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Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony

Toni M. Massaro

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INTRODUCTION

A twenty-one-year-old woman went alone one night to a private club. Shortly after arriving, she was approached by a man she did not know. He joined her at her booth; they talked and had two drinks together. The man falsely claimed that he had a Ph.D. and M.D. and was currently writing a book about people, based on his interviews with them. She naively believed him and agreed to be interviewed for the book.1

After talking for over an hour and a half with the woman, the man offered to arrange a trip to Nassau to repay her for assisting with the book.2 She agreed to accompany him to the house of one of his friends to make the arrangements. They drove to what was actually the man's house, where he pretended to make the travel reservations.3 Later, the man told her that she looked nervous and gave her a small white pill

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2. Marks, 231 Kan. at 646, 647 P.2d at 1294.
3. Id.
that made her dizzy. He then virtually forced her to take another pill, which made her dizziness worse.4

The man led the woman to the bedroom, where she lay down on the bed. He drew a chair next to the bed and began to quiz her about her sex life. When she refused to answer, he became angry and started to remove her clothes. He choked her and tried to smother her with a pillow; she tried to resist but was too dizzy to escape. The man then told her that if she would not stop fighting he would kill her.5 After a long struggle, he forced her into sexual intercourse and oral sodomy. Afterwards, he gave the woman a shower and massage and drove her to her car. The woman drove home and told her roommate what had happened; the roommate telephoned the police.6 The woman alleged that she had been raped;7 the man admitted sexual intercourse but asserted that the woman had consented.8

At the trial, the prosecution called Dr. Herbert Modlin, a board-certified psychiatrist and neurologist who practices psychiatry and teaches at the Menninger Foundation.9 Dr. Modlin described for the jury a type of posttraumatic stress disorder labeled “rape trauma syndrome” (RTS) that results from a sexual assault.10 The symptoms of RTS, according to Dr. Modlin, include “fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men in general, fear of being out alone, sleep disturbance, change in eating habits and sense of shame.”11

Dr. Modlin had examined the victim two weeks after the incident. Based on this examination, he concluded that the woman was the victim of a “frightening assault, an attack”12 and that she was suffering from RTS symptoms. This expert testimony was admitted to prove that a forcible assault had occurred.13

The jury convicted the man of rape and aggravated sodomy.14 On appeal, defense counsel argued that Dr. Modlin’s testimony on RTS had invaded the province of the jury and was

4. Id.
5. Id.
6. Id. at 646-47, 647 P.2d at 1294-95.
7. Id. at 647, 647 P.2d at 1295.
8. See id. at 651-52, 647 P.2d at 1298.
9. Id. at 647, 647 P.2d at 1295.
10. Id. at 653, 647 P.2d at 1299.
11. Id.
12. Id.
13. Id.
14. Id. at 646, 647 P.2d at 1294.
based solely on hearsay statements made by the victim during the psychiatric evaluation. The Kansas Supreme Court held that the expert's opinion did not invade the province of the jury; it was in fact relevant and proper and was subject to attack on cross-examination. The court found that although rape trauma syndrome has only recently been identified, it is generally accepted to be a common reaction to sexual assault. Testimony regarding its presence in a victim is therefore properly admissible as evidence when offered by a qualified witness who has had an adequate opportunity to evaluate the victim.

The court further held that although the expert's conclusions were based in part on hearsay, his testimony was admissible because the hearsay facts were introduced into evidence through in-court testimony by the victim and her roommate.

The California, Minnesota, and Missouri Supreme Courts disagree with the Kansas decision. In their view, identification of rape trauma syndrome is "not the type of scientific test that accurately and reliably determines whether a rape has occurred." Because these courts view rape trauma syndrome as a therapeutic tool rather than a fact-finding device, they maintain that using it as evidence will unfairly prejudice the jury. The jury must decide, say the courts, what actually happened and not how most people react to rape. These courts also assert that an expert's testimony that the complainant was raped or that the victim did not fantasize the rape is equally unhelpful and usurps the jury's duty to find facts and evaluate credibility. Moreover, to permit an expert to put his or her imprimatur on the complainant's version of the incident could overawe the jury by creating an aura of special reliability and trustworthiness.

15. Id. at 653-54, 647 P.2d at 1299-1300.
16. Id. at 654, 647 P.2d at 1299.
17. Id.
18. Id. at 655, 647 P.2d at 1300.
20. State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (en banc); State v. McGee, 324 N.W.2d 232 (Minn. 1982) (en banc).
21. State v. Taylor, 663 S.W.2d 235 (Mo. 1984) (en banc).
22. Saldana, 324 N.W.2d at 229; see also Bledsoe, 36 Cal. 3d at __, 681 P.2d at 300-01, 203 Cal. Rptr. at 459-60 (to same effect).
23. Saldana, 324 N.W.2d at 229-30; Taylor, 663 S.W.2d at 238-42.
24. Saldana, 324 N.W.2d at 231-32; Taylor, 663 S.W.2d at 241.
25. Saldana, 324 N.W.2d at 230; see also Bledsoe, 36 Cal. 3d at __, 681 P.2d at 301, 203 Cal. Rptr. at 460 (quoting Saldana with approval); Taylor, 663 S.W.2d at 241 (quoting Saldana with approval).
The sharp conflict between the Kansas court and the other three courts raises troublesome and provocative issues. The admissibility of RTS as evidence in rape trials in which the defendant claims consent involves important policy questions about rape, about expert psychological testimony, about jurors' attitudes, and about the way judges deal with novel scientific theories.

This Article first examines the mythology and the fears that people have about rape and ways in which those views affect jurors, judges, and victims, paying particular attention to the problems of false accusation and of distinguishing seduction from rape. The Article then discusses the evidentiary rules that govern the admissibility of expert testimony and novel scientific theories and describes the application of these rules to expert testimony about RTS. Finally, the Article examines the proper role of psychology in the courtroom and reviews the various approved uses of expert psychological testimony. The Article concludes that the California, Minnesota, and Missouri courts' exclusion of expert testimony on RTS cannot be reconciled with judicial acceptance of other forms of expert testimony. It also demonstrates that RTS evidence can help the fact finder resolve difficult issues of guilt or innocence and that such evidence can educate jurors and judges, which may help correct erroneous social attitudes about the crime of rape. The Article underscores the need for reform of the process by which judges determine the admissibility of expert psychological testimony and concludes that psychologists have an appropriate, even necessary, role in the legal system.

I. RAPE: THE PERCEPTIONS AND THE REALITY

To understand the controversy surrounding the use of expert testimony about RTS to prove that intercourse was not consensual, it is important to consider the ways in which rape differs from other violent crimes, both in reality and in popular conception. The word "rape" itself evokes a range of images, emotions, and concepts. People disagree strongly about what rape is, why rape occurs, and even what evidence should be admitted or required to prove that rape occurred. Furthermore,
most people are uncomfortable when rape is mentioned or dis-
cussed. That discomfort may emphasize the differences be-
tween rape and other violent crimes by preventing rational
discussion about rape and thus accentuating the disagreements
about rape. Despite the substantive disagreements about what
rape is, however, most people agree with Professor Vivian Ber-
ger that both people and the law treat rape as "something

the Prior Sexual History of the Complaining Witness in Cases of Forcible
Rape: Reflection of Reality or Denial of Due Process?, 3 HOFSTRA L. REV. 403
(1975); see also infra text accompanying notes 241-46 (noting that courts in
many jurisdictions have inherent power to require psychiatric exam of a rape
complainant where charge is uncorroborated, despite argument that such ex-
ams invade victim's privacy and serve no useful purpose in determining com-
plainant's credibility).

27. As one author has observed, people have "trouble with rape" because:

[T]he mention of rape makes us all uneasy—for different reasons de-
pending on who we are. It makes men uneasiest of all perhaps, and
usually brings forth an initial response of nervous laughter or guffaw-
evoking jokes. After all, as far as the normal, but uninformed, man
knows, rape is something he might suddenly do himself some night if
life becomes too dull. It isn't, of course, but he knows too little about
it to realize that.

On the other hand, the thoughtful normal man, after hearing the
details of a forcible rape, finds it difficult to believe. . . . He knows
that all thoughts of sex—which he equates with fun, romance, and
mutual admiration—would leave him if the woman were really strug-
gling to get free . . . . He does not realize that, to the rapist, the act
is not "love," not ardor, and usually not even passion; it is a way of
debasing and degrading a woman. . . . This gives rise to the com-
monly held view that: "There is no such thing as rape." . . . To most
women, [rape] is almost as unreal as it is to most men because they
themselves have not experienced it, and few people who have done so
are in the habit of talking about it. . . .

At the same time, an occasional newspaper story about a particu-
larly brutal rape-murder makes all women shudder. They wonder if
it could possibly happen to them, and if it did, how would they re-
act. . . .

. . .

One way of coping. . . is to imagine, and then believe, that wo-
men to whom rape happens are in some way vastly different from
oneself. Deciding that they must have been taller, shorter, fatter,
thinner, older, or younger will not work since rape victims come in all
variations of these attributes. It is far easier to settle on some impal-
pable quality which is not so easily measured with a ruler or scale.
This accounts for the overwhelming number of women who believe
that most claims of being raped are either outright lies, or that the
rapes were brought on by the victim herself . . . .

C. HURSCH, THE TROUBLE WITH RAPE 5-7 (1977). This is, of course, but one
explanation for people's uneasiness about rape. Violent crime in general
makes people uneasy because it reminds them of their own vulnerability and
of the human capacity for destructiveness and evil. As argued below, however,
people's uneasiness about rape goes beyond, and differs from, their uneasiness
about violent crime in general. See infra notes 28-32 and accompanying text.
The crime of rape is unique because it involves an underlying act that, in the absence of coercion or physical harm, is both pleasurable and necessary to society. Only the intent and perceptions of the participants, often ambiguous and conflicting, determine whether the act has crossed the line between lawful, consensual intercourse and unlawful, forcible rape. Further blurring the line between consensual intercourse and rape is our culture's linking of sex with violence and the often unclear or inadequate communication between men and women about their sexual needs and desires. These factors may make

28. Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977); see also Ross, The Overlooked Expert in Rape Prosecutions, 14 U. TOL. L. REV. 707, 710-13 (1983). The treatment of rape differs from the treatment of other violent crimes in that many jurisdictions define it as sex-specific, but see infra note 36 (examples of gender-neutral rape definitions), or require that a victim prove she resisted. Some jurisdictions require corroboration or view the victim's chastity as a relevant, even critical, factor. In most states a husband cannot rape his wife. Many jurisdictions impose harsh penalties on rapists and courts sometimes give the jury a unique instruction that the charge of rape is easily made and difficult to defend although the accused may be innocent. Berger, supra, at 7-10; see infra notes 57 & 94-96 and accompanying text. Another legal anomaly in rape cases is the "prompt complaint" doctrine, under which evidence that the victim made a prompt report of the assault is admissible, even though the complaint is hearsay and bolsters the victim's in-court testimony. The rationale courts offer for the exception is that without evidence of a prompt complaint, the fact finder could infer recent fabrication by the victim. The assumptions underlying this inference are that victims of sexual abuse will tell someone about the incident soon after it occurs; that without the testimony jurors will assume the victim did not make a prompt complaint; and that this inference would adversely affect the victim's credibility in the jurors' eyes. See Graham, The Cry of Rape: The Prompt Complaint Doctrine and the Federal Rules of Evidence, 19 WILLAMETTE L. REV. 489, 492-94 (1983).

29. Some other crimes arguably share these characteristics. Consensual touching is pleasurable and probably necessary to society; unwanted touching is not pleasurable and can be unlawful as battery. Stealing property also involves an underlying act—transfer of property—that, when voluntary, is necessary and probably pleasurable. With both of these crimes, as with rape, the closer the victim/offender relationship is, the harder it is to prove that the touching/transfer of property was nonconsensual. In these other crimes, however, victim consent is not the key factor in deciding if the offense occurred, nor is ambiguous victim conduct treated as precipitation of the offense as it is in rape. See Schwartz, An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape, 16 L.A.L. REV. 567, 583-88 (1983) (comparing robbery and rape).


the crime of rape more difficult to identify than other crimes, particularly in the "consent rape" cases, where intercourse is admitted but the man claims consent while the woman claims rape. This section will examine both the perceptions and realities of these factors that make rape unique.

A. WHAT IS RAPE?: THE LEGAL DEFINITION

Definitions of rape vary among time periods, disciplines, ideological groups, and individuals. The common law defined rape as unlawful carnal knowledge of a woman, forcibly and against her will. Today that definition is changing and some state statutes have replaced the word rape with terms such as sexual assault, sexual battery, or sexual abuse. This Article uses the definition of rape as sexual intercourse without the victim's consent and analyzes situations in which the only contested issue is whether the intercourse was consensual or forced.

32. See infra text accompanying notes 68-70.
33. See, e.g., V. BILLINGS, THE WOMAN'S BOOK (1974) ("Rape is a culturally fostered means of suppressing women. Legally we say we deplore it, but mythically we romanticize and perpetuate it, and privately we excuse and overlook it."); S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 14 (1975) (Rape is "man's basic weapon of force against woman, the principal agent of his will and her fear . . . the ultimate test of his superior strength, the triumph of his manhood."); J. WILLIAMS & K. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 54 (1981) ("Rape is the ultimate proof of male power over females, and it is the final breach of a social barrier erected by society between the dominant group and some racial and/or ethnic minorities."); Dworkin, For Men, Freedom of Speech; for Women, Silence Please, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 256, 257 (L. Lederer ed. 1980) (rape silences women); Fattah, Becoming a Victim: The Victimization Experience and Its Aftermath, 6 VICTIMOLOGY 29, 40 (1981) (explaining that the law makes women culturally legitimate victims; for example, forcible sexual intercourse with one's wife is not rape, and other violence against female spouses is ignored or protected).
35. See id. at 198-200; Bienen, Rape III—National Developments in Rape Reform Legislation, 6 WOMEN'S RIGHTS L. REP. 170, 172-76 (1980).
37. It does not exclude marital rape, nor is it gender-specific, though all of the cases cited deal with rape of a female by a male, and the pronouns used reflect that fact. Not addressed directly are statutory rape and attempted rape, although parts of the discussion may be relevant to these crimes.
B. THE MYTHOLOGY OF RAPE

The many myths about rape compound people's difficulty in understanding the crime. The more common myths include: good women don't get raped; an unwilling woman cannot be raped; all rape victims are attractive, young women; the victim provokes the rape because she wants to be raped or because she puts herself in a dangerous situation; women's sexual fantasies prove they enjoy rape; women often make false accusations of rape because they are revengeful, feel guilty, or are pregnant; rapists are strangers to the victim; rapists rape because they are overcome by sudden, uncontrollable sexual impulses; rapes occur in dark alleys; rapes are interracial; rape only counts if the victim was a virgin.

These myths, however, are overwhelmingly refuted by the data. Good women do get raped, and, although some women may fantasize about aggressive sex, even with strangers, they do not dream of violence and threats of death or injury. The claim that rape is impossible unless the woman wants it ignores completely the violence, expressed or threatened, often associated with the act and the profound, even paralyzing fear felt by the victim. Rape victims include not only young, attractive women but also children, young boys, aged female adults, male adults, and the handicapped. Rapists often plan their

39. C. Dean & M. DeBruyn-Kops, supra note 38, at 35; see also Berger, supra note 28, at 27-28. Barkas states that the myth that only women who really want to be raped are raped “survives despite the fact that the Federal Crime Commission has concluded that only 4 percent of all reported rapes occur because of any precipitative victim behavior.” J. Barkas, supra note 38, at 104.
40. Hursh cites the tactic employed by some defense lawyers of illustrating that an unwilling woman can't be raped by trying to insert a lead pencil into the opening of a moving Coke bottle. She describes this as a “puerile illustration” of what rape is not and suggests that a more telling illustration would be for someone twice the lawyer's size to put a gun to his head or a knife to his throat and then ask if he would dare disobey an order to drop his pants. C. Hursh, supra note 27, at 78-79; see also M. Amir, Patterns in Forcible Rape 161-74 (1971) (analyzing victim behavior and stating that “when confronted with a threat to her life or physical well-being, the victim was not willing to resist or fight”).
41. See, e.g., H. Field & L. Bienen, Jurors and Rape 47 (1980).
42. See, e.g., C. Dean & M. DeBruyn-Kops, supra note 38, at 36, 38. Eight out of thirteen of the Boston Strangler's victims were over 55 years old. Id. at 36. Rapes of male victims do not occur only in institutional settings as people
rapes and are motivated primarily by violence and hatred toward women rather than uncontrollable sexual desires. Furthermore, a majority of rapes occur indoors and the victim often knows the assailant. An overwhelming majority of rapes are intraracial, not interracial. Finally, rape does count, even if the woman is not a virgin: the psychological and physical trauma of rape is not less for women who have had consensual intercourse.

Imagine. See, e.g., Forman, Reported Male Rape, 7 VICTIMOLOGY 235, 235 (1982) (5.7% of rapes reported to the Columbia, S.C., police department in a 24-month period involved male victims); Groth & Burgess, Male Rape: Offenders and Victims, 137 AM. J. PSYCHIATRY 806 (1980) (study of male rape in a community setting).

43. Amir, in his leading study of the patterns of rape, found that 58% of rapes by single individuals were planned, 90% of group rapes were planned, and 83% of pair rapes were planned. M. AMIR, supra note 40, at 143.

44. See N. GROTH, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 2, 12-13 (1979). Indeed, one out of every five reported rapes involves a brutal beating. M. AMIR, supra note 40, at 155. Twenty-seven percent involve sexual humiliation, such as fellatio, cunnilingus, pederasty, use of prophylactics, and repeated intercourse. Id. at 159. Moreover, some studies suggest that the psychological profile of rapists is basically average except that they are more aggressive, impulsive, and violent. Such apparent normality may contribute to the low conviction rate for rape, as Feild and Bienen explain:

Assuming that rapists appear on the surface to be normal and thus do not conform to many jurors' expectations, the severity of punishment required by many state rape laws may actually work in favor of the defendant. For example, if jurors think of a stereotypic rapist as being a psychopathic degenerate, when confronted with an individual who does not look like their conceptions, the jury may acquit because they perceive the mandatory penalty as too severe for the individual given the offense.

H. FEILD & L. BIENEN, supra note 41, at 56. Perhaps the most distressing of the research on rape is a study by Neil Malamuth in which 35% of male college student respondents indicated at least some likelihood that they would rape a woman if there were no possibility that they would be caught. Malamuth, Rape Proclivity Among Males, J. SOC. ISSUES, Fall 1981, at 4.

45. H. FEILD & L. BIENEN, supra note 41, at 78. Amir found a significant relationship between the place of initial meeting between the victim and offender and the place where the crime took place. See M. AMIR, supra note 40, at 144-45.

46. M. AMIR, supra note 40, at 234-35; H. FEILD & L. BIENEN, supra note 41, at 76-77. See generally M. AMIR, supra note 40, at 229-52 (interpersonal relationships between victim and offender).

47. M. AMIR, supra note 40, at 13, 44-45; see also H. FEILD & L. BIENEN, supra note 41, at 80; J. WILLIAMS & K. HOLMES, supra note 33, at 80.

48. Studies on the psychological trauma of rape show that previous sexual experience does not insulate women from the trauma of rape. See infra text accompanying notes 124-35. Suggesting that it might be another example of how people confuse voluntary sexual intercourse with the force and violence of rape. A person who is mugged and forced to relinquish his wallet under threat of injury or death surely feels the trauma of the mugging even though...
Despite this evidence, however, the rape mythology persists, and recent studies reveal that rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims. The empirical studies show that judges, jurors, and the public know very little about rape and that much of what they believe about it is wrong. One of the most common and most damaging beliefs is that rape victims "ask for it," that their actions or appearance cause the rape. Believing that myth, jurors often attribute fault to the victim for precipitating the rape and then refuse to convict the alleged assailant. Su-

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50. The results of these studies defy pat generalizations because each study considers different populations and controls for different variables. See, e.g., H. Feild & L. Beinen, supra note 41, at 88-89; H. Kalven & H. Zeisel, The American Jury (1971); J. Williams & K. Holmes, supra note 33. Nevertheless, common themes emerge in the studies that support the conclusions of this Article.

51. H. Feild & L. Beinen, supra note 41, at 89. Feild and Beinen collected data from a total of 1,448 respondents, including citizens (1,056), patrol police officers (254), convicted rapists (20), and rape crisis center counselors (118). Id. at 88. They administered an "Attitudes Toward Rape" questionnaire and a "Rape Knowledge Test" to all of the respondents. The results on the attitude questionnaire revealed significant differences among the respondents on certain dimensions of rape perceptions: rape crisis counselors' perceptions of rape were "quite different" from the other three groups; the perceptions of citizens and police were the most similar. Sex, race, and marital status were the most important predictors of rape attitudes for the total sample. Within each group, other characteristics, such as attitudes toward women and their roles in society, were equally significant. Id. at 88-89.

