

THE ADMISSIBILITY OF EXPERT TESTIMONY REGARDING RAPE TRAUMA SYNDROME IN RAPE PROSECUTIONS†

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I. INTRODUCTION

The last decade has seen a dramatic increase in the use, in criminal cases, both by the prosecution and the defense, of evidence of psychiatric or psychological "syndromes."¹ One of the most important of these syndromes, and one that has been the subject of substantial litigation during the last three years, is "rape trauma syndrome."²

"Rape trauma syndrome" is a term that was coined in 1974 by a psychiatric nurse and a social scientist as a result of a research project studying women who sought treatment claiming to have been raped.³ During the ensuing eleven year period this syndrome has been the subject of extensive social science and medical research.⁴ Basically, behavioral scientists⁵ assert that there exists a set of physical and emotional symptoms experienced by rape victims which are so prevalent and consistent that they constitute a "syndrome" that most rape victims can be expected to experience. Researchers claim that the symptoms are distinctive enough that diagnosis of the syndrome is possible. After the syndrome is diagnosed, treatment can then proceed.⁶

"Rape trauma syndrome" evidence entered the rape prosecution arena in the early 1980's. Prosecutors became aware that when consent is an issue in a rape case, that is, when the defendant admits that the intercourse occurred, but claims that the complainant consented to the intercourse, testimony from an expert that the complainant suffered from rape trauma syndrome would be evidence of lack of consent, because the syndrome does not result from consensual intercourse.⁷ Such expert testimony was admitted in some rape prosecutions, and in mid-1982 the question of whether such testimony should be admitted began reaching state appellate courts.

Rape trauma syndrome has been met with widely varying treatment in state appellate courts. Two courts have held the evidence to be admissible on the issue of consent, but

¹ Examples of syndromes the use of which has been urged by the prosecution include battered child syndrome, *see, e.g.*, *People v. Jackson*, 18 Cal. App. 3d 504, 505-06, 95 Cal. Rptr. 919, 920 (1971), and battering parent syndrome, *see, e.g.*, *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Examples of syndromes that have been urged as defenses or mitigating factors by defendants include battered woman syndrome, *see, e.g.*, *Ibn-Tamas v. United States*, 407 A.2d 626, 631 (D.C. 1979), and Vietnam veteran's syndrome, *see, e.g.*, *United States v. Burgess*, 691 F.2d 1146, 1151-52 (4th Cir. 1982).

² "Rape" is traditionally defined as: "[u]nlawful sexual intercourse with a female without her consent." BLACK'S LAW DICTIONARY 1134 (5th ed. 1979). This definition is acceptable for purposes of this article, although it is possible that the symptoms of "rape trauma syndrome" can result from other nonconsensual intimate sexual activity, such as oral or anal sex, as well as from the nonconsensual vaginal intercourse that traditionally has been the focus of legal definitions of rape.

Aspects of the admissibility of rape trauma syndrome evidence are discussed in the following authorities: Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985); Raum, *Rape Trauma Syndrome as Circumstantial Evidence of Rape*, 11 J. PSYCHIATRY & LAW 203 (1983); Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. TOL. L. REV. 707 (1983); Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U.L. REV. 417 (1984); *Recent Developments: Rape Trauma Syndrome*, 7 HARV. WOMEN'S L.J. 301 (1984).

³ Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974).

⁴ See *infra* text accompanying notes 22-63 and 140-61.

⁵ The term "behavioral scientists" as used herein refers generally to persons who study and report on human behavior, including psychiatrists, psychologists, nurses, social workers, and sociologists. The term "behavioral science" will be used to refer to the study of human behavior.

⁶ See *infra* text accompanying notes 22-63 and 140-61.

⁷ See *id.*

to varying degrees.⁸ Four courts have held the evidence to be inadmissible on the issue of consent,⁹ although one of these courts has created an exception for "unusual" cases involving children or mentally retarded complainants.¹⁰ One of the courts that has rejected the evidence on the issue of consent has indicated that such evidence could be admissible to explain unusual behavior of the complainant.¹¹ Meanwhile, the first court to hold such testimony admissible is now divided as to whether that initial decision was correct.¹² Important appellate decisions concerning rape trauma syndrome are now being handed down on a regular basis.¹³

The admissibility of evidence concerning rape trauma syndrome is of great interest due to the seriousness of the crime involved and the serious consequences to a defendant if the testimony is improperly admitted. Further, rape trauma syndrome is an evidence scholar's dream because virtually every major evidentiary objection can be plausibly made to its admission.¹⁴ Given the importance of the topic, the divergent judicial treatments of it are unhelpful and unsatisfactory.

This article will begin examination of the admissibility of evidence concerning rape trauma syndrome by exploring research results of behavioral scientists.¹⁵ Next, the judicial precedents that existed with respect to similar evidence before behavioral scientists coined the term "rape trauma syndrome" will be outlined.¹⁶ Against this background, the article will scrutinize the "first generation" of cases dealing with rape trauma syndrome evidence, *State v. Marks*¹⁷ and *State v. Saldana*.¹⁸ The article will then study the

⁸ *State v. Marks*, 231 Kan. 645, 653-54, 647 P.2d 1292, 1298-1300 (1982); *State v. Liddell*, — Mont. —, 685 P.2d 918, 922-23 (1984).

⁹ *People v. Bledsoe*, 36 Cal. 3d 236, 245-47, 681 P.2d 291, 297-98, 203 Cal. Rptr. 450, 456-57 (1984); *Allewalt v. State*, 61 Md. App. 503, 514-16, 487 A.2d 664, 669-70 (1985); *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235, 240-42 (Mo. 1984).

¹⁰ *Saldana*, 324 N.W.2d at 231.

¹¹ *Bledsoe*, 36 Cal. 3d at 247-48, 681 P.2d at 298-99, 203 Cal. Rptr. at 457-58.

¹² *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984).

¹³ Courts are also dealing increasingly with expert testimony on a similar subject — child sexual abuse syndrome. See, e.g., *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984); *State v. Maule*, 35 Wash. App. 287, 667 P.2d 96 (1983). Despite the fact that rape trauma syndrome and child sexual abuse syndrome are similar subjects for expert testimony, they arise from entirely separate bodies of behavioral scientific studies. Rape trauma syndrome studies deal with *adults* who have been *forcibly* raped. See *infra* text accompanying notes 22-63 and 140-61. Child sexual abuse syndrome studies deal mainly with *children* who are victimized *without* physical force or threat of force. An in-depth analysis of child sexual abuse syndrome is beyond the scope of this article. It will be mentioned later, however, for the purposes of showing how courts have dealt differently with that syndrome than with rape trauma syndrome (see *infra* text accompanying notes 283-85) and how courts sometimes confuse the two syndromes (see *infra* note 230).

¹⁴ The objections include that: it violates the *Frye* rule regarding scientific evidence, see *infra* text accompanying notes 252-350; it is irrelevant, see *infra* text accompanying notes 351-61; the witness is not qualified as an expert, see *infra* text accompanying notes 374-87; it is unfairly prejudicial, see *infra* text accompanying notes 388-99; it improperly bolsters the complainant's credibility, see *infra* text accompanying notes 400-05; it is hearsay, see *infra* text accompanying notes 406-12; and it is contrary to a rape shield statute, see *infra* text accompanying notes 413-17.

¹⁵ See *infra* text accompanying notes 22-63.

¹⁶ See *infra* text accompanying notes 64-104.

¹⁷ 231 Kan. 645, 647 P.2d 1292 (1982).

¹⁸ 324 N.W.2d 227 (Minn. 1982). For a discussion of these two cases, see *infra* text accompanying notes 105-39.

progress of rape trauma syndrome in behavioral scientific circles, and in the courts,¹⁹ since *Marks* and *Saldana*. Next, an analysis of the various evidentiary objections that have been raised to the use of such evidence and suggestions as to the resolution of such objections will be presented.²⁰ Finally, the article will explore the relatively new concept of the use of rape trauma syndrome evidence by a criminal defendant.²¹ The article will conclude that expert testimony regarding rape trauma syndrome should, in most cases, be admissible because it is reliable evidence tending to prove the element of lack of consent in a rape case, it may be helpful to a jury in overcoming certain prevalent misconceptions that can stand in the way of rational decisionmaking, and it is not violative of any rule of evidence.

II. THE DEVELOPMENT OF RAPE TRAUMA SYNDROME PRIOR TO *MARKS* AND *SALDANA*

A. *In Behavioral Scientific Research*

Amazingly, the study of the effect of rape on its victims did not begin in the United States until 1970.²² The first study was conducted by two public health crisis workers who, after interviewing thirteen rape victims, concluded that specific, predictable responses to rape existed. The common responses were found to occur in three phases. Phase One, called the Acute Reaction, encompassed the victim's immediate reaction to the rape and was characterized by feelings of shock, disbelief and fear. Phase Two, called Outward Adjustment, was described as a period of pseudo-adjustment during which the victim made attempts to return to normalcy while denying or suppressing feelings evoked by the trauma. Finally, Phase Three, called Integration and Resolution, was the period during which resolution of the feelings about the rape usually occurred. This phase might be precipitated by a specific event such as diagnosis of pregnancy or realization of facing a police line-up, or any number of incidents which result in a deterioration and breakdown of the defenses successfully employed by the victim in Phase Two. A common characteristic of the Integration and Resolution phase was depression, which was described as psychologically normal for most young women who have been raped. While the authors concluded by stating that their findings indicated a clear pattern of response among young adult rape victims, the validity of the conclusion was questionable due to the small sample size and the demographic similarities. The authors of this initial study utilized their findings as an aid in developing supportive intervention techniques for mental health workers.²³

¹⁹ See *infra* text accompanying notes 140-61 and 162-238, respectively.

²⁰ See *infra* text accompanying notes 239-417.

²¹ See *infra* text accompanying notes 418-25.

²² Sutherland & Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503 (1970).

²³ In 1973, two less empirical articles dealing with the trauma of rape were published. The first article addressed the issue of contributing factors to the trauma experienced by the rape victim. Weis & Borges, *Victimology & Rape: The Case of the Legitimate Victim*, 8 ISSUES IN CRIMINOLOGY 71 (1973), reprinted in *RAPE VICTIMOLOGY* (L. Schultz ed. 1975). The authors suggested that the identifiable patterns of response among rape victims could arise from having to deal with the emotional conflicts that result from the decision whether to relate the experience to others or keep the rape a secret. The less closely a woman's rape experience coincided with the "rape myth" that dominated American society — that women are usually raped by men they do not know, and not

The term "rape trauma syndrome" was coined in 1974 by Ann Wolbert Burgess and Linda Lytle Holmstrom to describe the occurrence of certain specific symptoms of rape victims.²⁴ The research which resulted in the coining of the term "rape trauma syndrome" involved a study of ninety-two adult rape victims who sought treatment at a Boston hospital. The researchers concluded that "rape trauma syndrome is the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation."²⁵ The authors explained rape trauma syndrome as a two-stage reaction: the acute phase, during which the victim's life style was completely disrupted; and the long-term phase, which required a complete reorganization of the victim's disrupted life style.

The authors described the two phases more precisely. The acute phase was comprised of impact, somatic, and emotional reactions. The impact reactions encompassed feelings of shock and disbelief which were exhibited in either an express manner (fear, anger, and anxiety were displayed), or in a controlled manner (feelings were masked). The somatic or physical reactions included soreness, bruising, and other physical symptoms relative to the area of the body which was the focus of the attack. Loss of appetite and sleep pattern disturbances were also common. The primary emotional reactions were fear and self-blame. The authors stated that, "[i]t is this main feeling of fear that explains why victims develop the range of symptoms we call the rape trauma syndrome. Their symptoms are an acute stress reaction to the threat of being killed."²⁶ The second phase, or long-term reorganization process, began two or three weeks after the rape and was characterized by changes in lifestyle (including change in residence), dreams and nightmares, and a multitude of phobias.²⁷

Even between these two early rape studies, clear patterns began to emerge. Both studies noted definite time frames for the common reactions, evidenced by the characterization of the responses in phases: *immediate*, days and weeks following the attack in which a victim appears paralyzed by feelings of shock, fear and disbelief; and *long term*,

by men they do know, such as dates or acquaintances — the greater would be her degree of traumatization. Therefore, the decision to reveal or not to reveal the rape was viewed as increasing the relative degree of trauma experienced when the rapist and the victim were not strangers.

Also appearing in 1973, along with recognition of the trauma, was research regarding the need to educate the criminal justice system to the needs of rape victims. *Prince George's County (Maryland) Task Force to Study the Treatment of the Victims of Sexual Assaults* (1973) (task force report), reprinted in I. DRAPKIN & E. VIANO, *VICTIMOLOGY* (1974). The findings of a task force specifically organized to study the treatment of victims of sexual assault revealed that, despite outward appearance or behavior, *all* rape victims suffered trauma. The study also indicated that crisis intervention should be available to victims and that persons providing treatment should be knowledgeable about the trauma experienced by the victims.

²⁴ See Burgess & Holmstrom, *supra* note 3, at 981.

²⁵ *Id.* at 982.

²⁶ A. BURGESS & L. HOLMSTROM, *RAPE! VICTIMS OF CRISIS* (1974).

²⁷ *Id.* The authors also found two distinct variations of rape trauma syndrome. "Compounded reaction" to rape was defined as the exhibition of additional symptoms by victims (including depression, substance abuse, and suicidal or psychotic behavior) who had past psychiatric or behavior problems. "Silent reaction" to rape was seen in victims who had not reported or revealed the rape to anyone. The symptoms of this variation of rape trauma syndrome included increased anxiety, sudden marked changes in sexual behavior or sudden marked irritability, as well as persistent feelings of paranoia, loss of self-confidence or violent dreams and nightmares.

commencing some months after the attack, during which the victim begins to resolve the emotional conflicts left by the rape experience.²⁸

In 1976, several articles viewed rape as a medical "crisis" and studied it in terms of crisis theory. The authors concluded that, to understand a victim's reaction to rape, it is essential to understand the typical stress reaction. One author noted four clinical phases of stress reaction: 1) anticipatory or threat phase; 2) impact phase; 3) recoil phase; and 4) post-traumatic phase.²⁹ Among the fairly predictable responses to crisis reactions were: disruption of normal patterns of functioning (including eating and sleeping disturbances); regression to a state of dependency; and gradual openness to outside intervention. These responses to stress, although varying in intensity and duration, were also found in rape victims.

While the authors of these crisis theory studies³⁰ accepted the findings of the researchers who coined the term "rape trauma syndrome," the authors of one study suggested that generally the patterns of response were predictable, but the uniqueness of each victim's response depended on various psychodynamic considerations such as victim's age, personality style, life situation, and responses of supportive others. Despite these differing circumstances, feelings of guilt and shame emerged as virtually universal in all rape victims.³¹

Another study supporting the theory that rape victims exhibited similar as well as identifiable responses to rape compared the responses of rape victims to rape resisters.³² The study was based on responses to questionnaires and sought to examine differences between these two groups in two areas: emotions expressed during the assault; and personal social assessment. The results indicated that victims were significantly more depressed, fearful, and anxious than resisters and that they perceived themselves as less self-confident, less assertive, and more socially inept than did resisters.

²⁸ In 1975, Susan Brownmiller wrote an influential feminist book in which she addressed one of the primary factors contributing to women's response to rape. S. BROWN MILLER, *AGAINST OUR WILL* (1975). She opined that American society, abundant with stereotypes and prejudices about the rape victim and rape itself, created a hostile climate for rape victims. Rape was glamorized and mythified by attitudes and beliefs that pervaded American culture to the extent that sexual assault was accepted. *Id.*

²⁹ E. HILBERMAN, *THE RAPE VICTIM* (1976).

³⁰ *Id.* Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408 (1976).

³¹ Viewing rape in terms of a crisis prompted the development of crisis intervention programs to meet the needs of rape victims. See, e.g., McCombie, Bassuch, Savity & Pell, *Development of a Medical Center Rape Crisis Intervention Program*, 133 AM. J. PSYCHIATRY 418 (1976). It appeared that the prevailing attitude that rape was a sexual rather than a violent crime had prevented recognition of the trauma experienced by rape victims and, therefore, the development of resources to treat victims suffering from the trauma was stagnant until the mid-1970's. Crisis intervention programs were based on the premise that early intervention could prevent development of psychological disturbances in rape victims. It appeared that by the late 1970's "progress [had] been made in establishing rape as a legitimate health issue and in including the care of rape victims among the repertoire of services provided within a medical center." *Id.* at 421. In 1978, a survey of 500 psychiatrists' views on rape indicated "increased psychiatric knowledge and concern about rape victims." *Sexual Survey #11: Current Thinking on Rape, Medical Aspects of Human Sexuality* 125, 126 (1978) (commentary by E. Benedek, M.D.). Eighty percent of the doctors surveyed believed that victims exhibited psychiatric symptoms following the rape. *Id.*

³² Selkin, *Protecting Personal Space: Victim & Resistor Reactions to Assaultive Rape*, 6 J. COMMUNITY PSYCHOLOGY 263 (1978). A "rape resistor" is a woman who faced the threat of being raped but somehow managed to escape.

The first study to examine the long term effects of rape appeared in 1978.³³ This study focused upon the effects of prior life stress on length of recovery time. The study was based on a follow-up interview four to six years after the attack of the same ninety-two rape victims studied by Ann Wolbert Burgess and Linda Lytle Holmstrom in their 1974 study.³⁴ Four specific stresses were examined and responses were categorized into three areas: recovery within months; recovery within years; and not yet recovered at four to six years post rape. The results indicated, in general, that the greater the amount of prior life stress a victim had experienced, the longer it took the victim to recover from the rape. However, recent life changes (significant events occurring within six months prior to the rape) had little or no connection to the victim's length of recovery, and prior family grief (losing family member through death, divorce, or separation within two years prior to the rape) had an inverse relationship with the length of recovery. Fifty-six percent of the victims experiencing this type of stress recovered within months after the rape, whereas only twenty-four percent of the victims not subject to this type of stress recovered within the same time frame. The authors drew an analogy between the psychological work required in grief resolution and that required in rape trauma resolution, stating that "[t]he psychological work required by rape victims includes freeing oneself from the fears caused by rape, acknowledging and bearing the pain caused by the rape, redefining the feelings of vulnerability and helplessness, and gaining control of one's life again."³⁵

The primary conclusion which can be drawn from these early studies is that most rape victims exhibit some psychological symptoms following the rape, with the primary reaction being fear. Although the percentage of victims developing the varying symptoms differed from study to study, the *same* symptoms predominated in all the studies. These included: traumatophobia, obsessive thoughts, nightmares, depressive symptoms, changes in eating and sleeping habits, decreased sexual desire, and guilt. The research was conducted by a variety of professionals including public health crisis workers, public health doctors, professors of nursing and sociology, and psychiatrists, indicating a growing concern by these various professions regarding the trauma experienced by rape victims and their subsequent needs for professional treatment.

Beginning in 1979, the research on rape victims began to be conducted with more sophisticated methodology by utilizing control groups and attempting to isolate and study individual symptoms.³⁶ One of the first studies to assess individual symptoms

³³ Burgess & Holmstrom, *Recovery from Rape and Prior Life Stress*, 1 RESEARCH IN NURSING & HEALTH 165 (1978) [hereinafter cited as Burgess & Holmstrom, *Life Stresses*].

³⁴ See *supra* text accompanying notes 24-27.

³⁵ Burgess & Holmstrom, *Life Stresses*, *supra* note 33, at 166. See also Ruch, Chandler & Harter, *Life Change and Rape Impact*, 21 J. HEALTH & SOC. BEHAV. 248 (1980) [hereinafter cited as *Life Change*]. These researchers found that the degree of rape trauma experienced by a victim is not reflected solely by the victim's prior emotional state, but also by the degree of prior life change. The significance of the relationship found to exist between life change and level of rape trauma is that victims experiencing either a high degree of life change or no life change at all within a year prior to the rape will be the most severely traumatized, while victims experiencing minor life changes during this same period may be less traumatized by the rape. Therefore, as regards the occurrence of identifiable symptoms of rape trauma, this study had no impact. Its usefulness lay in the area of aiding crisis intervention counselors, who, once made aware of the effect of prior life changes, could assess why the level of trauma experienced by rape victims may be different.

³⁶ See *infra* text accompanying note 41 for methodological criticisms that have been leveled against the earlier studies.

delineated thirteen areas in which identifiable patterns of adjustment were found to exist in most rape victims.³⁷ Conclusions were drawn about the causal effect of rape on each of the specific symptoms or behaviors. Forty-seven percent of 598 victims interviewed experienced noticeable differences in their eating habits following the rape. Changes in this area reflected the level of anxiety felt by the victim, with overeating viewed as a means of self-imposed social ostracism, while undereating represented an attention-seeking need. Fifty percent of the victims experienced changes in sleeping patterns, with an inability to sleep indicative of feelings of anxiety and tension, while oversleeping reflected a desire to avoid interaction with others. Nightmares were another common occurrence among the victims. The authors stated that the replaying of the trauma "represents an attempt by the subconscious to integrate the event into the everyday world."³⁸

Two primary fears were expressed by a majority of the victims interviewed. Fear of being alone on the street was expressed by sixty-six percent of the victims, which reflected the victim's feelings of vulnerability and loss of independence. Fear of being alone at home was expressed by seventy-two percent of the victims who were raped in their homes. This fear was viewed as persistent when it related to the victim's coping ability in general. Due to these fears, changes in social activities were experienced by fifty percent of the rape victims. A curtailment of social activities was viewed as reflective of a victim's inability to deal with the sexual aspect of rape. A majority of rape victims experienced negative feelings toward both known men and male strangers as a result of being raped. These feelings were indicative of a loss of trust in others as well as in the victim herself.

The researchers noted that the frequency and occurrence of the aforementioned symptoms and behavior were affected by a number of demographic and personal factors such as the victim's age, marital status, employment status and prior interpersonal or intrapsychic problems. The results indicated that with respect to age, an adult victim was more likely to be confronted with adjustment problems than was a child or adolescent victim. This phenomenon occurred primarily because an adult was less likely to receive the support needed and was unable to retreat to the safe, supportive confines of the home. Marital status was another factor affecting a victim's coping ability. A married victim was more apt to have adjustment difficulties than a single woman because of the inability of the victim's husband to deal with the rape. The researchers found that in many instances the married victim's "anticipated primary source of emotional support [her husband] has become her most determined accuser."³⁹ The findings of this study, that a rape victim with certain pre-existing psychological problems is predisposed to adjustment patterns reflecting these prior problems, is supported by previous literature.⁴⁰ The researchers also stressed that a working victim will have more adjustment problems than a nonworking victim because of the former's forced interaction with men in the workplace.

One of the first studies to undertake an in-depth investigation of the fear reaction common in most rape victims yielded the following results: 1) rape victims were more

³⁷ T. McCahill, L. Meyer & A. Fischman, *THE AFTERMATH OF RAPE* (1979) [hereinafter cited as *AFTERMATH*].

³⁸ *Id.* at 27.

³⁹ *Id.* at 47.

⁴⁰ See, e.g., Burgess & Holmstrom, *supra* note 3 (described therein as compounded rape reaction).

fearful than nonvictims; 2) the pattern and the intensity of victims' fear reactions changed over time; and 3) situations feared by victims but not by nonvictims were rape-related.⁴¹ The findings specifically revealed that the victims' fears were higher initially and subsided over time but were significantly higher than nonvictims' fear during all four assessment periods after the rape, six to ten days, one month, three months, and six months. Three specific fears remained paramount throughout all four periods. These were the fear of being alone, and the fear of being awakened at night, both of which reflect the victims' sense of vulnerability, and the fear of going out with new people. All three of these fears represented attack vulnerability cues, suggesting that unique to the rape victim is the generalized fear of subsequent attack, which, unlike other rape related fears, did not diminish over time.

Another 1979 study examined a second, though not as prominent, common symptom of rape response — depression.⁴² The researchers analyzed thirty-four rape victims based on an assessment interview and a self-test questionnaire. The results indicated a high frequency of depressive symptoms with the three most prevalent symptoms identified as dysphoria (depressed mood) reported by fifty percent of the victims; extreme guilt feelings, also reported by fifty percent of the victims; and loss of interest in normal activities reported by thirty-five percent of the victims. Further analysis of victims whose test scores indicated that they were suffering from moderate or severe depression revealed that twenty-four percent were suffering from a major depressive disorder.

