1997); *Newkirk v. Commonwealth*, 937 S.W.2d 690 (Ky. 1996); *State v. Michaels*, 625 A.2d 489 (N.J. 1993); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

4. *Id.* at 1014.

This article encourages lawyers representing parents in family court to challenge validation testimony under *Frye* and argues that family court judges should exclude it from their courtrooms. It begins by reviewing the scientific theories behind validation testimony and their emergence in the context of a nationwide panic that led to numerous wrongful convictions for child sexual abuse. It then examines an extensive body of academic literature that rejects the validity of those theories and concludes that validation testimony does not pass muster under the *Frye* standard.

II.

HISTORY OF VALIDATION TESTIMONY

CSAS and CSAAS were developed in the early 1980s to explain common behaviors among victims of child sexual abuse. Dr. Suzanne Sgroi introduced CSAS in 1982 as a “theoretical model” consisting of five phases of behavior seen in children who have been sexually abused: (1) non-sexual engagement by the offender; (2) sexual activity occurs; (3) the offender uses rewards or threats to keep the child quiet; (4) disclosure by the child; and (5) suppression by the child.⁵ A year later, in 1983, Dr. Roland Summit introduced CSAAS, which similarly aimed to describe the most frequent behaviors among sexually abused children. It also consists of five categories of behavior: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction.⁶ Crucially, both Dr. Sgroi and Dr. Summit clarified that CSAS and CSAAS were not diagnostic tools and could not consistently be used to assess whether a given child was abused.⁷

Despite the caution expressed by their creators, the theories’ power to paint people as child abusers—sometimes erroneously—quickly entered the national spotlight. In 1988, Margaret Kelly Michaels, a twenty-six year-old teacher at a New Jersey day care center, was convicted of 115 counts of sexual abuse against twenty children—acts she never committed. She was sentenced to forty-seven years in prison.⁸ An in-depth article about the trial in Harper’s Magazine explained that “[p]erhaps the most important witness for the prosecution” was a psychologist, acting as validator, who testified that each of the twenty children suffered from CSAS. This testimony was offered as proof that Ms. Kelly Michaels sexually abused

5. SUZANNE M. SGROI, HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 12–36 (1982).

6. Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 181 (1983).

7. See Avi Springer & Patrick Clark, *Challenging Validation Testimony Through Frye Hearings* (2015) (describing how both Dr. Sgroi and Dr. Summit “qualified their theories in important ways”); SGROI, *supra* note 5, at 78 (“Behavioral indicators of child sexual abuse may be helpful but are rarely conclusive.”); Mary Meinig, *Profile on Roland Summit*, 1 VIOLENCE UPDATE 6, 6 (1991) (“The accommodation syndrome is neither an illness or a diagnosis, and it can’t be used to measure whether or not a child has been sexually abused.”).

8. Dorothy Rabinowitz, *From the Mouths of Babes to a Jail Cell*, HARPER’S, May 1990, at 52.

them.⁹ According to the psychologist, children who repeatedly denied abuse were in Dr. Sgroi's "suppression phase," and children who showed affection toward Ms. Kelly Michaels were in Dr. Sgroi's "engagement phase."¹⁰

In 1992, a New Jersey appellate court overturned Ms. Kelly Michaels' conviction. The basis of the reversal was the state's improper use of the psychologist's validation testimony as substantive evidence that the children were abused. "She was permitted to lead the jury to believe that the process was rooted in science and thus was a reliable means of determining sexual abuse,"¹¹ even though the "syndrome was not created as a diagnostic tool, and children who display signs of the syndrome may not have been abused."¹²

Ms. Kelly Michaels' wrongful conviction was not an isolated incident. Rather, it was part of a "wave of hysteria" in the 1980s and early 1990s that "tarred innocent people" as child sex abusers.¹³ The wave of hysteria included an "investigation in Wenatchee, Washington, in which forty-three adults were arrested on more than twenty nine *thousand* charges of sex abuse involving sixty-eight children"¹⁴ and several wrongful convictions that were eventually overturned because they involved the use of validation testimony.¹⁵ Multiple books have documented the wrongful convictions and unfounded investigations that arose out of the nationwide paranoia around child sexual abuse in the 1980s and 1990s.¹⁶ Expert testimony regarding CSAS and CSAAS emerged in courtrooms nationwide out of this same context of panic and fear.