The average score of the respondents on the Rape Knowledge Test was less than four items correct on a fourteen-item test. Rape crisis counselors, however, "scored significantly higher" than all other groups. The citizens and police scored similarly; the rapists scored "significantly lower" than all other groups. The researchers found a correlation between some dimensions of attitudes toward rape and knowledge about rape, leading them to conclude that "citizens' attitudes about rape might be modified by providing them with information on the factual aspects of rape." Id.

52. H. Kalven & H. Zeisel, supra note 50, at 249-57. Judges have inferred an "assumption of risk" from the facts that the victim and the defendant were formerly married, that the victim had been drinking with the
san Brownmiller's *Against Our Will* offers a feminist interpretation of the phenomenon of victim blaming and the low conviction rate in rape cases:

[J]uries are allies of male defendants and enemies of female complainants for reasons that run deeper than their poor grasp of the law or their predominantly male composition. They are composed of citizens who believe the many myths about rape, and they judge the female according to these cherished myths.53

Other studies and cases support Brownmiller's views about the effect of myths on jurors. In a study involving a hypothetical consent-defense case, when the victim's prior sexual history was admitted, the jurors inferred victim consent, carefully and unfavorably scrutinized her credibility and moral character, and attributed responsibility to her.54 Such inferences are not

defendant, that the victim entered a car with the defendant, that the victim was twice married and divorced, that the victim had had prior intercourse with the defendant (even though the rape was “savage” and the victim's jaw was fractured in two places), and that the victim had two illegitimate children and the defendant alleged she was a prostitute (even though the rape was brutal). *Id.* at 250-51.

Kalven and Zeisel described as “startling” the jury verdict patterns in “simple rape,” i.e., cases in which there is only one assailant, he is known to the victim, and there is no evidence of extrinsic violence:

The jury convicts of rape in just 3 of 42 cases of simple rape: further, the percentage of disagreement with the judge on the major charge is virtually 100 percent (201/2 out of 22). . . . [T]he jury chooses to redefine the crime of rape in terms of its notions of assumption of risk. Where it perceives an assumption of risk the jury, if given the option of finding the defendant guilty of a lesser crime, will frequently do so. It is thus saying not that the defendant has done nothing, but rather that what he has done does not deserve the distinctive opprobrium of rape. If forced to choose in these cases between total acquittal and finding the defendant guilty of rape, the jury will usually choose acquittal as the lesser evil.

*Id.* at 253-54 (footnote omitted). These findings suggest a policy reason favoring the gradation of sexual assault offenses. If juries refuse to convict despite criminal laws that do not include assumption of risk as a defense, the state legislature, by making the penalty less harsh, may increase the number of convictions for “simple rape” cases. An argument against such legal reform is that it may reinforce an “assumption of risk” attitude toward rape, and it thus may not significantly deter sexual assaults that victims perceive and experience as rape and that cause consequences as devastating as “nonsimple” rape.

*See also* H. Feild & L. Bienen, *supra* note 41, at 54 (66% of citizens who responded to their survey saw rape as being provoked by women's behavior or appearance).

53. S. Brownmiller, *supra* note 33, at 373.


Jurors also believe the myth that if she said “yes” before, she said “yes” again. This is a variation of the myth that rape doesn't count unless the victim is a virgin. *See supra* text accompanying note 48. Some jurisdictions now try
confined to hypotheticals. In one case reported by Kalven and Zeisel in their study of juries, the jury acquitted a young defendant charged with raping a seventeen-year-old girl. The judge explained the verdict thus: "A group of young people on a beer drinking party. The jury figured the girl asked for what she got."55

Jurors are not unique in relying on common stereotypes about rape to determine if rape occurred in a specific situation. Some judges also decide whether an alleged rape is a "real rape" based on rape mythology and stereotypes.56 For example, a Philadelphia study found several judges quoting Lord Hale's bromide that rape is the easiest crime to allege and the hardest to prove.57 Their responses indicated a belief in three categories of rape cases: cases involving what they considered to be "genuine victims," for example, victims of stranger rapes in an alley; "consensual intercourse" cases, involving victims who "asked for it," for example, by allowing the stranger to drive them home; and "vindictive female" cases, where the intercourse was either totally consensual or never occurred, for example, where the woman tired of her boyfriend or husband. The judges referred to the second category of cases as "friendly rape," "felonious gallantry," "assault with failure to please," and "breach of contract."58

Indeed, to find jurors or judges without a victim-blaming attitude toward rape may be very difficult because many members of the public share this attitude. A 1978 study of attitudes toward rape showed that sixty-nine percent of those polled in a to counter this myth through rape shield statutes that exclude from evidence testimony regarding the victim's sexual history. See, e.g., FED. R. EVID. 412; Borgida & White, supra, at 339. The myth, however, is not dispelled by such statutes; it is merely controlled. Other rape myths persist and are not controlled by appropriate jury instructions, expert testimony, or other attempts to disabuse the fact finder of mistaken and prejudicial assumptions.

57. Bohmer interviewed 38 Philadelphia judges who had handled rape cases. Bohmer, supra note 56, at 304. For further discussion of Lord Hale's comment, see infra notes 94-96 and accompanying text.
58. Id. at 304-05. In a similar vein, Illinois Criminal Judge Christy Berkos explained his lenient sentence of Brad Lieberman, a previously convicted rapist who pleaded guilty to five additional rape charges, as follows: "Lieberman had done things that did hurt the women, but fortunately he did not hurt the women physically by breaking their heads or other things we see. He didn't cut their breasts off, for instance." Dowd, supra note 56, at 29.
random sample of 600 adults believed that in the majority of rapes, the victim was promiscuous or had a bad reputation. Another study found that nearly one-third of the respondents believed that the degree of a woman's resistance should play a major factor in deciding whether a rape had occurred and over half indicated that a woman should do everything she can to resist.

The studies also show that the physical characteristics of both the victim and the rapist influence the jurors' attitudes toward rape. Black defendants typically receive harsher treatment than white defendants, especially when the victim is white and attractive, whereas both black and white defend-

59. Burt & Estep, Who Is A Victim? Definitional Problems in Sexual Victimization, 6 Victimology 15, 24 (1981). One-third of those polled believed that a woman who gets raped while hitchhiking gets what she deserves and half believed that a woman who goes to the home of a man on the first date implies she is willing to have sex. More than half of the respondents believed that 50% or more of reported rapes were not really rapes and that the victim was either angry with the man or was pregnant and wanted to protect her own reputation. Id. at 20.

60. H. Feild & L. Bienen, supra note 41, at 56. Thirty-four percent of the respondents tended to support the sexist logic behind many of the rape laws as they said it should be difficult to prove a rape in order to protect the male. Such reasoning is apparently based on the idea that rape is a charge easy to make but difficult to defend against even though the defendant is innocent. Id. (citation omitted); see infra text accompanying notes 94-96. This same attitude affected conviction rates; Feild and Bienen found that when jurors perceived that the victim precipitated or encouraged the attack, they were lenient with the defendant. H. Feild & L. Bienen, supra note 41, at 119.

61. H. Feild & L. Bienen, supra note 41, at 117-18. The problem of racism and rape is pervasive and significant but is beyond the scope of this Article. One writer who has examined the issue concludes, inter alia, that the serious treatment the law has given the rape of a white woman by a black man is not because the woman was coerced into intercourse but because it threatens white men's power over white women and black men. See Wriggins, Rape, Racism, and the Law, 6 Harv. Women's L.J. 103, 116 (1983). Wriggins also asserts that by treating the rape combination of black man/white woman more harshly, the legal system has implicitly condoned any rape of a black woman and most coerced sex experienced by white women. Id. at 116-17. The history of this harsher treatment is long and conspicuous, as evidenced by the following figures:

Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed. In stark contrast, only two percent of all defendants convicted of rape involving other racial combinations were executed. As a result of such disparate treatment, eighty-nine percent of the men executed for rape in this country were Black. Id. at 112-13 (footnotes omitted).
ants receive more lenient treatment when the victim is black.02 Attractive victims or victims with sexual experience more often are viewed as precipitators than victims.63

The attitudes toward rape and rape victims reflected in these studies may have several explanations. People may not consider rape a serious crime unless there is physical injury.64


63. See H. Feild & L. Bienen, supra note 41, at 103, 128-31, 134-35. The vast majority of the respondents in the Williams and Holmes study viewed rape as a behavioral problem. They believed that the rapist was mentally ill and that his attitudes and actions created the primary behavioral problem. J. Williams & K. Holmes, supra note 33, at 123. They also believed, however, that the victim posed a secondary behavioral problem, because she had contributed to the problem of rape through inappropriate behavior and/or appearance. Id.; see also H. Feild & L. Bienen, supra note 41, at 54. Few respondents believed that societal problems or sex-role problems were a cause of rape. J. Williams & K. Holmes, supra note 33, at 123. Blaming rape on individual pathologies and conduct, rather than on systemic social problems, is one way people distance themselves from the actors and victims and thus deny any responsibility for the problem or for its prevention. Moreover, the criminal law focuses on bad acts committed by individuals or entities, not by “society.”

The respondents’ evaluations of the credibility of various rape situations are not surprising. The most credible situation was the street rape, with a weapon and victim injuries; the second and third most credible situations were either a street rape with no weapon or a date rape with a weapon; the fourth most credible situation was the rape of a prostitute by a stranger with a weapon and victim injuries or, among minority men, the rape of a bar pick-up with a weapon. Lowest in credibility were husband-wife rapes and rapes of women who met their assailant in a bar where no weapon was used. Id. at 128.

Williams and Holmes concluded that the greater the perceived or actual risk of an accusation of rape to a certain age, sex, racial/ethnic group, the more “conservative” or “nonfeminist” the group’s attitudes are toward rape. For example, young men would more likely blame the victim for the assault than would older women. Williams and Holmes also found that individuals without rigid sex-role attitudes tended to believe the victim and not assume female fault. Id. at 168.

The Williams and Holmes data underscore that “consent rape” victims may face jury disbelief and stereotyping, especially if the jury consists of young minority males. The data also corroborate the “assumption of risk” phenomenon identified by Kalven and Zeisel, see supra note 52, and link the tendency to attribute fault to the victim with conservative sex-role attitudes. The data further suggest that the fear of false convictions or of discriminatorily harsh sentences may affect respondents' attitudes about rape, such as their definition of the crime and their willingness to prosecute and to attribute fault to the victim. Finally, and importantly, the data intimate that a change in sex-role attitudes would produce a positive change in attitudes toward rape. Id. at 168-69.

64. See S. Brownmiller, supra note 33, at 391. A recent rape trial in Lexington, Virginia, provides an example of this phenomenon, though the out-
They may blame the victims of the crime in order to preserve a sense of a "just world" and of control and safety for nonvictims.65 Other people may confuse their own sexual activities and desires with those of the rapist and view rape as an act of sex rather than violence. People with rigid and circumscribed notions of acceptable female behavior may blame victims for precipitating the crime.66 Others, especially those who are vulnerable to discriminatorily harsh treatment by the legal system, may be skeptical of all rapes because they believe it is easy to lie about rape. Whatever the reason, people's attitudes to-

The responses of the fraternity men and of the defendant can only be described as mystifying. One compelling inference is that none of them perceived what the defendant had done as serious enough to request or fear police involvement.

This perception seems to have ancient roots. Historical research by Professor Roger Groot shows that although rape was a crime in Angevin times, there is no record of a rape defendant being put to the usual proof or punished. He concludes that the reason for this "remarkable fact" is that "rape was not perceived as a sufficiently serious violation of the social order to call for a judicial response." Groot, The Crime of Rape temp. Richard I and John (unpublished manuscript, available at Washington and Lee University School of Law).

65. See, e.g., M. Lerner, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION 2 (1980) (describing people's need to rationalize injustice by concluding the victim somehow invited her fate); Lerner & Simmons, Observer's Reaction to the "Innocent Victim": Compassion or Rejection?, 4 J. PERSONALITY & SOC. PSYCHOLOGY 203 (1966) (studies support hypothesis that rejection and devaluation of a suffering victim are primarily based on the observer's need to believe in a just world).

66. The New Bedford gang-rape trial provides an example of this notion. The alleged victim testified that she was gang-raped on a pool table at Big Dan's bar as onlookers cheered. Defense lawyers attempted to impeach the woman's credibility by questioning her about a hospital report that showed she had complained of being raped two years before the barroom incident. The judge excluded the evidence as irrelevant. In explaining why he felt the evidence was relevant, the defense lawyer was quoted as saying, "'We're just trying to say: how many people get raped twice in such a short time when they are living with a man?' With a live-in boyfriend, he said, 'I shouldn't think she'd be out running around the streets getting raped.'" Wash. Post, Feb. 29, 1984, at A11, col. 3.
ward rape reflect misunderstandings, fear, and prejudice, and jurors and judges are as susceptible to those factually incorrect and legally irrelevant myths as the general population.67

C. SEDUCTION, FALSE ACCUSATION, OR RAPE?

The perception of rape as different from other violent crimes is further reinforced by the belief that only a fine line separates rape from seduction and by the fear that rape is particularly susceptible to false accusations. As the following analysis shows, however, these problems need be no greater for rape than for other crimes and are probably exaggerated because of the continuing belief in rape myths.

A fact finder may sometimes have difficulty distinguishing seduction from rape because the difference hinges solely on the perception and intent of the participants, direct evidence of which is impossible to obtain.68 Society's acceptance of certain coercive sexuality as normal sexual behavior makes it possible

67. See H. FEILD & L. BIENEN, supra note 41, at 45-49. Experience with myths in other disciplines suggests how formidable the task of demythologizing may be. Early theories about human anatomy were based on the work of Galen, born c. 130 A.D. Galen, although he had dissected Barbary apes, probably never performed a human dissection. His theories about human anatomy were, in some respects, visionary and erroneous. For example, Galen believed that the heart produced "vital spirits" that were changed to "animal spirits" by the blood.

Galen's theories persisted for 1300 years, and any evidence inconsistent with Galenic teaching was rejected. In approximately 1533, a man named Sylvius was given permission to dissect bodies of criminals. He was observed by a young student named Vesalius, who discovered that despite the inconsistencies between the anatomy of the cadavers and Galen's notions about anatomy, Sylvius clung to Galen's ideas and "sought to bridge over the mistakes of the master." D. ATKINSON, MAGIC, MYTH AND MEDICINE 153 (1956). Vesalius decided that Sylvius was not a proper teacher and left to conduct his own research and writing. Vesalius's work discrediting Galen's theories was ridiculed, however, and Vesalius was denounced as a heretic. Id. at 154.

68. Wiener, supra note 31, at 146-47. Here again, however, the problem is not unique to rape, although it may be more pronounced. Truth or reality is a matter of interpretation and direct evidence of what actually occurred in any crime is impossible to obtain. With rape, this problem is compounded because the crime is defined according to the participants' interpretation of their acts. Thus, investigation must show what actually happened and what the parties actually thought happened. At neither level, however, is it possible to know what actually occurred.

If people cannot ever know the "truth," then legal decisions, like all other decisions, must be based on something else. This "something else" is a balance of interests. This Article argues that people's interpretation of consent-rape fact situations is based on a flawed theory about rape and reflects a balance of interests that should be rejected because it is socially disadvantageous and inconsistent with the theory and ideology of rape the criminal law prescribes.
to regard even extreme aggressive behavior by the male participant as seduction rather than rape. Participants also may misinterpret the meaning and intent of the dating behavior or erotic play of their partners, further confounding attempts to distinguish between seduction and rape. Such misinterpretations may result from different perceptions or from the participants' failure to communicate clearly their intentions and desires to their partners.

Drawing the legal line between seduction and rape involves two important and perhaps conflicting policy interests: protecting individual freedom from coerced submission to sex and avoiding criminal liability for someone who could not reasonably have known he was committing a felony. Most jurisdictions strike the balance between the policies in favor of the latter by evaluating whether an act is seduction or rape in terms of the defendant's belief about the victim's desires rather than in terms of the victim's actual state of mind. Thus, a male's mistaken but "reasonable" perception that a woman wants, expects, or invites sex frees the male from liability. Basing reasonableness on the defendant's perception of the victim's behavior and the surrounding circumstances, however, puts a heavy burden on the victim. To the extent that society accepts coercive sex as normal and treats certain nonverbal or ambiguous verbal communications by a female as consent or assumption of risk, a woman who did not intend to consent and who never said "yes" may find that the law says that she was not raped. Such an approach also subjects her behavior, rather

69. Id. at 147. A recent example of this is State v. Radjenovich, 138 Ariz. 270, 674 P.2d 333 (1983), in which the defendant had bitten the alleged victim's thigh, scratched her back, and offered oral sex. He defended the charge of rape on the basis of her consent. To corroborate the defense, he intended to call a psychologist who specialized in sex counseling to testify that the biting, scratching, and offering of oral sex were consistent with normal sexual behavior. Id. at 272, 674 P.2d at 335.

70. Wiener, supra note 31, at 147. For example, a male may believe that a female's "no" means "yes," or that consent to petting is consent to intercourse, or that agreeing to a drink or a ride home is consent to intercourse. The female may misinterpret certain male cues as evidencing sensitivity to her limits, or she may fail to express those limits in a clear manner.

71. See State v. Greensweig, 103 Idaho 50, 53, 644 P.2d 372, 375 (1982) ("[W]e deem it beyond dispute that protection of women from rape is a legitimate, important state objective. Rape is a peculiarly degrading form of assault. It often results in a profound, enduring emotional trauma that only its victims can fully comprehend.").

72. Likewise, the opinion of an expert on rape that the victim's resistance was enough to make "reasonably manifest" her refusal is irrelevant. People v. Guthreau, 102 Cal. App. 3d 438, 162 Cal. Rptr. 376 (1980), emphasized that the
than the perpetrator's, to close scrutiny by the defense lawyer, the fact finder, and the community.\textsuperscript{73}

The effect of this approach during a trial is well-demonstrated by the 1980 Utah decision in \textit{State v. Myers}.\textsuperscript{74} The facts of \textit{Myers} are fairly unremarkable; the result and reasoning of the case are not. The defendant had approached the victim and another woman in a parking lot of a technical college and invited them to breakfast. They agreed, and the three had breakfast at a nearby cafe.\textsuperscript{75} After breakfast they went to a private club for drinks. Around 1:00 p.m. the victim left to change into her work clothes, a "somewhat scanty" costume that she wore for her job as a cocktail waitress at another club.\textsuperscript{76} When she returned, her friend left the bar, and the victim and the defendant remained at the club until after midnight. The manager of the club testified that he observed the victim and the defendant "petting" and that he saw the victim lying with her head in the defendant's lap.\textsuperscript{77}

After they left the club, the defendant and the victim critical inquiry is whether the victim's resistance was enough to show her refusal to the defendant. The defendant's perception, and not the victim's or any expert's, is the key. \textit{Id.} at 44, 162 Cal. Rptr. at 378; \textit{see also} People v. Clark, 109 Cal. App. 3d 88, 92-94, 167 Cal. Rptr. 51, 53-54 (1980) (expert's explanation of reasonableness of complainant's passive conduct constituted reversible error when case turned on credibility on consent issue). \textit{But see} Perez v. State, 653 S.W.2d 878, 882 (Tex. Civ. App. 1983) (admitting testimony of a rape crisis center lecturer to explain victim's passive resistance to the defendant).

73. Wiener offers a challenging proposal redefining consent that might change this result. She argues that the communication burden should shift, so that men would be responsible for ascertaining consent and held accountable if they did not secure consent before intercourse. The law's focus, Wiener maintains, should not be on the reasonableness of the offender's initial behavior, the victim's fear, or her resistance or demonstration of lack of consent. Wiener, \textit{supra} note 31, at 155. Rather, the court should examine one behavior only: the victim's overt consent. \textit{Id.} at 158. The purpose of rape laws, she adds, is to deter behavior and protect women's freedom of choice. These interests outweigh any benefit in allowing men to act in accordance with current "norms" of sexual behavior. \textit{Id.} at 159-60. In response to any argument that criminal law should not punish when the actor has neither subjective intent nor actual knowledge that his actions are unlawful, she concludes that punishment under these circumstances is not novel and that "requiring members of society to meet legally prescribed behavior standards is consistent with the purposes of our criminal law system." \textit{Id.} at 158 (citing O.W. Holmes, \textit{The Common Law} 41-43 (M. Howe ed. 1968)).

74. 606 P.2d 250 (Utah 1980).

75. \textit{Id.} at 251.

76. \textit{Id.} The facts indicate she never went to work at the other club that night.