In 1980, an important event occurred that helped to legitimate rape trauma syndrome as a psychiatric diagnosis. The medical profession in general and the psychiatric profession in particular, gave general acceptance and recognition to a psychiatric disorder known as "post-traumatic stress disorder" in the basic text relied upon by the profession for diagnostic purposes, the Diagnostic and Statistical Manual, third edition, of the American Psychiatric Association (DSM-III).⁴³ Post-traumatic stress disorder (PTSD) was explained as follows: "the essential feature [of post-traumatic stress disorder] is the development of characteristic symptoms after the experiencing of a psychologically traumatic event or events outside the range of usual human experience usually considered to be normal."⁴⁴ PTSD is always induced by certain psychological traumas (stressors),

⁴¹ Kilpatrick, Veronen & Resick, *Assessment of the Aftermath of Rape: Changing Patterns of Fear*, 1 J. BEHAV. ASSESSMENT 133 (1979) [hereinafter cited as *Changing Patterns of Fear*]. The research methods of previous studies were severely criticized by these authors because 1) sampling procedures were not described; 2) potential sample bias was not addressed; 3) control or comparison groups were not used; 4) standardized psychometric testing devices were not used; and 5) reliability of the measuring devices used were not documented. It is important to note, however, that the results of this and other later, more sophisticated studies did not differ from the conclusions drawn by the earlier studies regarding patterns of victim response.

In an attempt to compensate for the previous deficiencies in methodology, the Kilpatrick study, while examining fear reactions in rape victims, assessed both victims and nonvictims at four time intervals: six to ten days post-rape; one month post-rape; three months post-rape; and six months post-rape. To control for the effects of repeated testing, a victim group was also assessed at only one interval. Extensive documentation of the sampling procedures was also provided, which includes the fact that the nonvictim sample corresponded demographically with the victim sample to as great an extent as was possible.

⁴² Frank, Turner & Duffy, *Depressive Symptoms in Rape Victims*, 1 J. AFFECTIVE DISORDERS 269 (1979) [hereinafter cited as *Depressive Symptoms*].

⁴³ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter cited as DSM-III].

⁴⁴ *Id.* at 236.

among which are natural, accidental, or man-made disasters; and may be experienced alone, as in the case of rape, or in a group setting, as in the case of military combat.⁴⁵ The authoritative treatise interpreting PTSD immediately recognized that rape trauma syndrome was a quintessential example of post-traumatic stress disorder.⁴⁶ DSM-III describes two types of PTSD — acute and chronic or delayed.⁴⁷ A person diagnosed with the acute form will exhibit the requisite symptoms beginning and ending within six months after the trauma. The chronic or delayed form is diagnosed when the symptoms do not emerge until six months after the trauma. In either type, the following are the essential criteria for diagnosing PTSD: 1) existence of a recognizable trauma (stressor) that would cause distress symptoms in most people; 2) reexperiencing the trauma by one or more of several means, such as nightmares or recurrent dreams; 3) decreased involvement with the external world; and 4) exhibition of two or more of several specific symptoms.⁴⁸

The disorder appears to be more severe and longer in duration when the evoking trauma is induced by human design, as in the case of rape.⁴⁹ In instances when the psychological trauma is accompanied by physical trauma, as in the case of rape, the chances that a person experiencing the trauma will develop PTSD are increased because physical injury intensifies the nature of the stress.⁵⁰

Many of the symptoms experienced by a rape victim are synonymous with those necessary for PTSD diagnosis, for example, depression, anxiety, changes in lifestyle or residence, nightmares, and sleep disturbance. There remain, however, numerous specific identifiable symptoms associated with the rape experience which go beyond the general

⁴⁵ *Id.*

⁴⁶ H. KAPLAN & B. SADDOK, MODERN SYNOPSIS OF COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/III 448 (1980) [hereinafter cited as COMPREHENSIVE TEXTBOOK/III].

⁴⁷ DSM-III, *supra* note 43, at 237.

⁴⁸ The diagnostic criteria for post-traumatic stress disorder are as follows:

- A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone.
- B. Reexperiencing the trauma as evidenced by at least one of the following:
 - (1) recurrent and intrusive recollections of the event,
 - (2) recurrent dreams of the event,
 - (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus.
- C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:
 - (1) markedly diminished interest in one or more significant activities,
 - (2) sleep disturbance,
 - (3) guilt about surviving when others have not, or about behavior required for survival,
 - (4) memory impairment or trouble concentrating,
 - (5) avoidance of activities that arouse recollection of the traumatic event,
 - (6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event.

Id. at 238.

⁴⁹ COMPREHENSIVE TEXTBOOK/III, *supra* note 46, at 448. It should be noted that even the most severe trauma does not produce PTSD in all persons experiencing the trauma. *Id.* at 447. Also, in most persons diagnosed as having PTSD, the occurrence of the trauma is a necessary element of causation, but a variety of psychological, physical, genetic, and social factors may also contribute to the development of the disorder. *Id.*

⁵⁰ *Id.* at 571.

symptoms described of PTSD in DSM-III. These rape-specific symptoms include: rape-related fears (including a generalized fear of subsequent attack, fears of interaction with the criminal justice system, fears of being alone at home and on the street); changes in eating patterns; sexual dysfunction; and worsened relationships with men in general.

Another area of rape research that was undertaken in 1980 concerned examination of the underlying attitudes and beliefs of most Americans which result in perpetuation of the "rape myth" that women are usually raped by strangers and not by men they know.⁵¹ The research tested and confirmed hypotheses that certain aspects of American culture, such as sex role stereotyping, adversarial sexual beliefs, sexual conservatism, and acceptance of interpersonal violence, directly relate to acceptance of the "rape myth" by many Americans. The results indicated that because rape attitudes are strongly related to other deeply held attitudes, reeducating the general public to understand that a rape victim is indeed a victim of personal violence, is a difficult but necessary objective.⁵²

Despite the development of PTSD, some researchers continued to adhere to the belief that rape trauma was more properly explained in terms of crisis theory.⁵³ They argued that the common symptoms of rape response could be best understood by analyzing them in terms of common stress reactions induced by a crisis.

Crisis reactions occur in two phases — initial reactions and subsequent reactions.⁵⁴ In that regard, rape trauma syndrome encompasses a set of specific reactions to each phase which are experienced by almost all rape victims. The intensity and duration of the reactions, however, may depend on a victim's individual characteristics. The reactions occurring in rape victims immediately following the attack were viewed as "typical crisis reactions." In fact, most crisis counselors have been instructed to be aware that during this phase of initial reactions victims may appear to be in a controlled state, thereby masking underlying feelings.⁵⁵ This "characteristic presentation" behavior is "highly significant" because: 1) it is contrary to most people's expectations; 2) it hides the emotional trauma experienced by the victim; 3) it reinforces the common tendency to disbelieve the victim; and 4) it increases the victim's vulnerability because her immediate need for support may be overlooked.⁵⁶

⁵¹ Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOLOGY 217 (1980). See also Weis & Borges, *supra* note 23 (definition of "rape myth").

⁵² Burt, *supra* note 51.

⁵³ See generally A. BURGESS & B. BALDWIN, *CRISIS INTERVENTION THEORY AND PRACTICE — A CLINICAL HANDBOOK* (1981); C. WARNER, *RAPE & SEXUAL ASSAULT-MANAGEMENT AND INTERVENTION* (1980) [hereinafter cited as WARNER].

⁵⁴ WARNER, *supra* note 53, at 144.

⁵⁵ *Id.* at 146.

⁵⁶ *Id.* This finding that counselors need to be educated to suppress effects of societal conditioning, i.e. the victim is not agitated, therefore the rape was not traumatic and was probably brought on by the victim's behavior, is highly significant. If crisis counselors have to be educated that one of the common reactions among rape victims is to mask their feelings, then, arguably, testimony about rape trauma syndrome should be admitted to educate the jury in much the same manner.

In her work with rape victims, one researcher noted an almost universal victim reaction which characterizes the secondary phase of subsequent reactions as the "why me?" response. *Id.* at 148. The researcher's analysis of this reaction lends support to the idea that a victim's self-blame may be the underlying factor behind many of the patterned rape responses.

Most advocates of crisis theory, while disputing that rape trauma syndrome should be characterized as PTSD, do not dispute the validity of rape trauma syndrome. See *id.*; Notman & Nadelson, *supra* note 30. In analogizing rape reaction to the phases of crisis reaction, one researcher concluded that while the psychological response of rape victims is similar to the sequence of reactions occurring

Other researchers rejected the crisis theory explanation. In one study, sixty-one rape victims were interviewed, all of whom had been raped within one month to three years prior to the interview.⁵⁷ The researchers found that the *degree* of trauma experienced did not differ according to time but that instead, some degree of disequilibrium, that is, emotional and behavioral changes in the victims prior to and following the rape, existed in all victims. They concluded that this finding negates one of the basic tenets of crisis theory — that by definition, crises are time-limited, with the total length of time between the occurrence of the crisis and resolution thereof lasting only four to six weeks.⁵⁸ The researchers suggested that rape can be reconceptualized as a prolonged crisis because for the most part, rape victims do not reestablish a pre-crisis state of functioning. Instead, they experience fundamental behavioral and emotional changes which tend to make them more defensive and self-protective. It is still unknown at this time if victims ever overcome the residual effects of the rape experience.⁵⁹

A recent attempt to measure the effects of rape on immediate and long-term social adjustment of rape victims is documented in another 1981 study.⁶⁰ In this study, ninety-three rape victims were assessed at six intervals ranging from two weeks to one year post-rape. Their reactions were compared with a matched control group of nonvictims as well as three additional victim groups who were assessed only once to control for the effects of repeated testing. Overall social adjustment indicated that victims had significantly more problems adjusting to day-to-day social concerns than did nonvictims during the first two months following the rape. A comparison between the victims revealed a greater degree of difficulty in social adjustment among the latter victims. This tended to suggest that repeated assessment had a therapeutic effect and that rape victims who do not receive follow-up counseling may be impaired for a longer period of time in the area of social adjustment.

By four months post-rape, normal levels of response were seen in most victims, with the exception being in the area of work. The items measured on this subscale were level of functioning at work, interest in work, and relationships with others at work. Above-

in other crisis states, "specific [only] to rape trauma syndrome is the rape work [a victim must go through] to resolve the crisis." WARNER, *supra* note 53, at 128. See also Burgess & Holmstrom, *Life Stresses*, *supra* note 33. Rape work has three distinctive characteristics: 1) the victim experiences a breakdown of her usual existential denial of environmental threats, i.e. the victim's vulnerability and feelings of helplessness cause her to be overly cautious about undertaking normally routine activities; 2) the victim experiences a loss of integrity of bodily boundaries because of the rapist's invasion of personal space, i.e. the victim must regain a sense of independence and control over her body; and 3) the victim must confront power relations between men and women in our society, i.e. the victim must reassess and come to terms with her relationship with men while remaining aware of society's perception, both of her as a rape victim and of women in general. WARNER, *supra* note 53. While the first of these three characteristics could also arguably be classified as indicative of PTSD, the second and third are unique to the rape experience and are therefore distinctive characteristics of rape trauma syndrome.

⁵⁷ J. WILLIAMS & K. HOLMES, *THE SECOND ASSAULT — RAPE AND PUBLIC AUTHORITIES* (1981).

⁵⁸ *Id.* See *supra* notes 54–56 and accompanying text.

⁵⁹ Also of interest in the Williams and Holmes study were the findings of the researchers that a victim's race or ethnicity significantly affected the degree of crisis or level of rape trauma experienced. Mexican-Americans were found to experience the greatest degree of crisis, while Anglo-Americans experienced a slightly lesser degree, with Black victims experiencing the lowest degree of crisis. J. WILLIAMS & K. HOLMES, *supra* note 57, at 107.

⁶⁰ Resick, Calhoun, Atkeson & Ellis, *Social Adjustment in Victims of Sexual Assault*, 49 J. CONSULTING & CLINICAL PSYCHOLOGY 705 (1981) [hereinafter cited as *Social Adjustment*].

normal levels of adjustment problems in these areas continued for as long as eight months post-rape. The results indicated that while a victim's level of social functioning is initially disrupted by the rape with the disruption continuing for as long as four months after the rape, the only area where significant adjustment difficulties are long-lasting is in the victim's work environment.

Another 1981 study sought to determine whether the occurrence of four common rape-related factors identified by most rape victims were related to adverse psychological impacts.⁶¹ The four predictor variables studied were: 1) reporting versus nonreporting of the rape; 2) victim vulnerability to claims of responsibility; 3) presence of understanding others; and 4) severity of the attack. The impact variables measured were: 1) psychosomatic symptoms; 2) decreased sexual satisfaction and frequency; and 3) reclusiveness. The data obtained for the study was based on questionnaire responses by 179 rape victims. The basic conclusion of the study was the more severe the attack, the greater the frequency of occurrence of psychosomatic symptoms.⁶²

An important factor that continually reemerged in rape victim studies was the need to educate the public in general and the criminal justice system in particular about the common reactions of the rape victim and her subsequent needs as a result of being attacked. In conjunction with this, one study ascertained the extent to which a victim's emotional style affected the reactions of outside observers to her status as a rape victim.⁶³ The participants in the study (college students) were asked to assess the rape victim's credibility, the degree of the victim's social acceptance, and the degree to which the observers believed the victim found the rape to be unpleasant. The first phase of the study asked for observer assessment based on written descriptions of the rape victim's emotional state, while the second phase elicited observer's responses based on videotapes. In both phases, two types of victim responses were presented: controlled and expressed. The results of the study revealed that a victim's emotional response immediately after the rape significantly effected her perceived credibility. Those victims who exhibited the expressed form of reaction were seen as substantially more credible. These findings supported the views of many that a lack of emotional reaction, previously documented as common behavior during the acute phase of rape trauma syndrome, is inconsistent with society's perception of the credible rape victim.

In summary, the later studies confirmed the results of the earlier studies: most rape victims experience severe, predictable psychological symptoms for at least two months after the rape. The general symptoms are fear, depression, and guilt. These general symptoms are manifested by more specific symptoms: negative reactions to environments similar to that in which the rape occurred, changes in eating and sleeping habits, nightmares, unease at work, curtailment of normal social activities, and decreased sexual desire. The occurrence of these symptoms among rape victims is far greater than among women who have not been raped. This extensive body of research was available to the

⁶¹ Norris & Feldman-Summers, *Factors Related to the Psychological Impacts of Rape on the Victim*, 90 J. ABNORMAL PSYCHOLOGY 562 (1981).

⁶² *Id.* The results of this study suggested that the presence or absence of various psychological impacts of rape, as well as their severity, were related to certain common factors identified in most, if not all, rape victims. Therefore, ascertaining from the victim whether she feels responsible for the rape, whether she feels she has the support or understanding of others, and the severity of the attack, could aid counselors in their treatment of rape victims.

⁶³ Calhoun, Cann, Selby & Magee, *Victim Emotional Response: Effects of Social Reaction on Victims of Rape*, 20 BRIT. J. SOC. PSYCHOLOGY 17 (1981).

first courts that had to address the issue of the admissibility of rape trauma syndrome evidence.

III. THE STATUS OF THE LAW REGARDING THE ADMISSIBILITY OF EVIDENCE CONCERNING THE POST-RAPE CONDITION OF A COMPLAINANT PRIOR TO *MARKS* AND *SALDANA*

It is important to examine the legal environment that existed in the late 1970's and early 1980's, at the time prosecutors first sought to introduce rape trauma syndrome testimony in rape prosecutions. Evidence regarding the complainant's condition after the rape was not a new concept at the time *Marks* and *Saldana* were decided. The cases concerning the complainant's condition after the rape can be divided into three categories: those not involving expert opinion as to the cause of the complainant's condition; those that did involve expert opinion as to the cause of the complainant's condition; and those where the evidence bore on the complainant's credibility.

Generally, evidence concerning the post-rape condition of the complainant *not* in the form of expert opinion as to the cause of the condition, was admissible prior to *Marks* and *Saldana*.⁶⁴ Indisputably, pure physical evidence concerning the complainant's condition, such as bruises, swelling, and abrasions was admissible as showing that the intercourse had been forcible rather than consensual.⁶⁵ Courts sometimes went further and allowed testimony describing the physical manifestations of the complainant's emotional state such as crying, nervousness, and disorientation.⁶⁶ Such evidence usually concerned the period immediately following the rape and was admitted on the theory that such physical symptoms of emotional distress also evidenced lack of consent. Some courts went even further and held that physical manifestations of an emotional condition which took place long after the rape were admissible as some evidence that a crime had occurred, because the physical manifestations would not have taken place had a crime not occurred. For example, in one case it was held that evidence that one of the victims of a "gang" rape had dropped out of a beauty college after the incident and that another had moved to another state was relevant to the sexual activities testified to because such changes would not have been made if the activities had been consensual.⁶⁷

The second category concerning the condition of the complainant after the alleged rape is evidence involving expert opinion as to the cause of the complainant's condition. The only type of such evidence that was consistently held to be admissible was the diagnosis of an examining physician shortly after the incident, based *purely* on physical evidence, such as bruises, swelling, and abrasions, that the intercourse had been forced and not consensual.⁶⁸

Once the expert ventured past the purely physical basis of opinion and began to base the diagnosis on the emotional state of the complainant and statements made by the complainant to explain the incident, the majority of courts held that the attending

⁶⁴ See *infra* text accompanying notes 65-68.

⁶⁵ See *Smelcher v. State*, 385 So. 2d 653, 659-60 (Ala. Crim. App. 1980); *People v. Weaver*, 8 Ill. App. 3d 299, 306, 290 N.E.2d 691, 696 (1972); *State v. Mitchell*, 339 Mo. 228, 232-33, 96 S.W.2d 341, 343-44 (1936).

⁶⁶ See *Collins v. State*, 365 So. 2d 113, 115 (Ala. Crim. App. 1978); *Lang v. State*, 230 Miss. 147, 159, 87 So. 2d 265, 269, *cert. denied*, 352 U.S. 936 (1956).

⁶⁷ *State v. Johnson*, 637 S.W.2d 157, 161 (Mo. Ct. App. 1982).

⁶⁸ See, e.g., *State v. Miller*, 254 Iowa 545, 550-54, 117 N.W.2d 447, 451-53 (1962); *State v. Ring*, 54 Wash. 2d 250, 254-56, 339 P.2d 461, 464-65 (1959).

physician's opinion was inadmissible.⁶⁹ The predominant basis upon which the courts held such evidence to be inadmissible was that the physician was not competent to base a diagnosis concerning the cause of the complaint on anything other than purely physical symptoms.⁷⁰ It followed, then, that the jury was equally capable of forming an opinion as to the cause of the complaint, and that the expert testimony was not helpful.⁷¹ Two courts also reasoned that the physicians' opinions constituted improper bolstering of the complainant's credibility.⁷² One court, on the basis of peculiar state evidentiary rules, also held that the physician's recitation of what the two complainants had told him was inadmissible hearsay, and that the physician's opinion was improper because it concerned the "ultimate issue" in the case.⁷³

Although these cases constituted the weight of authority, there were isolated instances where expert opinion testimony concerning the cause of the complainant's condition based on other than purely physical evidence was allowed. In the 1978 Oregon case of *State v. LeBrun*, the first case to reach an appellate court, the prosecution had used rape trauma syndrome testimony in a rape prosecution.⁷⁴ In that case, a "rape victim advocate" testified that the complainant's emotional state comported with that of most women who came to the hospital complaining of rape.⁷⁵ The defendant's sole objection to the testimony was that the witness was not qualified to give such an opinion.⁷⁶ The court noted that the qualifications of an expert to testify is a matter that rests primarily in the trial court's discretion and thus would not hold that the trial court had abused its discretion in view of the substantial experience of the rape victim advocate.⁷⁷ The case is of limited importance in the development of the law of admissibility of rape trauma syndrome testimony because the defendant raised a very limited objection to the testimony enabling the appellate court to dispose of the issue on a very narrow ground.

Although not specifically mentioning rape trauma syndrome, a Michigan court in the 1981 case of *People v. LaPorte* admitted testimony somewhat similar to rape trauma syndrome testimony.⁷⁸ In this case the examining physician arrived at his opinion that the complainant had been raped on the basis of both the victim's physical and emotional conditions. Some of these emotional conditions were conveyed to him through statements by the complainant.⁷⁹ The Michigan Court of Appeals held the testimony to be admissible because the examination had occurred within hours after the alleged incident. Moreover, the court noted that the physician had testified that he always approached with skepticism any victim's version of an alleged rape, and rather based his opinion on his own inde-

⁶⁹ See, e.g., *Farley v. State*, 324 So. 2d 662, 663-64 (Fla. Dist. Ct. App. 1975); *Commonwealth v. Gardner*, 350 Mass. 664, 665-66, 216 N.E.2d 558, 559-60 (1966); *People v. McGillen*, 392 Mich. 278, 284-85, 220 N.W.2d 689, 692-93 (1974); *State v. Castore*, ___R.I. ___, 435 A.2d 321, 326 (1981); *Cartera v. Commonwealth*, 219 Va. 516, 518-19, 248 S.E.2d 784, 786 (1978).

⁷⁰ See, e.g., *Farley*, 324 So. 2d at 663; *Gardner*, 350 Mass. at 665-66, 216 N.E.2d at 560; *McGillen*, 392 Mich. at 284-85, 220 N.W.2d at 692-93; *Castore*, ___R.I. at ___, 435 A.2d at 326.

⁷¹ See, e.g., *Gardner*, 350 Mass. at 666, 216 N.E.2d at 560; *Castore*, ___R.I. at ___, 435 A.2d at 326; *Cartera*, 219 Va. at 518-19, 248 S.E.2d at 786.

⁷² *McGillen*, 392 Mich. at 285, 220 N.W.2d at 693; *Castore*, ___R.I. at ___, 435 A.2d at 326.

⁷³ *Cartera*, 219 Va. at 518-19, 248 S.E.2d at 786.

⁷⁴ 37 Or. App. 411, 587 P.2d 1044 (1978).

⁷⁵ *Id.* at 415, 587 P.2d at 1047.

⁷⁶ *Id.*

⁷⁷ *Id.* at 415-16, 587 P.2d at 1047.

⁷⁸ 103 Mich. App. 444, 303 N.W.2d 222 (1981).

⁷⁹ *Id.* at 452, 303 N.W.2d at 225.

pendent observations of the victim's physical and emotional conditions.⁸⁰ The court then stated that most importantly, the physician had given no testimony as to whether or not the victim had been raped by the defendant who was on trial.⁸¹ Thus the court held that "on this record," the testimony of the attending physician was admissible.⁸² It is clear, however, that had the physician's examination taken place a substantial time after the alleged rape, as most rape trauma syndrome examinations do, the Michigan Court of Appeals would not have held the evidence to be admissible.

The third category of evidence relating to the post-rape condition of the complainant that had received judicial scrutiny prior to *Marks* and *Saldana* was evidence offered for the explicit purpose of bolstering the credibility of the complaining witness. The general rule is that opinion evidence, other than by reputation or opinion by people familiar with a witness who has already testified, is not admissible to bolster the credibility of a witness.⁸³ In the 1978 case of *People v. Izzo*,⁸⁴ the Michigan Court of Appeals dealt with testimony of a psychiatrist who stated that he believed that a rape complainant whom he had examined had not been faking answers, and had been answering quite honestly. The court held that the prosecution was, in effect, presenting a "human lie detector"⁸⁵ to give a "stamp of scientific legitimacy to the truth of the complaining witness' factual testimony concerning the rape."⁸⁶ Such testimony was ruled to be improper bolstering of the complainant's testimony.

On the other hand, during this time period a minority of courts took the position that expert testimony concerning the credibility of a complaining witness in a rape prosecution was admissible where the credibility of the complainant had been attacked. The Hawaii Supreme Court in the 1982 case of *State v. Kim*,⁸⁷ while recognizing that the credibility of witnesses was solely for the jury to decide, was reluctant to categorically preclude all such testimony since it agreed with the "virtually unanimous opinion of commentators that under certain circumstances expert testimony may reveal to the trier of fact characteristics or conditions of the witness which may assist the jury's assessment of credibility."⁸⁸ Thus the Hawaii court held that the lower court had not erred in admitting the opinion of a qualified child psychiatrist and pediatrician who found the child sexual abuse complainant's account to be believable.⁸⁹

Probably of more importance for the admissibility of rape trauma syndrome evidence than the isolated cases allowing similar testimony in criminal cases prior to *Marks* and *Saldana* was the very favorable treatment that rape trauma syndrome was receiving in legal contexts other than rape prosecutions. In fact, the very first mention of the term "rape trauma syndrome" in an appellate court opinion was in *White v. Violent Crimes Compensation Board*,⁹⁰ decided by the New Jersey Supreme Court in 1978. In that case,

⁸⁰ *Id.* at 452-53, 303 N.W.2d at 226.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See, e.g., *United States v. Jackson*, 576 F.2d 46, 49 (5th Cir. 1978); *United States v. Wertis*, 505 F.2d 683, 685 (5th Cir. 1974) (per curiam), cert. denied, 422 U.S. 1045 (1975).

⁸⁴ 90 Mich. App. 727, 282 N.W.2d 10 (1979).

⁸⁵ *Id.* at 730, 282 N.W.2d at 11.

⁸⁶ *Id.*

⁸⁷ 64 Hawaii 598, 645 P.2d 1330 (1982).

⁸⁸ *Id.* at 602, 645 P.2d at 1334.

⁸⁹ *Id.* at 609-10, 645 P.2d at 1339.

⁹⁰ 76 N.J. 368, 388 A.2d 206 (1978).