9. *Id.* at 61.

10. *Id.*

11. *Michaels*, 625 A.2d at 502.

12. *Id.* at 499 (quoting JILL BIRNBAUM, NAT'L CTR. ON WOMEN AND FAMILY LAW, INC., EXPERT TESTIMONY IN CUSTODY AND VISITATION CASES INVOLVING CHILD SEXUAL ABUSE 699 (1990)).

13. Susan Chira, *Recovered Reputations*, N.Y. TIMES (Apr. 6, 2003), <http://www.nytimes.com/2003/04/06/books/recovered-reputations.html> [<https://perma.cc/UZF4-5J3L>].

14. RICHARD BECK, *WE BELIEVE THE CHILDREN*, xxii (2015). Eighteen of the accused, "nearly all of whom were poor and on welfare and some of whom were illiterate or mentally handicapped," were convicted in the mid-1990s. *Id.* The last of them was not released from prison until 2000. *Id.* City and county officials were found negligent in their conduct of the investigation in a civil lawsuit in 2001. Mike Barber & Larry Lange, *Jury Finds City, County Negligent in Child Sex Ring Case*, SEATTLE POST-INTELLIGENCER (July 31, 2001), <http://www.seattlepi.com/local/article/Jury-finds-city-county-negligent-in-child-sex-1061384.php> [<https://perma.cc/Y87N-4RB7>].

15. See *Hadden*, 690 So. 2d at 581; *Newkirk*, 937 S.W.2d at 699; *Dunkle*, 602 A.2d at 844.

16. See BECK, *supra* note 14; DOROTHY RABINOWITZ, *NO CRUELER TYRANNIES* (2004).

III.

THE SCIENTIFIC CONSENSUS AGAINST VALIDATION TESTIMONY

The wave of hysteria that led to Ms. Kelly Michaels' conviction is over.¹⁷ In its place is an overwhelming consensus among mental health experts that validation testimony is not based in science. A comprehensive set of studies has concluded that there is no single set of characteristics shared by sexually abused children and that CSAS/CSAAS cannot diagnose the occurrence of sexual abuse.

A 2005 literature review led by two Johns Hopkins University psychologists explained that "there are no gold standard psychological symptoms consistent with sexual abuse."¹⁸ Affirming that conclusion, a study of 122 appellate decisions found that testimony regarding the characteristics of sexually abused children "is inconsistent and often contradictory."¹⁹ Some experts said delayed reporting and conflicting accounts were consistent with abuse; others said that children were always forthcoming and did not lie about abuse.²⁰ Some experts said abused children were preoccupied with sex; others said they exhibited aversion to sex.²¹ The author of the study posited that these "sharp contradictions" may arise because "the expert is tailoring the list [of characteristics] to suit a particular child."²² With or without such an explanation of deliberate tailoring, the consensus of mental health experts today is clear: "There is no psychological symptom or set of symptoms observed in all or even a majority of sexually abused children," and "[t]here is no psychological symptom that is unique to sexually abused children."²³ Numerous other studies have reached a similar conclusion, establishing a consensus among mental health experts against the existence of a set of common characteristics shared by sexually abused children.²⁴

17. Chira, *supra* note 13 ("The sensational accusations of mass abuse have faded away. Reputable lawyers and judges have declared many of these cases travesties . . .").

18. Kamala London, Stephen J. Ceci & Daniel W. Shuman, *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Way That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 194 (2005).

19. Mary Ann Mason, *The Child Sex Abuse Syndrome: The Other Major Issue in State of New Jersey v. Margaret Kelly Michaels*, 1 PHSYCHOL. PUB. POL'Y & L. 399, 401 (1995).

20. *Id.*

21. *Id.*

22. *Id.* at 401-02.