77. \textit{Id.} This petting apparently consisted of kissing and hugging. \textit{Id.} at 252.
drove the victim's car to a motel parking lot. The victim had intended to drive the defendant to his car, but he asked her to take him to the motel because he wanted to see a friend. Once there, he told the victim she could make more money working as a prostitute for him than as a waitress and offered to pay her to have sex with him. She refused, at which point he became angry and called her names. She tried to escape but he grabbed her by the hair, dragged her back into the car, and raped her. Witnesses who saw the victim after the incident testified that "her face and eyes were swollen, her skirt was ripped and the front of her blouse was torn open[,] . . . a large strip of her hair was missing from her head and . . . she had had red marks on her arm."

The defendant claimed the intercourse was consensual and that the victim only complained because she was not paid. The jury disagreed and convicted the defendant of rape. The judge, however, entered an order in arrest of judgment and made the following remarks:

I cannot close my eyes to the fact situation that for this long period during that day these two people were in friendly contact association, necking with each other and participating in the kind of activity that ultimately might well lead to sexual relations. . . . If under those facts and circumstances a man has sexual intercourse with a woman, it seems to me, even if it can technically be said without her consent, I don't think we can, in any sense of the word, justify imposing a prison sentence upon him on that fact situation.

The Supreme Court of Utah disagreed with the trial judge. The law, the court observed, does not justify the conclusion that a woman loses her right to reject future advances once she has accepted drinks and food from a man or kissed and hugged him for a period of time. Moreover, although the jury may have considered the victim indiscreet, they did not believe her conduct justified the defendant's violence. The jury verdict

78. Id. at 251.
79. Id. at 252.
80. Id.
81. Id.
82. Id. The jury may have been persuaded by the evidence of extrinsic physical injury.
83. Id. (emphasis added by the appellate court).
84. Id. A similar sentiment was expressed by a Massachusetts judge in sentencing three members of a rock band for raping a woman aboard their tour bus. Middlesex Superior Court Judge Robert Barton stated: "No longer will society accept the facts [sic] that a woman, even if she may initially act in a seductive or compromising manner, has waived her right to say no at any further time." Tampa Tribune, Mar. 20, 1984, at 13-A, col. 4.
thus was ordered reinstated and the case was remanded for sentencing within the statutory limits.85

The Utah Supreme Court is not alone in demanding overt consent for a successful consent defense to a rape charge. Legislatures are also giving greater weight to the interest in preserving individual freedom from coercive sex by focusing on the "overt consent" of the victim and acknowledging her right to say "no" to specific acts even when she has consented to other acts that might, under a more traditional and restrictive view of female behavior, be construed as general permission for intercourse.86 For example, Illinois's new sexual assault statute defines consent as words or actions by a person indicating "a freely given agreement to the act of sexual penetration or sexual conduct in question."87 This statute reflects a concern for the right of a person to control not only the general tenor of an encounter but also the specific acts engaged in within that encounter.

Both the Myers case and the Illinois statute suggest an approach that clarifies the distinction between rape and seduction. Although credibility will always loom large in such cases, the participants need not fear the law if they have fulfilled their affirmative duty to ascertain overt consent by their partners rather than simply surmising such consent. Participants can no longer define consent according to what other people might do or want under the circumstances. They must learn what this partner wants, regardless of what the "reasonable man or woman" might desire.88 To redefine a "reasonable perception" that a woman consents to intercourse in a way that requires the man to obtain overt consent would promote the

85. Myers, 606 P.2d at 253.
86. See, e.g., Wiener, supra note 31, at 153-60 (discussing various changes in state rape consent tests); Note, Towards a Consent Standard in the Law of Rape, 43 U. CHI. L. Rev. 613, 645 (1976) (suggesting current confusion surrounding rape consent standards could be remedied through the adoption of a standard focusing on the complaining witness's effective consent).
88. This result may seem offensive to people who believe in a little mystery, even danger, in foreplay. Their inevitable argument will be that statutes like that of Illinois will force all sex partners to submit a questionnaire to each other before each act of intercourse, or to sign a consent form. Such objections to a specific consent approach to rape, however, are disingenuous and insensitive. The Illinois statute reasonably would not apply to sexual intercourse between consenting and familiar partners; the argument that it might be twisted to apply to these acts ignores the scope of the problem of rape and the purpose of the statute.
policy interest in protecting women from rape\textsuperscript{89} without unjustifiable harm to defendants: they need only ask\textsuperscript{90} and not hood-

\textsuperscript{89} Indeed, more is at stake than protecting women from rape. When a woman's behavior is construed as an "invitation to rape" whenever she goes out for a drink alone, kisses a man, or agrees to enter his automobile, the results are a circumscribed and stunted existence for women and unnecessary hostility and distrust between men and women.

\textsuperscript{90} American jurisdictions are not alone in their movement toward a consent standard more protective of individuals' sexual integrity. Tasmania places the burden on the accused to show that a mistaken belief in consent was based on reasonable grounds. Warner, \textit{The Mental Element and Consent under the New "Rape" Laws}, 7 CRM. L.J. 245, 249 (1983) (citing Martin \textsuperscript{[1963]} Tas. S.R.). Warner, noting that this rule has been criticized as unfair to the accused, responds: "This [criticism] indicates an obsessive concern with rights of the offender and the need for a 'guilty mind,' neglecting the need to protect victims from the physical and psychological trauma of sexual assault. A person who believes unreasonably in consent is not without culpability." \textit{Id.} She also cites the arguments of Lord Cross of Chelsea:

\textsuperscript{90} The hardest fact situations make this point, which is essentially a policy determination, most clearly. Assume that a man and woman meet in a bar, dance, drink, and then leave together. They enter his automobile, where they begin kissing, fondling, and hugging. He becomes excited; she then wants to stop, maybe out of fear, or maybe out of cruelty. He proceeds, thinking she is being coy. She says no. He construes this as insincere. She says, "Come on; stop." He continues and, applying physical pressure sufficient to leave marks but not bruises, has intercourse with her. Was the specific act with her consent? The facts suggest the answer is no.

What if, however, she had said nothing? She was thinking "no" and now says it was against her will, but she then said nothing. Could he reasonably assume she was consenting to the further act of intercourse? The facts suggest the answer is yes. Her behavior up to the moment the acts escalated to intercourse communicated consent. But why did he not ask if she wanted to take the additional step from kissing and fondling to intercourse? Why don't we hear questioning as follows in rape trials:

\begin{tabular}{ll}
Q: & And then you left the bar with her?\
A: & Yes.\
Q: & Although you never met her before this night?\
A: & Yes.\
Q: & And you had only talked to her for two hours?\
A: & Yes.\
Q: & Why did you leave the bar with this stranger?\
A: & To make out.\
Q: & What do you mean, to make out?\
A: & You know, make out.\
Q: & Was it your intention to have sexual intercourse with this stranger?\
A: & Well, I wanted to.\
Q: & Did you ask her then if she wanted to have intercourse?\
A: & No.\
\end{tabular}
wink, bludgeon, blindside, or proceed without conscious regard

Q: Then what happened?
A: We went to my car and began kissing.
Q: Did you ask her if she wanted to go to the car and kiss?
A: Yeah.
Q: What did you say?
A: I said—let's go to my car where we can have some fun.
Q: What did she say?
A: She smiled and said “okay.”
Q: Then what happened?
A: We went to the car and did it.
Q: Did what?
A: Made out.
Q: Please be specific. What did you do first?
A: Well, I started kissing her.
Q: Did she say she wanted to kiss you?
A: No, but she kissed me back.
Q: Then what happened?
A: We were kissing and petting.
Q: Both of you?
A: Yes.
Q: Did you ask her if she wanted this?
A: No, but I could tell she liked it.
Q: How do you know she enjoyed it?
A: Well, she was kissing and petting back.
Q: For how long?
A: Maybe twenty minutes.
Q: And then what happened?
A: Well, eventually I took her panties off.
Q: Did you ask her if she wanted this before you removed them?
A: No.
Q: Did she say anything then?
A: No.
Q: Did she act like she enjoyed it then?
A: I don't remember.
Q: Did she resist?
A: A little, but she didn't want me to stop.
Q: So, you took this stranger, whom you met only two hours before, into your automobile, kissed and fondled with her, and then removed her panties without asking her permission?
A: She wanted me to.
Q: How do you know that?
A: Because she didn't stop me.
Q: But you said she resisted a little.
A: A little.
Q: Is that what you call consent? Not stopping you?
A: Yeah. I assumed she wanted it.
Q: But you didn't know, did you, what she was thinking at that time?
A: No. I can't read minds.
Q: That's right, you can't. And you never asked what she wanted, did you?
A: I didn't think I needed to. Her actions spoke for her.
Q: Which actions? Be specific.
A: Well, the kissing and fondling and not stopping me when I took off her pants.
Q: Would you have stopped then if she had said no?
A: Well, sure. But she didn't.
for their partners' wishes.91

Even fact finders who understand the distinction between seduction and rape may be troubled by the fear that a woman may deliberately but falsely accuse a man of rape or unintentionally fabricate such a charge.92 Again, the underlying notion is that the lack of direct evidence or witnesses combines with the heinous nature of the crime to make it likely that false accusations of rape will evade exposure more often than false accusations of other crimes.93 In short, people believe that liars, hysterics, and pregnant girls who don't want to admit to con-

Q: But you admitted she resisted, and she now says she didn't want to have sexual intercourse.
A: Well, she's lying.
Q: How could you know what she wanted, if you only met two hours before and you never asked her what she wanted?
A: Well, she seemed like she wanted it.
Q: But how could you know?
A: She kissed and stuff.
Q: Is kissing someone or touching them consent to sex?
A: Well, yeah. When you meet someone in a bar you take your chances.

There is no sound public policy reason to allow this defendant to proceed with sexual intercourse without being required first to obtain the woman's consent. The legal standard in rape thus should focus on her overt consent and should impose responsibility on the participant for securing overt consent.

This answer may be easier to reach under statutes with gradations of sexual offenses, since the jury could find the defendant guilty of a lesser degree of sexual assault. The more controversial approach is to find the defendant guilty regardless of the availability of lesser degrees of rape. That is, unless her behavior or words evidenced overt consent to the specific act, it was "against her will." His mistaken belief that a stranger's general behavior, such as kissing or hugging, meant that she wanted to have intercourse with him will not exonerate him. Establishing whether that overt consent was given, however, will remain a difficult question of credibility and perception.

Of course, this consent need not be verbal to be overt in the context of a relationship, such as marriage, in which the parties have had prior consensual intercourse and have developed nonverbal means of communicating their sexual desires. But to require less than a verbal "yes" in the context of brief encounters, such as a first date, encourages coercive intercourse—an undeniably harmful act—with no apparent social benefit.

91. As Margaret Sanger wrote over six decades ago,
A mutual and satisfied sexual act is of great benefit to the average woman, the magnetism of it is health giving. When it is not desired on the part of the woman and she has no response, it should not take place. . . . [This is] degrading to the woman's finer sensibility, all the marriage certificates on earth to the contrary notwithstanding.

M. SANGER, FAMILY LIMITATIONS (1917).

92. See 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 737 (Chadbourn rev. 1970); infra text accompanying notes 94-114.

sensual intercourse will claim rape even though the sex was consensual. As Lord Hale wrote over 300 years ago,

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.94

Some writers see Hale's comment as an apt and important reminder that a defendant might be wrongly accused,95 but others cite it as an indictment of the law's insensitivity to the victims of rape.96 In the former category, Dean Wigmore devotes an entire section in his evidence treatise to the matter of lying complainants.97 He describes various derangements, such as hysteria, that could lead a woman to "cry rape"98 and concludes that every female complainant who makes a sex offense charge should be examined by a qualified physician regarding her social history and mental makeup before the charge can go to the jury.99

The authority cited by Wigmore that links these psychological disorders with tendencies to make false accusations of rape is a monograph written in 1915 that refers almost exclusively to children100 and contains findings that have been rejected.101 Also, Wigmore's medico-legal connection between female fantasy and false accusations of rape is dubious. The theoretical roots of this conclusion probably come from the works of psy-

94. 1 M. HALE, HISTORIA PLACITORUM CORONÆ 635 (1646).
96. See, e.g., S. BROWNMILLER, supra note 33, at 369; Berger, supra note 28, at 22; cf. Ross, supra note 28, at 712 (noting that Hale's original caveat was limited to uncorroborated complaints by minors but later was extended to cases involving complainants of all ages).
97. 3A J. WIGMORE, supra note 92, § 924a.
98. Wigmore explains:
Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.
99. Id. at 736.
100. Berger, supra note 28, at 28.
101. H. FEILD & L. BIENEN, supra note 41, at 200 n.108. The source was a 1915 monograph called Pathological Lying, now repudiated. Id.
chiatrists such as Sigmund Freud and Helene Deutsch, whose theories have been criticized and challenged by other psychiatrists.

Even if Freud and Deutsch were right, however, their conclusions are irrelevant to the law of rape because the fantasy theories do not establish that these fantasies give rise to a significant number of rape accusations. Moreover, as one commentator has correctly observed, even if some women do suffer from masochism and thus subtly place themselves at risk of being raped, "[i]n so doing they give the rapist his opportunity, not a legal or moral excuse." 4

Another writer who devotes considerable energy to false

102. Many of Freud's patients told him detailed stories of familial abuse and incest, and he initially believed them. After some time, however, he decided that the stories' prevalence argued against their reality and concluded that they were fantasies, products of repressed sexuality. J.masson, the Assault on Truth: Freud's Suppression Theory 107-19 (1983).


104. See, e.g., J. Masson, supra note 102, passim. Masson maintains that Freud's reversal was motivated by self-protection: "[W]hat Freud had uncovered in 1896—that, in many instances, children are the victims of sexual violence and abuse within their own families—became such a liability that he literally had to banish it from his consciousness." Id. at xxii. A more recent study of female rape fantasies indicates that linguistic ambiguities could contribute to the confusion about women's fantasies. That author concludes that women may refer to a fantasy as a "rape fantasy" when the facts of the fantasy indicate she is fantasizing about seduction, not rape. When her fantasy involves rape, the experience is negative, fearful, and nonerotic. See Kanin, Female Rape Fantasies: A Victimization Study, 7 Victimology 114, 119-20 (1982).

Deutsch's theory that women are more masochistic than men has been similarly challenged. See, e.g., Berger, supra note 28, at 28-29 (questioning both the theory and the causal link to rape); Kanin, supra note 104, at 116 (finding that women who engage in true rape fantasies undergo a negative, fearful fantasy experience, whereas women who have seduction fantasies undergo a pleasant, erotic fantasy experience); Waites, Female Masochism and the Enforced Restriction of Choice, 2 Victimology 535, 537-39 (1978) (challenging the notion that female masochism has a biological basis).

105. Berger, supra note 28, at 28. Berger carefully addresses and rejects the "cultural myths" about women that arise in sources ranging from the Bible to Freud. Id. at 22-29. Her discussion—buttressed by data, logic, and case citations—demonstrates that "[c]ontrary to the Hale thesis, the balance of advantage in rape prosecutions tips rather markedly toward the defendant." Id. at 29.

106. Id. at 28. Berger's approach is consistent with the specific consent theory of rape discussed previously, see supra notes 88-91 and accompanying text, and with a rejection of an assumption of risk analysis in the law of rape, see supra note 52.
accusations is James Macdonald. His book seems insensitive to rape victims and its data have been questioned, but his theories reflect and help perpetuate the mythology of rape. Macdonald offers five major reasons for false rape accusations: revenge, blackmail, protection of reputation, jealousy, and repressed erotic wishes or fantasies. Although some women might act on these motives by falsely accusing someone of rape, at least three of these motives—revenge, blackmail, and jealousy—are equally plausible motives for false charges of theft, assault, embezzlement, or other felonies. Moreover, "victims" of these other crimes do not face the cultural biases that victims of rape do; thus there is more incentive to make a false charge of another crime than of rape. Macdonald apparently places more emphasis on the motives of revenge, blackmail, and jealousy in rape cases because he views women as uncommonly prone to these motives:

The woman who agrees to sexual intercourse after prolonged courting and promise of marriage may become somewhat peevish when her boyfriend stops calling on her. She may respond by threatening to report to the police that he raped her unless he agrees to marry her. She may, in fact, go to the police with a fabricated story of forcible rape if the man fails to marry her.

Such sexual stereotyping distorts Macdonald's treatment of false accusations of rape and renders untrustworthy his observations about the role of revenge, jealousy, and blackmail.

Protection of reputation may motivate some women to make false rape charges, though not to the extent Macdonald imagines. Only four women in Macdonald's study gave reputation reasons—such as providing an explanation for an out-of-wedlock pregnancy or for an extramarital encounter—for their admittedly false charges of rape. This handful of cases, however, hardly justifies the pervasive conclusion that many wo-

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107. J. Macdonald, Rape: Offenders and Their Victims 209 (1971); see also Elliott, Rape Complainants' Sexual Experience with Third Parties, 1984 Crim. L. Rev. 4, 13-14 (similar assessment of the validity of rape claims).
108. The following is an example of Macdonald's unsympathetic view of complainants: "Promiscuous wives, involved in divorce suits, sometimes make false claims of rape to protect their reputation, especially when they anticipate a courtroom battle over custody of their children." J. Macdonald, supra note 107, at 205. But see C. Hursh, supra note 27, at 82-87 (criticizing Macdonald).
109. Hursh notes that most of the reasons Macdonald lists for a woman to "cry rape" come from an article written in 1918. C. Hursh, supra note 27, at 85-86 (referring to R.F. Bronson, False Accusations of Rape, 14 Am. J. Urology & Sexology 539 (1918)).
111. Id. at 204.
men cry rape out of such motives. Moreover, because each of the women Macdonald described admitted the falsehood in police questioning, undetected falsehoods are unlikely to be a crucial factor in cases reaching the court. Social changes in the fifteen years since Macdonald wrote his book also may have reduced the motives for a woman to lie in such circumstances; single motherhood and extramarital affairs are far more common and less shattering of reputations than they once were. Finally, Macdonald's conclusion that false accusations arise from the suppressed erotic wishes or fantasies of women suffers from the same infirmities as Wigmore's assumptions about women and rape.

Critics of Hale, Wigmore, and Macdonald argue that rape is not a charge easily made and cite statistics indicating that rape is vastly underreported and, when reported, rarely results in a conviction. A recent study on rape, citing 1980 Department of Justice figures, noted:

In 1977, only half of reported rapes (and it is estimated that the actual incidence of rape is three and one-half to nine times the reported rate) resulted in arrests; 65 percent of those arrested were prosecuted.

112. Id. at 204-07.
113. Id.
114. Most of Macdonald's examples of accusers motivated by psychological disorders are children, and the falsehoods were uncovered in police questioning. Id. at 202-24. Of the remaining false reports described by Macdonald, some were charges of rape that were neither concocted falsehoods nor mistaken perceptions about the difference between seduction and rape, as Macdonald claimed.

For example, Macdonald characterizes the following incident as a false claim of rape:

A woman who claimed that she had been raped and assaulted later acknowledged that she had agreed to have sexual intercourse with the man for fifteen dollars. "He told me to get my clothes off. He told me to lay down, so I did. So then he had this wax dill and tried putting it in me. I said no and I pushed this thing out. . . . I got my coat and purse and started walking toward the bathroom and he grabbed me and hit me on the face and head and then he made me lay down and . . . he put his penis through the rectum, so I told him that it hurt real bad. So he told me to get dressed and I told him to forget about the fifteen dollars.

Id. at 217. Or consider this curious entry by Macdonald:

Some women have difficulty in breaking off love affairs. Often they have ambivalent feelings toward the man and react ambivalently, one day announcing that all is over and the next day permitting the man to stay for dinner. When the discarded lover resorts to violence to obtain the sexual relations previously readily available, the woman may appeal to the police for help in her dilemma. She makes a report of rape but neglects to mention her seductive-rejecting relationship and prior acts of intercourse.

Id. at 208.
and 40 percent of these had their cases dismissed or were acquitted.\textsuperscript{115}

Women are often reluctant to report rapes because of the unique bias people have against victims of rape. They first must face the police, who deem reports of rape to be "unfounded," that is, not meriting police involvement, more often than any other major felony.\textsuperscript{116} Then, even if the police do believe the victim and the case proceeds to trial, the victim may face grueling cross-examination by the defense attorney. Moreover, perhaps because jurors apply an assumption of risk standard to the victim and scrutinize closely her behavior according to rigid notions of acceptable female conduct, rape victims are the least successful among all victims of violent crimes in proving their claims.\textsuperscript{117} Finally, rape victims who admit they were raped often suffer in their personal relationships because acquaintances, friends, and lovers sometimes withdraw, deny the

\textsuperscript{115} Scherer, \textit{supra} note 30, at 154; see also S. Brownmiller, \textit{supra} note 33, at 372 (in New York in 1971 there were 2,415 founded rape complaints but only 1,085 arrests, leading to only 18 convictions); Berger, \textit{supra} note 28, at 29 ("[A]ll the evidence points to a finding that many justified accusations never receive a fair hearing."); Russell, \textit{The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females}, 7 \textit{Victimology} 81, 88 (1982) ("Rape is the only crime for which the process referred to as 'unfounding' is utilized."); \textit{President's Commission on Law Enforcement & Administration of Justice, The Challenge of Crime in a Free Society} 97 (1967) (approximately 27\% of actual rapes are reported); Barrett, \textit{Date Rape: A Campus Epidemic?}. Ms., Sept. 1982, at 48. Estimates of the number of unreported rapes and of the incidence of rape vary. A recent study based on a survey of San Francisco women found that 41\% of the 930 women respondents reported at least one completed or attempted (nonmarital) rape; only 8\% of these incidents were reported to the police. Russell, \textit{supra}, at 81.