White, a rape victim, filed for compensation with the Violent Crimes Compensation Board. The Board denied compensation on the basis that the claim had been filed fourteen months after the crime when the statutory limitation for filing such a claim was twelve months. White argued that the statute of limitations should be tolled due to her incapacity resulting from the rape. The court agreed that the limitation period should be tolled, because in addition to the public embarrassment suffered by the victim due to severe facial injuries suffered during the attack, she also had an emotional disablement resulting from the attack which incapacitated her from filing within the statutory period. The court explained that emotional disablement as follows:

Moreover, it has been observed that a frequent component of the "rape trauma syndrome" rather consistently encountered in rape victims is a so-called "global fear of everyone" which is often marked by withdrawal from social relationships in reaction to that most dehumanizing of all crimes. See A. Burgess and L. Holmstrom, *Rape: Victims of Crisis*, 37-50 (1974); see also A. Burgess and L. Holmstrom, "Rape Trauma Syndrome," *The American Journal of Psychiatry*, September, 1974. We do not doubt that the totality of these factors effectively incapacitated plaintiff from normal social functioning for an extensive period of time.⁹¹

By this passage the New Jersey Supreme Court, in effect, judicially noticed both the existence and validity of rape trauma syndrome.⁹²

Another affirmation of the validity of rape trauma syndrome in a civil context is found in *Redmond v. Baxley*,⁹³ decided by the United States District Court for the Eastern District of Michigan in 1979. In that case a male sued the state, claiming damages as a result of a rape that occurred while he was a prison inmate. On the issue of damages, the plaintiff presented a behavioral scientist who was not a physician to testify to the severe personality changes wrought by the rape. The defendant objected that such evidence could only be given by a medical doctor. The court rejected this contention, holding that although the expert would perhaps not be qualified to testify about diagnosing or treating the illness, he was qualified to discuss the links between the trauma of rape and its medical ramifications.⁹⁴ The court characterized the expert as a "well qualified and believable"⁹⁵ one who gave the jury valuable information concerning "significant harm resulting from the rape."⁹⁶ Although the court did not use the term "rape

⁹¹ *Id.* at 388, 388 A.2d at 216.

⁹² It should be noted that the judicial notice taking place in this case was in the nature of taking notice of a "legislative" fact for appellate purposes, rather than taking notice of an "adjudicative" fact for trial purposes. "Adjudicative" facts are facts about the particular immediate parties to the case and "legislative" facts are all others. Ninety-nine percent of the time, "legislative" facts are facts used for making law and policy. 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15:3 (2d ed. 1980). It will be seen below that courts have been much more reluctant to judicially notice rape trauma syndrome for trial evidentiary purposes than the *White* court was to judicially notice them in determining policy questions on appeal. See *infra* text accompanying notes 118-38, 164-76, 180-86, and 219-23.

⁹³ 475 F. Supp. 1111 (E.D. Mich. 1979).

⁹⁴ *Id.* at 1122.

⁹⁵ *Id.*

⁹⁶ *Id.*

trauma syndrome," it did use the term "medical ramifications of the rape trauma,"⁹⁷ which would appear to be the same thing.

The strongest affirmation of the validity of rape trauma syndrome prior to *Marks* and *Saldana* was presented by Justice Larsen of the Pennsylvania Supreme Court, in his dissenting opinion in *In the Matter of Pittsburgh Action Against Rape*.⁹⁸ While representing the views of only one member of the Pennsylvania court, Justice Larsen's comments have been quoted with approval in many subsequent cases.⁹⁹ The question in that case was whether there existed or should be created a privilege to allow a rape counseling clinic to refuse to allow a defendant charged with rape to examine the clinic's files concerning the rape complainant. The majority of the Pennsylvania Supreme Court held that no such privilege existed and that none should be created. In dissent, Justice Larsen explained at length the origin and symptoms of rape trauma syndrome as part and parcel of his argument that a privilege was necessary.¹⁰⁰ Like the position of the New Jersey Supreme Court in *White v. Violent Crimes Compensation Board*,¹⁰¹ Justice Larsen's position in *In The Matter of Pittsburgh Action Against Rape* constituted judicial notice of rape trauma syndrome.

While the aforementioned cases dealt with the use of evidence to establish lack of consent, there is another important line of authority that began before *Marks* and *Saldana* that addresses the use of expert testimony regarding a complainant's post-rape condition or behavior to explain seemingly unusual behavior of a complainant after the alleged crime. The case which was the beginning of this line of authority was *State v. Harwood*,¹⁰² decided by the Oregon Court of Appeals in 1980. In that case the child complainant testified that the illegal sexual acts occurred while she was asleep. This was obviously unusual testimony, since if she had been asleep, how would she have known the attacks occurred? To refute this argument, the state called a social worker with substantial experience working with sexually abused children to testify that it was not uncommon for children to perceive and remember that sexual acts occurred during sleep. On appeal, the defendant claimed that the testimony constituted an impermissible expert bolstering of the complainant's credibility. The court held that expert testimony can be admissible if it goes to the ability of the witness to perceive, remember or relate, which this evidence did. Moreover, the court found that the evidence was helpful to the average juror because such juror would not have experience dealing with sexually abused children.¹⁰³ Although this case involved a child complainant, evidence to explain unusual behavior of an adult complainant has been met with judicial approval.¹⁰⁴

⁹⁷ *Id.* One glaring defect in the court's analysis is that the psychological trauma of rape for a male has never been systematically studied. There is no support for the claim that a male can suffer from rape trauma syndrome, although it intuitively seems likely that a male would suffer similar symptoms.

⁹⁸ 494 Pa. 15, 38-43, 428 A.2d 126, 138-40 (1981) (Larson, J., dissenting).

⁹⁹ See, e.g., *State v. Saldana*, 324 N.W.2d 227, 229 n.1 (Minn. 1982); *State v. Middleton*, 294 Or. 427, 436 n.8, 657 P.2d 1215, 1220 n.8 (1983).

¹⁰⁰ 494 Pa. at 38-43, 428 A.2d at 138-40 (Larson, J., dissenting).

¹⁰¹ 76 N.J. 368, 388, 388 A.2d 206, 216 (1978).

¹⁰² 45 Or. App. 931, 609 P.2d 1312 (1980).

¹⁰³ *Id.* at 939-40, 609 P.2d at 1317.

¹⁰⁴ The *State v. Harwood* line of authority also appears to have been used as authority for the admission of testimony regarding the typical characteristics of sexually abused children.

IV. *STATE V. MARKS* AND *STATE V. SALDANA*: THE FIRST GENERATION OF CASES

The question of the admissibility of expert testimony concerning rape trauma syndrome on the consent issue was first fully examined at the appellate level in two cases in different jurisdictions in the summer of 1982. The first case was *State v. Marks*,¹⁰⁵ decided by the Kansas Supreme Court on July 16, 1982. The second case was *State v. Saldana*,¹⁰⁶ decided by the Minnesota Supreme Court on August 31, 1982. The question appears to have been assessed independently by the two courts, since the *Saldana* court did not cite the *Marks* case in its decision.¹⁰⁷ The cases reached diametrically opposite results, with the Kansas Supreme Court in *Marks* holding that such expert testimony is admissible,¹⁰⁸ and the Minnesota Supreme Court in *Saldana* deciding that the testimony is not admissible except in "unusual cases" such as sexual assault cases where the alleged victim is a child or is mentally retarded.¹⁰⁹

In the *Marks* case, the defendant was charged with rape and aggravated sodomy. His defense was that the complainant had consented to the sexual activities. Two weeks after the alleged rape the complainant was examined by a doctor who, in addition to practicing psychiatry and teaching, was board certified in psychiatry, forensic psychiatry and neurology. The state called this doctor as a witness at trial. The doctor testified that rape trauma syndrome was a specific type of post-traumatic stress disorder¹¹⁰ and outlined the symptoms of the syndrome. He then testified that he was of the opinion that the complainant had been the victim of "a frightening assault, an attack"¹¹¹ and that she was suffering from the post-traumatic stress disorder known as rape trauma syndrome. The defendant objected on two bases: first, that the testimony invaded the province of the jury; and second, that the opinion was based on inadmissible hearsay.¹¹²

The court rejected the argument that the testimony invaded the province of the jury. First, the court stated that if the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault occurred, then it is relevant evidence when a defendant argues that the victim consented to sexual activities. Thus, according to the Kansas court, the admission of rape trauma syndrome evidence does not invade the province of the jury since it is merely offered as any other evidence, with the expert

¹⁰⁵ 231 Kan. 645, 647 P.2d 1292 (1982).

¹⁰⁶ 324 N.W.2d 227 (Minn. 1982).

¹⁰⁷ Indeed, it is clear that the *Saldana* court was unaware of the *Marks* decision, because the *Saldana* court stated that the only case it discovered where no error was found in admitting similar evidence was *State v. Le Brun*, 37 Or. App. 411, 587 P.2d 1044 (1978). See *Saldana*, 324 N.W.2d at 230 n.3.

¹⁰⁸ 231 Kan. at 654-56, 647 P.2d at 1299-1300.

¹⁰⁹ 324 N.W.2d at 230-31.

¹¹⁰ See *supra* text accompanying notes 43-50 for a discussion of post-traumatic stress disorder.

¹¹¹ *Marks*, 231 Kan. at 653, 647 P.2d at 1299.

¹¹² The resolution of the hearsay question is not of as much interest as the resolution of the invading the province of the jury objection inasmuch as the hearsay objection was based upon a peculiarity of Kansas law which does not exist under the Federal Rules of Evidence. In Kansas, physicians may only base their opinions upon matters within their personal knowledge, or upon evidence otherwise admissible in the case, *Klein v. Wells*, 194 Kan. 528, 539, 400 P.2d 1002, 1012 (1965), unlike under the Federal Rules where an expert can base an opinion upon otherwise inadmissible hearsay. FED. R. EVID. 703. The *Marks* court held that the history given to the doctor by the complainant, upon which he relied, was independently admitted through the testimony of the complainant and thus did not violate the Kansas rule. 231 Kan. at 655, 647 P.2d at 1300.

subject to cross-examination, and the jury left to determine its weight.¹¹³ The second stage of the court's reasoning answered in the affirmative the question of whether rape trauma syndrome was detectable and reliable. The Kansas court noted that even though the identification of rape trauma syndrome is a relatively new psychiatric development, examination of the literature "clearly demonstrates" that rape trauma syndrome is generally accepted to be a common reaction to sexual assault.¹¹⁴ After citing seven sources constituting the "literature"¹¹⁵ that it was relying upon, the court held, "[a]s such, qualified expert psychiatric testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case such as this where the defense is consent."¹¹⁶

The *Marks* decision is remarkable for the brevity of its discussion and the seeming ease with which the Kansas Supreme Court reached its holding on this important, novel evidentiary issue. Subsequent courts which discussed the issue have found the resolution of it far more difficult than did the *Marks* court. In part, this has resulted because as the issue has become more well known, defense counsel have begun to develop more persuasive arguments against the admissibility of the testimony.

A month and a half after *Marks*, the Minnesota Supreme Court decided *Saldana* in which it held that except possibly in extraordinary cases where the complainant is a child or mentally retarded, rape trauma syndrome testimony is inadmissible.¹¹⁷ In that case, *Saldana* had been charged with criminal sexual conduct in the first degree. Ten days after the alleged assault, the complainant began counseling with the director of a victims' assistance program, who held a bachelor's degree in psychology and social work. This counseling continued for approximately ten weeks. At trial the defendant admitted that the intercourse had taken place, but claimed that it had been consensual. In rebuttal the state presented the testimony of the counselor. The counselor explained symptoms of rape victims generally and described the complainant's reactions as she had observed them. She then testified that it was not unusual that the complainant did not report the incident until the following day and stated that the complainant was the victim of "acquaintance rape." Finally, she testified that she did not believe that the complainant had fantasized or made up the story. The exact objections raised at trial by the defendant to this testimony are not apparent from the Minnesota Supreme Court's decision.¹¹⁸

In examining the admissibility of rape trauma syndrome evidence, the court began its analysis with Rule 702 of the Minnesota Rules of Evidence, which is identical to Federal Rule 702. The court stated that to be admissible under that rule, expert testimony must be helpful to the jury.¹¹⁹ It then noted that if the jury is in as good a position to reach a decision on the issue in question as is the expert, the testimony is not helpful.¹²⁰ For the next step in the analysis, the court relied on Minnesota Rule of Evidence 403, which is identical to Federal Rule 403, and which provided that even if the testimony would be helpful, it may be excluded if its probative value is substantially outweighed by the danger of unfairly prejudicing, confusing or misleading the jury.¹²¹ Having set

¹¹³ 231 Kan. at 654, 647 P.2d at 1299.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 324 N.W.2d 227 (Minn. 1982).

¹¹⁸ *See id.* at 229.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

forth the standards for analysis the court then discussed separately three facets of the counselor's testimony: first, the general discussion of rape trauma syndrome; second, the opinion that the complainant had been raped; and third, the opinion that the complainant had not fantasized the rape.¹²²

As to the counselor's general testimony about rape trauma syndrome, the court held that it was improperly admitted.¹²³ The court's reasoning is based on a combination of four different evidentiary objections. First, although couched in terms of "helpfulness" rather than relevancy, the court decided that the testimony was not relevant "because evidence of reactions of other people does not assist the jury in its fact finding function."¹²⁴ That is, according to the Minnesota Supreme Court, simply because other people who have been raped have experienced these symptoms, this fact does not make it any more or less likely that the reason the complainant was suffering from these symptoms was because she had been raped. Second, the court found that the evidence was of no help to the jury since the jury was in as good a position as the expert to decide whether a rape had occurred.¹²⁵ Third, the court concluded that the danger of unfair prejudice was great because of the scientific nature of the evidence creating an "aura of special reliability and trustworthiness."¹²⁶ Finally, on the basis of the Minnesota version of the *Frye* rule,¹²⁷ which requires scientific evidence to be generally accepted in the scientific community before being admissible, the court held that the syndrome "is not the type of scientific test that accurately and reliably determines whether a rape has occurred."¹²⁸ The court stated that the syndrome was "not a fact finding tool, but a therapeutic tool."¹²⁹ It then held, "[t]he scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations."¹³⁰ The court cited no literature in support of this conclusion. The one specific criticism which the court leveled at rape trauma syndrome evidence was that: "[t]he characteristic symptoms may follow *any* psychologically traumatic event. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 236 (3d ed. 1980). At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case."¹³¹

The Minnesota court then moved to the second segment of the counselor's testimony, her opinion that the complainant had been raped. The court again stated that the primary criterion for admissibility is helpfulness, but then pointed out that the advisory committee note to Minnesota Rule of Evidence 704, which allows an opinion on the ultimate issue, states that opinions involving a legal analysis or mixed questions of law

¹²² Although the counselor had not used the term "rape trauma syndrome," the court noted that her testimony essentially was an explanation of rape trauma syndrome. *Id.*

¹²³ *Id.* at 230.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* The famous *Frye* "general acceptance" rule was articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). For an in-depth discussion of the *Frye* rule, see *infra* text accompanying notes 252-350. Minnesota adopted the *Frye* rule in *State v. Kolander*, 236 Minn. 209, 220-21, 52 N.W.2d 458, 464-65 (1952).

¹²⁸ 324 N.W.2d at 229.

¹²⁹ *Id.* at 230.

¹³⁰ *Id.*

¹³¹ *Id.* at 229-30.

and fact are deemed to be of no use to the jury.¹³² The court then reviewed authority on this issue, stating that a majority of courts that had considered the issue had held that the admission of a doctor's opinion that rape or sexual assault had occurred is error,¹³³ while courts in a few other jurisdictions had permitted a doctor who had physically examined a complaining witness shortly after the alleged rape to give an opinion that the sexual intercourse was not voluntary.¹³⁴ The court then noted that the counselor's testimony constituted error under the majority rule and further, because the counselor was not a physician and had never physically examined the complainant, and did not meet the complainant until ten days after the alleged rape, the admission of the testimony constituted error even under the minority rule.¹³⁵

Having reached the conclusion that the evidence was inadmissible on the basis of this authority, the court then went on to discuss together three reasons why the evidence was not admissible under the Minnesota Rules of Evidence. First, the evidence was not helpful because the jury was equally capable of considering the evidence and coming to its own opinion.¹³⁶ Second, because the testimony was a legal conclusion, it was of no use to the jury.¹³⁷ Finally, the danger of unfair prejudice outweighed any probative value because of the "stamp of scientific legitimacy" that the opinion gave to the truth of the complaining witness's testimony.¹³⁸

The court then moved to the third segment of the counselor's testimony, her opinion that the complainant had not fantasized the rape. The court categorized this testimony as an expert opinion concerning the complainant's credibility and stated the general rule that expert opinions on the credibility of witnesses are not allowed except in "unusual cases" such as when a sexual assault case involves an alleged victim who is a child or mentally retarded. Having set forth this general principle, the court held the testimony inadmissible for three reasons: first, this was not an "unusual case" falling within the exception; second, the counselor had no medical education or training to enable her to determine whether a person was fantasizing; and third, the counselor was simply stating her opinion that the complainant had been telling the truth, the determination of which is within the sole province of the jury.¹³⁹

The *Saldana* decision is curious in two respects. The first is the lack of citation of scientific literature prior to the court's reaching the conclusion that rape trauma syn-

¹³² *Id.* at 230.

¹³³ *Id.* at 231. The court cited five cases that have already been discussed in this article. *Id.* at 231 n.5. See *supra* notes 69-73 and accompanying text.

¹³⁴ 324 N.W.2d at 231. The court cited three cases that have already been discussed in this article. *Id.* at 231 n.6. See *supra* notes 68, 78-81.

¹³⁵ It should be noted that although some of the cases cited do support the court's holding, the manner in which the cases were analyzed and categorized does not reflect careful legal reasoning. As already demonstrated, the cases do not appear to establish "majority and minority" positions; rather, the two lines of cases represent two different conclusions based upon two different types of fact situations, with one line of decisions holding that a physician's testimony in the form of an opinion that the complainant had been raped is admissible when based solely upon a physical examination, and the other line of cases holding that such an opinion is inadmissible if also based upon the emotional condition of the complainant or statements made to the physician by the complainant.

¹³⁶ 324 N.W.2d at 231.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 231-32.

drome was not generally accepted in the scientific community. The second is the way in which the court revealed the conclusion that the testimony was inadmissible. While it is clear from the Minnesota court's opinion that it was strenuously opposed to the admission of rape trauma syndrome evidence, the reasoning of the court is unclear, conclusory, and reveals no in-depth analysis of the literature.

In summary, the first set of battle lines regarding the admissibility of rape trauma syndrome testimony was set by the end of the summer of 1982. Subsequent cases will show, however, that substantial skirmishes have occurred outside the originally drawn battle lines.

V. THE DEVELOPMENT OF RAPE TRAUMA SYNDROME AFTER MARKS AND SALDANA

A. Behavioral Scientific Research

Since 1982, behavioral science researchers have conducted more detailed studies of specific symptoms occurring in rape victims. Moreover, researchers have sought to determine the most descriptive general labels to attach to these symptoms that are more specific than the general description of PTSD, but also, due to the long lasting effects of rape trauma, do not fall neatly into the category of crisis theory.

During 1982 three studies appeared, all of which dealt specifically with the long term effects of rape. One analyzed the persistence of *overall* effects on the victim one to two and one-half years after the rape,¹⁴⁰ while the other two focused on the persistence of specific symptoms — fear and depression.¹⁴¹

The first study was based on follow-up interviews of forty-one rape victims one to two and one-half years following the rape.¹⁴² Based on the researchers' analysis of the literature which discussed rape response in terms of crisis theory, they concluded that crisis theory is useful only for analyzing the initial period of disequilibrium associated with rape. The long-term consequences are more easily comprehended when equated with post-traumatic stress disorder because "the effects of exposure to a severely stressful event may persist for many years."¹⁴³

Results of this study indicated that seventy-five percent of the victims still experienced feelings of fear and distrust of others. Fifty percent continued to fear being alone; forty-one percent expressed persistent depressive feelings; and one quarter of the more than fifty percent who complained of having current sexual problems reported complete avoidance of any sexual relationship since the rape.¹⁴⁴

The second study, which focused on fear and anxiety reactions of victims, supported the findings of previous studies that fear reactions can be severe and long lasting, becoming chronic in nature.¹⁴⁵ In fact, the study indicated that they may be the longest

¹⁴⁰ Nadelson, Notman, Zackson & Gornick, *A Follow-Up Study of Rape Victims*, 139 AM. J. PSYCHIATRY 1266 (1982) [hereinafter cited as *Follow-Up Study*].

¹⁴¹ See Calhoun, Atkeson & Resick, *A Longitudinal Examination of Fear Reactions in Victims of Rape*, 29 J. COUNSELING PSYCHOLOGY 655 (1982) [hereinafter cited as *Fear Reactions*]; Atkeson, Calhoun, Resick & Ellis, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. CONSULTING & CLINICAL PSYCHOLOGY 96 (1982) [hereinafter cited as *Repeated Depressive Symptoms*].

¹⁴² *Follow-Up Study*, *supra* note 140.

¹⁴³ *Id.* at 1267.

¹⁴⁴ *Id.*

¹⁴⁵ *Fear Reactions*, *supra* note 141.

lasting of all the associated after-effects of rape. Data for the study was based on the participants' scores on the Modified Fear Survey Schedule. In this study, one hundred fifteen victims were assessed at six intervals ranging from two weeks to one year post-rape and their scores were compared with those of a matched control group of nonvictims as well as three additional victim groups assessed only once to control the effects of repeated testing.¹⁴⁶ The results showed that the overall fearfulness of victims was significantly higher than that of nonvictims at each of the assessment intervals, although the differences between the groups had decreased by one year post-rape. Repeated testing had little effect on the participants' scores, suggesting that even if testing had some therapeutic effect, fear reactions of rape victims remain high regardless of the number of times they are tested.

The assessment measure administered also provided a score for "rape fears," based upon responses to forty-two items on the Modified Fear Survey Schedule. The fears indicated by the rape victims were significantly higher than for nonvictims. The test scores were also analyzed to ascertain what *specific* fears were more disturbing to victims than nonvictims. During the early assessment intervals, highly feared items were those classified as rape cues and attack vulnerability cues, including weapons, male genitals, darkness, and being alone. Over time, rape-precipitated concerns such as fear of venereal disease and pregnancy, and fear of testifying in court, became the most highly feared items.¹⁴⁷

The results of this study were significant first because they provided more sophisticated research support for prior findings that fear is a common reaction among rape victims. Second, they identified specific fears unique to rape trauma, which persist over time, thereby adding credence to the argument that rape trauma syndrome is a specifically identifiable form of PTSD.

The same participants in the foregoing study were assessed in the third significant 1982 study, which focused on depressive symptoms in rape victims.¹⁴⁸ The structure of the study was identical to the fear reaction study except that the results were based on the scores which were derived from *two* assessment measures and an interview with the participants. In addition to assessing the incidence, severity, and duration of depressive symptoms, the researchers also examined various demographic, assault, and pre-rape functioning variables in an attempt to ascertain their predictive ability with respect to the occurrence of depressive symptoms. The results indicated that most rape victims exhibit significantly greater depressive symptoms than do nonvictims during the initial assessment periods. While the symptoms of most victims return to normal levels by four months post-rape, some victims continue to exhibit depressive symptoms even one year after the rape.¹⁴⁹

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Repeated Depressive Symptoms, supra* note 141.

¹⁴⁹ The external variable analysis indicated that this persistence of depressive symptoms can be predicted. Specifically, age and socioeconomic status predict that older and poorer victims may continue to experience depression even one year following the rape. Pre-rape functioning variables tended to be good predictors of continued depressive symptoms, with the results of the study suggesting that victims with prior psychological problems are more apt to exhibit signs of depression longer and with greater severity than other victims. Also of interest is that depressive symptoms diminished more quickly in victims who were assessed at all six intervals than in single testing victims. This suggests, once again, that repeated assessment may have a therapeutic effect and one

An article summarizing the research on the long term effects of rape found that while there were very few studies that examined symptoms appearing during or continuing into the second phase or long term reorganization process of rape trauma syndrome, such studies began to show the emergence of coping patterns in rape victims as well as to provide a framework for understanding the victim's trauma, thereby enhancing her recovery.¹⁵⁰ The article discussed and provided an analysis of several studies which were conducted between 1979 and 1982 by various researchers,¹⁵¹ and stated that: "[d]espite differences in focus, design, sample size, and population, the studies typically report that 20 to 30 percent of the victims recover within a month [following the rape] . . . while 70 to 80 percent experience problems attributable to the rape for varying periods of time, sometimes lasting many years."¹⁵² With respect to specific areas of focus, the studies indicated that rape-related fears and sexual dysfunctioning are two symptoms unique to rape trauma which continue to persist in many victims after the attack.