23. MYERS, *supra* note 1, at § 6.09.

24. See, e.g., David Faust, Ana J. Bridges & David C. Ahern, *Methods for the Identification of Sexually Abused Children: Issues and Needed Features for Abuse Indicators*, in THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS 3, 7 (Kathryn Kuehnle & Mary Connell eds., 2009) ("A perfectly differentiating indicator would be uniquely associated with child sexual abuse--it would occur only if a child has been sexually abused and would never occur for other reasons--but such indicators are extremely rare in psychology."); Esther Deblinger, Julie Lippmann & Robert Steer, *Sexually Abused Children Suffering Posttraumatic Stress Symptoms: Initial Treatment Outcome Findings*, 1 CHILD MALTREATMENT 310, 310 (1996) ("Approximately one third of sexually abused children demonstrate no apparent symptomology, and no single symptom or syndrome is characteristic of the majority of

Because sexually abused children do not exhibit a single set of characteristics, mental health experts have forcefully rejected the notion of any recognized diagnosis that can detect the occurrence of abuse. To date, not a single scientific research study supports the validity of the CSAS or CSAAS diagnosis.²⁵ They are not included in the most recent edition of *The Diagnostic and Statistical Manual of Mental Disorders*, a manual published by the American Psychiatric Association that “contains a listing of diagnostic criteria for every psychiatric disorder recognized by the U.S. healthcare system.”²⁶ A literature review by three University of New Hampshire psychologists finds an “apparent lack of evidence for a conspicuous syndrome in children who have been sexually abused.”²⁷ Mental health experts are united in the view that “[t]here is no psychological test that detects sexual abuse” and “no Sexually Abused Child Syndrome that detects or diagnoses abuse.”²⁸

Even the creators of CSAS and CSAAS recognize that they are not valid tools to detect sexual abuse. In her book introducing CSAS, Dr. Sgroi explained that “[v]alidation of child sexual abuse depends upon recognizing behavioral indicators . . . Behavioral indicators of child sexual abuse may be helpful but are rarely conclusive.”²⁹ Nine years after the introduction of CSAAS, Dr. Summit was more direct: “The accommodation syndrome is neither an illness nor a diagnosis, and it can’t be used to measure whether or not a child has been sexually abused.”³⁰

sexually abused children.”); Marian D. Hall, *The Role of Psychologists As Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 463 (1989) (“Children’s reactions to sexual abuse vary dramatically and, to date, the methodological problems involved in compiling results of the scores of diverse studies have led only to lists of very general symptoms . . .”).

25. See *Gerstein v. Senkowski*, 426 F.3d 588, 600 (2d Cir. 2005) (quoting a leading psychologist for the conclusion that “the child sexual abuse accommodation syndrome . . . has no validity and is not regularly accepted in the scientific community”).

26. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, AM. PSYCHIATRIC ASS’N, <http://www.dsm5.org/about/pages/default.aspx> [<https://perma.cc/X5Y4-QBFT>].

27. Kathleen A. Kendall-Tackett, Linda Meyer Williams, & David Finkelhor, *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 173 (1993).

28. MYERS, *supra* note 1, at § 6.09; see also Mark D. Everson & Kathleen Coulbourn Faller, *Base Rates, Multiple Indicators, and Comprehensive Forensic Assessments: Why Sexualized Behavior Still Counts in Forensic Child Sexual Abuse Evaluations*, 21 J. CHILD SEXUAL ABUSE 45 (2012) (arguing that sexualized behavior in children is not necessarily consistent with the occurrence of abuse); JILL BIRNBAUM, NAT’L CTR. ON WOMEN AND FAMILY LAW, INC., *EXPERT TESTIMONY IN CUSTODY AND VISITATION CASES INVOLVING CHILD SEXUAL ABUSE* 699 (1990) (“Unlike some other syndromes, such as battered women’s syndrome or rape victim’s syndrome, the child sexual abuse accommodation syndrome was not created as a diagnostic tool, and children who display signs of the syndrome may not have been abused.”).

29. SGROI, *supra* note 5, at 78.

30. Meinig, *supra* note 7, at 6.

IV.

VALIDATION TESTIMONY IN NEW YORK FAMILY COURTS

Despite the overwhelming scientific consensus against it, validation testimony continues to be routinely admitted in New York Family Courts.³¹ When first confronted with validation testimony in the 1980s, New York Family Courts called for its evaluation under *Frye*.³² Remarkably, thirty years later, no New York court has ever held a *Frye* hearing to determine the admissibility of validation testimony.