\textsuperscript{116} Berger, \textit{supra} note 28, at 24 (citing \textit{Federal Bureau of Investigation, Uniform Crime Reports} 10 (1974)).

\textsuperscript{117} \textit{See supra} note 115; see also H. Feild & L. Bienen, \textit{supra} note 41, at 95 (noting that "rape has the highest rate of acquittal or dismissal and lowest rate of conviction for the offense charged") (emphasis in original); Ross, \textit{supra} note 28, at 715 (observing that the high rate of acquittals has remained nearly constant despite recent legislative and judicial reform of rape law).

One court responded to the claim that rape is easy to allege by stating: "An equally cogent argument to the contrary can be made—that in cases involving adults it is ordinarily difficult to prove that a sex act was the culmination of force exerted by the male rather than the mutual act of the participants." \textit{State v. Walgraeve}, 243 Or. 328, 330, 412 P.2d 23, 24 (1966); \textit{see supra} text accompanying notes 49-67. The victim may even be subject to live television filming and broadcast of the trial. For example, the New Bedford gang-rape trial was broadcast on a national cable news station (CNN). Though the alleged victim's face was not shown, her voice was broadcast as she testified to the details of her alleged rape on the pool table in Big Dan's bar, and some area cable channels broadcast the victim's name. \textit{See Henry, When News Becomes Voyeurism}, \textit{Time}, Mar. 26, 1984, at 64.
incident, blame or disbelieve the victim, or even abandon the victim out of ignorance, anger, fear, or hurt. Indeed, victims often accept these reactions as valid and blame themselves for the incident, thinking they exercised poor judgment or were careless. The old claim that rape is easily charged, therefore, ignores the meaning and consequences of rape to the victim and to the people around her.


119. See, e.g., C. DEAN & M. DEBRUYN-KOPS, supra note 38, at 106; J. WILLIAMS & K. HOLMES, supra note 33, at 81; Becker, Skinner, Abel, Howell & Bruce, The Effects of Sexual Assault on Rape and Attempted Rape Victims, 7 Victimology 106, 111 (1983) [hereinafter cited as Effects of Sexual Assault]; Notman & Nadelson, supra note 118, at 133-34.

120. Those who view Hale's warning as warranted and necessary support their view by noting the high incidence of false accusations as shown by the high police "unfounding" rate for complaints. Compare Berger, supra note 28, at 23-24 (victims who do not fit police stereotypes of true victims find their claims unfounded) with J. MACDONALD, supra note 107, at 202 ("The frequency of unfounded claims of rape provides a serious problem for law enforcement agencies.").

A major problem in analyzing the incidence of false reports rests with the meaning of the term "unfounded" in police parlance. One study of rape complaints received by the Philadelphia Police Department found that the police officer's decision that a complaint was "unfounded" hinged on numerous factors, such as the promptness of the complaint, the physical condition of the victim, her refusal to submit to medical attention, her behavior during the hours before the attack (e.g., drinking), her actions during the offense (e.g., outcry, resistance), the location of the offense, and the participants' ages and races. The complaint was more likely to be deemed "unfounded" when the victim refused medical attention, when the offense occurred indoors, when the victim knew the defendant, and when both participants were black. Cf. Comment, supra note 95, at 282-309 (presenting and discussing results of study).

See also C. HURSCH, supra note 27, at 83 (noting that in Denver the police use "unfounded" as a catch-all category for cases when no further police action is possible, not for when the reported event did not actually occur); Russell, supra note 115, at 89 (noting wide year-to-year variations in unfounding statistics).

The analyses of the "unfounding" of a charge of rape demonstrate that law enforcement personnel, like the rest of society, operate on assumptions about victim and offender behavior. See, e.g., C. HURSCH, supra note 27, at 118-22 (police "blame" victims for placing themselves in situations in which they are vulnerable); Berger, supra note 28, at 24; supra text accompanying notes 49-67 (police have a preconceived notion of what a victim's postassault behavior "should" be). Many of these assumptions, however, are suspect or wrong.
II. RAPE TRAUMA SYNDROME: THE THEORY AND ITS USE IN EXPERT TESTIMONY

The following section describes RTS research in detail and discusses the evidentiary standard for admissibility of other expert testimony and novel theories. It then examines the use of RTS theory in criminal trials and explains why testimony about RTS is reliable and can help the jury without prejudicing it.

A. RAPE TRAUMA SYNDROME

The term "rape trauma syndrome" comes from a study of rape victims conducted by Ann Wolbert Burgess and Lynda Lytle Holmstrom. From July 20, 1972, to July 19, 1973, 146 people entered the emergency room of Boston City Hospital alleging they had been raped. The researchers divided the 146 alleged victims into three groups based on the researchers' assessments of whether the victims had consented to the intercourse. The first group consisted of ninety-two adults and included victims who Burgess and Holmstrom say "clearly did not consent," although the researchers give no explanation for this conclusion. The second group consisted of victims who lacked the cognitive or personality development to make a judgment of consent, such as children or adolescents. The third group consisted of individuals who had initially consented but then experienced some stress that upset them, such as the man demanding perversion or using violence, people in authority finding the couple, or anxious parents bringing the child to the hospital for examination.

For example, they assume a true victim will report a rape immediately (and will be hysterical). Studies show, however, that many victims do not report their rapes and that the external reactions of rape victims vary greatly, with some appearing impassive and controlled. See supra text accompanying note 115; infra text accompanying notes 128-30; cf. S. BROWNMILLER, supra note 33, at 387 (noting that when New York City instituted a special sex crimes analysis squad and had policewomen interview complainants, the number of charges classified as "false" dropped dramatically to a figure that corresponded exactly to the rate of false reports for other violent crimes).

121. A "syndrome" is a "[g]roup of symptoms; an assembly of signs and symptoms which indicate [a] recognizable condition." A "trauma" is a "[p]hysical injury caused by a blow, or fall, or a psychologically damaging emotional experience." A. MOENSSENS & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 112 (2d ed. 1978).


Defining rape as "forced, violent sexual penetration against the victim's will and without the victim's consent," the researchers based their study only on the first group, women who allegedly had suffered forcible rapes in which there was no question of consent. These ninety-two women included blacks and whites in approximately equal numbers and a much smaller number of women of other races and ethnicity (Oriental, Indian, Spanish-speaking). Their work statuses varied; the victims included college students, career women, housewives, and women on welfare. They ranged in age from seventeen to seventy-three years. They included women who were single, married, divorced, separated, widowed, and cohabitating with a man. Their attractiveness ranged from "very pretty" to "very plain" and they dressed in a variety of ways—from "high fashion" to "hippie." Some had children; some did not. Some victims were pregnant, including one woman who was in her eighth month.

The researchers interviewed all of the women within thirty minutes of a call from the hospital. They followed up the initial interviews with phone counseling or home visits. Based on these interviews and later consultations with the victims, Burgess and Holmstrom concluded that rape victims evidence a two-phase group of symptoms, which the researchers called "rape trauma syndrome," as a result of being raped. Phase I of RTS is the "acute phase," which occurs immediately after the attack and is marked by a disorganization of the victim's life style. The most prominent symptom in this stage is extreme fear. The victims also may demonstrate a wide range of emotions in one of two "styles," expressed or controlled. A victim with an expressed style would express her feelings of fear, anger, and anxiety by crying, sobbing, smiling, or acting restless or tense. A victim with a controlled style would hide her feelings and appear calm. About equal numbers of victims

124. Id. at 111.
125. Burgess & Holmstrom, Rape Trauma Syndrome, in THE RAPE VICTIM, supra note 118, at 119-21.
126. Id. at 121.
127. Rape trauma syndrome is "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." Id.
128. During the first several weeks after the rape, the emotional reactions of the victims covered a "wide gamut of feelings" as the victims began to deal with the rape. They ranged from fear, humiliation, and embarrassment to anger, revenge, and self-blame. Some victims also expressed fear of physical violence and death. Id. at 123.
fell into each style of emotion.129

The acute phase also may include physical effects from the attack, such as soreness and bruising, skeletal muscle tension, headaches, and fatigue.130 Some women complained of gastrointestinal irritability such as stomach pains, loss of appetite or nausea, and genitourinary disturbances such as vaginal discharge, itching, burning with urination, and generalized pain in the genital area.131 Some victims also experienced sleeping disorders related to the time of the attack. If, for example, the victim was awakened by the assailant, she might awaken at that same time each night. Other victims cried or screamed in their sleep. Some became edgy or jumpy over minor incidents.132

Phase II of RTS is the long-term reorganization process victims undergo after the rape.133 Although not all victims experienced the same symptoms in the same sequence during this period, the majority continued to experience moderate to mild symptoms ranging from phobic reactions to discomfort.134 Some victims changed residences, many changed phone numbers, many had nightmares, and almost eighty percent turned to family or close friends for support. Many of the women developed "traumatophobias"—defensive reactions to the circumstances of the rape. Those who were attacked while alone reported fear of being alone and those who were attacked while sleeping in bed reported fear of being indoors. Others developed fear of crowds, fear of people walking behind them, or fear of the outdoors, depending on the circumstances of their assaults.135 Many of the victims reported having sexual fears after the rape. Some victims reported disruptions in relationships and those who had been sexually active before the incident also reported crises in their sex lives.136

129. Id. at 122.
130. Id.
131. Id. at 123.
132. Id. at 122.
133. In a follow-up study published by Burgess and Holmstrom in 1979, they reported that four to six years after a sexual assault, 26% of the 81 victims responding stated that they had not yet recovered from or adjusted to their assault. A. BURGESS & L. HOLMSTROM, RAPE: CRISIS & RECOVERY 407-48 (1979); see infra note 165.
135. Id. at 124-27.
136. One woman is quoted as stating five months after the assault, "There are times I get hysterical with my boyfriend. I don't want him near me; I get panicked. Sex is OK, but I still feel like screaming." Id. at 127.
A special problem arose in victims who had been raped before in their lives. The researchers found that while the victim was discussing the later rape, she "spontaneously would switch back and forth between the present rape and the past one. The current crisis reactivated the older one."  

Numerous other writers who have joined the research on the effect of rape on victims tend to corroborate Burgess and Holmstrom's theory of RTS as a two-phase reaction to rape. These later studies describe Phase I of RTS as beginning immediately after an attack, when the victim experiences feelings of shock, fear, humiliation, vulnerability, powerlessness, anxiety, and disgust. The victim moves into Phase II when she attempts to reorganize her life, but she may continue to experience fear, nightmares about the assault, depression, avoidance responses

137. Holmstrom & Burgess, Assessing Trauma in the Rape Victim, in THE RAPE VICTIM, supra note 118, at 112, 115. Burgess and Holmstrom describe two variations on RTS: "compounded reaction" and "silent reaction." "Compounded reaction" occurs when the victim experiences RTS symptoms and reactivates symptoms of previous conditions, such as physical or psychiatric illness or drug dependency. Id. at 111. "Silent reaction" occurs when a victim experiences the symptoms of rape but never reveals that she has been raped. Id. at 111-12. The finding that preexisting life stresses can compound rape trauma finds support in recent research by Ruch and Hennessy, who conclude that a victim with preexisting stress may be more vulnerable to the trauma of a sexual assault than a victim who is not experiencing serious life-change stresses. Ruch & Hennessy, Sexual Assault: Victim and Attack Dimensions, 7 VICTIMOLOGY 94, 102 (1982). Seventeen percent of the victims in their study were victims of earlier assaults. Id. at 103.

138. Indeed, the study of rape and of victims in general has expanded phenomenally since the early 1970's. Entire periodicals and books now are devoted to victimology and a comprehensive bibliography on rape would fill a small volume. See Pawloski, Forcible Rape: An Updated Bibliography, 74 J. CRIM. L. & CRIMINOLOGY 601 (1983).


Rape now appears in the Diagnostic and Statistical Manual of the American Psychiatric Association as one stressor that can produce the syndrome posttraumatic stress disorder. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 236 (3d ed. 1980).
to people and situations that take the form of phobias, changes in lifestyle, anxiety, and sexual and interpersonal dysfunctions.140

Some writers have refined the two-phase theory. Sutherland and Scherl,141 for example, add an interim phase called the "outward adjustment" phase between Phases I and II.142 In this interim phase the rape victim denies, suppresses, and rationalizes the event. She resumes normal activities and appears to adjust to the assault. The adjustment, however, is a "pseudoadjustment" that is followed by later depression, often precipitated by a specific event such as a court summons, sighting of a man who resembles the rapist, or the discovery that she is pregnant.143

Notman and Nadelson also add details to the description of victims' emotional reactions to rape.144 They characterize rape as a crisis situation that increases feelings of helplessness; intensifies conflicts about dependence and independence; generates self-criticism and guilt that devalue the victim and may interfere with trusting relationships, especially with men; creates difficulty in handling anger and aggression; and produces persistent feelings of vulnerability.145 They also conclude that, although the identified posttrauma phases apply to any posttrauma stress, rape trauma syndrome includes the distinctive symptoms of sexual dysfunction and decreased trust in men.146

Notman and Nadelson offer an important qualification of

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140. See, e.g., Ruch & Hennessy, supra note 137; Effects of Sexual Assault, supra note 119.
141. Sutherland & Scherl, Patterns of Response Among Victims of Rape, 40 AM. J. ORTHOPSYCHIATRY 503 (1979) [hereinafter cited as Patterns of Response].
142. Id. at 507.
143. Sutherland & Scherl, Crisis Intervention with Victims of Rape, in THE RAPE VICTIM, supra note 118, at 335-36.

Sutherland and Scherl based these observations on the experiences of 13 rape victims they studied in 1966 and 1967. The victims were white women aged from 18 to 24 and were seen in a setting similar to a community mental health facility within 48 hours of the attack. Patterns of Response, supra note 141, at 504. Other researchers cite the Sutherland and Scherl modification of the RTS theory, in apparent approval of the theory. See, e.g., C. DEAN & M. DEBRUYN-KOPS, supra note 38, at 110-13.
145. Id. at 130.
146. Id. at 137-38; see also Bristow, supra note 1. Becker, Abel, and Skinner reported in a 1979 survey of clinical research on rape that 61% of rape victims showed a decreased interest in sex or discontinued all sexual activity. The Impact of a Sexual Assault, supra note 139, at 231.
their results: "Each rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support." Other researchers likewise observe that not every victim responds the same because complex variables may affect a victim's reaction to her assault.

One such variable is the relationship between the victim and her assailant. Studies suggest that rape by a stranger is less emotionally devastating than rape by an acquaintance in one's own home. A second variable that can change the impact of rape is the use of physical force. A woman who is beaten senseless may suffer less emotional trauma from a rape than one who submits to the rape under threat of her life. A possible explanation for these results is that a victim who can depersonalize the offender and herself will deny the event. A second possible explanation is that the victim is less likely to blame herself for a brutal attack by a stranger than for an assault by an acquaintance in which she escapes extrinsic physical injury. Although these researchers acknowledge the differ-

148. See, e.g., J. Williams & K. Holmes, supra note 33, at 21, 87, 110; Effects of Sexual Assault, supra note 119, at 107; Ruch & Hennessy, supra note 137, at 94. Reactions among victims may be affected by numerous variables including, but not limited to, the victim's age, ethnicity, attitude toward sexuality, and acquaintance with her assailant, the brutality of the attack, and the place of the attack. J. Williams & K. Holmes, supra note 33. These variables may explain the range of reactions to rape within the RTS construct; they do not, however, contradict the syndrome theory of reactions to rape. Many other diagnostic categories of psychological dysfunction, such as depression, are characterized by common symptoms that may be experienced in varying degrees by people suffering from the disorder. Likewise, one virus can cause different reactions in different individuals, all of which would be diagnosed in the same manner. For example, a strain of influenza could produce a range of symptoms in the people exposed to the virus, all of whom accurately would be described as "having the flu."

The usefulness and validity of the RTS theory thus are not destroyed by the fact that all victims do not experience precisely the same symptoms in the same order. Proponents of the theory, including Burgess and Holmstrom, make no claim of uniform reactions. See Burgess & Holmstrom, supra note 125, at 123-24.
149. See, e.g., Weis & Borges, Victomology and Rape: The Case of the Legitimate Victim, in The Rape Victim, supra note 118, at 35, 60.
150. Id. at 61.
151. Id. at 60-61.
152. See C. Dean & M. DeBruyn-Kops, supra note 38, at 106. Other studies suggest that a victim who assumes some responsibility for her victimization may cope more effectively because self-blame may reduce the victim's sense of
ences in the degree of impact experienced by rape victims and the range of variables that may explain those differences, they support the two-phase RTS theory of Burgess and Holmstrom.

A recent work by Williams and Holmes challenges the methodology of the Burgess and Holmstrom studies and their underlying assumption that rape is a crisis. The authors examine the empirical studies of rape victims’ experiences and conclude that the work “lack[s] methodological sophistication.” They observe:

For obvious reasons, there has been and should be a hesitancy to impose empirical designs and measures on personal tragedy. It is not surprising, then, that much of what is known about the rape experience is subjective, based on a limited number of case studies and characterized by a great many unsupported assumptions, one of which is that rape constitutes or precipitates a crisis.

They criticize several of the leading studies, including the work of Burgess and Holmstrom and that of Sutherland and Scherl, for not systematically documenting the “intrinsic meaning” of rape—how the victim perceives it. They further conclude that no data offer a reasonable explanation of why the extrinsic meaning of rape—how the public sees the rape victim—differs from that of other public attitudes towards other victims.

Williams and Holmes conducted their own cross-cultural study to examine both victim responses to rape and public attitudes about rape. The victim study was based on interviews with sixty-one rape victims who were seen in crisis centers in two Texas cities and who agreed to be interviewed. The public attitude study was based on the reactions of members of different ethnic groups to nine scenarios, including their definition of a specific set of facts as rape, their attribution of fault to the victim, and their willingness to prosecute the alleged assailant. Significantly, the Williams and Holmes study did not contradict the basic description of rape trauma syndrome; indeed, the results corroborated the Burgess and Holm-

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154. Id. at 12.
155. Id.
156. Id. at 14-17.
157. Id. at 17.
158. The victims were Anglo, Black, and Mexican-American. Id. at 52.
159. Id. at 56-57.
160. Id. at 60-62.
strom RTS model. The victims experienced negative feelings towards men, intense fear, and feelings of helplessness. Many victims changed residences and phone numbers after the assault. All the victims in the study evidenced some change in general functioning and a tendency to withdraw from routine activities. Many victims reported health concerns of varying degrees, including tension (eighty-two percent), panicky feelings (sixty percent), sleep disturbances (fifty-eight percent), nightmares (fifty-eight percent), headaches (forty percent), poor appetite (thirty-three percent), fatigue (twenty-seven percent), suicidal thoughts (twenty-seven percent), stomach problems (twenty-four percent), and dizziness (nine percent).161

Of the factors considered, only the race and ethnicity of the victims affected the degree of impact on the victim.162 The researchers concluded that people who treat rape victims, such as crisis intervention personnel, may operate on assumptions about victims that are based on studies of Anglo victims. They may thus mishandle victims of different races and ethnic backgrounds, believing that an overtly calm victim was not raped or that a hysterical one is psychologically disturbed.163 Williams and Holmes also concluded that victims' reactions to rape are not short-lived;164 victims may never fully recover and may function indefinitely at a "lower than pre-crisis level."165

These findings corroborate the RTS theory and show that the victim's psychological trauma is affected by the attitudes of people around her.166 Although the majority of the respondents in the Williams and Holmes study were victims of "stereotypic assaults"—that is, by a stranger, without warning, where

161. Id. at 95, 100, 104 & table 10. "Other symptoms," reported by 11% of the victims, included epileptic seizures exacerbated by the assault, manic behavior, chain-smoking, back problems, seizures from concussion, and frigidity. Id.

162. Id. at 105-07.

163. Id. at 111.

164. Id. at 109-10.

165. Id. at 109. Burgess and Holmstrom in their later work observed that rape victims still suffered effects of the rape years after the attack. See supra note 133. Research on the long-range effects of rape is limited because the interest in rape victims is a fairly recent phenomenon. This research has begun, however, and reports of long-range studies have begun to appear in the journals. See, e.g., Effects of Sexual Assault, supra note 119, at 107.