In 1983 a study was undertaken to determine whether the level of trauma experienced by rape victims during the acute phase of rape trauma syndrome is affected by attack variables, victim's demographics and social support systems, or prior life stresses.¹⁵³ Results were based on interviews with 326 rape victims during their initial visit to a rape treatment center. While ninety-eight percent of the victims were emotionally traumatized as a result of the rape, the degree of trauma varied considerably according to the effect of the different variables.¹⁵⁴ The sexual assault variables revealed that only physical injury is significantly related to the degree of the trauma experienced. The preexisting life stresses variable supported the findings of previous research in this area that significant life changes or no life changes prior to the rape evoke more severe trauma, while minor life changes facilitate coping behavior. The nature of the victim's support system variable revealed that married women were the most severely traumatized, with single women living alone constituting the second highest trauma level group. An analysis of the demographic variables indicated that older, noncaucasian, married victims were the most highly traumatized.¹⁵⁵

might conclude that the sooner and more frequently a rape victim receives counseling, the quicker the incidence and severity of depressive symptoms will subside.

¹⁵⁰ Ferris, *Long-Term Consequences of Adult Rape*, RESPONSES, Jan.-Feb. 1983, at 5.

¹⁵¹ Most of these studies have already been discussed in this article. See *AFTERMATH*, *supra* note 37; *Follow-Up Study*, *supra* note 140; *Changing Patterns of Fear*, *supra* note 41; Burgess & Holmstrom, *Life Stresses*, *supra* note 33.

¹⁵² Ferris, *supra* note 150, at 6.

¹⁵³ Ruch & Chandler, *Sexual Assault Trauma During the Acute Phase: An Exploratory Model and Multivariate Analysis*, 24 J. HEALTH & SOC. BEHAV. 174 (1983).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* This study was significant because its results indicated the emergence of several types of high-risk victims. A secondary, but perhaps more important aspect of the study was that it tends to negate prevailing stereotypes about rape victims: 1) that the trauma experienced is, or should be, greater when the rape involves strangers, multiple assailants, or weapons; and 2) that "marriage [is] a protective harbor for women." *Id.*

The debate concerning whether rape trauma syndrome is more properly characterized as PTSD or in terms of a crisis theory continued during this period. However, none of the disputants questioned the validity of rape trauma syndrome. Recognition by the medical profession of PTSD has prompted some researchers to suggest alternative methods for treatment of rape victims other than crisis intervention. See Koss, *The Scope of Rape: Implications for the Clinical Treatment of Victims*, CLINICAL PSYCHOLOGIST Summer 1983, at 88; Kilpatrick, *Rape Victims: Detection, Assessment & Treatment*, CLINICAL PSYCHOLOGIST, Summer 1983, at 92. Because rape is defined as a stressor causing

A recent survey of 2000 women revealed that forty-four percent of those who were rape victims had at one time seriously contemplated suicide.¹⁵⁶ This revelation supported the finding that, among crime victims, rape "cause[s] the most severe mental consequences."¹⁵⁷ Psychological damage to victims is suffered in direct proportion to the amount of personal violation that occurs. Therefore, the victims of sexual assaults, and rape in particular, usually suffer the greatest amount of psychological damage when compared with other crime victims.

The 1985 edition of a major psychiatric textbook utilized by the psychiatric profession¹⁵⁸ reemphasized the recognized status of PTSD, noting that official recognition of the disorder by the medical profession in general "has been minimal, late in arriving and long overdue."¹⁵⁹ The text also stated, in describing the effects of rape on the rape victim, that "[m]any women experience the symptoms of a post traumatic stress disorder."¹⁶⁰ As a result of the assault "[t]he victim experiences a physical and psychological trauma"¹⁶¹

The research since 1982 supports the basic findings emerging from the early studies that rape causes a trauma in its victims that is characterized by commonly occurring symptoms, namely, fear, depression, and guilt, as manifested by more specific symptoms such as eating and sleeping disturbances and more difficulty in social interaction. Indeed, although the early studies suffered from methodological deficiencies, their conclusions have been abundantly supported by every subsequent, more sophisticated study. It is fair to conclude that rape trauma syndrome is commonly accepted by that segment of the scientific community that is ultimately involved with rape victims. The medical

PTSD and because rape victims exhibit many of the symptoms of that disorder, it has been suggested that clinicians familiarize themselves with PTSD and be alert that many of the common symptoms appearing in rape victims which are associated with PTSD may not emerge until many months or even years after the rape. See Koss, *supra*, at 88. While an understanding of PTSD is obviously helpful to persons treating rape victims, it does not speak to some of the rape-specific symptoms suffered by victims. As has been previously noted, rape victims appear to experience a multitude of identifiable characteristics, many of which are unique to the rape experience.

One researcher expressly rejects the idea that rape evokes a crisis reaction. Resick, *The Trauma of Rape and the Criminal Justice System*, 9 JUST. SYS. J. 52 (1984). Her analysis of the rape victim research, particularly the recent studies on long-term effects of rape, leads her to believe that crisis theory is both inadequate and inaccurate to describe the common rape response. Because crisis theory predicts emergence and resolution of the symptoms associated with a crisis reaction within six to eight weeks of the trauma, it cannot be utilized to explain the persistence of symptoms beyond this limited time frame. Also, crisis theory fails to explain the *pattern* of symptoms most frequently occurring in rape victims — fear, anxiety, depression, sexual dysfunction, and loss of self-esteem. This is because crisis theory is conceptualized as including only three interrelated factors: 1) a hazardous event posing a threat to an individual; 2) an inability to adequately cope with the threat; and 3) a resultant temporary disturbance in the threatened person's normal pattern of functioning. In support of her rejection of crisis theory, the researcher proposes instead a cognitive-behavioral theory upon which the common rape reaction can be based. However, research supporting this theory (which focuses on classical conditioning as a possible explanation for why certain symptoms, such as fear and anxiety, continue unabated for long periods after the rape) is minimal.

¹⁵⁶ Stack, *The Psychological Aftermath*, PSYCHOLOGY TODAY, Feb. 1985, at 48.

¹⁵⁷ *Id.*

¹⁵⁸ H. KAPLAN & B. SADDOCK, MODERN SYNOPSIS OF COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/IV (1985).

¹⁵⁹ *Id.* at 335.

¹⁶⁰ *Id.* at 470.

¹⁶¹ *Id.*

profession as a whole, through DSM-III, has recognized rape trauma syndrome on the more general level as a type of PTSD.

B. *The Judiciary*

1. On the Issue of Consent

After the decisions in *Marks* and *Saldana*, there was a lull in appellate court activity regarding the admissibility of rape trauma syndrome evidence on the issue of consent. The only 1983 case decided on this issue was *People v. Bledsoe*¹⁶² by the California Court of Appeals. In this case the defendant admitted that intercourse had occurred but claimed that it had been consensual. In rebuttal, the prosecution called a rape counselor who explained the general characteristics of rape trauma syndrome and then opined that the complainant was definitely suffering from that syndrome. With no citation of authority, the court of appeals concluded that the testimony was relevant on the issue of whether the rape occurred. The court noted that while the opinion undoubtedly bolstered the testimony of the complainant, its main purpose was to impeach the defendant's account of the incident and therefore the testimony was properly admitted.¹⁶³

Even though the last half of 1982 and all of 1983 was a lull period for rape trauma syndrome cases on the issue of consent, the year of 1984 was the beginning of a "boom" period for such appellate decisions, the end of which is not in sight. This dramatic increase in judicial scrutiny of the rape trauma syndrome issue began with the decision of the Missouri Supreme Court in *State v. Taylor* in January, 1984.¹⁶⁴ In that case the prosecution presented during its case-in-chief the testimony of a psychiatrist who explained the general characteristics of rape trauma syndrome. He then testified that as a result of his examination of the complainant three months after the alleged rape, she displayed forty of the fifty recognized manifestations of the syndrome. He further testified that the complainant was not fantasizing when she described the rape and that she would not be capable of feigning the symptoms. He concluded by testifying that he could see no reason why consensual intercourse would cause such symptoms. The defendant objected to the testimony for lack of foundation, lack of relevance, opinion based upon inadmissible hearsay, and invasion of the province of the jury.

The Missouri court reviewed the decisions in *Marks*, *Saldana* and the California Court of Appeals decision in *Bledsoe*. The court then set forth the two-part test to determine the admissibility of this evidence. The test first examined whether the evidence was relevant, and second, whether its relevance was outweighed by its tendency to create undue prejudice in the minds of the jurors.¹⁶⁵ Without citation to case authority, the court then equated this balancing test with a form of the *Frye* test for scientific evidence, stating that the test was "more accurately expressed in terms of the soundness of the scientific basis on which it rests, rather than its tendency, if taken as true, to prove the fact in issue."¹⁶⁶ The court then held that it was apparent that the doctor's statements

¹⁶² 140 Cal. App. 3d 267 (opinion omitted), 189 Cal. Rptr. 726 (1983).

¹⁶³ 189 Cal. Rptr. at 730. This decision was subsequently disapproved by the California Supreme Court in mid-1984. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). For a discussion of the California Supreme Court opinion, see *infra* text accompanying notes 180-87.

¹⁶⁴ 663 S.W.2d 235 (Mo. 1984).

¹⁶⁵ *Id.* at 240.

¹⁶⁶ *Id.*

were "not sufficiently based on a scientific technique, which is either parochially accepted or rationally sound, to overcome the inherent danger of prejudice created by his status as an expert."¹⁶⁷ The reasons supporting this holding are far from clear and the opinion itself appears to contain two major contradictions. First, in contradiction to the holding, the court earlier in its opinion stated, "[l]iterature covering the treatment of the psychiatric consequences of rape supports Doctor Amanat's testimony that rape trauma syndrome is generally accepted as a common reaction to sexual assault."¹⁶⁸ Second, the court indicated that the doctor would have been competent to explain the general symptoms of the syndrome and to have given an opinion that the complainant's symptoms were consistent with a stressful sexual experience,¹⁶⁹ while earlier in the opinion the court had indicated that such limited testimony would not be relevant.¹⁷⁰

Another troublesome aspect of the *Taylor* court's opinion is that it inferred that the psychiatrist's testimony included an opinion that the complainant had been raped by the defendant, and then held that the expert was not competent to render such an opinion. The court stated, "Doctor Amanat was permitted to state that the prosecutrix suffered from rape trauma syndrome and further comment, albeit implicitly, that she was in fact raped at Mary's Moonlight Lounge."¹⁷¹ Later in the opinion, the court stated, "But it goes beyond his qualifications to say that she was raped by defendant at Mary's Moonlight Lounge."¹⁷² Yet from the doctor's testimony it is clear that the doctor did not directly opine that the complainant was raped at Mary's Moonlight Lounge, or that she was raped by the defendant. Thus, although one of the court's major conclusions — that the doctor had no expertise to opine that complainant had been raped at a particular time and place by a particular person — is undoubtedly correct, it seems that in order to reach that result the court had to imply statements that were never made by the witness from the witness stand.

The court gave several other reasons in support of its holding that the psychiatrist had gone too far in expressing his opinion that the complainant had been raped by the defendant in Mary's Moonlight Lounge. First, it found the term "rape trauma syndrome" to have inherently prejudicial implications in that it suggests that the syndrome may only be caused by rape.¹⁷³ The court also stated that the doctor's conclusion "vouches too much for the victim's credibility and supplies verisimilitude for her on the critical issue of whether defendant did rape her."¹⁷⁴ The court commented that the psychiatrist's opinion that the complainant did not fantasize the rape was an express opinion about her credibility and that the testimony had been invested with an illegitimate "scientific cachet."¹⁷⁵ All in all, the court concluded that the "peril of prejudice and confusion resulting from the opinion testimony substantially outweighs any probative value that it might have."¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 237.

¹⁶⁹ *Id.* at 241.

¹⁷⁰ *Id.* at 240.

¹⁷¹ *Id.*

¹⁷² *Id.* at 241.

¹⁷³ *Id.* at 240.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 241.

¹⁷⁶ *Id.* The Missouri Court of Appeals relied on *Taylor* in summarily reversing a conviction in February, 1984. See *State v. Nobles*, 665 S.W.2d 694, 695 (Mo. App. 1984). However, in March,

The Minnesota Court of Appeals in *State v. Danielski*¹⁷⁷ in June, 1984 dealt directly with evidence of typical characteristics of sexually abused children and indirectly with rape trauma syndrome, when it held that testimony regarding "familial sexual abuse syndrome" was indistinguishable for evidentiary purposes from rape trauma syndrome and thus was inadmissible on the basis of *Saldana*.¹⁷⁸ The court further noted that this case did not fall within the exception for "unusual cases" involving children since the child in this case was now seventeen years old and fully capable of testifying.¹⁷⁹

The next appellate activity regarding rape trauma syndrome is the important opinion by the California Supreme Court in *People v. Bledsoe*.¹⁸⁰ The California Supreme Court disagreed with the California Court of Appeals' decision approving the admission of rape trauma syndrome testimony.¹⁸¹ The basis for the California Supreme Court's holding was that rape trauma evidence did not meet the *Frye* general acceptance standard. While acknowledging that rape trauma syndrome was generally accepted by the scientific community from which it arose for *therapeutic* purposes, the court held that it was *not* generally accepted by that community *to prove that a rape had occurred*, which was the purpose for which the prosecution offered it at trial.¹⁸² Thus, unlike fingerprints, blood tests, lie detector tests, voiceprints, or the battered child syndrome, the court found that rape trauma syndrome was not devised to determine the truth or accuracy of a particular past event.¹⁸³ The court noted that unlike the battered child syndrome, rape trauma syndrome "does not consist of a relatively narrow set of criteria or symptoms whose presence demonstrates that the client or patient has been raped; rather, as the counselor in this case testified, it is an 'umbrella' concept, reflecting the broad range of emotional trauma experienced by clients of rape counselors."¹⁸⁴ The court then concluded by stating that evidence of the severe emotional distress experienced by the

1984, the Missouri Court of Appeals let stand a rape conviction where two physicians had testified in very general terms that rape victims often have psychological damage that may last for a long time. Neither of the physicians had ever examined the complainant. See *State v. Ogle*, 668 S.W.2d 138, 140 (Mo. App. 1984), *cert. denied*, 105 S. Ct. 154 (1984). There was, however, testimony from the complainant's mother that the complainant had been suffering mental and emotional problems over a three-year period after the alleged rape. The court noted that, "[it] is common knowledge that a violent crime can cause changes in the mental condition of a person. Where, as here, the evidence shows that the change was caused by the crime, we think it is some evidence that the crime occurred." *Id.* at 141. The court then held that the experts' contribution was on such a general level as to not raise the dangers seen by the Missouri Supreme Court in *Taylor*, particularly in view of the fact that the term "rape trauma syndrome" was never mentioned and no opinion was given that the complainant had been raped. *Id.* at 144. It was the court's opinion that the testimony was so general that it was "unlikely that this told the jurors any more than they already knew." *Id.* Thus the conviction was affirmed. Also in March, 1984, the Missouri Court of Appeals held that testimony by a detective who testified that he had investigated 200 rapes during his career and that the complainant's appearance and behavior were consistent with a lot of earlier victims, to which testimony the defendant did not make proper objection, did not constitute plain error and thus the conviction would be affirmed. *State v. Thompson*, 668 S.W.2d 179, 182 (Mo. App. 1984).

¹⁷⁷ 350 N.W.2d 395 (Minn. App. 1984).

¹⁷⁸ *Id.* at 397.

¹⁷⁹ *Id.* at 398.

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

¹⁸¹ See *supra* text accompanying notes 162-63.

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

¹⁸³ *Id.* at 249, 681 P.2d at 300, 203 Cal. Rptr. at 459.

¹⁸⁴ *Id.* at 250, 681 P.2d at 300-01, 203 Cal. Rptr. at 460.

complainant, both immediately following the attack and in the subsequent weeks, was admissible. The expert opinion based on that evidence, however, was inadmissible because the lay jurors were fully competent to consider the evidence and determine whether a rape had occurred. The court noted that permitting a person in the role of an expert to suggest that because the complainant exhibits some symptoms of rape trauma syndrome the victim was therefore raped, unfairly prejudiced the defendant by creating an aura of special reliability and trustworthiness.¹⁸⁵

Having held the testimony inadmissible, however, the court held that the error was not so prejudicial as to require reversal because the prosecution's case against the defendant was very strong, while the rape trauma syndrome testimony "in truth . . . did little more than provide the jury with information that it either already had or that was not particularly pertinent to the facts of this case."¹⁸⁶ The court did not see fit to explain how such innocuous evidence could possibly have unfairly prejudiced the appellant, as was stated earlier in its opinion.¹⁸⁷

The next court to tackle the issue was the Montana Supreme Court in *State v. Liddell* in July, 1984.¹⁸⁸ In that rape prosecution, the defendant objected to rape trauma syndrome testimony by a psychiatric nurse on the basis that it was not the proper subject for expert testimony, it was highly prejudicial, it caused confusion and misled the jury, it was not a proper subject for expert opinion, and the psychiatric nurse was not qualified to render an opinion as to the defendant's state of mind. The court rejected all of these arguments and ruled that the evidence had been properly admitted. The court found that the testimony would aid the jury and thus was a proper subject for expert opinion.¹⁸⁹ The court held that the evidence did not confuse or mislead the jury, since "[a]ny relevant evidence which tends to support the existence or nonexistence of a fact in issue can only aid the jury determination, not mislead and confuse."¹⁹⁰ The court found that the only prejudice to the defendant was that the evidence supported the state's case, which did not constitute "unfair" prejudice.¹⁹¹

An equally significant aspect of *Liddell* is the court's rejection of the defendant's argument that the trial court erred by refusing to compel the complainant to be examined by the defendant's psychologist.¹⁹² Inexplicably, the Montana Supreme Court resorted to Rule 35(a) of the Montana Rules of Civil Procedure¹⁹³ and pointed out that the rule allowed the mental or physical examination only of a party, not of a witness. The court then added, "[t]he rape-trauma syndrome evidence was admissible as evidence relevant to the question of whether there had or had not been intercourse without the victim's

¹⁸⁵ *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

¹⁸⁶ *Id.* at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 461.

¹⁸⁷ In a companion case decided on the same day, *People v. Stanley*, 36 Cal. 3d 253, 681 P.2d 302, 203 Cal. Rptr. 461 (1984), the California Supreme Court held that there had been no sufficient objection to preserve the *Frye* argument regarding the lack of general scientific acceptance of the rape trauma syndrome evidence and that even if the objection had been properly made, admission of the testimony did not constitute plain error so as to require reversal. *Id.* at 260-61, 681 P.2d at 307, 203 Cal. Rptr. at 466.

¹⁸⁸ — Mont. —, 685 P.2d 918 (1984).

¹⁸⁹ *Id.* at —, 685 P.2d at 923.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at —, 685 P.2d at 924.

¹⁹³ There is no indication in the Montana Rules of Civil Procedure that they are applicable in criminal cases.

consent. The act was at issue, not the victim's state of mind."¹⁹⁴ This last sentence is, of course, hard to understand since it was not the act of intercourse that was at issue, the act having been admitted, but rather, the victim's state of mind — consenting or not consenting — at the time of the act. Nonetheless, the court determined that because the victim was not a party and her state of mind was not at issue, it was proper for the trial court to refuse to order her to be examined by the defendant's psychologist.

The majority was taken to task by dissenting Justice Morrison on this last point.¹⁹⁵ Justice Morrison argued that if rape trauma syndrome testimony is to be allowed then a full opportunity must be accorded the defendant to rebut the testimony, which would involve permitting a doctor or other qualified person to examine the complainant and provide the same opportunity for testimony that is given to the prosecution.¹⁹⁶

The Kansas Supreme Court revisited the rape trauma syndrome in two cases decided on the same day in October, 1984, *State v. McQuillen*¹⁹⁷ and *State v. Bressman*.¹⁹⁸ In *State v. McQuillen* the defendant was charged with rape and aggravated sodomy and claimed consent as a defense. In preparation for trial the state had the complainant examined by a psychiatrist to determine if she was suffering from rape trauma syndrome.¹⁹⁹ The trial court granted a motion in limine made by the defense to preclude the state's psychiatrist from testifying concerning the complainant's experiencing rape trauma syndrome. The basis for the trial court's ruling was that the Kansas Supreme Court had been wrong in *Marks* and that other opinions in other jurisdictions disallowing the testimony were better reasoned.²⁰⁰ The trial court also held that admission of the testimony would lead to a breach of the Kansas rape shield statute.²⁰¹

On appeal, the Kansas Supreme Court held that the trial court had been in error in precluding the state's expert from testifying.²⁰² In the process of examining the cases upon which the trial court had relied, mainly *Saldana* and *Taylor*, the court found that "the common thread"²⁰³ in those cases was that the evidence offered by the expert "was evidence affirming the rape by the defendant"²⁰⁴ as opposed to evidence simply generally explaining the syndrome or testimony that the complainant had been raped without specifying that she had been raped by any particular person.²⁰⁵ The court then went on to affirm the validity of the holding in *Marks*. In affirming *Marks*, the Kansas court seemed to narrow the holding by intimating that while the psychiatrist could testify that

¹⁹⁴ — Mont. at —, 685 P.2d at 924.

¹⁹⁵ *Id.* at —, 685 P.2d at 925 (Morrison, J., dissenting).

¹⁹⁶ *Id.* at —, 685 P.2d at 925–26 (Morrison, J., dissenting).

¹⁹⁷ 236 Kan. 161, 689 P.2d 822 (1984).

¹⁹⁸ 236 Kan. 296, 689 P.2d 901 (1984).

¹⁹⁹ The defendant filed a motion to compel the victim to submit to a similar examination by the defendant's psychiatrist and the court granted the motion. The complainant did not like the defense psychiatrist, and was uncooperative in granting interviews. This caused a delay in the proceedings, which allowed the defendant to argue that his right to a speedy trial had been violated. The speedy trial question will not be examined in this article.

²⁰⁰ *McQuillen*, 236 Kan. at 168–69, 689 P.2d at 827–28.

²⁰¹ *Id.* at 169, 689 P.2d at 828.

²⁰² *Id.* at 171, 689 P.2d at 829.

²⁰³ *Id.* at 170, 689 P.2d at 828.

²⁰⁴ *Id.* at 170, 689 P.2d at 829.

²⁰⁵ While this is a partially correct reading of *Taylor*, it is certainly not a correct reading of *Saldana*. *Saldana* clearly held that the testimony is inadmissible even at a general level, and is simply in contradiction to *Marks*. See *supra* text accompanying notes 123–31.

the complainant was suffering from the traumatic stress disorder known as rape trauma syndrome, he could not give an opinion that the victim was raped or that the stress which caused her disorder was a rape.²⁰⁶

The court next considered whether admitting testimony concerning rape trauma syndrome would violate the Kansas rape shield statute. The defendant argued that allowing the prosecution to present rape trauma syndrome evidence and permitting the defense to have its experts examine the complainant to rebut that testimony would allow the defense to bring out the prior sexual activity of the complainant through the defense expert who would examine the complainant's prior sexual history in order to determine whether she was suffering from rape trauma syndrome. The court's response to this argument was that such rebuttal evidence would not allow wholesale admittance of the victim's past sexual conduct unless that information was used by the state's expert to make his determination of rape trauma syndrome.²⁰⁷ The court then went on to state that the defendant could not offer evidence that the complainant was not suffering from rape trauma syndrome where the state had not first introduced evidence that the complainant was suffering from rape trauma syndrome. The court stated:

There are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim. Negative evidence to be admissible must have some probative value. Where consent is the defense in a prosecution for rape, expert testimony of the absence of rape trauma syndrome is not relevant or admissible.²⁰⁸

The *McQuillen* opinion is also significant because of the indication by the Kansas court, in contrast with the Montana Supreme Court in *Liddell*, that the defendant had an absolute right to have a complainant examined by a defense expert if the prosecution chose to use rape trauma syndrome testimony.²⁰⁹

While the Kansas Supreme Court had been unanimous in its holding in *Marks*, two justices dissented from the majority opinion in *McQuillen*.²¹⁰ The two dissenters found the reasoning in *Saldana* and *Taylor* to be more persuasive. Additionally, they disagreed with the majority holding that a defendant may not present expert evidence that the rape victim does not display signs of rape trauma syndrome unless the prosecution first introduces evidence of this condition.

In *State v. Bressman*²¹¹ the Kansas Supreme Court examined rape trauma syndrome evidence in a different factual context. In *Bressman*, the defense was not consent, but instead that no sexual activity had taken place at all.²¹² The state called an emergency room doctor who testified that the complainant fell into one of three categories that the doctor had noticed in treating rape complainants. The doctor's testimony was not in terms of rape trauma syndrome as researched by behavioral scientists, but rather was couched in terms of her own observations regarding the rape victims whom she had counseled. The doctor then stated that in her opinion the complainant had been raped.

²⁰⁶ *McQuillen*, 236 Kan. at 171, 689 P.2d at 829.

²⁰⁷ *Id.* at 172, 689 P.2d at 830.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 167, 689 P.2d at 827.

²¹⁰ *Id.* at 182, 689 P.2d at 836 (Miller, J., dissenting in part and concurring in part).

²¹¹ 236 Kan. 296, 689 P.2d 901 (1984).