One reason for this is *Matter of Nicole V.*, a 1987 New York Court of Appeals case that has created confusion on the issue.³³ A statutory exception to the hearsay rule in New York Family Courts permits out-of-court statements made by children to support findings of child abuse or neglect if those statements are corroborated by “[a]ny other evidence tending to support [their] reliability.”³⁴ The question before the *Nicole V.* Court was whether a validator’s testimony was sufficient to meet this corroboration requirement³⁵—a requirement that has been interpreted liberally.³⁶ The case involved the testimony of a therapist who relayed a child’s out-of-court statements and discussed behavior such as “uncommunicative, withdrawn demeanor” and “severe temper tantrums or depression inappropriate for a child of her age,” which “led her to conclude [the child] was sexually abused.”³⁷

The attorney for the respondent father in *Nicole V.* did not challenge the admissibility of the testimony under *Frye*, and the Court of Appeals did not mention *Frye* in its opinion.³⁸ The Court noted that SACS “is a recognized diagnosis,” but cited only two publications to support that assertion—Dr. Sgroi’s book and a 1982 compilation of state statutes and decisions concerning child abuse.³⁹ *Frye*, meanwhile, requires a court to assess whether a scientific method is generally accepted as reliable in the relevant scientific community.⁴⁰ The Court in *Nicole V.*

31. N.Y. BAR ASSOC., FOCUS ON FAMILY COURT: HOLISTIC & EFFECTIVE FAMILY REPRESENTATION 14 (June 5, 2015), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=56886> [<https://perma.cc/74P4-FDJY>]; Springer & Clark, *supra* note 7.

32. See *In re E.M.*, 520 N.Y.S.2d 327, 331–32 (Fam. Ct. 1987).

33. *In re Nicole V.*, 518 N.E.2d 914 (N.Y. 1987)

34. N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney’s 2015).

35. *Nicole V.*, 518 N.E.2d at 914 (“The proof of abuse rests principally on out-of-court statements of each child, evidence which is not legally sufficient to make a fact finding of child abuse unless corroborated in accordance with . . . section 1046(a)(vi) of the Family Court Act. The common issue presented is whether the corroborative evidence in each proceeding is sufficient . . .”).

36. *In re Kaitlyn R.*, 700 N.Y.S.2d 533, 536 (App. Div. 3d Dep’t 1999) (describing Family Court Act § 1046(a)(vi) as a “broad and flexible rule”).

37. *Nicole V.*, 518 N.E.2d at 918.

38. *Id.* at 914.

39. *Id.* at 917 (citing IRVING J. SLOAN, PROTECTION OF ABUSED VICTIMS: STATE LAWS & DECISIONS 110–13 (1982)).

40. *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1119–20 (N.Y. 2006); *People v. Wesley*, 633 N.E.2d 451, 454 (N.Y. 2004).

made no attempt to assess the views of the community of mental health experts regarding the validity of SACS—the only mental health professional it cited was Dr. Sgroi, who created SACS. It did not have to do anything more because the standard for corroboration of a child’s out-of-court statements—unlike *Frye*—is not an issue of admissibility. The Court could not have been clearer in stating its holding: “We conclude expert testimony was properly used to satisfy the *corroboration requirements of section 1046(a)(vi)* in this case.”⁴¹

Despite the clarity of that conclusion, some courts have misconstrued the case as endorsing validation testimony under *Frye*. A 2015 decision by the Bronx County Family Court, for example, denied a respondent’s application for a *Frye* hearing on validation testimony because “*Nicole V.* . . . concluded that expert opinion on ‘sexually abused child abuse syndrome’ is admissible on the issue of whether a child is the victim of intra-familial sexual abuse.”⁴² Similarly, in 2011, the Fourth Department affirmed the denial of a *Frye* hearing on a validator’s testimony that “utilized the Sgroi method,” citing *Nicole V.* for the proposition that “[t]he Court of Appeals has cited to Dr. Sgroi’s ‘Handbook of Clinic Intervention in Child Sexual Abuse’”⁴³ As a result, the court shielded itself from the numerous studies finding validation testimony to be unscientific. Instead, it credited the testimony of “the court-appointed counselor at the hearing that the Sgroi method was used by ‘all’ counselors in the field to validate allegations of sexual abuse.”⁴⁴ Thus, New York courts continue to uncritically admit validation testimony without evaluating it under *Frye*.

V.

VALIDATION TESTIMONY AND *Frye*

Frye asks “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.”⁴⁵ General acceptance by the *scientific* community should not be confused with past acceptance by *courts*. The Appellate Division has explained that general acceptance must be demonstrated by “controlled studies, clinical data, medical literature, peer review, or supportive proof.”⁴⁶ Past acceptance by courts figures nowhere in this analysis.