166. J. Williams & K. Holmes, supra note 33, at 21. They describe rape as "an individual experience which is compounded by the reactions of significant and generalized others who respond to the victim. Rape is thus conceptualized as comprised of interwoven intrinsic (personal) and extrinsic (public) dimensions." Id.
the stranger threatened the victim and the victim suffered observable injury\textsuperscript{167}—more recent studies indicate that the psychological cost of sexual assault is not confined to such stereotypic, completed rapes. In addition, victims of attempted rape experience short-term and long-range symptoms similar to those of victims of completed rape.\textsuperscript{168} These common reaction patterns again conform to the Burgess and Holmstrom two-phase model.\textsuperscript{169}

B. EXPERT TESTIMONY AND NOVEL THEORIES: THE STANDARD FOR ADMISSIBILITY

The admissibility of expert testimony hinges on fairly simple federal and state rules of evidence that afford the trial judge broad discretion. Although courts and legislatures invoke numerous phrases to describe the standard of admissibility, all jurisdictions essentially require that the expert testimony be helpful to the trier of fact.\textsuperscript{170} To determine what is helpful, a

\begin{itemize}
\item \textsuperscript{167} Id. at 56-57, 80-81.
\item \textsuperscript{168} Effects of Sexual Assault, supra note 119, at 112.
\item \textsuperscript{169} Id. at 107.
\item \textsuperscript{170} This is the standard set forth in the Federal Rules of Evidence, which has served as a model for many state evidence codes. Rule 702 states that:
\begin{quote}
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
\end{quote}

This discussion assumes that the testimony is offered by a person qualified as an expert. Expertise under Rule 702 is satisfied by a wide range of qualifications; an educational degree or other formal training is not necessarily required. The advisory committee note to Rule 702 explains the broad phrasing of the rule:
\begin{quote}
The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.
\end{quote}
\textsc{FED. R. EVID. 702 advisory committee note.} Courts have read the Rule 702 standard liberally to qualify as experts a vast array of persons with special
court should consider whether the jury already knows about the content of the testimony; whether the jury will be confused, prejudiced, or overawed by the testimony; whether the testimony is reliable; and whether the testimony will involve too much court time. 171 Neither federal nor state rules of evidence, however, explain how a court should weigh these factors, and judges, left to their own assessments and assumptions, use broad discretion in determining what is helpful. 172

When the expert testimony involves a novel underlying scientific theory or method, judicial discretion raises yet another

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171. See generally E. CLEARY, MCCORMICK ON EVIDENCE § 13, at 29-31 (1984) (discussing elements warranting use of expert testimony) [hereinafter MCCORMICK]; FED. R. EVID. 403 (grounds for exclusion of relevant evidence).


Appellate courts occasionally will find an abuse of discretion. See, e.g., In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 278-79 (3d Cir. 1983) (doubts about whether an expert can help the jury should be resolved in favor of admissibility); Garrett v. Desa Indus., Inc., 705 F.2d 721, 724 (4th Cir. 1983) (abuse of discretion to prevent mechanical engineer from testifying about negligent design of product manufactured by defendant).

As Professor Weyrauch has observed, the rules of evidence operate as masks of the judges' deep-seated and often unconscious value choices. Weyrauch says that when a judge has excluded evidence as irrelevant, the judge "might as meaningfully have said, 'I do not want to hear this at all!'" Weyrauch, Law as Mask—Legal Ritual and Relevance, 66 CALIF. L. REV. 699, 710-11 (1978). Although Weyrauch does not see the legal masks as necessarily wicked, he suggests that the masks can have negative uses when the social policies they protect or help enforce are harmful. Id. at 711-13. The exclusion of RTS evidence supports Weyrauch's theory, because neither logic nor reason explains the exclusion. The underlying reason may be that some judges simply "do not want to hear this evidence at all." As a result, they exclude the evidence by invoking the legal masks of "relevance," "discretion," "reliability," and "prejudice."
hurdle to admissibility. Most apply the Frye standard, which requires that the underlying scientific method or theory be generally accepted by the relevant scientific community. The notion is that judges should defer to a consensus of the experts because the judges lack the expertise to evaluate the value of novel theories and methods. Under the Frye standard, parties can demonstrate the general acceptance of novel scientific

173. The name derives from the case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The defendant in Frye argued that the trial court erred in excluding expert testimony about the results of a lie detector test to which he had submitted. The appellate court affirmed his conviction, holding that the lie detector test had not yet gained enough scientific recognition among physiological and psychological authorities to justify the testimony. Id. at 1014.


174. Frye, 293 F. at 1014. Absolute certainty, however, is not required. See, e.g., United States v. Baller, 519 F.2d 463, 466 (4th Cir.) (expert testimony identifying defendant's voice by spectrographic evidence admissible despite doubts within the scientific community about the process's absolute accuracy), cert. denied, 423 U.S. 1019 (1975).

175. See United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977) ("A courtroom is not a research laboratory."); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (Frye assures that "a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case."). A related concern is the aura of reliability that the scientific evidence may bear, despite its tentative or unproved character. Brown, 557 F.2d at 556.
evidence by its use in other cases; discussion about it in scientific journals, law reviews, and other scholarly or authoritative materials; the number of people writing about it; and other evidence that the expert's theory or method is generally accepted. Other courts depend on a reliability test, which requires only that the novel scientific evidence is reliable. "General acceptance" by the relevant scientific community is not required, but it can affect the weight of the testimony. Still other courts use a hybrid test, whereby the novel theory or method either must be accepted by scientists or have "passed from the stage of experimentation and uncertainty to that of reasonable demonstrability." Trial judges reserve broad discretion under each of these standards, and one commentator has argued that judges exercise that discretion arbitrarily:

Instead of using [the Frye standard] as an analytical tool to decide whether novel scientific evidence should be admitted, it appears that many courts apply it as a label to justify their own views about the


180. Coppolino v. State, 223 So. 2d 68, 70 (Fla. Dist. Ct. App. 1969); see also Brown v. State, 426 So. 2d 76, 85-90 (Fla. 1983) (using what it called the "relevancy approach" in holding that hypnotically induced recall testimony was properly admitted); cf. Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 395, 395 (1982) (rejecting the Frye general acceptance requirement and stating that trial judges should weigh the evidence in each case to decide if the procedure is at the "scientific stage of verifiable certainty" rather than calculate a consensus).
The reaction of judges to RTS evidence, as shown in the next section, supports this criticism. The reported decisions on RTS evidence tend merely to describe the evidence, cursorily define rape trauma syndrome, present a rote incantation of the legal tests for admissibility, and conclude that the evidence does or does not help, is or is not generally accepted, is or is not reliable, and will or will not prejudice the jury. Some courts excluding the evidence also add that the evidence will "invade the province of the jury." None of the decisions analyzes the research on which the theory is based; none examines in any depth the underlying theory or its acceptance in the relevant field of experts; and none articulates a persuasive rationale for admission or exclusion of the evidence. Also missing from these cases is a persuasive factual basis for the determinations of helpfulness, prejudice, reliability, or general acceptance.

C. THE RTS DECISIONS

Offers of expert testimony about RTS has surfaced in many civil and criminal cases, but only four of the crimi-
nal cases have reached the state supreme court level. The Supreme Court of Kansas concluded that RTS evidence is admissible when offered to prove nonconsent to intercourse, and the supreme courts of California, Minnesota, and Missouri concluded that it is inadmissible.


185. See, e.g., People v. Bledsoe, 36 Cal. 3d 236, __, 681 P.2d 291, 293-302, 203 Cal. Rptr. 450, 452-61 (1984) (rejecting testimony of rape counselor that victim suffered from RTS on issue of whether a forcible rape occurred); State v. Marks, 231 Kan. 645, 654-55, 647 P.2d 1292, 1299-1300 (1982) (allowing RTS evidence offered on issue of consent); State v. Saldana, 324 N.W.2d 227, 240 (Minn. 1982) (en banc) (rejecting RTS evidence offered on the issue of whether complainant was a victim of rape and had not fabricated her allegations); State v. McGee, 324 N.W.2d 232, 233 (Minn. 1982) (en banc) (same); State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (en banc) (rejecting RTS evidence offered on the issue of whether the intercourse was consensual); State v. Jackson, 97 N.M. 467, 468, 641 P.2d 498, 499, 500 (1982) (allowing psychologist who had examined victim to testify that victim's case was "one of the worst cases of rape trauma syndrome he had ever seen" when defense had voluntarily revealed to prosecution results of the psychiatric exam ordered at defendant's request); State v. Whitman, No. 9-181 (Ohio Ct. App. Apr. 27, 1984) (approving admission of psychiatric testimony on RTS in case involving 12-year-old victim offered to corroborate her testimony that she was raped); cf. State v. Thomas, 130 Ariz. 432, 434, 636 P.2d 1214, 1216 (1981) (en banc) (trial judge properly admitted testimony of witnesses acquainted with victim that she evidenced a marked change in personality after the incident; testimony relevant and not an improper attempt to bolster victim's credibility); People v. Mathews, 91 Cal. App. 3d 1018, 1022, 1025, 154 Cal. Rptr. 628, 630, 632 (1979) (victim of gang rape claimed RTS as part of defense of diminished capacity or self-defense to charge of murder of man with rapist; claimed RTS created fear for her life).

Closely related to these decisions are cases that involve expert psychological testimony on typical reactions of child sex-abuse victims offered to prove that abuse occurred or to explain seemingly curious behavior of the victims. See, e.g., State v. Kim, 64 Hawaii 598, 610, 645 P.2d 1330, 1339 (1982) (allowing a child psychiatrist and pediatrician to testify regarding credibility of child victim of incest by stepfather); State v. Middleton, 294 Or. 427, __, 657 P.2d 1215, 1221 (1983) (allowing testimony by social worker that child incest victim's behavior was typical of children sexually abused by a family member); State v. Harwood, 45 Or. App. 931, 940, 609 P.2d 1312, 1317 (1980) (same); Commonwealth v. Stago, 267 Pa. Super. 90, 406 A.2d 533, 535 (1979) (rejecting argument that court erred in allowing treating psychologist to testify that incest victims often felt depressed, angry, and guilty and needed psychiatric care and hospitalization); see also infra note 205.

186. Marks, 231 Kan. at 653, 647 P.2d at 1299.
187. Bledsoe, 36 Cal. 3d at __, 681 P.2d at 301, 203 Cal. Rptr. at 460; Saldana, 324 N.W.2d at 230; Taylor, 663 S.W.2d at 240.
1. Arguments Against RTS

Using the admissibility standard of "helpfulness to the jury," the Missouri and Minnesota courts concluded that expert testimony on RTS is not admissible in a consent-rape trial because it does not help the jury. The courts did not view RTS as a test that can accurately determine if a rape occurred because RTS might result from any psychologically traumatic event. Thus, an expert on RTS cannot testify that a victim's symptoms were caused by a particular incident but only that the victim possesses characteristics consistent with a traumatic stress reaction to an event such as rape. Such limited testimony, some courts believe, is irrelevant.

The Minnesota and Missouri courts offered a second argument against RTS evidence that the California court found especially persuasive: because mental health professionals use RTS theory as a therapeutic tool in counseling victims, and not as a fact-finding tool, it is unhelpful when offered to prove that a rape occurred. The California court, in adopting this argument, stressed the nonjudgmental nature of therapy and that rape counselors "do not probe inconsistencies in their clients' descriptions of the facts of the incident."

Given these alleged limitations of RTS, the only purpose the Minnesota and Missouri courts perceive for introduction of expert testimony on RTS in a consent-rape case is to bolster the victim's credibility. Most jurisdictions allow expert testimony on witness credibility only in unusual circumstances such as sexual assault cases involving child victims or mentally retarded victims. The reason courts give for this limitation is that credibility determinations are the province of the jury, not the province of experts.

All three courts viewed RTS evidence as prejudicial. They variously speculated that expert testimony on RTS would have
an aura of special reliability and certainty;\textsuperscript{197} that it would divert the jury's attention away from the real issue and cause confusion with numerous collateral issues;\textsuperscript{198} and that it could trigger a "battle of experts."\textsuperscript{199}

For these reasons, concluded the Missouri court, expert testimony that a victim suffers from RTS and that she has been raped is "not sufficiently based on a scientific technique, which is either parochially accepted or rationally sound, to overcome the inherent danger of prejudice created by [the witness's] status as an expert."\textsuperscript{200} RTS evidence has not, added the Minnesota court, "reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations."\textsuperscript{201} Finally, according to the California court, although RTS may be generally recognized by the relevant scientific community, "it is not relied on in that community for the purpose for which the prosecution sought to use it in this case, namely, to prove that a rape in fact occurred."\textsuperscript{202}

2. Responding to the Arguments Against RTS

California, Minnesota, and Missouri rejected the use of expert testimony about the presence of RTS in a victim as evidence of nonconsent because they believe such testimony is not "helpful" and would unduly prejudice the jury in favor of the victim. These conclusions are surprising, given the general trend toward relaxation of admissibility standards for expert testimony.\textsuperscript{203} The arguments these courts offer to support their conclusions are unconvincing and seem to be based on mistaken assumptions about the underlying psychological theory, about jurors, and about victims.

a. The Relevancy of RTS

The argument that RTS is irrelevant because a psychologist cannot properly say that a particular incident caused the symptoms misses the point. The Federal Rules define relevancy as having a tendency to make a fact more probable than

\begin{itemize}
  \item \textsuperscript{197} Bledsoe, 36 Cal. 3d at \textsuperscript{-}, 681 P.2d at 301, 203 Cal. Rptr. at 460; Saldana, 324 N.W.2d at 230; Taylor, 663 S.W.2d at 241.
  \item \textsuperscript{198} Taylor, 663 S.W.2d at 241.
  \item \textsuperscript{199} Saldana, 324 N.W.2d at 230; Taylor, 663 S.W.2d at 241.
  \item \textsuperscript{200} Taylor, 663 S.W.2d at 240.
  \item \textsuperscript{201} Saldana, 324 N.W.2d at 230.
  \item \textsuperscript{202} Bledsoe, 36 Cal. 3d at \textsuperscript{-}, 681 P.2d at 301, 203 Cal. Rptr. at 460.
  \item \textsuperscript{203} See United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977).
\end{itemize}
it would have been without the evidence. That definition makes psychological "bruises" as relevant as physical bruises in a consent-rape trial. Both certainly may result from many causes. Neither the physician who testifies that a woman has physical bruises nor a psychologist who testifies that a woman suffers from RTS can state unequivocally that the condition was caused by a specific incident of nonconsensual intercourse, yet the evidence of a victim's physical injuries is

204. See 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.'").

In a case applying the rule, the Fifth Circuit considered an offer of expert testimony that a man accused of willfully shooting at a passing helicopter lacked the "propensity to commit a violent act." United States v. Webb, 625 F.2d 709, 710 (5th Cir. 1980) (quoting Brief for Appellant at 24). The court found the offered testimony relevant, explaining:

The excluded testimony would have purported to show, based on psychological tests, that [the defendant] was non-violent and therefore unlikely to shoot at a helicopter. If competent, that evidence clearly would have some tendency to confirm [his] alibi, i.e., a peaceable man would more likely be planting turnips than shooting at passing aircraft.

Id. at 711. The court nevertheless concluded that the evidence was properly excluded because the subject was within the ken of the jurors and because the defendant's lay character witness already had testified to the defendant's non-violent character. Id. The court did not rule on the lower court's suggestion that the expert testimony was irrelevant for the additional reason that it was a personality analysis and not a prediction of human behavior. Id. at 710 n.1.

205. The fear some courts express about expert conclusions that embrace the "ultimate issue" is that the jury will defer to that opinion and abdicate its decision-making duties. The Federal Rules of Evidence and many state rules of evidence, however, have abandoned the rule that opinion testimony may not embrace an ultimate issue. See, e.g., Fed. R. Evid. 704. The opinion still must be helpful and not prejudicial. Applying these principles, several courts have admitted expert testimony having "ultimate issue" characteristics similar to that of RTS testimony. See, e.g., United States v. Johnson, 637 F.2d 1224, 1246 (9th Cir. 1980) (physician's opinion that a victim suffered serious bodily injury admitted in criminal assault case); United States v. Hearst, 563 F.2d 1331, 1351 (9th Cir. 1977) (psychiatrist's and psychologist's opinions that appellant acted voluntarily at the time of a robbery admitted in robbery case), cert. denied, 435 U.S. 1000 (1978); State v. Miller, 254 Iowa 545, 554, 117 N.W.2d 447, 453 (1962) (examining physician's opinion that victim was forcibly raped admitted in rape case); People v. Stull, 127 Mich. App. 14, 19, 338 N.W.2d 403, 406 (1983) (rape counselor's opinion that victim's behavior after rape was consistent with the profile of a rape victim admitted in rape case); People v. LaPorte, 103 Mich. App. 444, 451-52, 303 N.W.2d 222, 225 (1981) (examining physician's opinion that complainant was a legitimate rape victim admitted in rape case); People v. Wells, 102 Mich. App. 558, 560-62, 302 N.W.2d 232, 233 (1980) (examining physician's opinion that this was a "legitimate case of sexual assault" admitted in consent-rape case); State v. Ring, 54 Wash. 2d 250, 254-55, 339 P.2d 461, 464 (1959) (examining physician's opinion that victim's physical condition "could
RAPED TRAUMA SYNDROME

deemed clearly relevant in a rape case and admissibility of this evidence is beyond doubt. A victim's psychic injuries are equally relevant; the "fact" made more probable by evidence that the victim suffers from RTS is that the victim did not consent to the admitted intercourse.

As with physical bruises, proper cross-examination of an expert about a victim's RTS symptoms can elicit whether other explanations for the trauma symptoms exist and, if so, whether those explanations contradict the inference that the trauma resulted from the incident at issue. For example, the defense could explore whether the victim had been raped or sexually assaulted before in her life, a sad but significant possibility. Alternatively, the defense might question the victim regarding other life events that might produce stress disorder symptoms, such as death of a loved one, loss of a job, or other major stressful incidents.

The time between the intercourse and the psychological examination may also be an important factor for defense counsel to consider. Although some RTS symptoms may endure indefinitely, the acute phase begins immediately after the assault. A psychologist or psychiatrist who first interviews the victim months after an attack may be unable to detect accurately symptoms of the two-phase cycle because the examiner must rely on the victim's memory and account of her prior emotional, psychological, and behavioral symptoms.


206. See Ruch & Hennessy, supra note 137, at 103.
207. See supra note 165.
208. See supra notes 126-40 and accompanying text.
209. Bonnie and Slobogin suggest several ways that a mental health professional could test the reliability of a client's account. For example, the clinician could conduct multiple interviews, separated by several days; attend to nonverbal cues that register sincerity or ambivalence; administer a psychological test such as the Minnesota Multiphasic Personality Index that includes a scale designed to reflect whether a client responded truthfully to the test questions; or use hypnosis, a polygraph test, or data from other sources to help determine whether the client's account is truthful. Bonnie & Slobogin, The Role of
proposing treatment must always depend on a patient's memory and perception, as well as sincerity, in relating symptoms. The expert's own observations of the patient's response are a valuable but necessary supplement. As a result, an expert's reliance on the patient's account of her symptoms instead of direct observation of the Phase I symptoms does not make the expert's conclusions irrelevant. It may produce potential reliability and credibility problems, but these problems properly go to the weight, not the admissibility, of the testimony.

b. The Helpfulness of RTS

In finding RTS not helpful to the jury, the three courts make erroneous assumptions about the four aspects of helpfulness. The following application of all four factors (does the jury already know the information; will the jury be confused, prejudiced, or overawed by it; is it reliable; will it consume too much court time) demonstrates that RTS meets all four facets of the helpfulness test.

i. Jury Knowledge

Jurors do not already know about the psychological and behavioral impact of rape. Indeed, the studies on what jurors know about rape indicate that jurors enter the courtroom with misassumptions and biases that will make them peculiarly unresponsive to a woman's claim that admitted intercourse was nonconsensual—especially in the absence of bruises, cuts, or other physical injuries. Expert testimony about RTS can assist in overcoming this tendency of jurors to blame and disbelieve the victim; it may reveal the psychological trauma suffered by a victim, even though that trauma may have progressed to the second, less obvious stage by the time of trial. Jurors are not trained to identify trauma or evaluate the extent of a victim's psychological injuries. Psychological experts, like physicians diagnosing the extent of physical injuries, can better diagnose and explain a victim's psychological injuries than can an untrained person. Because the presence of either physical or psychological injuries makes it more probable that intercourse was not consensual, jurors need to know about all such possible injuries in order to perform their duty of determining

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210. See supra text accompanying notes 49-67; see also Ross, supra note 28, at 713-17.
whether rape has occurred. Expert testimony about RTS is useful because it provides information about some possible psychological injuries.

ii. Jury Confusion or Prejudice

The proper use of expert testimony about RTS need not confuse, prejudice, or overawe the jury. The argument that such expert psychological testimony is prejudicial because it bears on the credibility of a witness, and thus invades the province of the jury, is simply wrong. Expert testimony cannot "invade the province of the jury" unless the jury is instructed that it must agree with the expert's assessment. Indeed, putting evidence before a jury that reflects on the credibility of witnesses is common practice and any circumstantial evidence that supports a victim's testimony will have the effect of "bolstering" credibility. The testimony of a medical doctor that


212. See State v. Middleton, 294 Or. 427, 657 P.2d 1215, 1219 (1983) ("[i]t is impossible to usurp the jury's function. Even if there is uncontradicted expert testimony, the jury is not bound by it, for the jury alone must make the ultimate decision."); see also State v. Bush, 260 N.W.2d 226, 231 (S.D. 1977) (when there was conflicting expert testimony about defendant's mental state, jury nevertheless could find defendant guilty beyond a reasonable doubt because deciding which testimony to credit is jury's function).