²¹² *Id.* at 298, 689 P.2d at 904.

The defendant argued that this testimony was without foundation and invaded the province of the jury. The trial court overruled these objections, allowed the testimony, and the defendant was convicted.

On appeal, the Kansas Supreme Court agreed with the defendant for several reasons. First, there was no showing that the doctor was an expert in the field of psychiatry.²¹³ Moreover, according to the court, there was no showing that the bases for her conclusions were generally accepted in the field of psychiatry.²¹⁴ The court also determined that the jury could properly assess the state of mind and actions of the complainant and therefore expert testimony was not necessary.²¹⁵ Further, according to the court the testimony was an improper bolstering of the complainant's testimony.²¹⁶ Additionally, the court considered evidence of rape trauma syndrome irrelevant where the defense is something other than consent.²¹⁷ Finally, the court found that the expert had gone beyond what was allowed in *Marks* when she opined that the complainant had been raped, because *Marks* restricted the expert psychiatric testimony to the victim's state of mind and the existence of rape trauma syndrome. The court therefore reversed the conviction.²¹⁸

Thus, in *Bressman* the Kansas Supreme Court clearly limited rape trauma syndrome testimony to that of a *psychiatrist* who examines the complainant for the explicit purpose of determining whether rape trauma syndrome exists, which testimony can only be used in cases where consent is a defense. Further, there is a basis in the opinion itself to question how useful rape trauma syndrome evidence will continue to be for the prosecution in Kansas in view of the court's holding that testimony was not helpful and the jury could properly assess the state of mind and actions of the complainant by itself. Both the *Bressman* and *McQuillen* cases show the Kansas Supreme Court struggling to deal with the ramifications of the *Marks* decision. Further, both cases indicate a distinct narrowing of the circumstances in which the court believes that the testimony should be admissible.

The next state appellate decision to consider the rape trauma syndrome question was *Allewalt v. State*, decided by the Maryland Court of Special Appeals in February, 1985.²¹⁹ Again, the defendant's defense was that the complainant had consented to the intercourse. In rebuttal, the state called a forensic psychiatrist who explained the general characteristics of PTSD, of which rape trauma syndrome is a subcategory. He testified that it was his opinion from his examination of the complainant three and one half months after the alleged rape that she was suffering from rape trauma syndrome and

²¹³ *Id.* at 303, 689 P.2d at 907.

²¹⁴ *Id.*

²¹⁵ *Id.* at 303, 689 P.2d at 908.

²¹⁶ *Id.* at 304, 689 P.2d at 908.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ 61 Md. App. 503, 487 A.2d 664 (1985). *Allewalt* was the most recent rape trauma syndrome case at the time this article was written. Since then, an important rape trauma case has been decided by the Arizona Supreme Court. A detailed discussion of that case is not undertaken in this article. In *State v. Huey*, ___Az. ___, 699 P.2d 1290, 1293-94 (1985), the court approved the use of rape trauma syndrome testimony on the issue of consent, disagreeing with the defense contention that the testimony improperly invaded the province of the jury. The court based its approval upon its agreement with the reasoning of the Kansas Supreme Court in *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982).

that the cause of this disorder was rape. The defendant objected to the testimony as not being generally accepted in the pertinent scientific community, and as not relating to a subject matter on which the jury needed expert assistance. The trial court overruled these objections, allowed the testimony, and the defendant was convicted.

After reviewing the authorities on the subject, the appellate court held that although the psychiatrist fulfilled the necessary qualifications to testify as an expert concerning PTSD, and although the evidence was relevant as tending to support an inference of lack of consent, the testimony should not have been admitted because its substantial prejudicial impact outweighed its limited probative value.²²⁰ The prejudicial impact identified by the court partook of several evidentiary principles. First, the court reasoned that although a diagnosis of PTSD does reliably indicate that the victim displays certain symptoms, it does not reliably prove that those symptoms are a result of forced sexual intercourse.²²¹ The court noted that this is particularly true since the evidence relied upon by the physician in making the diagnosis assumes that the victim related what actually happened, or at least what in her perception actually took place. The court then noted that although testimony relaying information given to a doctor by a patient is admissible under a hearsay exception on the theory that it is reliable because a person seeking medical care will tell the truth to the doctor, information transmitted to a doctor by a patient which would result in a diagnosis of PTSD "becomes less reliable because 'it is more important that the individual . . . believes that it took place.'"²²² Additionally, the court stated that the testimony unduly corroborated the complainant's rendition of the incident so as to lead to confusion of the issue being decided and create the perception that no further fact-finding was necessary. Thus, the court concluded that admission of the testimony constituted reversible error.²²³ The court then noted that it did not have to reach the question of whether the *Frye* test applies to PTSD evidence.²²⁴ The court's statement is peculiar, since reliability of the evidence was a major concern of the courts, and the reliability of scientific evidence is seen by most commentators to also be at the heart of the *Frye* test.²²⁵

To summarize, expert testimony regarding rape trauma syndrome on the issue of consent is admissible in two jurisdictions, Montana and Kansas.²²⁶ In Montana, a properly qualified expert need not be a psychiatrist, and the expert can testify about the general characteristics of the syndrome, give the opinion that the complainant is suffering from those symptoms, and give the opinion that those symptoms are a result of a rape. But in Montana the defense has no right to a psychological examination of the complainant. In Kansas, the only proper expert is a psychiatrist. The psychiatrist's testimony is limited to a general explanation of the syndrome and an opinion that the complainant is

²²⁰ 61 Md. App. at 514, 487 A.2d at 669.

²²¹ *Id.*

²²² *Id.* at 514 n.8, 487 A.2d at 669 n.8.

²²³ *Id.* at 516, 487 A.2d at 670.

²²⁴ *Id.*

²²⁵ See *infra* text accompanying notes 314-19.

²²⁶ Rape trauma syndrome testimony has also been admitted in Oregon in *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978), but it is not possible to assert that the court was expressing general approval of such testimony, since the only objection that was preserved for appeal was that the expert was not competent. See *supra* text accompanying notes 74-77. See also discussion of the Arizona case of *State v. Huey* in note 219.

suffering from it. In Kansas, if the prosecution chooses to use rape trauma syndrome testimony, the defense has a right to a psychological examination of the complainant.

Expert testimony regarding rape trauma syndrome on the issue of consent is clearly barred in three jurisdictions: Minnesota, California and Maryland. Missouri also apparently falls into this category, although the bar is less clear due to the *Taylor* court's contradictory statements indicating that an expert could be properly qualified to testify concerning the general characteristics of the syndrome, and that the complainant's symptoms were consistent with the syndrome, but that such "limited" testimony would not be relevant.²²⁷

2. To Explain Unusual Behavior of the Complainant

Building on *State v. Harwood*,²²⁸ there have been several cases decided after *Marks* and *Saldana* where expert opinion testimony has been admitted to explain unusual behavior of the complainant. Some of these cases do not involve true rape trauma syndrome testimony, but rather testimony about sexually abused children. The cases involving sexually abused children are, however, illustrative of types of behavior that are unusual enough for a court to allow an expert to explain them.²²⁹ For example, when a child complainant reports sexual abuse but later recants the charges, and is then cross-examined about the recantation at trial, the prosecution has been allowed to call an expert to testify that it is not unusual for children to retract such an allegation in the face of confusion, fear, and mixed feelings about the abuser.²³⁰ Similarly, when a child complainant who claims that the abuse continued over a substantial period of time is cross-examined concerning why the abuse was not reported earlier, the prosecution has been allowed to call an expert to explain that a child victim is often reluctant to reveal the crime when it is committed in a family setting.²³¹

Two civil cases in which the plaintiffs were seeking damages for an alleged rape by the defendant, decided in 1982 and 1983, allowed rape trauma syndrome testimony to explain the seemingly unusual behavior of the complainant. In *Delia S. v. Torres*,²³² a civil

²²⁷ The *Allewalt* court interpreted *Taylor* as barring rape trauma syndrome testimony. See 61 Md. App. at 512 n.7, 487 A.2d at 668 n.7.

²²⁸ 45 Or. App. 931, 609 P.2d 1312 (1980). For a discussion of this case, see *supra* text accompanying notes 102-04.

²²⁹ Further, these cases have been cited as authority by one court for allowing such testimony in rape cases. *People v. Bledsoe*, 36 Cal. 3d 236, 247 n.7, 681 P.2d 291, 298 n.7, 203 Cal. Rptr. 450, 457 n.7 (1984). See *supra* text accompanying notes 180-87 for a discussion of the *Bledsoe* court's dealing with this issue. See also *State v. Middleton*, 58 Or. App. 447, 454, 648 P.2d 1296, 1300 (1982), *aff'd*, 294 Or. 429, 435-38, 647 P.2d 1215, 1219-21 (1983).

²³⁰ Expert testimony explaining a child complainant's recantation of a sexual abuse allegation was also allowed in *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984). The case is interesting because it analyzed the child's recantation as a symptom associated with rape trauma syndrome. The rape trauma syndrome literature, however, is inappropriate as authority for two reasons: first, it deals with *adults* who were *forcibly* raped; and second, no "recantation" symptom of rape trauma syndrome has been found.

²³¹ *People v. Benjamin R.*, 103 A.D.2d 663, 669, 481 N.Y.S.2d 827, 832 (1984). Unlike the court in *People v. Reid*, see *supra* note 230, the court in *Benjamin R.* recognized that rape trauma syndrome testimony and child sexual abuse syndrome testimony are not synonymous. 103 A.D.2d at 669, 481 N.Y.S.2d at 832.

²³² 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982).

action for damages for rape decided by the California Court of Appeals in July, 1982, the defense was predicated in part on the theory that the actions and responses of the plaintiff were inconsistent with those of a rape victim. In response the plaintiff presented testimony of a licensed clinical social worker who had considerable experience working in rape crisis centers. She testified that feelings of fear, shame, and guilt resulting in a failure to speak or report the experience are very common reactions for rape victims. The defendant objected that the testimony improperly bolstered the testimony of the plaintiff. The court rejected the defendant's argument, stating that rather than improperly "validating" the testimony of the plaintiff, the evidence provided a background against which the jury could establish the relevance of the defense theory that the plaintiff's conduct was not typical or expected of a rape victim.²³³

Similarly, in *Terrio v. McDonough*,²³⁴ another civil damages action for alleged rape in Massachusetts, the plaintiff had voluntarily returned to the defendant's presence after the alleged rape because she had locked her keys in her car. The defendant attempted to use this as evidence that she had consented to the intercourse, because if she had not consented she would not have returned to his presence. In response the plaintiff presented the testimony of Ann Wolbert Burgess, Dean of the School of Nursing at Boston University and one of the two persons who coined the term "rape trauma syndrome" in the seminal article on the issue in 1974. Burgess testified that it would not necessarily be remarkable for a rape victim to return to the scene with her attacker or to feel safe in his company after the event. The court held that the testimony was properly admissible because it held the promise of assisting the jury in understanding the evidence.²³⁵

Although it rejected rape trauma syndrome testimony on the issue of consent, the California Supreme Court in *People v. Bledsoe* approved the use of rape trauma syndrome testimony to explain the unusual behavior of an adult complainant in a criminal case.²³⁶ The court explicitly recognized the divergent uses of rape trauma syndrome testimony. That is, on one hand such testimony can be used to prove lack of consent, and on the other hand to explain unusual behavior of the complainant. The *Bledsoe* court expressed its opinion that use of the testimony on the latter point was permissible.²³⁷

In summary, there is unanimous agreement among the courts which have considered the issue that rape trauma syndrome testimony (and child sexual abuse testimony) is properly admissible to explain what might otherwise seem to be unusual complainant behavior. Such testimony is used in rebuttal when the defendant seeks to capitalize on the unusual behavior by attempting to persuade the jury that a person who had actually been the victim of a sexual attack would not behave afterwards in the way that the complainant behaved.²³⁸

²³³ *Id.* at 478-79, 184 Cal. Rptr. at 792.

²³⁴ 16 Mass. App. Ct. 163, 450 N.E.2d 190 (1983).

²³⁵ *Id.* at 176, 450 N.E.2d at 198.

²³⁶ 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). For a case allowing very similar testimony without mentioning rape trauma syndrome, see *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984) (in a Mann Act prosecution, PTSD expert allowed to explain why victims did not flee from the defendant over a period of several months).

²³⁷ 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

²³⁸ The focus of the remainder of this article will be on the admissibility of rape trauma syndrome evidence on the issue of consent. If such evidence is admissible to prove an element of the charge in the case-in-chief, then *a fortiori* it is admissible in rebuttal on the issue of the credibility of a witness.

VI. EVIDENTIARY ANALYSIS CONCERNING THE ADMISSIBILITY OF RAPE TRAUMA SYNDROME EVIDENCE WHEN OFFERED BY THE PROSECUTION

In continuing the analysis of rape trauma syndrome evidence, the various evidentiary objections raised by the defense will be analyzed to determine whether they provide a basis for excluding the evidence. Preliminarily, four complicating variables that appear in the facts of the previously discussed cases need be mentioned. The first of these is that in some cases the evidence is offered by the prosecution in its case-in-chief²³⁹ and in other cases it is offered in rebuttal.²⁴⁰ This difference in when the evidence is offered is not of major significance. Rape trauma syndrome evidence offered on the issue of consent, if admissible, should be admissible either in the case-in-chief or in rebuttal. It is admissible in the case-in-chief because lack of consent is an element of the prosecution's case and the prosecution should be able to present whatever probative evidence it has on that point in order to defeat a motion for judgment of acquittal. The evidence should also be permissible in rebuttal since the prosecution should be able to choose to marshal its evidence concerning lack of consent to rebut the defendant's testimony that the intercourse was consensual.

When the rape trauma syndrome evidence is offered for the purpose of explaining what would otherwise seem to be unusual behavior of the complainant, the prosecution's use of the evidence is in theory slightly more restricted. The restriction arises because generally the testimony of a witness cannot be bolstered before the opponent attacks the witness' credibility.²⁴¹ Thus, the prosecution's case-in-chief could not use rape trauma syndrome evidence for this explanatory purpose until the veracity of the complainant is called into question on her cross-examination. As to use in rebuttal, it should be allowed assuming that the complainant's credibility has been assailed either by cross-examination or by evidence presented by the defendant in his case-in-chief. Thus, except for the restriction that the prosecution must wait in its case-in-chief until the credibility of the complainant has been attacked before offering such evidence, the admissibility of rape trauma syndrome evidence does not hinge upon whether the prosecution offers it in its case-in-chief or in rebuttal.

The second variable that merits discussion preliminarily is the differences in the levels of opinion that can be elicited from a rape trauma syndrome expert. The cases reveal at least four levels of opinion, ranging from general to very specific. The first level of opinion is testimony from the expert only regarding the general characteristics of the syndrome, coupled with testimony of the complainant and/or other witnesses (usually relatives) concerning the condition and behavior of the complainant, with the jury left to determine for itself whether the complainant's behavior matches the general characteristics.²⁴² The second level of testimony is where the expert testifies to the general

²³⁹ See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *People v. Stanley*, 36 Cal. 3d 253, 681 P.2d 302, 203 Cal. Rptr. 461 (1984); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

²⁴⁰ See *Allewalt v. State*, 61 Md. App. 503, 487 A.2d 664 (1985); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982). In some important cases it is impossible to tell from the appellate opinion whether the testimony was offered in the prosecution's case-in-chief or in rebuttal. See, e.g., *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. Liddell*, ___ Mont. ___, 685 P.2d 918 (1984).

²⁴¹ See C. McCORMICK, *McCORMICK ON EVIDENCE* § 49 (E. Cleary 3d ed. 1984).

²⁴² See, e.g., *State v. Ogle*, 668 S.W.2d 138, 140 (Mo. Ct. App. 1984), *cert. denied*, 105 S. Ct. 154 (1984). It is unusual for the prosecution to limit the expert's testimony to this level.

characteristics of the syndrome and then gives an opinion that the complainant's symptoms match the symptoms of rape trauma syndrome.²⁴³ The third level of testimony consists of the expert outlining the general characteristics of the syndrome, opining that the complainant's match those characteristics, and further opining that the cause of the complainant's symptoms is rape.²⁴⁴ The fourth and most specific level of expert testimony involves the expert testifying additionally in such a manner as to affirm the credibility of the complainant, such as by stating that she believes the complainant or that the complainant did not fantasize the incident.²⁴⁵ In general, as will be seen, objections to the testimony grow more weighty as the testimony grows more specific.

The third variable that merits preliminary discussion is the two different bases of expert opinion relied upon by experts with respect to rape trauma syndrome. One basis of testimony is when the expert compares the symptoms of the complainant with the symptoms of other rape victims with whom the expert has personally dealt *without* invoking a comparison based on rape trauma syndrome in general.²⁴⁶ This basis of opinion can be characterized as the "personal experience" basis. The second basis for such testimony in rape trauma syndrome cases is when the expert compares the symptoms of the complainant with the "textbook" symptoms of rape trauma syndrome, thereby invoking the expertise of the scientific community. Most rape trauma syndrome testimony has been given in this form,²⁴⁷ which will be referred to as the "textbook" form.

Additionally in many rape trauma syndrome cases the defense raises the objection that the admission of this type of evidence "invades the province of the jury."²⁴⁸ This imprecise objection could refer to any of three specific objections: that the testimony constitutes an improper bolstering of credibility of the complainant, which is peculiarly within the province of the jury;²⁴⁹ that the testimony does not relate to a proper subject for expert opinion in that it is not helpful to the jury because the jury is in as good a position to determine consent as is the expert;²⁵⁰ or that the testimony is unfairly prejudicial because it overwhelms the jury with an aura of scientific reliability.²⁵¹ The "invading province of the jury" objection will not be discussed as such, but rather will be discussed as appropriate under these three separate and more specific objection headings.

²⁴³ See, e.g., *Bledsoe*, 36 Cal. 3d at 243-44, 681 P.2d at 295-96, 203 Cal. Rptr. at 454-55; *Marks*, 231 Kan. at 653, 647 P.2d at 1299; *Allewalt*, 61 Md. App. at 508, 487 A.2d at 666. Testimony on this level is sometimes barely distinguishable from that on the third level because if on the second level the expert testifies that the complainant is suffering from rape trauma syndrome, implicit in this opinion is that the cause was rape, even if the expert does not so opine.

²⁴⁴ See, e.g., *Saldana*, 324 N.W.2d at 229; *Liddell*, ___ Mont. at ___, 685 P.2d at 922.

²⁴⁵ See, e.g., *Saldana*, 324 N.W.2d at 229; *Taylor*, 663 S.W.2d at 237.

²⁴⁶ See, e.g., *State v. Bressman*, 236 Kan. 296, 301, 689 P.2d 901, 906 (1984); *State v. LeBrun*, 37 Or. App. 411, 416, 587 P.2d 1044, 1047 (1978), *cert. denied*, 286 Or. 149 (1979).

²⁴⁷ See, e.g., *Bledsoe*, 36 Cal. 3d at 241-44, 681 P.2d at 294-96, 203 Cal. Rptr. at 453-55; *Taylor*, 663 S.W.2d at 236-37.

²⁴⁸ See, e.g., *Marks*, 231 Kan. at 653, 647 P.2d at 1299; *Saldana*, 324 N.W.2d at 231; *Taylor*, 663 S.W.2d at 236; *Reid*, 123 Misc. 2d at 1085, 475 N.Y.S.2d at 742.

²⁴⁹ See *infra* text accompanying notes 400-05.

²⁵⁰ See *infra* text accompanying notes 373-87.

²⁵¹ See *infra* text accompanying notes 304-10.

*A. Rape Trauma Syndrome Evidence and the Frye Test*1. Should the *Frye* Test Apply to Rape Trauma Syndrome Evidence?

Virtually all American jurisdictions approach "scientific" evidence with particular caution. The traditional manifestation of that caution is the *Frye* test enunciated by the District of Columbia Circuit Court of Appeals in *Frye v. United States* in 1923.²⁵² *Frye* established the "general acceptance" test for the admissibility of scientific evidence. The *Frye* case involved a rudimentary polygraph device, the results of which the defendant sought to have admitted at the trial claiming that they tended to show his innocence. The court held that the trial court had properly refused to admit the evidence, stating:

Just when a scientific principle crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.²⁵³

The threshold requirement with respect to the application of the *Frye* test is whether a particular item of evidence is "scientific." If "scientific," it should have to meet the test, while if not "scientific," it should not have to meet the test. Courts have been inconsistent in determining the types of evidence "scientific" enough to require application of the test.²⁵⁴ Among the rape trauma syndrome cases, however, no such inconsistency exists — in every reported case in which a defendant has raised the objection that the evidence when offered on the issue of consent must pass the *Frye* test (or its state equivalent), the courts have, without discussion, agreed.²⁵⁵

The case law regarding the applicability of the *Frye* test²⁵⁶ to behavioral scientific evidence, at a minimum, is perplexing. A listing of the types of behavioral scientific evidence to which such a test has been applied, when compared with a list of the types of behavioral scientific evidence to which it has not been applied, does not reveal any rational pattern of application.

²⁵² 293 F. 1013 (D.C. Cir. 1923).

²⁵³ *Id.* at 1014.

²⁵⁴ See Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1219 (1980); Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539, 556-57 (1979) [hereinafter cited as Comment, *The Psychologist as Expert Witness*].

²⁵⁵ See, e.g., *Bledsoe*, 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457; *Bressman*, 236 Kan. 296, 305, 689 P.2d 901, 908 (1984); *Marks*, 231 Kan. at 653, 647 P.2d at 1299; *Saldana*, 324 N.W.2d at 229 n.30; *Taylor*, 663 S.W.2d at 240.

²⁵⁶ The *Frye* test has been subjected to considerable criticism in recent years. This has resulted in some courts modifying the test, some abandoning it in favor of other special tests for scientific evidence, and some abandoning all special tests for scientific evidence, and purporting to treat scientific evidence like all other expert testimony. These trends are well analyzed in McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 886-905 (1982). For purposes of this article a "special test for scientific evidence" refers to any test that treats scientific evidence substantially differently than other expert testimony.

In addition to rape trauma syndrome, a special scientific evidence test has been applied to the following types of behavioral scientific evidence: battered wife syndrome,²⁵⁷ battering parent syndrome,²⁵⁸ the psychology of heroin addiction,²⁵⁹ the sexual propensities of a defendant in a sex crimes case when offered by the defendant²⁶⁰ or by the prosecution,²⁶¹ and pathological gambling syndrome.²⁶² Additionally, there is scholarly opinion advocating a special test for scientific evidence which should be more broadly applied to behavioral scientific evidence than has traditionally been the case. This opinion ranges from the narrow recommendation of applying the *Frye* test to predictions of dangerousness in capital cases,²⁶³ to broader arguments that virtually all psychiatric or psychological testimony should be subjected to such a test.²⁶⁴

On the other hand, in general the vast majority of behavioral scientific evidence has not had to pass a special scientific evidence test. For example, in the traditional areas of psychiatric and psychological testimony in criminal cases, namely, competency to stand trial and sanity at the time of the crime, the courts almost never apply the *Frye* test.²⁶⁵ Additionally, the following types of behavioral scientific evidence have not been subjected to the *Frye* test: PTSD defenses raised by Vietnam veterans,²⁶⁶ PTSD of a white slavery victim,²⁶⁷ expert opinion concerning the veracity of another witness,²⁶⁸ the phenomenon of repression,²⁶⁹ Munchausen's syndrome by proxy,²⁷⁰ susceptibility to inducement,²⁷¹

²⁵⁷ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 637-39 (D.C. 1979); *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981).

²⁵⁸ See, e.g., *State v. Loebach*, 310 N.W.2d 58, 64-65 (Minn. 1981).

²⁵⁹ See, e.g., *State v. Blea*, 101 N.M. 323, 327, 681 P.2d 1100, 1103 (1984).

²⁶⁰ See, e.g., *People v. Spigno*, 156 Cal. App. 2d 279, 287-91, 319 P.2d 458, 463-65 (1957); *Douglas v. United States*, 386 A.2d 289, 295-96 (D.C. 1978); *State v. Cavallo*, 88 N.J. 508, 516-18, 443 A.2d 1020, 1024-25 (1982).

²⁶¹ See *State v. Fitzgerald*, 694 P.2d 1117, 1122 (Wash. Ct. App. 1985).

²⁶² See *United States v. Lewellyn*, 723 F.2d 615, 618-20 (8th Cir. 1983).

²⁶³ See Note, *People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 CALIF. L. REV. 1069, 1084-90 (1982).

²⁶⁴ See I. J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 3 (3d ed. 1981); Ennis & Litwack, *Psychiatry and Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 737-38 (1974); Comment, *The Psychologist as Expert Witness*, *supra* note 254, at 561.

²⁶⁵ See Comment, *The Psychologist as Expert Witness*, *supra* note 254, at 556-57. Occasionally a court will apply *Frye* in the context of an insanity defense. See, e.g., *United States v. Lewellyn*, 723 F.2d 615, 619 (8th Cir. 1983) (pathological gambling evidence inadmissible); *Kramer v. United States*, 579 F. Supp. 314, 318 (D. Md. 1984) (Episodic Dyscontrol Syndrome evidence inadmissible).