Frye applies to “novel” scientific methods.⁴⁷ The *Frye* opinion itself describes the distinction between novel and non-novel science as that between science that is “experimental” and that which is “demonstrable.”⁴⁸ Accordingly, a theory or

41. *Nicole V.*, 518 N.E.2d at 918 (emphasis added).

42. *In re Wendy P.*, 2015 WL 1380220, at *8 (N.Y. Fam. Ct. Jan. 30, 2015).

43. *In re Bethany F.*, 925 N.Y.S.2d 737, 738 (App. Div. 4th Dep’t 2011).

44. *Id.*

45. *Parker*, 857 N.E.2d at 1119–20 (quoting *Wesley*, 633 N.E.2d at 454).

46. *Saulpaugh v. Krafte*, 774 N.Y.S.2d 194, 196 (App. Div. 3d Dep’t 2004).

47. *Wesley*, 633 N.E.2d at 461 (Kaye., C.J., concurring).

48. *Frye*, 293 F. at 1013.

methodology does not have to be recently developed to be “novel.” For the purposes of *Frye*, “novel” means unproven or unreliable, not newly coined. Applying *Frye* to old but unproven or disproven scientific evidence is necessary to effectuate the test’s core purpose of keeping unreliable science out of the courtroom. Otherwise, “the admission of long-relied upon but ultimately unproven analysis . . . may unwittingly perpetuate junk science.”⁴⁹ In that vein, New York courts have evaluated scientific evidence under *Frye* when that evidence has previously been admitted by a large number of courts and was at one time accepted as reliable in the scientific community.⁵⁰ The fact that New York Family Courts have admitted validation testimony in the past does not preclude a court from evaluating it under *Frye* today.

The consensus in the scientific community could not be clearer: validation testimony is unscientific. It purports to describe behaviors in children consistent with the occurrence of sexual abuse and to diagnose the occurrence of abuse. Yet a comprehensive set of studies concludes emphatically that there is no set of behaviors in children consistent with abuse, nor any diagnosis that can detect abuse. *Frye* requires general acceptance of a scientific method. The view of mental health experts on CSAS and CSAAS is more accurately described as general rejection. With the stakes as high as a parent’s right to care for his or her own children, New York Family Courts should follow the lead of other states and exclude validation testimony from their courtrooms. Otherwise, validation testimony will continue to tarnish the accuracy and fairness of abuse and neglect proceedings, where our state’s most vulnerable parents—disproportionately poor⁵¹ and of color⁵²—face the risk of erroneous findings of guilt in maltreatment cases, the stigma of being labeled as child sexual abusers, and the removal of their children from their care based on this unscientific testimony.

49. *United States v. Lewis*, 220 F. Supp.2d 548, 554 (S.D. W. Va. 2002).

50. *See, e.g.*, *People v. Collins*, 15 N.Y.S.3d 564, 570 (Sup. Ct. 2015) (holding *Frye* hearing and finding “low copy” DNA analysis inadmissible, even though two trial courts had admitted this form of analysis as early as 2010); *People v. Anderson*, No. 06060051, 2006 WL 3452407, at *2 (N.Y. Just. Ct., Monroe Cty. Nov. 30, 2006) (holding that the proper foundation for the reliability of a sobriety test had not been established and scrutinizing it under *Frye*, “[d]espite the fact that various lower courts in the Third Department . . . concluded that [it] is reliable” as early as 2001).

51. A 2006 study found that “half of the caregivers of children entering out-of-home care have trouble paying for basic necessities.” Richard P. Barth, Judy Wildfire & Rebecca L. Green, *Placement into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty*, 76 AM. J. ORTHOPSYCHIATRY 358, 361 (2006).

52. In 2014, 46% of children in foster care in New York state were black; 22% were white. N.Y. OFFICE OF CHILDREN AND FAMILY SERVS., ANNUAL REPORT 2014 18 (2014), <http://ocfs.ny.gov/main/reports/OCFS%20Annual%20Report%202014.pdf> [HTTPS://PERMA.CC/73LC-KBA5]. The state’s overall child population that same year was 17% black and 59% white. *Children Characteristics: 2010-2014 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited Dec. 4, 2016).