213. See, e.g., State v. Staples, 120 N.H. 278, 281-82, 415 A.2d 320, 322 (1980) (rejecting argument that examining physician's testimony that memory loss is not unusual in rape victims was an improper opinion on the victim's credibility, because, "[f]ollowing defendant's logic, opinion evidence would be excluded whenever it corroborated a witness's testimony"); Commonwealth v. Stago, 267 Pa. Super. 90, 406 A.2d 533, 535 (1979) (rejecting argument that treating psychologist's testimony that incest victims often felt depressed, angry, and guilty and needed psychiatric care and hospitalization was an opinion about the victim's credibility).

Some cases go further and approve expert testimony on credibility in appropriate circumstances. See, e.g., Hawkins v. State, 326 So. 2d 229, 230-31 (Fla. Dist. Ct. App.) (ruling lower court erred in refusing to grant a continuance in rape trial to allow defense to produce an examining psychiatrist who could have testified that the child victim did not always tell the truth and had paranoid tendencies), cert. denied, 386 So. 2d 108 (Fla. 1976); Mosley v. Commonwealth, 420 S.W.2d 679, 680 (Ky. Ct. App. 1967) (stating lower court erred in excluding psychologist's testimony that victim was schizophrenic and immature, when testimony was offered to impeach her credibility); State v. Tafoya, 94 N.M. 762, 764, 617 P.2d 151, 153 (1980) (stating in dicta that New Mexico evidence rules allow expert testimony to impeach the credibility of witnesses, but the probative value must outweigh prejudicial effect; judge reserves discretion); M. LEVITT & M. LEVITT, A TISSUE OF LIES: NIXON v. HISS 160 (1979) (discussing the Alger Hiss case, in which the court allowed expert testimony
an alleged rape victim had bruises enhances the victim’s credibility and yet does not “invite the province of the jury.” The testimony of a psychiatrist or psychologist that a woman suffers from RTS should also enhance the victim’s credibility without usurping the jury’s duty to decide what circumstantial evidence it chooses to believe.

Some critics of this last view assume that jurors will be so overawed by the expert that they will abdicate their decision-making responsibilities and simply agree with the expert. As a result, the critics maintain, courts must be more careful about expert testimony that encroaches on the jury’s duties to decide ultimate issues and evaluate credibility than with other, less awesome evidence.214 Adherents to this view, however, cite no data for their assumption that jurors are overawed by mental health experts. Although empirical evidence on this issue is limited, the available evidence suggests that the assumption is wrong. Studies by Kalven and Zeisel215 and by Simon216 indicate that jurors are not overawed by expert testimony. Simon explains that “[t]he jury is too impressed with its importance as an institution and with its responsibility to the court and to the community at large to relinquish its decision-making powers.”217 Kalven and Zeisel express similar faith in the jurors’ independence and ability to comprehend the facts.218

These findings suggest that withholding expert testimony from jurors because it may prejudice or “overawe the jury” is paternalistic. If the expert’s testimony is too complex, the jurors (and the judge, for that matter) may ignore it; if a battle of

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214. See, e.g., United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).
217. Id. at 170.
218. H. Kalven & H. Zeisel, supra note 50, at 153, 157-59. Similarly unfounded is the fear that both sides will present so many experts with conflicting views that the jury will be confused if not overawed. Kalven and Zeisel found that “battles of experts” were infrequent; in only 3% of all cases did both sides present experts. Id. at 139. Medical experts were used in only 12% of all cases, and psychiatrists testified in less than 2%. Id. at 139-40. In rape cases, the prosecution used experts in 28% of the cases; the defense used no experts. Id. at 142 & table 40, 143 & table 41.
experts ensues, fact finders again are likely to discount the evidence; if neither occurs, the indications are that the jury will not treat the expert's testimony as conclusive even then.219 This may be especially true when the expert is a psychologist, psychiatrist, or expert in the "social sciences" 220 rather than a physicist, ballistics expert, or other expert in the "hard sciences." Even these latter experts, however, have been shown not to overawe the jury.221

The law's resistance to admitting expert psychological testimony on credibility is ironic. Judges and jurors consistently make decisions that are based on inferences, speculation, and intuition. Like psychologists, the fact finders rely on their own interpretations of a person's words, actions, and demeanor in deciding questions of perception, intent, credibility, motive, and fact. Unlike psychologists, however, they conduct their inquiry with no special training in human behavior or psychology, after only brief encounters with the witnesses, and in a setting and pursuant to a procedure that never has been shown to produce the most accurate results. If the substantive law compels the fact finder to assess how people think and behave in certain situations and psychology can offer information about that thought and behavior, it seems unreasonable to exclude expert evidence that might help the fact finder, forcing untrained jurors to draw conclusions based on untested hunches and intuition.222

219. H. KALVEN & H. ZEISEL, supra note 50, at 177 n.12 ("[I]n the case of expert witnesses, the judge never offers as a reason for disagreement [with the jury] the differential response to the expert's persuasiveness.").

220. Id.; see also Imwinkelreid, The Standard for Admitting Scientific Evidence: A Critique From the Perspective of Juror Psychology, 28 VILL. L. REV. 554, 566-71 (1983). Imwinkelreid observes that psychiatry in particular has received "extensive adverse publicity," especially after the 1982 trial of John Hinckley, Jr., making it even less likely jurors will be overawed. Id. at 569 n.112. He also argues that the discrimination against scientific evidence in general misses the point, because such criticism focuses on internal reliability of evidence without comparing that evidence's reliability to that of available alternatives, such as eyewitness testimony. Id. at 564-65; see also Bonnie & Slobogin, supra note 209, at 463-66 & n.121 (arguing that laypersons are naturally skeptical of psychology and that the knowledge of mental health professionals should be compared, not with the knowledge of physicists, but with that of laypersons about psychological aberrations and criminal behavior).

221. See, e.g., sources cited infra note 227.

222. The United States Supreme Court recently expressed a similar attitude toward expert psychiatric testimony in a death penalty case involving expert predictions of future dangerousness. See Barefoot v. Estelle, 103 S. Ct. 3383 (1983). The Court rejected the petitioner's argument that the psychiatric testimony against him was so unreliable that his sentence should be set aside,
Some of the resistance to expert psychological testimony on credibility may spring from judicial experience with other scientific evidence on credibility. For example, judicial resistance to lie-detector results may prompt arguments that psychiatrists or psychologists who give opinions are acting as lie detectors and by analogy should not be allowed to testify as to the witness’s veracity. Again, the argument fails. Analogizing a psychologist or psychiatrist to a lie detector is irrelevant unless the reasons for exclusion of lie detector results apply to expert psychological testimony. The major objection to lie detector results, however, is not primarily that of test reliability—the reliability of polygraph results is sufficiently high to satisfy relevance standards—but of prejudice, because it is assumed that jurors give polygraph results undue weight and thus a mechanical device rather than the jury would decide credibility. Regardless of whether that assumption is valid stating that “[i]f the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State’s psychiatrists along with opposing views of the defendant’s doctors.” Id. at 3397.

See State v. Kim, 64 Hawaii 598, 606 n.12, 645 P.2d 1330, 1337 n.12 (1982).


The interesting aspect of the polygraph cases is that they reflect an attitude of resistance to scientific evidence regardless of its reliability. Presumably, the alternative means of assessing credibility—judors' assessments of a witness's credibility based on in-court observation—is also unreliable, perhaps even more so. Even if polygraph results were 95% reliable, and were offered only in nonjury cases, chances are that some opponents still would not favor their admissibility.

The root of this resistance to a more scientific justice system may be an instinctive preference for people's judgments—even if erroneous—over those of machines. Once science begins to supplement the fact-finding process, the issue immediately arises of where the limits should be drawn and when the jurors should be allowed to decide the facts without additional, specialized information. This inquiry leads very quickly to imponderable questions, such as “What is truth?, “How do we perceive?,“ and so forth—questions that the legal system rarely asks itself (at least not consciously), because the participants are not trained to engage in this kind of intellectual or philosophical in-
for polygraph results,\textsuperscript{227} it does not apply to expert psychological testimony because such testimony does not involve a mechanical device impervious to effective cross-examination.

iii. Evidence Reliability

Despite the arguments of the Minnesota and Missouri courts that RTS evidence is not reliable because such symptoms may flow from any psychologically traumatic event, experts believe that RTS evidence is highly reliable. RTS symptoms are similar but not identical to other posttraumatic stress-disorder symptoms, and the stress reactions of rape victims often are related to the incident in ways that distinguish that reaction from reactions to other life stress. For example, if a victim were raped in her apartment, she may experience fear of being indoors—a reaction that would not necessarily flow from other types of stress.\textsuperscript{228} Similarly, rape victims often develop a fear of men, a reaction not common to nonrape psychological trauma.\textsuperscript{229}

Furthermore, even if the symptoms were identical to other stress disorder symptoms, RTS evidence still would be helpful to the jury. If the victim had suffered a physical bruise, no one would argue that the fact of the bruise is irrelevant to the issue of nonconsent or that a doctor's testimony about that bruise is unreliable simply because this "symptom" is consistent with other causes. Similarly, if a victim manifests the psychological patterns and other RTS symptoms shown to be common to
most victims of rape, then a permissible and plausible inference is that she is a rape victim.

Nor can RTS testimony be deemed unreliable because it is too novel or lacks support among the relevant scientific community. Over ten years have elapsed since the RTS theory was first advanced, research on rape victimology has mushroomed, yet no one writing on rape victimology seriously contests the RTS theory. Several researchers in studies on the impact of rape have corroborated Burgess and Holmstrom's original findings, and clinical psychologists and research psychologists use the model in therapy and as a research tool. Consequently, if courts apply their stated standards for admissibility of scientific evidence, they should accept RTS as a reliable theory because it has gained general acceptance in the relevant scientific community.

A caveat to the foregoing is suggested by the argument that the relevant scientific community uses RTS theory as a therapeutic tool in counseling rather than as a fact-finding tool. Psychiatrists and psychologists do not, the courts assume, use RTS to uncover whether the complainant was raped but as a means of evaluating what type of therapy is indicated for patients who come to them and allege they have been raped. Because the theory merely assumes that rape occurred, the argument continues, the theory cannot be applied in an inverse fashion—by identifying RTS symptoms in a patient and then concluding that the patient's symptoms were caused by rape—because that

230. See, e.g., J. BARKAS, VICTIMS 124-27 (1978) (an intensive 1975 study of rape victims at a Miami hospital showed that women suffer from a wide range of after-effects); S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 216 (1979) (listing studies showing that most rape victims develop psychiatric symptoms and behavioral changes following rape).

231. Other types of expert testimony that courts routinely admit in criminal trials are subject to substantial error or disagreement. As Saks and Kidd report,

[A]lthough the expert may be confident of the conclusions testified to, this or another expert could inform the court about relevant background findings such as those of the Forensic Sciences Association in a national study (Peterson et al., 1978) showing that as many as 51 percent of police laboratories misidentified paint samples, 71 percent misidentified blood samples, and 28 percent misidentified firearms.

Saks & Kidd, Human Informational Processing and Adjudication: Trial by Heuristics, 15 LAW & SOC'Y REV. 123, 155 (1980-1981). Nonscientific evidence also is subject to error, as the research on memory and eyewitness testimony makes clear. See generally E. LOFTUS, MEMORY (1980); MCCORMICK, supra note 171, § 206; Gardners, The Perception and Memory of Witnesses, 18 CORNELL L.Q. 391 (1933).
inverse inference never has been tested in the studies of rape victims.

This argument has superficial appeal when examined in isolation. Simply stated, it says that proof that a known $x$ leads to $y$ does not prove that $x$ is the only cause of $y$, such that the presence of $y$ will always mean $x$ and only $x$. For example, proof that people who are known to be left-handed tend to have certain characteristics does not mean that all people who have those characteristics are left-handed. Consequently, a study outlining the characteristics of $x$ would not be reliable for identifying $y$, and one describing left-handed people would not be an appropriate, reliable test for identifying left-handers.

This analysis is flawed both in its basic assumptions and in its conclusion. First, the RTS theory can be used by clinicians as a diagnostic tool: Burgess and Holmstrom noted that because a significant number of women suffer silently rather than report rapes, clinicians should consider a diagnosis of silent reaction to a past rape when a woman shows increasing anxiety as the interview progresses or reports sudden marked irritability, avoidance of relationships with men, change in sexual behavior, sudden onset of phobic reactions, dreams of violence, or other symptoms of RTS.232

Second, RTS symptoms are hardly usual or common occurrences. People tend not to form phobic reactions, to be profoundly fearful or depressed, or to have recurring nightmares. Likewise, people do not tend suddenly to move, change their phone numbers, or cease being interested in sex. When those symptoms occur in a woman who alleges she has been raped, and when they occur in a cycle consistent with that experienced by other rape victims, the logical inference is that she is the victim of a sexual assault. Rape is not the only inference, but it is a plausible one. All possible causes of aberrant symptoms of trauma can be considered and accounted for in court and in the therapist's office.

One part of the unreliability argument is that the victim might lie about the assault and "fake" her symptoms. The fear that complainants will fake RTS symptoms, however, is as unfounded as the fear that women will falsely cry rape. First, RTS symptoms are not self-evident: a potential lying "victim" would have to do substantial research in order to learn just

232. Burgess & Holmstrom, supra note 125, at 128. Burgess and Holmstrom suggest in another book that clinicians do use RTS to diagnose and treat rape victims. See Burgess & Holmstrom, supra note 133, at 449-52.
what to fake. Second, even if a person tried to fake RTS symptoms, a qualified treating psychologist or psychiatrist would be aware of deviations from common reactions and might well conclude from experience that this patient is not truthfully relating her symptoms. Third, the victim and the expert would be available in the courtroom where the jury could observe their demeanor and the defendant could attack the victim's credibility, the expert's credibility, and the reliability of the theory. Fourth, the disincentives to crying rape, and the personal and intimate nature of counseling or psychotherapy, further reduce the likelihood that women will lie to a treating psychiatrist or psychologist about a consensual sexual encounter.

It is possible, of course, that someone might lie about consensual intercourse, call it rape, complain to the police, conduct research on RTS, go to a psychiatrist, psychologist, or rape counselor, fabricate the RTS symptoms she has researched, and convince everyone that she is suffering from those symptoms. The risk of this sequence of events, however, is easily overestimated and is likely no greater, if not less, than the risk of false accusations that exists with any crime.

In addition to the "therapeutic only" objection, a second argument that RTS is not a reliable indication of rape significantly influenced the California decision to exclude the expert testimony. California criminal law determines consent to sexual intercourse by the defendant's reasonable, good faith perception, not by the victim's perception.3 Thus, the court concluded, it is possible that in some cases the victim may not believe she consented and thus may manifest trauma symptoms, even though the crime of rape has not been committed.34 The court was concerned that none of the studies on RTS includes attempts to verify the victims' recollections of the incident or to determine the "legal implication"235 of their accounts. It was also apparently disturbed because rape has a legal meaning that researchers may not have understood or intended to convey when they developed the RTS theory. The reactions of women in those studies thus may not have been reactions to legal rapes but to sexual encounters that the women

234. Id.
235. Id. at __, 681 P.2d at 300, 203 Cal. Rptr. at 459.
or the researchers perceived as rape. An expert cannot, therefore, prejudice the jurors by suggesting that because a victim suffers from RTS symptoms, she was raped. The California justices quickly added, however, that testimony about a complainant’s emotional and psychological trauma after an alleged rape is admissible.

This is a curious and circular argument. By approving admission of evidence about a victim’s emotional and psychological trauma, the judges contradict their own earlier suggestion that the victim’s perception of an incident as a rape is irrelevant. Whether an expert or a layperson testifies about a victim’s trauma, the testimony still is an assessment of the victim’s reaction, which obviously is affected by her perception of the incident. The California court presumably would not argue that hysteria, crying, nervousness, phobic reactions, or other evidence of trauma in a woman who alleges she was raped is irrelevant, even though the criminal law focuses on the defendant’s reasonable perception, not the complainant’s. The reactions of the victim are admissible because they have a tendency to prove that her version of the sexual encounter is correct. Again, the reactions do not prove it; they have a tendency to prove it.

Furthermore, even if stress reactions do occur in women who claim nonconsensual intercourse but whom courts find not

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236. Holmstrom and Burgess define rape as “forced, violent sexual penetration against the victim’s will and without the victim’s consent.” Holmstrom & Burgess, supra note 123, at 111. They specifically address the legal implications of a diagnosis of rape as follows:

Certain diagnoses—rape, for example, or battered child syndrome—may also entail criminal charges. The diagnosis has not only treatment implications for the patient but legal implications for another person, who may become a defendant charged with a criminal offense.

The court, to determine whether a crime was committed, has the right to subpoena the hospital record and expert witnesses, usually physicians. But as nurses expand their role, they may come to be defined as expert witnesses. By these procedures, the criminal justice system places the hospital staff in the role of detective.

While staff may not object to recording signs and symptoms, they may want to discuss whether to write down such a diagnosis as rape. Policy will not permit staff in some hospitals to be placed in the position of detective; policy may prohibit recording a presenting complaint of rape. Instead, the physician writes “gyn injury.”

At Boston City Hospital, physicians avoid the designation of rape. No matter how clear-cut the evidence, the diagnosis is written as “alleged rape,” “rape case for evaluation,” or “diagnosis deferred.”

Id. at 117.

237. Bledsoe, 36 Cal. 3d at __, 681 P.2d at 301, 203 Cal. Rptr. at 460.
to have been raped, the presence of trauma symptoms in a rape complainant should not be excluded simply because a court may ultimately find the defendant reasonably perceived consent. Some women may be physically bruised in consensual intercourse, and some may be physically bruised during intercourse that they perceive as coerced but that is not found to be rape. Yet the physical bruise nevertheless tends to prove nonconsent and so is probative. Psychological trauma likewise tends to prove nonconsent and should be accepted as probative.

Finally, RTS research can be explained to the jury or judge in a way that avoids the implication of ascertaining legal rape. For example, the expert can avoid the term "rape" in describing RTS and instead use the term "post-traumatic stress disorder." The expert may also be prohibited from opining that the complainant was legally raped but may be allowed to explain that the victim's trauma is consistent with that of other people who have reported being victims of nonconsensual intercourse. Though this may seem a semantic ploy, it is one that the California court seems to require.

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238. The California court was concerned that the studies of rape victims do not include follow-up work to verify that the victim was raped. But no research could be conducted that would isolate only true rape victims unless perhaps it included only victims whose rape was determined to be a "legal" rape by a court of law. Perhaps ironically, Williams and Holmes note that their study of the aftermath of rape included mostly victims of "stereotypic assaults," that is, victims raped by strangers, without warning, who were threatened ("preferably" with a weapon) and suffered observable injury. They explain that other rape situations were most likely selected out by the victims who elected not to report to the police, not to seek medical treatment, and not to contact a rape crisis program. The most obvious examples of so-called questionable assaults are those that occur within the context of what is generally consensual social interaction ("date rapes"), those in which the assailant is a former husband or lover, and those in which the victim herself feels somehow responsible for what happened, perhaps because of poor judgment or carelessness.

J. WILLIAMS & K. HOLMES, supra note 33, at 81. The self-reporting nature of the sample selection in the rape research studies makes those results more reliable, not less so, given the documented and marked tendency of women not to report "questionable" rapes and the researchers' definition of rape as forcible, violent sexual penetration. See supra note 236. The court may have confused therapy with research. Although practicing psychologists, psychiatrists, and rape counselors may suspend judgment in treating self-reporting rape-victim clients, researchers probably are more discriminating. This would explain why Burgess and Holmstrom chose only 92 of the 146 women who alleged they had been raped as the research sample. See supra text accompanying notes 122-23. Doubtless the remaining 54 complaining victims nevertheless were given treatment by Boston City Hospital.
iv. Proper use of court time

The final test of helpfulness is whether expert testimony on credibility consumes too much court time on an issue that is collateral to the primary issues of the case.\(^{239}\) In a consent-rape case, credibility is not simply a collateral issue. Indeed, some courts exclude psychological testimony in consent-rape cases on the basis that the \textit{only} real issue is the credibility of the parties and that issue is for the jury to decide without the influence of experts.\(^{240}\) Moreover, the additional court time this expert testimony would consume presumably would be no greater than the time spent on testimony by statisticians in employment discrimination suits, by physicians in personal injury suits, or by forensics experts in other criminal cases.