²⁶⁶ See, e.g., *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1982); *Miller v. State*, 338 N.W.2d 673 (S.D. 1983). In these cases, as in most of the cases cited *infra* notes 267-74, the courts did not need to consider the applicability of the *Frye* test because the appellant did not make the argument that the *Frye* test applied. Thus, the decisions do not hold that the *Frye* test does not apply, but the decisions are of note nonetheless because they show that counsel, at least some of whom must have been competent, did not think of making the *Frye* objection with respect to many kinds of behavioral scientific evidence, which is indicative of how foreign *Frye* is to this type of evidence.

²⁶⁷ See *United States v. Winters*, 729 F.2d 602 (9th Cir. 1984).

²⁶⁸ See, e.g., *United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978); *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *Holliday v. State*, 389 So. 2d 679 (Fla. Dist. Ct. App. 1980); *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980).

²⁶⁹ See *People v. Fisher*, 73 A.D.2d 886, 424 N.Y.S.2d 197 (1980), *aff'd*, 53 N.Y.2d 907, 423 N.E.2d 53, 440 N.Y.S.2d 630 (1981).

²⁷⁰ See *People v. Phillips*, 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1981).

²⁷¹ See *United States v. Hill*, 655 F.2d 512 (3d Cir. 1981).

voluntariness of a defendant's actions,²⁷² absence of a requisite mental state for a crime,²⁷³ and the state of mind of the defendant at the time of a confession.²⁷⁴

A graphic illustration of the confusion of the case law with respect to the applicability of a special test for scientific evidence is presented by cases involving expert testimony regarding the fallibility of eyewitness identifications. Many courts have applied a special scientific evidence test to such evidence,²⁷⁵ and in earlier years the testimony consistently failed the test,²⁷⁶ although it now appears to be passing the test in some jurisdictions.²⁷⁷ On the other hand, the California Supreme Court recently held that expert testimony regarding the fallibility of eyewitness identification is not a type of evidence to which a special scientific evidence test should be applied.²⁷⁸ The court held that such evidence was mere expert evidence, not "scientific" evidence because "scientific" evidence is proof "derived from an apparently 'scientific' mechanism, instrument, or procedure."²⁷⁹ The court then stated:

Here, by contrast, no such methods are in issue. We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association We see no reason to require a greater foundation when the witness is a qualified psychologist who will simply explain to the jury how certain aspects of everyday experience shown by the record can affect human perception, memory, and through them, the accuracy of eyewitness identification testimony.²⁸⁰

The court unconvincingly cited rape trauma syndrome as in the same category of "novel [scientific] devices or processes" as lie detectors, truth serum, Nalline testing, experimental systems of blood typing, voiceprints, identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis,²⁸¹ even though rape trauma syndrome testimony clearly falls more naturally into the category of expert medical and psychological testimony to which the court held that the *Frye* rule should not be applied.

Indeed, one need look no further than rape trauma syndrome and its related concepts to see the inconsistency in the courts' application of special scientific evidence tests to behavioral scientific evidence. While the courts unquestioningly apply a special scientific evidence test to rape trauma syndrome testimony offered on the issue of consent, no court has applied a scientific evidence test when rape trauma syndrome

²⁷² See *United States v. Hearst*, 563 F.2d 1331 (9th Cir.), cert. denied, 435 U.S. 1000 (1978).

²⁷³ See *United States v. Zink*, 612 F.2d 511 (10th Cir. 1980).

²⁷⁴ See *United States v. Smith*, 638 F.2d 131 (9th Cir. 1981).

²⁷⁵ See, e.g., *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979); *United States v. Watson*, 587 F.2d 365, 368-69 (7th Cir. 1978), cert. denied sub nom. *Davis v. United States*, 439 U.S. 1132 (1979); *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973).

²⁷⁶ See *supra* note 275 and cases cited therein.

²⁷⁷ See, e.g., *United States v. Smith*, 736 F.2d 1103, 1106-07 (6th Cir.), cert. denied, 105 S. Ct. 213 (1984); *State v. Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219 (1983).

²⁷⁸ See *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

²⁷⁹ *Id.* at 372, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51.

²⁸⁰ *Id.* at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251 (citing *People v. Phillips*, 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1981) ("Munchausen's syndrome by proxy")).

²⁸¹ *Id.*

evidence or evidence of typical symptoms of sexually abused children has been offered to explain seemingly unusual behavior of the complainant.²⁸² Even more strikingly, the Minnesota Supreme Court, which had held that rape trauma syndrome testimony was inadmissible on the basis of the *Frye* test in *Saldana*,²⁸³ did not apply the *Frye* test in a later case when evidence of typical symptoms of sexually abused children was offered to show that illegal sexual activity had occurred.²⁸⁴ Thus, while the perceived weakness of rape trauma syndrome evidence went to the admissibility rather than the weight of the evidence in *Saldana*, the court stated in the child sexual abuse case "[t]he reliability of expert opinion testimony with regard to the existence or cause of the condition goes not to the admissibility of the testimony but to its relative weight."²⁸⁵ The court did not attempt to explain this jarring inconsistency between its treatment of the two very similar types of evidence.

The "weight versus admissibility" distinction shows the difference between how expert testimony is treated if it is deemed to be "scientific" versus how it is treated if it is deemed not to be scientific. Basically, when a special test for scientific evidence is applicable, weaknesses in the evidence tend to be viewed as going to its admissibility rather than its weight, whereas if the evidence is deemed not to be "scientific" expert testimony, then weaknesses in the evidence will generally be viewed as going to its weight and not to its admissibility. Thus, traditional analysis leads to the conclusion that the key question is whether the type of evidence being offered is evidence the weaknesses of which should entirely prevent the jury from hearing it, or whether its weaknesses are such that the jury should be permitted to hear it, allow the opponent an opportunity to expose those weaknesses to the jury, and then let the jury make its own decision on the weight to be given such evidence.

But how does a court determine whether the evidence is "scientific" so that its weaknesses go to its admissibility, or whether it is mere "expert" testimony, the weaknesses of which go to its weight? With respect to at least behavioral scientific evidence, it is apparent that the courts have not reached an acceptable answer to this question. Further, it seems that if intelligent jurists are unable to formulate a satisfactory and consistent answer to a question, then perhaps the wrong question is being asked. Indeed, the best scholarly thinking in this area indicates that attempting to separate "scientific" sheep from "expert" goats and applying different tests to each is not the most profitable line of inquiry for courts. This thinking is exemplified by the work of Professor Stephen Saltzburg.²⁸⁶ Professor Saltzburg believes that there is no reason to separate "scientific" evidence from expert testimony generally.²⁸⁷ Moreover, he finds that both the *Frye* test and its emerging major competitor, "relevance analysis,"²⁸⁸ attempt to fulfill the same

²⁸² See *supra* text accompanying notes 228-38.

²⁸³ 324 N.W.2d 227, 229-30 (Minn. 1982).

²⁸⁴ *State v. Myers*, 359 N.W.2d 604 (Minn. 1984).

²⁸⁵ *Id.* at 611.

²⁸⁶ Saltzburg, *Frye and Alternatives*, 99 F.R.D. 208 (1983) (paper presented at the National Conference of Lawyers and Scientists, *Symposium on Science and the Rules of Evidence*) [hereinafter cited as Saltzburg, *Frye and Alternatives*].

²⁸⁷ *Id.* at 216.

²⁸⁸ "Relevance analysis" seeks to treat scientific evidence the same way that other evidence is treated, weighing its probative value and helpfulness against countervailing dangers. Its earliest major scholarly proponent was Professor McCormick, see C. MCCORMICK, MCCORMICK'S HANDBOOK

basic goal: to assure that the trier of fact has a trustworthy basis for crediting or discrediting evidence offered at trial.²⁸⁹ Professor Saltzburg points out that this goal accounts for other precepts of the law of evidence, such as the reluctance to admit lay opinion testimony, limitations of expert testimony generally, and the mistrust of hearsay evidence.²⁹⁰ These precepts rest at least partly on the assumption that evidence that cannot be fairly weighed is more likely to be harmful than helpful and that a rational system of deciding disputes should avoid rather than rely on such evidence.²⁹¹ Professor Saltzburg then points out that the usual means by which a jury is allowed to weigh fairly evidence is by the weaknesses in the evidence brought out on cross-examination.²⁹² He notes that this means of attacking the evidence may be less useful with an expert than with an ordinary witness because often the expert may claim that his testimony is not based upon his ability to perceive, remember, and narrate, but on extrinsic data or principles that the expert claims to be especially reliable.²⁹³ Professor Saltzburg suggests that if cross-examination appears to be insufficient to allow the trier of fact to understand and fairly evaluate the data or principles upon which the testimony is based, then more than the claim of the expert called to testify is needed to warrant acceptance of the evidence as valid.²⁹⁴

Professor Saltzburg suggests that one way in which expert evidence can be sufficiently illuminated for the jury is if some guarantee of reliability exists independent of the claim of the one called as an expert to testify.²⁹⁵ The guarantee of reliability called for by the *Frye* test is general acceptance in the scientific field in which the evidence belongs. Basically, the out-of-court acceptance of the validity of the evidence serves to compensate for the jury's inability to fairly weigh such evidence by assuring that it is not likely to be misguided by placing reliance on the evidence. This, he says, is the nub of both the *Frye* and the relevance analysis doctrines.²⁹⁶ Professor Saltzburg points out two reasons why some guarantee of reliability must exist in such circumstances with respect to expert testimony when no such guarantee is required with respect to the testimony of ordinary witnesses. First, unlike ordinary witness testimony, a claim may be made that the scientific evidence is perfect or close to perfect. Second, unlike the testimony of ordinary witnesses, an assessment of the value of scientific evidence may become quite a bit more accurate over time.²⁹⁷ Because triers of fact are forced to make final decisions on the basis of the evidence available and cannot usually reconsider those decisions later on in light of changing scientific knowledge, the legal system may come to regret allowing

OF THE LAW OF EVIDENCE 491 (2d ed. 1972). The most influential statement regarding relevance analysis appears in 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702 (1982). This text sets out seven factors to provide structure and guidance to trial judges, and in doing so arguably provides the opportunity for creation of another "special" test for scientific evidence. For courts that have recently embraced relevance analysis, see *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984).

²⁸⁹ Saltzburg, *Frye and Alternatives*, 99 F.R.D. at 210.

²⁹⁰ *Id.* at 210-11.

²⁹¹ *Id.* at 211.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 212.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 211.

²⁹⁷ *Id.* at 212.

triers of fact to have used scientific evidence which is later shown to be unreliable.²⁹⁸ In summary, Professor Saltzburg states:

Courts like the *Frye* court accept scientific evidence when they are satisfied that a judge or jury can assess it and that their assessment represents a reasonable judgment as to the weight it should be given. They hesitate to admit evidence where a judge or jury cannot independently assess the legitimacy of the expert's testimony and the scientific community has not yet validated the expert's claim for his discovery or principle.²⁹⁹

Different types of expert evidence raise different issues with respect to whether a trier of fact has a trustworthy basis for crediting or discrediting the evidence. For example, some types of expert testimony rely on machines to accurately perform the analysis on which the probative value of the evidence is based.³⁰⁰ With respect to such evidence, there needs to be a basis for the jury to determine that the machine is in fact capable of making an accurate analysis. Many types of scientific evidence involve a comparison of an unknown item with a known item, such as fingerprints, blood groupings, ballistics and tire marks. With respect to such evidence, a trier of fact needs to be able to decide whether such a comparison can accurately be made. Further, with respect to most types of evidence involving such comparison, there is an additional component of the testimony explaining why the result of a match between a known and an unknown are significant. For example, a match between a known and an unknown fingerprint is significant because fingerprints are unique, or a match between a known and an unknown blood sample is significant because only a certain percentage of the population has a particular blood type. When such a comparison is made, the trier of fact must be able to evaluate whether the underlying statistical basis for comparison is valid.³⁰¹ Other types of scientific evidence involve a machine producing "hard" data which then requires subjective rather than objective comparison. The prime example of this type of evidence is the polygraph. With respect to the polygraph, the trier of fact must have a trustworthy basis for crediting or discrediting both the ability of the machine to accurately measure the physical phenomena which it purports to measure and the ability of the examiner to interpret the data correctly.³⁰²

²⁹⁸ *Id.* at 213.

²⁹⁹ *Id.*

³⁰⁰ Examples of this type of evidence include speed radar and neutron activation analysis. Neutron activation analysis is a means of measuring the elemental composition of a material by making it artificially radioactive and then measuring the radioactive decay, which occurs at consistent rates for specific elements. See Karjala, *The Evidentiary Uses of Neutron Activation Analysis*, 59 CALIF. L. REV. 997, 998-1000 (1971). Another example is gas chromatograph analysis, which is a means of measuring the elemental composition of a material by converting it to a gas, and forcing the gas through a filtration material which measures the molecular concentration. This measurement is then converted to electrical impulses which are recorded on a graph. See *United States v. Distler*, 671 F.2d 954, 961-62 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981).

³⁰¹ Some types of scientific evidence are a combination of machine analysis and a comparison with a broad sample to show the significance of the result. An example of this is a gunshot residue test where a machine determines the level of two elements (barium and antimony) on the skin of a person believed to have recently fired a gun. If significant levels of those elements are found, it is then asserted that persons who have not fired guns recently have much lower concentrations of those elements on their skin. SCIENTIFIC AND EXPERT EVIDENCE 289-341 (E. Imwinkelreid ed. 1981).

³⁰² Voiceprint evidence raises similar but not identical concerns to those raised by polygraph evidence. The jury must have a trustworthy basis for crediting or discrediting the premise that the

Another major type of scientific evidence that raises yet a different set of questions involves processes applying a technique to an individual, the result of which is supposed to be an enhanced testimonial ability. These processes include hypnosis and truth serum. With respect to these processes, the jury must have a trustworthy basis for crediting or discrediting that the processes do indeed result in better, not worse, testimonial abilities. Focusing, as Professor Saltzburg suggests, on whether an item of expert testimony can be fairly understood and evaluated by the trier of fact directs a court's attention to the exact questions that exist with respect to each type of evidence. This should be more helpful to a court than focusing on some across-the-board standards such as "general acceptance." Such a general standard can cloud a court's perception of the basic problems that exist with each type of evidence.

Rape trauma syndrome evidence, like all behavioral scientific evidence, is a type of expert testimony that falls into a different category than any of those types of evidence mentioned above. Behavioral scientific evidence consists of one person's subjective comparison, without the intervention of any mechanical device, of characteristics of other persons studied in the past who have exhibited similar characteristics. All of behavioral science consists of studying human reactions, attempting to find patterns in those reactions, giving names to those patterns, and thereafter examining particular individuals to see if their symptoms coincide with the symptoms of other people in the past whose symptoms have given rise to a category of behavior.³⁰³

The opinion has been expressed by several commentators that behavioral science evidence is the least likely type to overly influence the jury, since no machine or mysterious process³⁰⁴ is involved, which is what lends real "scientific cachet" to expert testimony. The evidence falls into a category which Professor Edward Imwinkelreid characterizes as "software" evidence and as to which he says:

This is the sort of evidence least likely to overawe the jury. When a layperson thinks of science, the layperson naturally thinks of sophisticated instruments capable of precise management. Software techniques are the farthest removed from the layperson's conception of science; and for that reason, in the minds of many laypersons these techniques hardly deserve the august title "scientific." The element of subjectivity in these techniques is patent to any juror.³⁰⁵

And in holding that the *Frye* test did not apply to testimony regarding the fallibility of eyewitness identification, the California Supreme Court noted:

When a witness gives his personal opinion on the stand — even if he qualifies as an expert — the jurors may temper their acceptance of his testimony with

sound waves produced by the human voice can be accurately charted. In addition, it must be able to believe that an accurate subjective comparison can be made between two charts, and must also have a basis for crediting or discrediting whether further testimony regarding the significance of the evidence is valid, that is, whether each person's voice produces a unique print.

³⁰³ Other specific examples of this type of evidence include testimony concerning sanity, competence to stand trial, battered woman syndrome, battering parent syndrome, Vietnam veteran syndrome, and testimony regarding the unreliability of eyewitness identification.

³⁰⁴ However, some psychiatric and psychological testing techniques, such as the Rorschach Inkblot test and the Thematic Apperception Test, do seem fairly mysterious. See A. MOENSSENS & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* § 3.09 (2d ed. 1978).

³⁰⁵ Imwinkelreid, *A New Era in the Evolution of Scientific Evidence — A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 283 (1981).

a healthy sense of skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many lay persons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently "scientific" mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative.³⁰⁶

In addition to rape trauma syndrome evidence tending not to overawe a jury, other reasons exist why a jury is likely to have a trustworthy basis for crediting or discrediting such evidence. First, there exists abundant literature for a defense lawyer to utilize in developing effective cross-examination of the prosecution's rape trauma syndrome expert.³⁰⁷ Second, there are experts who can be retained by the defense to testify on the subject and assist in trial preparation.³⁰⁸ Third, the evidence does not raise the two problems seen by Professor Saltzburg with respect to scientific evidence.³⁰⁹ It does not purport to be perfect or nearly so, nor does it appear that the assessment of the value of the evidence will become substantially more accurate over time. The assessment of the validity of rape trauma syndrome by the scientific community has remained at a high level since the seminal article on the issue was published more than a decade ago. Finally, and very importantly, the evidence is not very far removed from the juror's ordinary experience and is not clouded in mysterious jargon. The syndrome itself and the test used to determine its existence are nontechnical and are easily explained and understood. The fact that testimony is not far removed from the jury's common experience has been an important factor with respect to other types of expert testimony to which courts have not applied a special scientific evidence test.³¹⁰

Thus, without having to consider whether "textbook" rape trauma syndrome evidence is "scientific," it appears to be expert evidence that is a good candidate for admission under the proposed Saltzburg analysis without requiring any out-of-court validation of it, because the jury can rationally decide what weight to give it. Leaving Professor Saltzburg's proposed analysis and returning to traditional "weight versus ad-

³⁰⁶ *People v. McDonald*, 37 Cal. 3d 351, 372-73, 690 P.2d 709, 724, 208 Cal. Rptr. 236, 251 (1984). Similarly the Colorado Court of Appeals recently discussed whether in a child sexual abuse case an expert's testimony regarding the truth of children's claims of sexual assault had been improperly admitted. In holding that the testimony had been properly admitted, the court stated:

People v. Anderson, 637 P.2d 354 (Colo. 1981), relied upon by defendants, is inapposite because it deals with the inadmissibility of polygraph results. Here, unlike *Anderson*, there is no possibility that the jury would have placed an almost "mystical" reliance on a particular scientific instrument for truth-finding. Rather, cross-examination of Dr. Cantwell successfully ferreted out the possible flaws of her expert conclusions in a way in which cross-examination might never be able to pierce the lay juror's inflated belief in polygraph infallibility.

People v. Ashley, 687 P.2d 473, 475 (Colo. Ct. App. 1984).

³⁰⁷ See *supra* text accompanying notes 22-63 and 140-61.

³⁰⁸ The defendants found expert witnesses in *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984), and *State v. Liddell*, ___ Mont. ___, 685 P.2d 918 (1984).

³⁰⁹ See *supra* notes 286-99 and accompanying text.

³¹⁰ See, e.g., *People v. Marx*, 54 Cal. App. 3d 100, 111, 126 Cal. Rptr. 350, 356 (1975) (expert testimony comparing human bite marks not far removed from the common experience of the jury); *State v. Hall*, 297 N.W.2d 80, 86 (Iowa 1980), cert. denied, 450 U.S. 927 (1981) (blood spatter evidence need not meet a special test for scientific evidence because it could be easily understood and weighed by the jury).

missibility" analysis, the same factors mentioned above tend toward the conclusion that this is not the type of expert testimony to which a special scientific evidence test should be applied. Its weaknesses should, therefore, go to its weight, not to its admissibility.

With respect to testimony based on personal experience with rape victims rather than on the textbook symptoms of rape trauma syndrome, that testimony should also be admissible under the Saltzburg analysis. All of the tools for discrediting that testimony exist for the defense and the defense does not even have to seek to overcome whatever "aura of reliability" attaches to the assertion that rape trauma syndrome is recognized by the scientific community. Similarly, under the "weight versus admissibility" traditional analysis, if the witness is not basing the personal opinion on a general principle, but rather merely on personal experience, the jurors are even in a better position, in the words of the California Supreme Court, to "temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible."³¹¹

In summary then, all expert testimony should be subjected to the same basic test, which is whether the trier of fact has a trustworthy basis for crediting or discrediting the evidence. Under that test, rape trauma syndrome evidence should be admissible unless it violates some other rule of evidence. Even under the traditional "weight versus admissibility" test rape trauma syndrome testimony does not appear to be the type of "scientific" evidence the weaknesses of which should go to its admissibility rather than merely its weight. Accordingly, the courts have erred in requiring rape trauma syndrome evidence to pass the *Frye* test in order to gain admission into evidence.

2. Does Rape Trauma Syndrome Evidence Pass the *Frye* Test?

Although application of the *Frye* test to rape trauma syndrome testimony appears unwarranted, courts have consistently applied the *Frye* test to rape trauma syndrome evidence and may well continue to do so in the future. Accordingly, it becomes important to ascertain whether rape trauma syndrome testimony passes the *Frye* test.

The first question that has to be answered is exactly *what* does the *Frye* test require general acceptance of with respect to rape trauma syndrome evidence. This question is not easily answered by resort to case authority. Commentators have recognized that it is unclear whether the *Frye* standard requires general acceptance of the underlying scientific principle, the scientific technique, or both.³¹² Indeed, this principle/technique dichotomy seems particularly ill-suited to behavioral scientific evidence, because the only underlying scientific principle involved is the general belief that science can discover something about human behavior.³¹³

³¹¹ *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251.

³¹² Gianelli, *supra* note 254, at 1211; National Conference of Lawyers and Scientists, *Symposium on Science and the Rules of Evidence*, 9 F.R.D. 208, 230 (1983) (Remarks by Professor Margaret Berger) [hereinafter cited as *Symposium*].

³¹³ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979). There, with respect to battered wife syndrome, a majority of the court held that the testimony met the *Frye* test because it fell within the bounds of clinical psychology, a field of endeavor the accuracy of which is generally accepted in the scientific community, and because the expert had employed generally accepted clinical psychology research methods. *Id.* at 638. Application of the test in this way could result in any clinical psychology testimony being admitted as long as the psychologist had followed generally accepted scientific methodology. This seems to be an incorrect result since it ignores the possible unreliability of such evidence. As many courts have recognized, the major thrust of the *Frye* rule is to filter out unreliable evidence. See, e.g., *United States v. Franks*, 511 F.2d 25, 33 n.12 (6th Cir.),

A more profitable line of inquiry is to ask what evidentiary values are promoted by the *Frye* rule, and then determine whether the evidence is of a type the admission of which is consistent with those values. A review of the authorities suggests that the two basic values promoted by the *Frye* rule are assuring reliability of evidence³¹⁴ and assuring that the opponent will have a fair opportunity to expose the weaknesses in such evidence.³¹⁵ It has already been demonstrated that the defendant has the resources available to have a fair opportunity to discredit the evidence.³¹⁶ The question remaining is whether the evidence meets *Frye*'s reliability standard.

The meaning of the term "reliable" in this context is more complex than it might first appear. In using the term, courts often combine two concepts that are correctly viewed by scientists as separate and distinct. Those two concepts are "validity" and "reliability" (which to avoid confusion will hereinafter be referred to as "consistency").³¹⁷ "Validity" refers to a technique's ability to measure what it purports to measure: a technique's validity is its *accuracy*.³¹⁸ "Consistency" refers to the extent to which a technique leads to the same result in the hands of different examiners.³¹⁹ A technique can be thus "unreliable" in the general way courts use that term *either* because it does not accurately measure what it purports to measure, *or* because even though it can perform accurately, its performance is so subtle that experts cannot agree on the meaning of the results. The rationale of the *Frye* test requires scientific results to have both validity and consistency.

Another area where the courts have not been as clear as they should be with respect to the *Frye* test is the relationship between general acceptance and reliability. Although general acceptance usually indicates reliability,³²⁰ it has been recognized that scientific communities are not infallible and may generally accept evidence that is not in fact reliable.³²¹ When the general acceptance safeguard breaks down, presumably the unreliable evidence should be excluded despite its general acceptance.

cert. denied, 422 U.S. 1042 (1975); *Pulakis v. State*, 476 P.2d 474, 479 (Alaska 1970); *People v. Bynum*, 192 Colo. 60, 62, 556 P.2d 469, 470-71 (1976); *State v. Hurd*, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981). Indeed, these courts have virtually equated the *Frye* test with reliability, which does violence to that test since it requires *both* reliability *and* general acceptance of reliability. *See infra* text accompanying note 320.

³¹⁴ *See supra* note 313 and authorities cited therein. *See also* Gianelli, *supra* note 254, at 1200-03.

³¹⁵ *See supra* text accompanying notes 286-99.

³¹⁶ *See supra* text accompanying notes 307-08. Certainly the defendant has the "resources" in terms of *theoretically* available ammunition, such as literature, with which to cross-examine defense experts. It is to be doubted that most defendants have the financial resources to make this ammunition *actually* available to themselves. This imbalance of resources between the prosecution and defense worries some commentators, as does their belief that many defense lawyers are unwilling or unable to perform adequate cross-examination of the prosecution's scientific experts. *See Symposium, supra* note 312, at 221, 232-33 (Remarks of Joseph Nicol, Michael Graham, and Margaret Berger). This author, although recognizing these concerns, does not believe they warrant precluding the prosecution from presenting probative evidence.

³¹⁷ *See* Imwinkelreid, *supra* note 305, at 279.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *See* *United States v. Downing*, 753 F.2d 1224, 1238 (2d Cir. 1985). Although rejecting the *Frye* test in favor of a relevance analysis, the *Downing* court noted that general acceptance could still go far toward showing reliability: "The district court in assessing reliability may examine a variety of factors in addition to scientific acceptance. In many cases, however, the acceptance factor may well be decisive, or nearly so." *Id.*

³²¹ *Id.* at 1236-37 n.14. *See* Gianelli, *supra* note 254, at 1224-26 (describing the general accep-

Thus, in order for evidence to be reliable under the *Frye* rule, it must pass three tests: it must (1) be reliable in the sense of being valid; (2) it must be reliable in the sense of being consistent; and (3) its validity and consistency must be generally accepted by the proper scientific community. This three-prong test must be passed by rape trauma syndrome evidence in order for it to be admissible in a *Frye* jurisdiction. Further, if more than one level of rape trauma syndrome testimony is offered, each level must pass each prong of the test. This is true because each level of testimony involves different psychological assertions.³²²

At the most general level, the expert testifies that certain symptoms collectively known as rape trauma syndrome follow from rape. The assertion is that rape causes a certain pattern of after-effects to its victims. The first prong of the *Frye* test is whether this assertion is valid. Its validity depends upon whether the symptoms can be accurately perceived, and upon whether the existence of the symptoms accurately diagnose rape as the cause of the symptoms. The severe and prominent symptoms of rape trauma syndrome, including fear, nightmares, depressive symptoms and changes in eating, sleeping and sexual patterns,³²³ can be accurately perceived by the victim, and through her report of them, by the researchers. Further, there was no doubt that the cause of the symptoms in the women who were studied by the researchers was anything other than rape. The research was for the most part conducted by studying women who had sought treatment as a result of rape. It is highly unlikely that a woman would seek treatment for rape if she had not actually been raped. There is no evidence that similar symptoms result from consensual intercourse. Most of the women studied had experienced no other traumas that could account for their changed behavior, and even if they had undergone other recent trauma, no other trauma causes many of the exact symptoms experienced by rape victims.³²⁴

To pass the second prong of the *Frye* test, the diagnosis of rape trauma syndrome must be consistent. Consistency is usually thought of on a smaller scale, for example, two polygraph examiners independently examining one examinee. An analogous concept involving consistency on a larger scale would appear to be two behavioral scientific researchers examining the same type of research data base and coming to the same conclusion. It is beyond dispute that several behavioral scientists have conducted rape trauma syndrome studies and even more behavioral scientists have examined the results of those studies, and all have come to the conclusion that a rape causes certain specific symptoms in the victim which can be characterized as rape trauma syndrome.³²⁵ Thus, it appears that the general syndrome has consistency.

Finally, under the third prong of the test, it must be determined whether the validity and consistency of rape trauma syndrome on the first level is generally accepted in the pertinent scientific community. The pertinent scientific community can be viewed as psychiatrists in general, in which case the recognition of rape trauma syndrome as a

tance of the paraffin test for gunshot residue before any scientific testing had established the test as reliable).

³²² The results of the analysis on all levels will be the same whether based on the scientific literature in existence prior to *Marks* and *Saldana* or on all scientific literature on the subject. The basic research conclusions were well-established prior to the *Marks* and *Saldana* decisions.

³²³ See *supra* notes 25-63 and accompanying text.

³²⁴ Moreover, even if some individuals who were studied were faking or had some other cause of the symptoms, the size of the groups studied and the number of studies done would make the inclusion of these few individuals statistically unimportant.

³²⁵ See *supra* text accompanying notes 22-63 and 140-61.

form of PTSD in DSM-III constitutes unequivocal general acceptance. For that segment of the behavioral scientific community that deals with rape victims, the existence of a method of treatment based on the occurrence of the syndrome demonstrates conclusively that it is generally accepted.³²⁶ Accordingly, it seems clear that the general conclusion that rape causes certain symptoms in its victims is "scientific" evidence that passes the *Frye* test.

The second level of expert testimony regarding rape trauma syndrome is that the symptoms of the complainant match the symptoms of rape trauma syndrome. It must also pass the three-pronged *Frye* test. The first prong involves the question whether such a diagnosis is valid, that is, whether it can be accurately determined that the symptoms of the complainant match the symptoms of rape trauma syndrome. In examining this question, one encounters a substantial body of scholarly research that has developed over the last decade arguing that psychiatric and psychological diagnoses are notoriously invalid and have been admitted far too freely in the past.³²⁷ Thus, an argument can be framed that not only should no additional psychiatric and psychological areas of testimony be allowed, but those already existing should be subject to drastic cutbacks. However, while it is true that many studies indicate that psychological and psychiatric diagnoses in complex areas such as sanity and competence to stand trial are invalid,³²⁸ rape trauma syndrome testimony is substantially different for two reasons. First, diagnosis of rape trauma syndrome is based in part upon DSM-III, which provides objective criteria upon which to base a diagnosis.³²⁹ Second, rape trauma syndrome is a particularly uncomplicated diagnosis to make, since the symptoms are distinct and identifiable. Accordingly, it seems that not only psychiatrists and psychologists, but also trained social workers and nurses, can validly diagnose a complainant as suffering from symptoms matching those of rape trauma syndrome. With respect to the second prong of the *Frye* test, consistency of such diagnoses, given the distinct nature of rape trauma syndrome symptoms, it seems likely that two different clinicians, each independently examining the same complainant, would reach the same diagnosis a large percentage of the time. Finally, the third prong of the test is also satisfied because it appears to be generally accepted in the relevant scientific community that victims can be validly and technically reliably diagnosed as having symptoms that are consistent with the symptoms of rape trauma syndrome.³³⁰

The third level of expert opinion testimony regarding rape trauma syndrome adds the additional opinion that the cause of the complainant's symptoms is that she was raped. The question for purposes of determining the validity prong of the *Frye* test is whether the existence of the symptoms allows the clinician to accurately extrapolate back to rape as the cause of the symptoms. This question must be answered in the affirmative. First, rape causes a unique set of readily identifiable symptoms. These rape specific symptoms include rape-related fears of subsequent attack and being alone at home or on the street, sexual dysfunction and worsened relationships with men.³³¹ Other post-

³²⁶ See *supra* notes 28, 54-59 and accompanying text.

³²⁷ See *supra* note 264 and authorities cited therein.

³²⁸ See Ennis & Litwack, *supra* note 264, at 697-718.

³²⁹ See Spitzer, Endicott & Robins, *Clinical Criteria for Psychiatric Diagnosis and DSM-III*, 132 AM. J. PSYCHIATRY 1187 (1975).

³³⁰ See *supra* text accompanying notes 22-63 and 140-61.

³³¹ See *supra* notes 48-52 and accompanying text.

traumatic stress disorders resulting from other traumas produce similar but not identical symptoms. Even if the symptoms of rape trauma syndrome were not readily distinguishable from post-traumatic stress disorders caused by other traumas, it would still appear that absent any other major trauma that could have caused the symptoms, the clinician could accurately identify the cause of the symptoms as rape. With respect to the consistency prong of the *Frye* test, as already mentioned, two experts independently given the opportunity to evaluate a complainant, would come to the same diagnosis a large percentage of the time. Finally, with respect to the third prong of the test, the ability to make the diagnosis of the cause of the symptoms as rape is generally accepted in the relevant scientific community. The literature demonstrates that it is generally believed that the symptoms resulting from rape are so unique and identifiable that if the symptoms appear it is reasonable to conclude that rape was the cause of the symptoms.³³²

The fourth level of the possible rape trauma syndrome testimony is an opinion by the expert that she believes the complainant or believes that the complainant did not fantasize the rape. In applying the three-prong *Frye* test to this testimony, there is no support in the literature which would allow the testimony to pass any of the prongs. The clinician may indeed believe the complainant and base her opinion on that belief, but that does not mean that she can opine that that belief is accurate. Evaluating credibility is a completely different, more complex, and more questionable area of behavioral scientific endeavor than diagnosis and treatment of rape trauma syndrome. Thus, a credibility opinion given by a rape trauma syndrome expert is not demonstrably valid or consistent, and is definitely not generally accepted as such.

The personal experience basis of expert testimony appears less clearly admissible under the *Frye* test. If the expert's conclusions based on personal experience correlate closely with the textbook symptoms of rape trauma syndrome, then they could be held to pass the *Frye* test. However, if the expert's conclusions diverge substantially from the textbook symptoms, then they should be held to fail the *Frye* test because they would not be generally accepted.

In summary then, rape trauma syndrome evidence on the first three levels passes the *Frye* test, while evidence on the fourth level does not. Personal experience testimony may or may not pass the *Frye* test depending on how closely it corresponds to rape trauma syndrome conclusions. How, then, have four courts determined that rape trauma syndrome evidence on the first three levels fails the *Frye* test?³³³ Although the holdings of the courts are couched in terms of lack of general acceptance, a close review of the opinions demonstrates that the real problems these courts have with rape trauma syndrome testimony is with its validity. More specifically, the courts do not accept the validity or accuracy of testimony at the level of the general characteristics of rape trauma syndrome and at the level of opinion that rape was a cause of the symptoms in the complainant. The courts' basic position is that there is no validity to reasoning backwards from a complainant's report of the symptoms to rape as the cause of those symptoms.

Courts reason that since rape trauma syndrome does not universally occur among rape victims, and that when it does occur the symptoms can vary among victims, the

³³² See *supra* text accompanying notes 22-63 and 140-61.

³³³ See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *Allewalt v. State*, 61 Md. App. 503, 487 A.2d 664 (1985); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984). In *Allewalt*, although the court said that it did not have to reach the *Frye* test, by determining that the evidence was unreliable the court was in fact engaging in a *Frye* analysis.

existence of the symptoms does not reliably indicate that they were caused by rape.³³⁴ In essence, the courts seem to be requiring one hundred percent accuracy of the evidence before it can be admitted. This is certainly a higher standard than that to which any other expert testimony is held. For example, in most other contexts a physician's opinion as to the cause of an injury is required to be stated with a reasonable degree of medical certainty.³³⁵ Rape trauma syndrome occurs in a large percentage of rape victims, and although specific reactions vary, there is much greater correlation between the reactions than there is variance. In virtually any other medical context this would be a more than sufficient basis upon which a qualified witness could render an opinion as to the cause of the symptoms.

Courts also have found that because PTSD can occur due to a variety of traumatic experiences, any diagnosis of a particular complainant's symptoms as resulting from having been raped is invalid.³³⁶ First, this ignores the fact that rape trauma syndrome is a particular type of PTSD with specific symptoms that do not occur in other types of PTSD. Second, even if this were not true, in virtually any other expert testimony context an expert reasoning from the results of an event to its cause need only express the opinion to a reasonable degree of certainty. Other possible causes can be explored through either cross-examination or presentation of the opponent's own expert. Such a "weakness" in the evidence generally goes to its weight, not to its admissibility. One commentator has designed a comparison between a "hard" scientific test and rape trauma syndrome testimony to show the different standard to which rape trauma syndrome testimony is being held.³³⁷ The standard test for whether a person has recently fired a gun is to test the person's skin for barium and antimony, which generally occur as primer residue from firearms ammunition. An unusually high level of barium and antimony is an indication that the person has recently fired a gun. Unusually high levels of barium and antimony can, however, occur from other causes, such as certain occupations, and conversely, sometimes no residue at all is left on the hand of persons known to have recently fired a weapon. Nevertheless, gunshot residue testimony is routinely admitted with these "weaknesses" left open to cross-examination by the opponent. It is difficult to understand why this should not also be the case with rape trauma syndrome evidence.

Another rationale relied upon by courts in holding that rape trauma syndrome testimony does not pass the *Frye* test is that the syndrome was not developed as a fact-finding tool to determine whether a rape had occurred, but rather as a therapeutic tool for treating persons claiming to have been raped.³³⁸ Having found this to be the case, the California Supreme Court in *Bledsoe* noted that due to the "nonjudgmental" stance that counselors maintain, they do not probe for inconsistencies in their clients' stories, or conduct independent investigations to verify the "truth" of the clients' recollections, or to determine the legal implications of the clients' factual accounts.³³⁹ Thus, the court

³³⁴ See, e.g., *Saldana*, 324 N.W.2d at 229-30.

³³⁵ See M. GRAHAM, EVIDENCE TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 303 (1983).

³³⁶ See *Allewalt*, 61 Md. App. at 514-15, 487 A.2d at 669; *Saldana*, 324 N.W.2d at 229-30.

³³⁷ Ross, *supra* note 2, at 730.

³³⁸ See *Bledsoe*, 36 Cal. 3d at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459; *Saldana*, 324 N.W.2d at 230.

³³⁹ *Bledsoe*, 36 Cal. 3d at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459. It is difficult to see how a rape counselor could go about verifying the truth of the allegation, especially if the sole issue is consent and there were no witnesses other than the complainant and the defendant. Certainly the defendant is not likely to admit the crime at trial if he has not done so earlier.

held that although rape trauma syndrome was generally recognized or used in the general scientific community from which it arose, "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."³⁴⁰ This holding adds a never before seen twist to the *Frye* test: rather than asking whether the scientific evidence is generally *accepted*, the court chose to ask whether it is generally relied upon for a particular purpose. Although in most cases generally accepted scientific principles are utilized for the purpose for which they were developed, general acceptance can exist with respect to a technique even though the scientific community does not rely on that technique for the same purpose for which the legal system may want to rely on it. With respect to rape trauma syndrome, it is abundantly clear from the literature that it is generally accepted in the scientific community from which rape trauma syndrome arose that the symptoms of rape trauma syndrome are the result of rape.³⁴¹ The counseling community has no need to use this conclusion to prove that the cause of the symptoms was rape, because that community is in the business of treating victims, not prosecuting rapists. The "non-proof" use of the principle, however, does not in any way detract from the general acceptance of the fact that the cause of the symptoms is rape.³⁴²

The California Supreme Court's veiled holding that because rape counselors do not investigate the "truth" of their clients' allegations, rape trauma syndrome evidence generally, and a diagnosis of it in a particular complainant, may be unreliable, is disturbing because it demonstrates a holdover of a belief that one would hope would have disappeared by now: that there are a substantial number of false allegations of rape made by disturbed women.³⁴³ Implicit in the court's holding is the belief that such false allegations may render the results of the rape trauma syndrome studies and diagnoses invalid. Inexplicably, the court seems to be having one last fling with a famous statement

³⁴⁰ *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

³⁴¹ See *supra* text accompanying notes 22-63 and 140-61.

³⁴² What the California Supreme Court may have been saying *sub silentio* is that even though it is generally accepted by the scientific community that the cause of rape trauma syndrome symptoms can be diagnosed as rape, the court does not find this general acceptance to be convincing. Although general acceptance is usually sufficient proof of reliability, the court may have been saying that it believes that this is one of the rare circumstances in which the general acceptance does not equate with reliability. If that is the court's real position, then that too is incorrect because the evidence is reliable. See *supra* text accompanying notes 321-32.

³⁴³ Wigmore was one of the main culprits in perpetuating this myth. He used five case histories of mentally ill girls who had made false sexual allegations against men (none of whom were subsequently convicted of a crime due to the allegation) to reach the conclusion that modern psychiatrists "have amply studied the behavior of young girls and women . . . [whose] psychic complexes are multifarious . . . [so as to establish that] one form taken by these complexes is that of contriving false charges of sexual offenses by men." 3A J. WIGMORE, WIGMORE ON EVIDENCE 736 (Chadbourn rev. 1970). Wigmore's conclusion has been cited with approval by reputable sources. See *Ballard v. Superior Court*, 64 Cal. 2d 159, 172, 410 P.2d 838, 846, 49 Cal. Rptr. 302, 310 (1966); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1139 (1967); Note, *Criminal Law — Psychiatric Examination of Prosecutrix in Rape Case*, 45 N.C.L. REV. 234, 235 (1966).

Actually, just the opposite is true: rape is such a difficult charge for a woman to make that it is highly unlikely that false charges will be made. See *infra* text accompanying notes 346-48. Statistics indicate that true experts believe that approximately two percent to four percent of rape reports are suspicious; no higher than for other crimes. See O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119, 141 n.132 (1978).

of Lord Hale's, which had worked its way into the law of many American jurisdictions in the form of a jury instruction, that although rape was "a most detestable crime, . . . 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."³⁴⁴ The specific portion of that statement that the court implicitly appears to be embracing is that rape is "an accusation easily to be made." Yet that court itself nine years earlier in *People v. Rincon-Pineda*³⁴⁵ had forcefully rejected this portion of Lord Hale's instruction when it stated:

The initial emotional trauma of submitting to official investigatory processes, the fear of subsequent humiliation through attendant publicity and embarrassment at trial through defense tactics which are often demeaning, and a disinclination to encounter the discretion of the police in deciding whether to pursue charges of rape, especially with regard to what may appear to the police to be "victim precipitated" rapes, are among the powerful yet common disincentives to the reporting of rape Those victims with the pluck to disregard such disincentives discover the utter fallaciousness that rape is a charge easily made.³⁴⁶

Thus, it is highly unlikely that false charges of rape will be made and even more unlikely that they will be made to rape trauma counselors, whose clients were the research subjects for the various rape trauma syndrome studies.³⁴⁷ It is impossible to discern why the California Supreme Court would not again, as it had in *Rincon-Pineda*, judicially notice the legislative fact that false reports of rape are very rare.³⁴⁸

³⁴⁴ See HALE, PLEAS OF THE CROWN, 633, 635 (1680).

³⁴⁵ 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

³⁴⁶ *Id.* at 880-81, 538 P.2d at 258-59, 123 Cal. Rptr. at 130-31. See also *State v. Bashaw*, 296 Or. 50, 53-54, 672 P.2d 48, 49 (1983).

³⁴⁷ This is true because if the motive of a woman in falsely reporting a rape is to "get" a particular male, there is no reason for the woman to report to a rape counselor. Instead, such a woman would report to the police. And even if somehow the rape trauma syndrome studies did include complainants who had falsely reported rapes, the percentage of such false reports must have been so small that for statistical purposes it would not in the least invalidate the studies.

³⁴⁸ The highest court of New York has recently indicated in *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), that it would be amenable to taking judicial notice that false reports of rape are rare. In the context of holding unconstitutional a New York statute which did not define the crime of rape to include female perpetrators and did not include married men assaulting their wives within its ambit, the New York Court of Appeals noted, "[t]he stigma and other difficulties associated with a woman reporting a rape and pressing charges probably deter most attempts to fabricate an incident; rape remains a grossly underreported crime." *Id.* at 166 n.8, 474 N.E.2d at 574 n.8, 485 N.Y.S.2d at 214 n.8 (citations omitted).

Courts have not hesitated to make liberal use of judicial notice of legislative facts in other cases. See, e.g., *Sotiriades v. Mathews*, 546 F.2d 1018, 1021 (D.C. Cir. 1976) (matter of common knowledge that a woman's undocumented statement of her age is subject to discount); *Perkins v. Perkins*, 226 Ark. 765, 767, 293 S.W.2d 889, 890 (1956) (matter of common knowledge that there is no love like a mother's love); *Tan v. Tan*, 3 Ill. App. 3d 671, 674, 279 N.E.2d 486, 488 (1972) (matter of common knowledge that women have recently been emancipated socially and economically); *Department of Revenue v. To Your Door Pizza, Inc.*, 670 S.W.2d 482, 485 (Ky. Ct. App. 1984) (matter of common knowledge that a pizza is a "meal"). Courts have taken judicial notice of facts of much more questionable validity than the fact that most reports of rape are legitimate. See, e.g., *United States v. Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960) (court will take judicial notice that in a normal family a father has equal love and affection for all his children and provides equal care, guidance,

Finally, courts which have held that rape trauma syndrome testimony does not meet the *Frye* test have found that the testimony is unreliable because in order to reach the diagnosis, the expert has to rely on the truth of the complainant's story.³⁴⁹ This is a particularly specious rationale because virtually all psychiatric and psychological testimony is based upon what a person with interest in the case tells the psychiatrist or psychologist and a subsequent evaluation by the psychiatrist or psychologist of whether those statements should be believed. For example, a criminal defendant claiming insanity has the greatest interest in being found insane, yet there is no question but that a psychiatrist or psychologist is entitled to rely on the truth of the defendant's statements in formulating a diagnosis. In similar fashion, a psychiatrist or psychologist should be entitled to rely on the truth of the complainant's statements in making a rape trauma syndrome diagnosis. Holding that rape trauma syndrome testimony is unreliable and therefore inadmissible because in order to come to a diagnosis of rape trauma syndrome the expert must believe what she has been told by the complainant results in singling out rape trauma syndrome testimony for special adverse treatment.

In summary, then, it is clear that most rape trauma syndrome testimony, specifically, testimony about the first three levels of rape trauma — the general existence of the syndrome, the matching of the complainant's symptoms with the general symptoms, and the assessment of the cause of the complainant's symptoms as rape — is admissible and meets the *Frye* test. All of the rationales put forth by courts for holding that rape trauma syndrome testimony does not meet the *Frye* test are incorrect. In fact, the singling out of rape trauma syndrome for special adverse treatment under the *Frye* test may stem in part from the same attitudes that gave rise to increasingly discredited special rape prosecution doctrines such as corroboration requirements, chastity attacks based on credibility, cautionary instructions, and court-ordered psychiatric examinations of complainants.³⁵⁰ If rape trauma syndrome testimony is treated the same as other evidence to which the *Frye* standard is applied, it will pass the test.

B. Is Rape Trauma Syndrome Evidence Relevant?

The theory of relevance for rape trauma syndrome evidence on the issue of consent is simple and straightforward. Women who engage in consensual intercourse do not experience rape trauma syndrome. Most women who are forced to engage in nonconsensual intercourse do experience rape trauma syndrome. Thus, if the complainant is experiencing rape trauma syndrome, it is because she was raped. The probative value of the evidence seems patently obvious. Nonetheless, several courts have found the evidence to be irrelevant or of such limited relevance that its relevance is easily outweighed by countervailing considerations such as unfairly prejudicing the defendant, diverting the jury's attention, and causing confusion.

One court directly³⁵¹ and two other courts indirectly have found the evidence to be irrelevant.³⁵² Although it couched its holding in terms of "helpfulness," the *Saldana* court

discipline and support); *Snure v. Skipworth*, 61 N.M. 340, 300 P.2d 792 (1956) (common knowledge that a constant loser in gambling game of cards usually drops out of the game).

³⁴⁹ See, e.g., *Bledsoe*, 36 Cal. 3d at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459; *Allewalt*, 61 Md. App. at 514-15, 487 A.2d at 669.

³⁵⁰ For a critical examination of these doctrines, see Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973) [hereinafter cited as Note, *A Feminist View*].

³⁵¹ *Saldana*, 324 N.W.2d at 230.

³⁵² *Bledsoe*, 36 Cal. 3d at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 460-61; *Taylor*, 663 S.W.2d at 240.

in fact was making a determination that rape trauma syndrome evidence was irrelevant when it stated that "evidence of reactions of other people does not assist the jury in its fact-finding function"³⁵³ The *Taylor* court seems to have indirectly held the evidence to be irrelevant when it stated that a properly qualified expert may testify that the complainant possesses characteristics consistent with those resulting from a reaction to a traumatic stress such as rape, but that "there would be no relevancy of that limited testimony in this proceeding."³⁵⁴ Also, the California Supreme Court in *Bledsoe* more indirectly suggested that the admission of the evidence did not require reversal, "in truth, the testimony did little more than provide the jury with information that it either already had or that was not particularly pertinent to the facts of this case."³⁵⁵

The holding of the *Saldana* court is unsupportable. Again, it demonstrates rape trauma syndrome testimony being treated differently than almost all other psychological and psychiatric testimony. Virtually all psychiatric and psychological testimony compares the reactions of a particular person with the reactions of other people studied in the past and then proceeds to a diagnosis based on the correlation of the individual's symptoms with patterns that have been observed in other people in the past. To illustrate, where the question is whether a defendant is schizophrenic, a psychiatrist or psychologist will base his opinion on whether the symptoms of the defendant match the symptoms of the people who have in the past been found to be schizophrenic. This comparison based upon the "reactions of other people," is indeed helpful to the jury in its fact-finding function. Likewise, an expert testifying about rape trauma syndrome will compare the victim's symptoms to previously diagnosed victims of rape trauma syndrome. The indirect holdings of the *Taylor* and *Bledsoe* courts, although the reasons for them are not made explicit, are therefore incorrect.