D. COMPULSORY PSYCHIATRIC EXAMINATIONS

Dean Wigmore urged that psychiatric examination of the complainant in a sexual assault case be mandatory.\(^{241}\) He believed, and some writers agree,\(^{242}\) that the examination is

\(^{239}\) McCormick notes that two of the reasons for excluding relevant evidence are the probability that proof will "create a side issue" and the likelihood that evidence will "consume an undue amount of time." \textit{McCormick, supra} note 171, § 185, at 439-40; \textit{see also} State v. Taylor, 663 S.W.2d 235, 239 (Mo. 1984) (en banc) (court may "exclude evidence if it unnecessarily diverts the attention of the jury from the question to be decided").

\(^{240}\) \textit{See, e.g.}, State v. Saldana, 324 N.W.2d 227, 232 (Minn. 1984) (concluding that the admission of a rape counselor's testimony was error because the sole issue was whether the sexual intercourse was voluntary and credibility was the sole province of the jury); State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (excluding psychological testimony because "[t]he only real issue was whether the intercourse was forcible or consensual . . . [and the] jury could determine whether the intercourse was forcible based on its own evaluation of the physical evidence and testimony and credibility of the witnesses"). To argue that the victim's credibility is a key aspect of a consent-rape case is not to suggest that her credibility should be scrutinized in ways that have no relevance to the incident. Nevertheless, as long as misperceptions about rape persist and jurors continue to carry these misperceptions into the courtroom, victim credibility will, rightly or wrongly, remain a key factor in a rape case. Thus, although extrinsic evidence of a witness's credibility ordinarily is inadmissible, this rule alone should not bar expert testimony on credibility in consent-rape cases.

\(^{241}\) \textit{See supra} text accompanying notes 98-99.

\(^{242}\) \textit{See, e.g.}, \textit{McCormick, supra} note 171, § 45, at 95-96; \textit{A. Moenssens & F. Inbau, supra} note 121, at 131-32; Juvalier, \textit{Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach}, 48 \textit{Calif. L. Rev.} 648, 676 (1960) (favoring exam when corroborative evidence is lacking and defendant can confirm the need for the exam); Saxe, \textit{supra} note 213, at 244-45; Weihofen, \textit{supra} note 213, at 73-75 (but cautioning that it may be premature to require the examination in every prosecution for a sex offense); \textit{Note, Complainant Credibil-
greatly needed because it can help determine whether the victim is fabricating the charge of rape as a result of some psychological disorder. No jurisdiction has adopted Wigmore's extreme position that the examination be mandatory in all cases, and the factual basis for Wigmore's fear of fabrication has been discredited.\textsuperscript{243} Nevertheless, many courts maintain that a judge has inherent authority to order a psychiatric examination of a complainant in narrow and compelling circumstances, such as when the charge is uncorroborated or when the defendant adduces evidence to suggest that the complainant may suffer from a psychological disorder.\textsuperscript{244}

Opponents of compulsory psychiatric examinations maintain that the examination invades the privacy of the victim, that the results may not be valuable because the examination is mandatory, that psychiatrists are trained to determine a mental defect or disorder and not credibility, that requiring the examination for rape victims treats them differently from victims of

\textsuperscript{243} See O'Neale, \textit{supra} note 242, at 133-38 (exploring traditional attitudes and exposing lack of basis for them); \textit{supra} text accompanying notes 100-06.

\textsuperscript{244} For cases acknowledging court authority to order psychiatric examination of the complaining witness in sexual offense cases, see Government of Virgin Islands v. Scuito, 623 F.2d 869, 874-76 (3d Cir. 1980) (acknowledging authority but upholding trial court's denial of defendant's motion for exam); Ballard v. Superior Ct., 64 Cal. 2d 159, 177, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966) (abrogated by 1980 Cal. Stat. ch. 16, § 1 (codified at CAL. PENAL CODE § 1112 (West Supp. 1984))); McDonald v. State, 307 A.2d 796, 798 (Del. 1973); Dinkins v. State, 244 So. 2d 148, 150 (Fla. Dist. Ct. App. 1971) (in extreme circumstances); Easterday v. State, 254 Ind. 13, 16-17, 256 N.E.2d 901, 903 (1970); State v. Maestas, 190 Neb. 312, 314, 207 N.W.2d 699, 700 (1973); State v. Clasey, 252 Or. 22, 24, 446 P.2d 116, 117 (1968). Even those courts that acknowledge their power to order examinations state that this power should be exercised only in exceptional circumstances, such as when the charge is uncorroborated or when the defendant can produce evidence that the complainant may suffer from a mental disorder. In nearly every reported appellate case, the court upheld the trial judge's denial of defendant's motion for a court-ordered examination.

other crimes who are not required to submit to an exam, that
the evidence will distract the jury and waste time, and that the
underlying rationale for the examination is a perversive view of
women as liars or hysterics.245 Such criticism prompted Cali-
ifornia in 1981 to prohibit court-ordered examinations.246

Given these criticisms of court-ordered examinations of
complainants in rape cases, a proposal that the prosecution's
RTS evidence should be admissible may raise the spectre of
further harm to a complainant. That is, if presence of RTS is
probative evidence that a woman has been raped, then absence
of RTS might be probative evidence that she has not been
raped,247 and a defendant arguably should have access to that
information. This access might be construed to include the
right to compel all complainants to submit to examinations or
to release records of any private therapy or voluntary coun-
seling pursued by complainants.248 Either alternative could have

245. See, e.g., O'Neale, supra note 242, at 119-21, 146-50. See also United
States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978), where the court quoted the
district court to the effect that

a court-ordered medical examination is an infringement on a witness'
privacy, and this factor must be taken into account by the district
court. . . . "The examination itself could serve as a tool of harass-
ment, and the likelihood of an examination could deter witnesses
from coming forward, producing a chilling effect in crime detection."


247. This is not necessarily so. The psychological research has focused on
discovery and treatment of trauma of persons complaining of sexual assault. It
indicates that most, not all, victims suffer from the characteristic symptoms of
RTS. Therefore, the inference that one who suffers from RTS is a rape victim
is different from the inference that one who does not suffer from RTS is not a
rape victim. The studies on RTS support the former inference; they do not
necessarily support the latter.

248. The director of a rape crisis center in Pittsburgh was held in contempt
for refusing access to records of a rape victim. See Pittsburgh Action Against
Rape v. Pride, 494 Pa. 15, 428 A.2d 126 (1981). The court held that a court
could authorize defendant's counsel to inspect the statements of the victim
contained in the file. The court rejected the appellant's argument that the
communications were absolutely privileged. Defense counsel sought the
records to impeach the complainant. Id. at 27-28, 428 A.2d at 131-32.

A defendant could conceivably argue that access to such information from
a complainant's therapist, counselor, or psychiatrist is vital to his constitu-
tional right to defend himself, as it may contain material evidence favorable to
him. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973) (refusal to admit evi-
dence of another's confession to crime charged or to permit impeachment of
the other's subsequent denial violates due process); Washington v. Texas, 388
U.S. 14 (1967) (refusal to admit testimony of convicted coparticipant in crime
violated due process); Brady v. Maryland, 373 U.S. 83 (1963) (same). See gener-
ally Clinton, The Right to Present a Defense: An Emergent Constitutional
adverse effects, such as deterring a complainant who has sought counseling from reporting a rape out of fear that confidential information from her therapy will be disclosed, deterring a complainant who reports her rape from seeking counseling, and compounding a victim's trauma and violation by opening to public view her private thoughts, feelings, and behavior as they may relate to her sexual assault.

There is, however, a third alternative that would accommodate adequately both the complainant's privacy and the defendant's right to evidence. When a complainant voluntarily seeks counseling, crisis intervention, or psychotherapy, and the prosecution does not call her therapist or counselor as a witness, then her communications with the therapist or counselor should be privileged. The defendant should not be entitled to discover the communications or the expert's opinions or findings based on the communications. Moreover, the court should not order the victim to submit to an examination by the defendant's expert absent a showing of the compelling and unusual circumstances that have traditionally been required for such an order.

If the prosecution decides to hire a nontreating expert to evaluate the complainant but does not intend to call the expert as a witness, the defendant should be entitled, on proper motion, to the limited discovery of results or reports favorable to him, as determined by a trial judge in an in camera review of the evidence.249 Again, the court should not order an examina-

249. This suggestion is based on criminal discovery rules and constitutional requirements. In some jurisdictions, criminal discovery rules may compel disclosure of any relevant reports or statements of experts made in connection with the particular case, including results of mental examinations. See, e.g., Fed. R. Crim. P. 16(a)(1)(D). The report, however, typically must be material to the defendant's defense or intended for use by the government in its case-in-chief. Moreover, these discovery rules exempt privileged material.

The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87 (1963), that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The Court explained in a later case that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976). This requirement means more than a "mere possibility" that the evidence might have helped the defense. Id. at 109-10; see also Hilliard v. Spalding, 719 F.2d 1443, 1445 (9th Cir. 1983) (evidence is material if it would have created a reasonable doubt that was not already there); United States v. Pitt, 717 F.2d 1394, 1339 (11th Cir. 1983) ("Due process mandates the disclosure of favorable evidence, material for exculpatory or impeachment purposes, to an accused upon request . . . .") (emphasis in original), cert. denied, 104 S. Ct. 1421 (1984).
tion of the complainant absent compelling circumstances.

If, however, the prosecution decides to call a treating or nontreating expert to testify about the complainant's symptoms, the defendant should be entitled to discovery and inspection of the results of this expert's examination. The defendant also should be entitled to a court order compelling the complainant to submit to an examination by the defendant's expert. If the complainant refuses to submit to an examination by defendant's expert, however, or if the court decides that she should not be compelled to undergo this examination, the state should be prohibited from calling its expert as a witness. If the defendant's expert testifies, the scope of that expert's testimony about the complainant should be restricted to topics relevant to a diagnosis of RTS. The state's decision to introduce expert testimony on RTS should not open the door to character evidence or other impeachment evidence unrelated to the RTS diagnosis. When the state decides to call a nontreating expert—such as Holmstrom or Burgess—to testify generally about the RTS theory and research, the defendant should be entitled to discovery of the expert's name and address and any reports or statements the expert may have made in connection with the case.

This alternative gives the complainant some control over the defendant's access to RTS evidence, yet the result is consistent with the purpose of privileges, with policy, and with precedent. Privileges are created to promote relationships that depend for their existence on confidentiality between the parties. The need for the privilege must outweigh the accused's right to evidence. Although the balance struck between these interests varies from jurisdiction to jurisdiction, the modern trend is to protect psychotherapist-patient communications either by statute or through case law. This is true, despite growing criticism of privileges in other areas, primarily because of people's recognition of the compelling need for confidentiality associated with psychiatric or psychological counseling. This need is equally compelling, if not more so, in the context of counseling of rape victims, who may find their usual support

251. The complainant, however, still should be allowed to testify to her symptoms.
253. Id. at 619-21.
systems unhelpful or even hostile should they reveal that they were raped.

Once the prosecution decides to introduce expert testimony based on these communications, however, the interest in preserving victim confidentiality must give way to the accused's right to meet that evidence with effective cross-examination.\footnote{See, e.g., \textit{Fed. R. Evid.} 412.} Therefore, if a complainant decides she does not want the defendant to have access to the communications, the prosecution should respect that determination as consistent with public policy and should forego expert testimony on RTS. The policy interest in protecting a rape victim's privacy also is expressed in the "rape shield" statutes, which exclude reputation or opinion evidence about her past sexual behavior.\footnote{See, e.g., \textit{People v. Lowe}, 96 Misc. 2d 33, 38, 408 N.Y.S.2d 873, 876 (N.Y. Crim. Ct. 1978).}

This alternative will not impair the defendant's ability to defend himself. Defendants currently do not ordinarily have access to private psychological evaluations or therapy records of complainants.\footnote{But see \textit{supra} note 248.} The low conviction rate in consent-rape cases, however, indicates that defendants are able to defend themselves adequately through the usual cross-examination techniques and attacks on the victim's credibility. Furthermore, no criminal defendant is constitutionally entitled to obtain all evidence that the prosecution or a witness possesses.\footnote{For example, the United States Supreme Court ruled unanimously in \textit{California v. Trombetta}, 104 S. Ct. 2528 (1984), that the Constitution does not require California to preserve breath samples of drivers who submit to a breath test, even though it was possible to save the breath samples for later verification. The state need only preserve evidence "that might be expected to play a significant role in the suspect's defense." \textit{Id.} at 2534. Given the accuracy of breathalyzer test results, the breath samples rarely would help defendants. The Court noted that defendants in California are entitled to inspect the machine used to test their breath. \textit{Id.} at 2534-35. Thus, even though the state used the results of the breath test against the defendant and then discarded that evidence—rendering it unavailable to the defendant—the Court found no violation of the defendant's constitutional rights. This suggests that the approach to RTS evidence proposed herein adequately protects the defendant's constitutional rights. The evaluation results would be available to the defendant whenever the state intended to use those results against the defendant. Moreover, the defendant would be entitled to conduct his own evaluation. Finally, the results would be available whenever they were procured by the state and favorable to the defendant.}

254. \textit{See, e.g., Fed. R. Evid. 412.}


256. \textit{But see supra} note 248.

257. For example, the United States Supreme Court ruled unanimously in \textit{California v. Trombetta}, 104 S. Ct. 2528 (1984), that the Constitution does not require California to preserve breath samples of drivers who submit to a breath test, even though it was possible to save the breath samples for later verification. The state need only preserve evidence "that might be expected to play a significant role in the suspect's defense." \textit{Id.} at 2534. Given the accuracy of breathalyzer test results, the breath samples rarely would help defendants. The Court noted that defendants in California are entitled to inspect the machine used to test their breath. \textit{Id.} at 2534-35. Thus, even though the state used the results of the breath test against the defendant and then discarded that evidence—rendering it unavailable to the defendant—the Court found no violation of the defendant's constitutional rights. This suggests that the approach to RTS evidence proposed herein adequately protects the defendant's constitutional rights. The evaluation results would be available to the defendant whenever the state intended to use those results against the defendant. Moreover, the defendant would be entitled to conduct his own evaluation. Finally, the results would be available whenever they were procured by the state and favorable to the defendant.
Privileges and work-product protection further limit defendants' rights to discover the state's evidence against them. To restrict a rape defendant's access to the results of a psychological examination of a complainant in the manner described is thus neither unusual nor unfair. Defense counsel on cross-examination can attack the expert's credentials, experience, and training; the underlying theory, method, and evaluation techniques; and the expert's evaluation and conclusions in the case sub judice. The defendant can also, when his finances permit, hire his own experts.

Finally, it is important to remember that expert psychological testimony on RTS is not expert psychological testimony.
about the victim's credibility, though it, like any other evidence, may affect the jury's assessment of her credibility. Wigmore's court-ordered examinations were to determine the mental capacity of complainants for truth telling and to uncover any abnormality that might affect the complainant's credibility. Wigmore's belief that the examinations were necessary only in sexual assault cases resulted from his exaggerated suspicion of women. In contrast, the object of the psychological examination proposed herein is to uncover characteristic trauma in a woman who alleges she has been raped. The underlying assumption—that many women who have been raped experience trauma that tends to manifest itself in RTS symptoms—is based on reliable studies of rape victims and quite obviously grew out of efforts to better understand and treat victims of sexual assault. Accordingly, the risks, the objectives, and the roots of the examination differ from those of the examinations Wigmore proposed, and the objections to the latter thus do not apply.

III. PSYCHOLOGY: THE ROLE OF MENTAL HEALTH PROFESSIONALS IN THE COURTROOM

A. OUR TROUBLE WITH PSYCHOLOGY

The RTS decisions of the California, Minnesota, and Missouri courts contradict the evidentiary principles cited in those decisions. One explanation for the incongruity between what courts say and what they do with regard to RTS evidence is that judges intuitively may not trust the assessment by mental health professionals that the professionals' theories and methods are reliable. Some people insist that psychology and psychiatry are, at best, mere speculation about an enormously complex and elusive subject.261 Judicial distrust of this speculation may be greatest when it is offered against a criminal defendant on the "ultimate issue" of whether a crime has occurred262 and thus might have prompted the courts to exclude RTS evidence even though a consensus of the relevant scientific community considers it reliable.

Ziskin, who opposes the use of expert psychological testimony in trials, likely would approve of the exclusion of RTS.263

261. See authorities cited infra note 263.
262. See Bonnie & Slobogin, supra note 209, at 434-35 (the law's tolerance for speculation and imprecision is lowest when the speculation provides the basis for criminal liability or for significant stigmatization or punishment).
263. His two volume treatise, which contains arguments against the court-
His criticism of courtroom use of psychology is biting:

Despite the ever increasing utilization of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria of admissability and should not be admitted in a court of law and, if admitted, should be given little or no weight. It is unfortunate that because of the need of courts for the assistance they hope these "experts" can provide, because of the requirement that attorneys use any means legally available to advance the cause of their clients, and because of the ignorance or unwillingness to face facts on the part of the "experts" involved, such testimony continues to be accorded scientific status. In the light of current scientific evidence, there is no reason to consider such testimony as other than highly speculative.264

Other writers, however, disagree with Ziskin's skepticism about the helpfulness of mental health professionals in the legal process. They argue that the value of the experts is not a function of whether their methods or theories are as reliable as expert opinions in other areas of medicine or science but of whether the experts can offer better or more information than the jury or judge would have otherwise.265 Most courtroom use of psychology, is designed to assist lawyers in defending against expert testimony. See 1 J. ZISKIN, supra note 225; see also Ennis & Litwack, supra note 224; Falknor & Steffen, Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist," 102 U. PA. L. REV. 980, 994 (1954); Gardner, The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy, 2 LAW & PSYCHOLOGY REV. 99 (1976); Comment, The Psychologist as Expert Witness: Science in the Courtroom?, 38 MD. L. REV. 539 (1979); cf. Note, Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703, 51 S. CAL. L. REV. 129 (1977) (criticizing admissibility of expert testimony based on hearsay and suggesting safeguards for reliability).

264. 1 J. ZISKIN, supra note 225, at 1. Ziskin further argues that with psychology, the process of collecting "data" may influence the substance of the data elicited. For example, if a defendant charged with murder is examined by three psychiatrists and each asks the defendant about thoughts of suicide after the act, the answer could go from "No" to "I'm not sure, I don't recall" to "Yes." Ziskin offers two possible reasons for the change in answers: the defendant realizes the benefits of an affirmative answer, or repetitive asking plants the idea of suicide in the defendant's mind. See id. at 29. Also, according to Ziskin, psychiatry "is a field where there is maximum opportunity for biases to operate because it is based almost entirely on 'soft' knowledge and to a large extent on 'soft' data." Id. at 38. The only "hard" data psychiatrists and psychologists can observe is behavior—verbal and otherwise—from which they make inferences about a person's inner self. Ziskin maintains these inferences lack sound foundation and are little more than "fanciful speculation." Id. at 9.

mentators fall somewhere between the poles of blanket rejection and uncritical acceptance of expert psychological testimony and suggest that the legal system needs to develop a means of presenting this evidence that would minimize its dangers without sacrificing its potential benefits.266

Professor Bonnie, a defender of psychiatric participation in the criminal process, believes that

administration of the penal law sometimes requires the resolution of questions that can be answered only by approximation. . .

. . . Of course the law should be sensitive to the limits of professional understanding. But it should not ignore clinical perspectives on human behavior simply because they fall short of the physicist's understanding of the laws of motion.267

The problems with expert psychological testimony, Bonnie maintains, derive from the legal system's shortcomings and not from the supposed deficiencies of the testimony. He continues:

If experts give conclusory testimony, encompassing so-called ultimate issues—and fail to explain the basis for their opinions—the fault lies with the bench and bar, not with experts. If forensic evaluators do not have access to the same information and reach different opinions for this reason, the fault lies with the legal system, not with the experts.268

Bonnie's argument makes sense. If the law forces jurors and judges to make decisions that entail approximation and speculation, and if psychology can add meaningful insight to assist them, that information should be admitted. Accordingly, because the law of rape forces fact finders to decide questions of credibility, perception, and intent, and because expert testimony on RTS can add meaningful information to assist them, such testimony should be admitted.

The hostility some people express toward psychology and expert psychological testimony also may reflect misplaced frustration about the inability to reduce variables that the law deems significant to objective and certain principles. The appropriate response, however, is not to exclude expert psychological testimony simply because it is not absolute. Instead,

and skills and thus fear exposing them to the adversarial process. Other bases for their resistance suggested by Delman include the ethical dilemma of "Who is the client?" and a concern, at least with regard to the insanity defense, that the issue is essentially a moral judgment that experts should not make for society. Delman, supra, at 252-53, 256-57.

266. See, e.g., Bonnie & Slobogin, supra note 209.


268. Id. at 5-6.
either subjective, individualistic factors should be removed from the legal inquiry—which most people likely would oppose—or some meaningful rationale should be developed for deciding when and how psychology, despite its limitations, can help.269 Although judges have neither the resources nor the procedures to determine independently the reliability of a psychological theory or method, lawyers and psychological experts can study the research about a theory and analyze what that research and theory mean for the particular issue being tried. The judge, in turn, must actually examine the results of this inquiry and articulate a factual basis for the judge's determination about the helpfulness of the testimony.

Absent this investigation and scrutiny, evidentiary rulings can be based only on judge's intuition and speculation. Such intuitive rulings then may have a monolithic effect when other courts simply follow them rather than conducting their own inquiries into the helpfulness of the evidence. This result is offensive because it may be wrong on the merits, excluding potentially helpful evidence or admitting unreliable evidence. It is also troubling because a decision-making process that is conclusory and impressionistic undermines people's faith in the fairness of that process. A review of the decisions in which courts have admitted expert psychological testimony underscores this concern and demonstrates the need for a principled approach to expert psychological testimony.

B. ACCEPTED USES OF EXPERT PSYCHOLOGICAL TESTIMONY

Opponents of expert psychological testimony notwithstanding, courts have admitted such testimony on a wide range of issues. To argue, however, that RTS evidence should be admitted simply because courts have used other expert psychological testimony is problematic for several reasons.

First, these non-RTS cases may not provide good precedent

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269. If, for example, a jurisdiction chooses to follow Frye and defer to the relevant experts' consensus about the reliability of psychological methods and theories, see supra notes 173-78 and accompanying text, then it should do so consistently and according to stated criteria for determining that consensus. If, however, a jurisdiction chooses to treat the experts' consensus as just one factor and allow courts to decide for themselves whether a psychological theory or method is reliable, then the courts must develop standard ways of investigating and resolving whether a theory or method is valid. Likewise, if the law continues to consider the knowledge or impressionability of jurors as a factor in the admissibility of expert testimony, then courts must examine evidence about what jurors know and what will in fact overawe or prejudice them.
because they, like their counterparts excluding expert psychological testimony, are conclusory and reveal very little about the reliability of the underlying psychological theory or method. Second, the judges give no guidance as to which, if any, differences or similarities among various forms of expert psychological testimony are legally significant. For example, the observation that expert testimony about posttraumatic stress disorder ("PTSD") has been admitted to prove a defendant's diminished capacity at the time of a murder says very little about whether expert testimony on RTS should be admissible to prove a forcible assault. The characteristics of PTSD that made it acceptable to the judges simply are not known, and therefore it cannot be determined whether RTS shares those characteristics.

This judicial silence renders the usual method of legal reasoning—analogy to past decisions—peculiarly unhelpful in analyzing the admissibility of expert testimony about a new psychological theory. Nevertheless, the precedent is instructive as a means of eliminating principles that cannot explain the exclusion of RTS evidence despite the appearance that they do.270

270. The precedent reveals four uses of an expert's psychological diagnosis or assessment: to reconstruct past behavior or mental status, to assess current capacity, to predict future capacity or behavior, and to determine the cause of a current condition.

First, courts have allowed mental health experts to testify about the effects of an individual's existing psychological disorder or condition on the individual's past behavior or mental state. For example, an expert can testify that a defendant currently suffers from schizophrenia, that the defendant probably suffered from it at the time of the crime, and that the disorder made the defendant unable to appreciate right and wrong at the time of the crime. See, e.g., United States v. Brawner, 471 F.2d 969, 994, 1002, 1006-07 (D.C. Cir. 1972) (permitting expert testimony on the causal relationship between a mental disease and the existence of substantial capacity for control and knowledge at the time of the act); Jones v. State, 289 So. 2d 725, 727 (Fla. 1974) (permitting expert testimony regarding defendant's insanity at the time of the alleged act, based on expert's examination of defendant and elicited history); State v. Kelly, 118 N.J. Super. 38, 44-45, 285 A.2d 571, 575 (App. Div.) (same), cert. denied, 60 N.J. 350, 289 A.2d 795 (1972). But see United States v. Lewellyn, 723 F.2d 615, 617-18 (8th Cir. 1983) (rejecting use of pathological gambling as support of insanity defense to embezzlement charge because no general acceptance in scientific community of condition as mental disease).

Similarly, an expert's testimony that a defendant suffers from "Vietnam Vet syndrome" or from "battered woman syndrome" could be offered to prove a diminished capacity at the time of a crime or to support a claim of self-defense. See, e.g., United States v. Burgess, 691 F.2d 1146, 1148 (4th Cir. 1982) (testimony that defendant suffers from posttraumatic stress—"Vietnam Vet"—disorder offered to prove diminished capacity at time of crime); People v. Pettibone, No. 9632-C (Sonoma Super. Ct. Cal. Feb. 29, 1980) (same); Smith v. State, 247 Ga. 612, 619-20, 277 S.E.2d 678, 683 (1981) (testimony that defend-
By comparing cases that admit expert testimony to cases that do not, the court noted instances where expert testimony on susceptibility to inducement where defendant claimed entrapment, was allowed. See, e.g., State v. Anaya, 438 A.2d 892, 894 (Me. 1981) (same); State v. Cocuzza, No. 1484-79 (N.J. Super. Ct. Middlesex Co., May 27, 1981) (same); State v. Mann, Cr. 80-F-75 (Kanawha County Ct., Charleston, W. Va., Apr. 2, 1981) (same); see also United States v. Hill, 655 F.2d 512, 516 (3d Cir. 1981) (error to exclude expert testimony on susceptibility to inducement where defendant claimed entrapment), cert. denied, 104 S. Ct. 699 (1984); People v. Parks, 135 Colo. 344, 347, 579 P.2d 76, 78 (1978) (testimony admitted on defendant's ability to make free and intelligent decisions at the time of his arrest); People v. Sanchez, 112 Misc. 2d 100, 101-02, 446 N.Y.S.2d 164, 165 (N.Y. Sup. Ct. 1982) (testimony about defendant's intelligence admitted to support defense of duress); Commonwealth v. McCusker, 448 Pa. 382, 391, 292 A.2d 286, 289 (1972) (expert testimony admitted on "heat of passion"). See generally Bonnie & Slobogin, supra note 209, at 473-74 (a majority of courts permit expert testimony on some variety of the diminished capacity defense).

Finally, an expert's testimony that a defendant does not match the psychological profile of a sexual deviate could be offered to prove that the defendant did not commit a sexual assault. This is a more tenuous inference than the preceding ones because it includes the step from an individual's psychological makeup to his or her behavior rather than to his or her state of mind. See, e.g., People v. Jones, 42 Cal. 2d 219, 225, 266 P.2d 38, 43 (1954) (allowing testimony of psychiatrist that defendant charged with sexual abuse was not a sexual deviate). But cf. United States v. MacDonald, 688 F.2d 224, 227-28 (4th Cir. 1982) (holding no abuse of discretion to exclude expert psychiatric testimony that defendant's personality configuration was inconsistent with violent murders of his family), cert. denied, 459 U.S. 1103 (1983); Douglas v. United States, 386 A.2d 289, 296 (D.C. 1978) (holding psychologist may not testify regarding defendant's capacity to commit child molestation, because psychology not exact enough to determine reliably that defendant did not commit a crime by examining his characteristics); State v. Cavallo, 88 N.J. 508, 526, 443 A.2d 1020, 1029 (1982) (rejecting expert testimony of psychiatrist that defendant did not match the psychological profile of a rapist because, although relevant, defendant failed to prove the evidence was accepted as reliable); State v. Holcomb, 643 S.W.2d 336, 340-41 (Tenn. Crim. App. 1982) (excluding testimony by psychologist that defendant's personality made him unlikely to have engaged in violent behavior because it seemed "more a matter of speculation than of science").

When expert psychological testimony is offered against a party to prove that he or she acted consistently with the expert's diagnosis on a particular occasion, the traditional bar to character evidence offered to prove propensity may apply. See, e.g., State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981) (holding prosecution cannot introduce evidence of "battered child syndrome" or establish defendant's "character" as a battering parent unless defendant first puts character in issue). At least one court has cited this propensity rule in excluding evidence favorable to the defendant. See Freeman v. State, 486 P.2d 967, 972 n.8 (Alaska 1971) (stating that it is "uniformly accepted" that psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should probably be regarded as character evidence).

Mental health experts also have testified about their diagnosis of an existing psychological disorder or condition and assessment of the effects of that disorder or condition on an individual's current capacity or well-being. Examples include expert testimony on competency of an individual to stand trial, see, e.g., Blunt v. United States, 389 F.2d 545, 547-48, passim (D.C. Cir. 1967);
that exclude testimony about RTS, we can critique the possible rationales for rejection of RTS testimony. For example, judges routinely admit an expert's prediction of future dangerousness of a defendant. When such a judge then excludes testimony on RTS, several possible reasons for the latter ruling can be eliminated. The relevant experts' assessment of the reliability of the theory and underlying research cannot explain the conclusion. Rape specialists believe that RTS accurately describes typical psychological trauma in victims of nonconsensual intercourse, whereas professionals and laypersons alike have concluded that expert predictions of future dangerousness are subject to substantial error.\textsuperscript{271} An alternative explanation for the different rulings might be the judge's perception that RTS is a credibility assessment whereas a future dangerousness prediction is not. Thus, because credibility assessments are the exclusive province of the jury, the judge may believe that juries must decide the issue of consent in rape trials without the aid of RTS testi-

Colbert v. State, 18 Md. App. 632, 641-42, 308 A.2d 726, 732 (1973); People v. Crawford, 66 Mich. App. 581, 585-88, 239 N.W.2d 670, 671-73 (1976), expert testimony on an individual's credibility, see supra note 213, expert testimony on psychological injuries offered to prove damages in a tort action, see, e.g., Lalonde v. Weaver, 360 So. 2d 542, 545-46 (La. App. 1978); Barlow v. Thornhill, 537 S.W.2d 412, 415-16 (Mo. 1976); Select Ins. Co. v. Boucher, 561 S.W.2d 474, 475 (Tex. 1978), and expert testimony offered on the issue of parental fitness in custody proceedings, see, e.g., Painter v. Bannister, 258 Iowa 1390, 1397-1400, 140 N.W.2d 152, 156-58, cert. denied, 385 U.S. 949 (1966). This last category has a predictive component as well, for the judge is also speculating as to future fitness.

In addition, mental health experts have testified about the effects of an existing psychological disorder or condition on an individual's future capacity or behavior. Examples include expert predictions of future dangerousness of criminals in sentencing or parole determinations, see, e.g., Barefoot v. Estelle, 103 S. Ct. 3383, 3396 (1983), and expert testimony predicting the future psychological cost of psychic injuries in a tort action, see, e.g., Crown Drug Co. v. MacBride, 303 P.2d 970, 978-79 (Okla. 1956).

Finally, some courts have allowed mental health experts to testify about the likely past cause of an existing psychological disorder or condition. For example, an expert's testimony that a child suffers from characteristic psychological problems may be offered to prove the child is a victim of child abuse and has not fantasized the incident, see, e.g., State v. Kim, 64 Hawaii 598, 607-08, 645 P.2d 1330, 1338 (1982); State v. Middleton, 294 Or. 427, —, 657 P.2d 1215, 1220-21 (1983); State v. Harwood, 45 Or. App. 931, 939-40, 609 P.2d 1312, 1317 (1980); Commonwealth v. Stago, 267 Pa. Super. 267 Pa. Super. 267 Pa. Super. 90, 406 A.2d 533, 535 (1979), or an expert's testimony that a woman suffers from RTS may be offered to prove that she is a victim of rape, see supra note 185.

mony, although juries may be guided by expert testimony in regard to a defendant's potential dangerousness in the future. As shown above, however, this rationale is a weak one that probably masks distrust of the evidence rather than revealing solicitude for the jury. Finally, the differing results cannot be explained by the potential cost of erroneous or unreliable testimony. A judge should be as concerned about the margin of error in a future dangerousness prediction, which is used for parole and sentencing purposes, as about the potential error in RTS diagnosis, which is used for conviction purposes, because expert predictions of future dangerousness are allowed when capital punishment is a possible sentence. Thus, the admission of expert testimony about future dangerousness raises questions about whether the exclusion of testimony about RTS is an arbitrary result.

A situation in which a judge admits expert testimony on the psychological effects of child sexual assault but excludes RTS testimony is even harder to justify. The evidence in both cases is based on similar inferences: a child/woman who manifests y symptoms, experienced generally by victims of child sexual assault/adult rape, likely is a victim of assault/rape. The only apparent difference is the assumption that consent cannot be an issue in a child sexual assault case. Credibility is the key factor in both cases, however. Both crimes are difficult to prove because of the private nature of the act and the absence of witnesses other than the participants. In both cases the testimony is offered by the prosecution, and in both cases the penalty is extremely harsh. Yet child sexual assault cases expressly admit testimony to bolster credibility and adult rape cases seldom do.

Although both the sexual abuse of a child and the rape of an adult are heinous acts, it may be that the helplessness and immaturity of the child make the rape of a child more outrageous to judges than the rape of an adult. This could prompt

272. See supra text accompanying notes 211-22.

273. E.g., State v. Kim, 64 Hawaii 598, 607, 645 P.2d 1330, 1337-38 (1982); State v. Middleton, 294 Or. 427, 657 P.2d 1215, 1219-20 (1983); see also State v. Harwood, 45 Or. App. 931, 939-40, 609 P.2d 1312, 1317 (1980) (expert evidence relating to child witness credibility in sexual abuse case is admissible if related to witness's ability to perceive, remember, or relate but not to prove complainant's veracity). Disbelief of the complainant occurs in child sexual abuse cases as it does in adult rape cases. This disbelief is arguably more logical in child-abuse cases because most of the few reported cases of false accusations involve children. See supra text accompanying notes 100-04.
judges to rule more favorably on evidence offered by the state in child molestation cases. Also, the primary fears in child sexual abuse cases likely are misidentification and fabrication. The fears in a consent-rape case, however, go beyond fabrication and include the many myths previously described. These myths and fears may be harder for some judges to overcome than the fears associated with child molestation and thus may make them less inclined to admit new kinds of expert testimony that would aid the prosecution. Nevertheless, a judge's opinions about the seriousness of a crime and sympathy for a victim are improper bases for rulings on expert testimony.

Comparison of these examples of approved uses of expert psychological testimony with the exclusion of RTS testimony does not reveal the true rationale for the rulings. It merely eliminates some potential explanations and suggests that the real basis for the rulings is not the appropriate one: the relative reliability of the underlying theory or method. The decisions cannot be explained solely by judicial distrust of psychiatrists, because psychiatric evidence is admitted in many cases. The severity of the sanction likewise fails as a rationale because expert testimony is admitted in other cases in which the sanction is equally or more severe.274 The results do not

274. The California court attempts to explain this inconsistency by arguing that in some of these cases, the testimony is offered to rebut the defendant's suggestion that the victim's behavior was inconsistent with the claim of rape. In this context, the expert testimony "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." Bledsoe, 36 Cal. 3d at __, 681 P.2d at 298, 203 Cal. Rptr. at 457. This is an odd argument, as it suggests that the California court is not concerned about the methodology of studies on reactions to sexual assault when the studies contradict people's views but is concerned when they confirm people's views. The methodology—reliance on victims' accounts of their assaults—is the same in both contexts. In addition, as has been shown, rape mythology is especially significant and distorting in consent-rape cases, and RTS evidence therefore should be "particularly useful" in those cases.

What the court may have meant is that the evidence may be admitted to rebut the defendant's argument that the complainant's actions were inconsistent with those of a typical rape victim. In arguing this, the defendant has implicitly opened the door to evidence about what typical reactions are. When, however, the prosecution offers RTS evidence as part of its case-in-chief, then the defendant has not (affirmatively) injected popular myths about typical reactions to rape into the trial and thus may prevent the prosecution from introducing the evidence.

The obvious problem with this analysis is that a defendant cannot "open the door" to unreliable rebuttal evidence. The California court suggests that an RTS diagnosis is not a reliable indicator of whether a rape has occurred because the studies on RTS involved no investigation of the victims' accounts.
depend on whether the state rather than the defendant offers the testimony, because expert psychological testimony favoring a defendant, such as that a defendant lacks the propensity to commit a violent act or does not match the profile of a rapist, has also been excluded. Finally, fear of invading the province of the jury cannot be the rationale for the exclusion of RTS evidence, because expert testimony about a child's credibility is admitted, as is evidence about an adult complainant's credibility when offered by the defendant.

No single principle seems to guide the courts in their decisions to exclude RTS evidence. Judges instead react to the evidence on a case-by-case basis, invoking broad discretion and general legal standards to support their visceral responses. They do not, however, decide the cases on the basis of an investigation of the four factors that should help determine the helpfulness of the evidence. Moreover, the decisions they reach are irreconcilable, unpredictable, and virtually unreviewable. This is a poor process that has, at least in the case of the RTS issue, produced a bad result.

IV. CONCLUSIONS

Rape is a crime that few understand. People misperceive why it occurs, when or where it happens, how it might be prevented, and what effect it has on a victim. When a woman claims she was raped and the man claims she consented, misperceptions about rape play a prominent and documented role in the fact finder's imagination and speculation about who is telling the truth. A qualified expert who has examined the woman and detected signs of RTS can help to educate this fact finder in several ways. The expert can confirm the existence of trauma consistent with the woman's allegation of nonconsent. The expert can also, in explaining RTS, help the jurors to understand the psychological cost of rape—even when the victim is a nonvirgin or a prostitute, lacks physical injuries, met her

The court believes that the profile of a rape victim that emerges from these studies is no measure of the typical legal rape victim's reaction to an assault. If that is true, then rebuttal testimony about RTS would not tend to disprove the defendant's version of a typical reaction to a rape, even if it were inconsistent with the defendant's version of a typical reaction. The admissibility of expert testimony under prevailing evidentiary principles does not depend on whether the testimony is offered as substantive evidence or for impeachment purposes; it hinges on reliability and helpfulness of the evidence.

275. See, e.g., MacDonald, 688 F.2d at 227; Cavallo, 88 N.J. at 526, 443 A.2d at 1024; Holcomb, 643 S.W.2d at 341.
assailant in a bar, or is married to him. Further, the expert can help to dispel the fact finder's confusion of seduction fantasies with the reality of rape. Hearing, perhaps for the first time, about the profound fear and long-term psychological trauma that rape can cause, the fact finder may overcome traditional disbelief of a complainant who was raped by someone who was not a stranger wielding a weapon in a dark alley.

Finally, a treating expert who diagnoses RTS in a complainant can also help to educate the victim, who also likely knew nothing about rape until it happened to her. The experienced expert can help her to understand her reactions to the assault and may thereby help her to avoid self-blame and self-punishment. Moreover, the expert's courtroom testimony about her emotional pain and trauma may give the woman a sense of being heard that may help her to withstand the defendant's inevitable and rightful attack on her credibility and perception.

As the law of sexual assault and the attitudes toward the crime and its victims change,276 the role of mental health experts in sexual assault cases also will change. For example, public education about sexual assault eventually may reduce the need for education of the fact finder about the psychological aftermath of a nonstereotypic assault. When the myths about the crime of rape and its victims are dispelled, then the need for experts to combat those myths ideally will disappear as well. Until that time, however, the experts can help an imperfect process work in a more informed, more enlightened way.


Significant legal changes include the rape shield statutes that protect complainants from unwarranted intrusions into their sexual histories, see id. at 171; Fed. R. Evid. 412, and the redrafting of rape laws to include rape within marriage, see Rani, supra. See generally Comment, Spousal Exemption to Rape, 65 Marq. L. Rev. 120 (1981). Other developments include an increasing number of civil suits brought by rape survivors, including tort actions against third parties such as employers, owners of shopping centers, and others who fail to maintain reasonably safe conditions for employees or patrons. See, e.g. Skaria v. State, 110 Misc. 2d 711, 442 N.Y.S.2d 838 (N.Y. Ct. Cl. 1981). See generally Ballou, Recourse for Rape Victims: Third Party Liability, 4 Harv. Women's L.J. 105 (1981); Hauserman & Lansing, Rape on Campus: Postsecondary Institutions as Third Party Defendants, 8 J. Coll. & U.L. 182, 184 (1981-1982) (predicting an increase in number of suits brought against postsecondary institutions by plaintiffs seeking damages resulting from sexual assaults).