One court has directly found the evidence to be relevant, but of such minimal relevance that its probative value is easily outweighed by countervailing considerations.³⁵⁶ The *Allewalt* court held that since a diagnosis of PTSD does not reliably prove that the cause of that disorder was rape, "the diagnosis has little probative value in a rape case in which the ultimate issue is the occurrence of rape, i.e., whether a rape caused the disorder."³⁵⁷ It has already been pointed out that it can be reliably determined that the cause of rape trauma syndrome was rape.³⁵⁸ It seems clear, then, that although rape trauma syndrome evidence is not conclusive, it is certainly more than minimally probative on the issue of whether a rape occurred. Accordingly, it should take more than minimal prejudice or other countervailing considerations to cause the exclusion of that evidence, particularly under a rule similar to Federal Rule of Evidence 403, which provides for exclusion of relevant evidence only if its probative value is "substantially" outweighed by countervailing considerations.

A separate relevance issue is whether rape trauma syndrome evidence is admissible when the defendant's defense is something other than consent. One court has expressly

³⁵³ *Saldana*, 324 N.W.2d at 230.

³⁵⁴ *Taylor*, 663 S.W.2d at 240.

³⁵⁵ *Bledsoe*, 36 Cal. 3d at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 461.

³⁵⁶ *Allewalt*, 61 Md. App. at 515-16, 487 A.2d at 669-70.

³⁵⁷ *Id.* at 515-16, 487 A.2d at 670.

³⁵⁸ See *supra* text accompanying notes 325-32.

held,³⁵⁹ and another court has suggested in dictum,³⁶⁰ that rape trauma syndrome evidence is only relevant when the defendant claims that the complainant consented. This is clearly incorrect. Lack of consent is an element that the prosecution has to prove in every rape case in order to avoid a directed verdict. The existence of rape trauma syndrome is probative of lack of consent. Thus, the prosecution should be able to present evidence of rape trauma syndrome in its case-in-chief whether or not it appears that the defendant will raise consent as a defense. One can conceive of various fact patterns where the defendant's defense is something other than lack of consent. The main possible fact situation in which rape trauma syndrome evidence would be relevant to issues other than consent is where the defendant admits having been with the complainant but completely denies that any sexual activity occurred.³⁶¹ This situation arose in *State v. Bressman* where the Kansas Supreme Court found rape trauma syndrome evidence to be irrelevant. In a fact situation like *Bressman*, the prosecution may well desire to use rape trauma syndrome evidence to prove that nonconsensual intercourse occurred. The evidence is clearly probative on two elements of the prosecution's case in such a fact situation: that intercourse in fact occurred, and that it was nonconsensual. It is impossible to see why the Kansas Supreme Court found the evidence not to be relevant in *Bressman*.

C. *What is Necessary for a Witness to Qualify as an Expert on Rape Trauma Syndrome?*

As to the necessary qualifications to allow an expert to testify regarding rape trauma syndrome, there has developed a split of authority. Kansas has adopted the position that the only properly qualified expert is a psychiatrist.³⁶² On the other hand, Montana has allowed an expert other than a psychiatrist (specifically a psychiatric nurse) to testify.³⁶³ There is support for the Montana position in cases that have rejected rape trauma syndrome testimony for other reasons, but have had no problem accepting persons other than psychiatrists, such as nurses and social workers, as properly qualified experts.³⁶⁴

The Kansas position also is supported by authority. Psychologists have had a long, uphill battle against the medical profession in order to be considered proper experts to

³⁵⁹ *State v. Bressman*, 236 Kan. 296, 304, 689 P.2d 901, 908 (1984).

³⁶⁰ *State v. Ogle*, 668 S.W.2d 138, 141 (Mo. Ct. App. 1984).

³⁶¹ Another possible fact pattern is where the defendant claims mistaken identity. In such a case, although the prosecution could theoretically choose to use rape trauma syndrome evidence to prove that in fact a rape occurred, usually the prosecution would not desire to complicate the case with rape trauma syndrome testimony since the defendant is not contesting that the complainant was raped, but is claiming that the rape was perpetrated by someone else.

³⁶² Although the court in *Marks* did not explicitly state that its holding — that “qualified expert psychiatric testimony” is admissible — limited the field of proper experts to psychiatrists, *State v. Marks*, 231 Kan. 645, 653–54, 647 P.2d 1292, 1299 (1984), that clearly appears to be the result after *Bressman*, where the court held that even a physician without psychiatric training is not a properly qualified expert. See *Bressman*, 236 Kan. at 304, 689 P.2d at 908. To the extent that the thinking in the concurring opinion in *McQuillen* reflects the thinking of the court, it also points to the result that the only proper expert in Kansas is a psychiatrist. In attempting to distinguish *Bledsoe*, the concurring opinion stated: “In California the witness called to give testimony was merely a rape counselor, not a psychiatrist, and therefore would not qualify as an expert under *Marks*.” *McQuillen*, 236 Kan. at 174, 689 P.2d at 831 (Herd, J., concurring).

³⁶³ *State v. Liddell*, — Mont. —, 685 P.2d 918, 922–23 (1984).

³⁶⁴ See, e.g., *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982).

testify regarding mental conditions.³⁶⁵ Although psychologists appear for the most part to have won that battle, it is still not entirely clear in all jurisdictions that a psychologist can testify regarding mental conditions.³⁶⁶ With respect to other mental health professionals, two commentators noted as recently as 1981 that, "[t]he ability of other mental health professionals to qualify as experts on matters relating to mental health disorders is less established."³⁶⁷ These commentators noted that the courts are split concerning social workers, that nurses "have not fared well," and that with respect to other mental health personnel, a psychology technician with a B.A. in psychology had been found not to be properly an expert in interpretation of psychological tests and could not express an opinion on the defendant's sanity.³⁶⁸ Thus, whenever the expert witness is someone other than a psychiatrist, careful opposing counsel can plausibly and should object that the expert is not qualified. However, despite the plausibility of the objection and the support in the case law, a court should not sustain this objection, because a person other than a psychiatrist can be properly qualified as an expert on this subject.

There exists a better-reasoned line of authority holding that courts should examine the *expertise* of the witness rather than merely the *degrees* held by the witness in determining whether a person other than a psychiatrist should be allowed to testify regarding mental conditions. A witness with the requisite expertise can be helpful to the trier of fact whether or not the witness has a particular title or degree.³⁶⁹ A recent case has

³⁶⁵ See Dix & Poythress, *Propriety of Medical Dominance of Forensic Mental Health Practice: The Empirical Evidence*, 23 ARIZ. L. REV. 961, 961-63 (1981); Comment, *The Psychologist as Expert Witness*, *supra* note 254, at 544-54.

³⁶⁶ Three decisions form the basis of modern authority that psychologists can be proper experts regarding mental conditions: *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (en banc); *Hidden v. Mutual Life Ins. Co.*, 217 F.2d 818 (4th Cir. 1954); and *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940). For a jurisdiction where it is not entirely clear that a psychologist can so testify, see *State v. Peterson*, 24 N.C. App. 404, 407-08, 210 S.E.2d 883, 885-86 (1975).

³⁶⁷ Dix & Poythress, *supra* note 365, at 969 n.51.

³⁶⁸ *Id.*

³⁶⁹ The correct mode of analysis is demonstrated by *Maloney v. Wake Hosp. Sys., Inc.*, 45 N.C. App. 172, 262 S.E.2d 680 (1980). Although that case involved the competence of a nurse to give an expert opinion as to the cause of a physical injury rather than a mental condition, the reasoning of the opinion is applicable and compelling with respect to all expert medical testimony. The opponent of the nurse's testimony argued that since she was not a doctor, she could not give an expert opinion as to the cause of a physical injury. The trial court sustained this objection. The North Carolina Court of Appeals disagreed:

The common law . . . does not require that the expert witness on a medical subject shall be a person *duly licensed to practice medicine* Except as an indirect stimulus to obtain a license, such a rule is ill-advised, first, because the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses, and, secondly, because some of the most capable investigators have probably not needed or cared to obtain a license to practice medicine.

Id. at 178, 262 S.E.2d 683-84 (quoting 2 J. WIGMORE, WIGMORE ON EVIDENCE § 569, at 667-68 (3d ed. 1940)) (emphasis added). The court further quoted Professor Wigmore concerning the "only true criterion" for determination of an expert's qualifications: "On *this subject* can a jury from *this person* receive appreciable help?" *Id.* at 178, 262 S.E.2d at 683 (quoting 7 J. WIGMORE, WIGMORE ON EVIDENCE § 1923, at 21 (3d ed. 1940)) (emphasis added). The court then held:

Since we accept the principle that the giving of expert testimony should not be limited to those witnesses who are licensed in some particular field of endeavor, nor limited by whether such witnesses employ their skills professionally or commercially, there is

affirmed the proposition that a witness other than a psychiatrist can be a proper expert witness to render a diagnosis regarding psychological conditions.³⁷⁰

Allowing testimony by persons other than psychiatrists is particularly appropriate where the diagnosis is simple and straightforward, as it is with rape trauma syndrome. Research on the subject of whether persons other than psychiatrists can make judgments as reliably as psychiatrists concerning mental condition indicates that even with respect to complicated diagnoses such as sanity or competence to stand trial, psychologists and other mental health professionals are at least as accurate as (and often more thorough than) psychiatrists.³⁷¹ There is no reason to believe that experts other than psychiatrists would be more prone to err in the relatively simpler diagnosis required with respect to rape trauma syndrome.

accordingly no basis or justification for treating medical experts differently — for establishing a preferred or exclusive class among medical expert witnesses.

Id. at 178, 262 S.E.2d at 684. The court then held that the trial court had erred in refusing to allow the nurse to testify. *Id.* at 180, 262 S.E.2d at 684.

³⁷⁰ See *People v. Gans*, 119 Misc. 2d 843, 465 N.Y.S.2d 147 (N.Y. Sup. Ct. 1983). There the defendant attempted to call a certified social worker as an expert to testify as to the defendant's mental capacity to proceed and his competency in the foreseeable future. The prosecution opposed the social worker's testimony on the basis that the social worker was not properly qualified as an expert. The trial court ruled that the testimony of the social worker should be admitted, finding no basis to artificially limit the range of qualified experts to psychiatrists:

I note that clinical social work, as a profession, is one of the core mental health disciplines. As are psychiatrists and clinical psychologists, clinical social workers are skilled in the diagnosis and treatment of mental disorders. Psychiatrists, who are physicians, bring their expertise in the understanding of organic pathology, psychopharmacology and other somatic treatments to the mental health field. Clinical psychologists, being scientists who study human behavior as well as being non-medical mental health professionals, bring their particular skills in research and in the study of behavior to the mental health field. It can be noted that clinical social workers, also non-medical mental health professionals, bring their expertise in dealing with the relationship between social and emotional functioning as well as their expertise in social policy and in environmental intervention to the mental health field.

Id. at 844, 465 N.Y.S.2d at 148. The court then went on to note that the diagnostic criteria set forth in the DSM-III were validated during field trials carried out by professionals from the disciplines of psychiatry, psychology, clinical social work, and psychiatric nursing. Psychologists and clinical social workers served on several of the advisory committees which developed DSM-III and served as consultants to the task force which compiled it. In fact, a social worker served as co-principal investigator and project coordinator for the reliability study and field trials of the DSM-III. *Id.* The court further noted that throughout DSM-III references are made to utilization by "clinicians," not exclusively by psychiatrists. *Id.* Thus the court held:

It is clear, that if one is to accept DSM-III as a valid and reliable guide, then one must accept that properly trained psychiatrists, psychologists, clinical social workers and psychiatric nurses are qualified to apply its diagnostic criteria in their diagnostic assessment of patients. I find no merit in any arguments that the application and use of the DSM-III diagnoses should be limited to physicians and psychiatrists.

Id. Other courts have recognized that properly qualified experts other than psychiatrists can testify concerning mental condition. See, e.g., *Cook v. Cook*, 396 So. 2d 1037 (Ala. 1981) (allowing testimony of psychiatric social worker regarding mental disorder); *People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976) (psychiatric social worker may give opinion as to a person's mental condition); *State v. McDonald*, 89 Wash. 2d 256, 571 P.2d 930 (1977) (psychiatric social worker permitted to testify regarding mental condition).

³⁷¹ See *Dix & Poythress*, *supra* note 365, at 975-84.

Accordingly, nurses and social workers with substantial training and expertise in the field of rape counseling should be recognized as proper experts to testify regarding rape trauma syndrome. The Federal Rules of Evidence explicitly recognize that a witness may be qualified as an expert through training, knowledge or experience and not solely education.³⁷² To refuse to allow such testimony could lead to the anomalous result that the opinion of a rape trauma counselor based upon an interview of the complainant shortly after the event when the complainant has voluntarily come to the rape counseling center could be inadmissible, while the opinion of a psychiatrist based upon an interview weeks or months after the alleged rape and perhaps undertaken at the request of the prosecution would be admissible. The former testimony would appear to be clearly more reliable concerning the immediate post-rape symptoms exhibited by the victim.

D. Is the Issue of Consent in a Rape Case a Proper Subject for Expert Opinion?

The issue of whether in an individual case expert testimony on an issue is warranted depends upon whether expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. This "helpfulness" standard is further explained in the Advisory Committee Note to Federal Rule of Evidence 702:

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier of fact. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." . . . When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.³⁷³

In a rape case where consent is the main issue, usually the case will come down to a contest of credibility between the complainant and the defendant. There will usually not be any other eyewitness testimony available. Our system assumes the jurors are able to "intelligently" decide such a contest. Indeed, assessment of witness credibility is perhaps the premier ability generally attributed to jurors, and jurors have performed such assessments in rape cases for centuries without the benefit of expert testimony. However, it seems that jurors will be able to make their determination of what actually happened to the "best possible degree" if they have the benefit of probative, easily understandable expert testimony that gives them information beyond their common knowledge and experience. Thus, on its face, rape trauma syndrome evidence appears to be a proper subject for expert testimony.

The foregoing analysis assumed that jurors were able to "intelligently" decide rape cases. However, there is reason to believe that this is not true, which provides a more compelling reason for allowing "remedial" expert testimony. Many scholars believe lay jurors are often not able to decide the issue of consent in a rape case "intelligently" on

³⁷² See FED. R. EVID. 702.

³⁷³ FED. R. EVID. 702 advisory committee note (quoting Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

the basis of evidence traditionally available to the prosecution in rape trials.³⁷⁴ One study has demonstrated that jurors often have the preconceived notion that a woman who is raped has "brought it on herself" and thus tend to acquit or convict on lesser charges much more frequently than with respect to other criminal charges.³⁷⁵ In addition, the "rape myth,"³⁷⁶ prevalent in American society, may also improperly influence the jury. Surely resolution of rape cases on such a basis is not intelligent or a determination of the issue to the best possible degree. Accordingly, rape trauma syndrome testimony which is probative evidence on the key issue of consent "will assist the trier of fact to understand the evidence or to determine a fact in issue."³⁷⁷ Nonetheless, three courts have held that the issue of consent in a rape case is not a proper subject for rape trauma syndrome expert testimony.

The broadest such holding appears to be in the *Saldana*³⁷⁸ case where the best reading of the court's opinion on this point — that "jurors of ordinary abilities are competent to consider the evidence and to determine whether the alleged crime occurred" — is that the court believed that jurors were competent to make the determination of whether the intercourse was not consensual on the basis of evidence traditionally available to the prosecution in rape cases. The research shows this conclusion to be incorrect.³⁷⁹ Further, there are many issues that jurors are presumed to be competent to decide without expert testimony, but this has never been seen as a bar to expert testimony that will assist the jury to decide that issue.³⁸⁰

A second and slightly more narrow reason found by the California Supreme Court in *Bledsoe*³⁸¹ and the Kansas Supreme Court in *Bressman*³⁸² to render rape trauma syndrome testimony without value in assisting the jury to reach a determination on the issue of consent, is that the jurors are fully competent to weigh the evidence concerning the post-rape behavior and emotional condition of the complainant, and decide whether it is indicative that a rape occurred, without the need for expert testimony to further explain or comment upon the evidence. This holding can be shown to be incorrect by referring back to the Advisory Committee Note to Federal Rule of Evidence 702, under which the test for expert testimony is not only whether the untrained layman will be

³⁷⁴ See *People v. Rincon-Pineda*, 14 Cal. 3d 864, 880–81, 538 P.2d 247, 258, 123 Cal. Rptr. 119, 129–30 (1975); *State v. Bashaw*, 296 Or. 50, 53–55, 672 P.2d 48, 49–50 (1983); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 6 (1977); O'Neale, *supra* note 343, at 142–43; Note, *A Feminist View*, *supra* note 350, at 338–43.

³⁷⁵ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 249 (1966) [hereinafter cited as *THE AMERICAN JURY*].

³⁷⁶ See *supra* notes 51–52 and accompanying text.

³⁷⁷ FED. R. EVID. 702 advisory committee note.

³⁷⁸ 324 N.W.2d 227 (Minn. 1982).

³⁷⁹ See *THE AMERICAN JURY*, *supra* note 375. The Kalven & Zeisel research was conducted prior to the blooming of the women's rights movement. It would be interesting to see if attitudes have changed as a result of that movement. A cover story in a recent popular news magazine, without engaging in anything approaching empirical research, indicates that jurors are much less prejudiced against rape complainants than previously was the case. See *Rape and the Law*, *NEWSWEEK*, May 20, 1985, at 60.

³⁸⁰ See, e.g., *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967); *Miller v. Pillsbury Co.*, 33 Ill. 2d 514, 211 N.E.2d 733 (1965); C. McCORMICK, *McCORMICK ON EVIDENCE* § 13 (E. Cleary 3d ed. 1984).

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

³⁸² 236 Kan. 296, 689 P.2d 901 (1984).

qualified to intelligently determine that issue without expert testimony, but whether the layman would be qualified to determine the issue *to the best possible degree* without the expert testimony. Although jurors *may* be able to evaluate evidence of the complainant's behavior and emotional condition after the alleged incident without expert guidance, it seems obvious that the testimony will be more meaningful if it is explained to the jury that the behavior falls into a recognized psychological category which has been determined to result from the crime with which the defendant is charged, rape. The proper mode of dealing with such evidence is demonstrated by the Oregon Supreme Court in *State v. Middleton*,³⁸³ when it dealt with the closely related issue of typical behavior of sexually abused children. The court stated:

Perhaps the jury itself would have been capable of deciding whether the daughter's behavior actually fit the pattern described by the experts. However, as said in 4 *Weinstein's Evidence* 702[02] (1981), there is no bright line separating issues within the comprehension of the jurors from those that are not. Generally the admission of expert testimony is within the discretion of the trial court. . . . If a qualified expert offers to give testimony on whether the reaction of one child is similar to the reaction of most victims of familial child abuse, and if this would assist the jury in deciding whether a rape occurred, it may be admitted.³⁸⁴

Similarly, with respect to rape trauma syndrome testimony, expert testimony would assist the jury in deciding whether a rape occurred and thus such testimony may, and in the trial court's discretion should, be admitted.

Finally, the *Bledsoe* court's statement that rape trauma syndrome evidence does "little more than provide the jury with information that it *already had* or that was not particularly pertinent to the facts of this case"³⁸⁵ suggests that rape trauma syndrome evidence does not tell the jurors anything that they do not already know. In this instance, the California Supreme Court was in error. Although most jurors undoubtedly believe that rape is a traumatic experience, there is no reason to believe that jurors understand the results of the trauma or that the results tend to fall into a general pattern. In fact, there appears to be no support for the Minnesota Supreme Court's holding in *State v. Myers*³⁸⁶ that jurors are more ignorant and in need of more assistance with respect to the behavior of sexually abused children than they are with respect to the behavior of adult rape victims. The research tends to indicate that jurors are quite uninformed with respect to adult rape victims,³⁸⁷ and in fact may be at even a greater disadvantage than they are with respect to sexually abused children due to certain incorrect preconceptions about adult rape victims which cloud an intelligent resolution of the issue.

E. *Is Rape Trauma Syndrome Evidence Unfairly Prejudicial?*

According to the Advisory Committee's note to Federal Rule of Evidence 403, the term "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." There have so far been no

³⁸³ 294 Or. 427, 657 P.2d 1215 (1983).

³⁸⁴ *Id.* at 437, 657 P.2d at 1220-21 (citations omitted).

³⁸⁵ 36 Cal. 3d at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 461 (emphasis added).

³⁸⁶ 359 N.W.2d 604 (Minn. 1984).

³⁸⁷ See *supra* notes 374-75 and accompanying text.

arguments made by defendants that rape trauma syndrome evidence is unfairly prejudicial because it appeals too much to the emotions of the jury. However, another type of unfair prejudice sometimes raised with respect to expert testimony, and particularly expert testimony that is deemed to be "scientific," is that when evidence is presented through an expert, the evidence is invested with an "aura of special reliability and trustworthiness"³⁸⁸ or an unwarranted "scientific cachet."³⁸⁹ The essence of the argument is that such testimony overawes the jurors to the extent that they uncritically accept such evidence as conclusive on the point at issue without performing their proper function of critically examining the evidence to determine the extent to which it in fact does prove the point for which the proponent has offered it. The *Saldana*,³⁹⁰ *Taylor*,³⁹¹ and *Bledsoe*³⁹² courts held that rape trauma syndrome evidence does unfairly prejudice a defendant in this manner.

It has been lamented by evidence scholars that there is a dearth of empirical research on the question of whether jurors actually do tend to overvalue expert testimony.³⁹³ The traditional view of the courts has been that jurors may indeed have a tendency to do so. However, the best a court can really do, given the lack of empirical research, is to make an educated, common sense guess about how likely a certain piece of expert testimony is to overwhelm the jury. The best educated guess with respect to rape trauma syndrome testimony is that it will not have a tendency to be overvalued by the jury.

Rape trauma syndrome evidence will not "overawe" the jury because first, rape trauma syndrome evidence does not involve the use of any mysterious machine or process.³⁹⁴ Also, rape trauma syndrome evidence is not likely to improperly influence a jury because it is nontechnical and easily understandable.³⁹⁵ If a jury can truly understand a piece of evidence, it seems likely that a jury will be able to fairly weigh its probative value. Accordingly, it does not appear that rape trauma syndrome evidence is so invested with a "special aura of reliability and trustworthiness" so as to render it unfairly prejudicial. For the same reasons, the evidence also does not have a tendency to confuse the jury, as the *Taylor* court suggested.³⁹⁶ Furthermore, because the evidence goes to the key question in the case, it also should not be excluded on the basis of the countervailing consideration that it diverts the jury's attention from the main issue in the case — another rationale suggested by *Taylor* in excluding the evidence.³⁹⁷

A second species of "unfair prejudice" that was cited by the *Taylor* court is that the very term "rape trauma syndrome" itself is unfairly prejudicial because "[t]here are inherent implications from the use of the term 'rape trauma syndrome,' for it suggests that the syndrome may only be caused by 'rape' as the court in *Saldana*, . . . emphasized."³⁹⁸ Thus, the *Taylor* court concluded that "[t]he term itself connotes rape."³⁹⁹

³⁸⁸ *Saldana*, 324 N.W.2d at 230.

³⁸⁹ *Taylor*, 663 S.W.2d at 241.

³⁹⁰ 324 N.W.2d at 230.

³⁹¹ 663 S.W.2d at 241.

³⁹² 36 Cal. 3d at 252, 681 P.2d at 301, 203 Cal. Rptr. at 460.

³⁹³ See *Symposium*, *supra* note 312, at 218-19, 232-33 (comments of Paul Gianelli, James Starrs, Michael Graham, Arnold Barnette, and Andre Moenssens).

³⁹⁴ See *supra* text accompanying notes 304-06.

³⁹⁵ See *supra* text accompanying note 310.

³⁹⁶ See *Taylor*, 663 S.W.2d at 241-42.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 240.

³⁹⁹ *Id.* at 241.

Perhaps the court was suggesting that there can be other causes of rape trauma syndrome other than rape, although the court did not specify what those causes might be, and psychiatric and psychological literature likewise does not suggest what they might be. If the court is simply concerned about the jury hearing the word "rape" issue from the mouth of an expert witness, the court should be reminded that the trials where that will occur will be *rape* trials where the term "rape" will be mentioned often. The term will probably be mentioned more forcefully in other ways than it will through the testimony of the expert, such as in the reading of the charging document to the jury, the prosecutor's opening statement, the testimony of the complainant, and the prosecutor's closing argument.

F. *Does Rape Trauma Syndrome Evidence Improperly Bolster the Credibility of the Complainant?*

Probably the second greatest stumbling block to rape trauma syndrome evidence after the *Frye* test has been the defense contention that such testimony improperly bolsters the credibility of the complainant. It is a general rule in most jurisdictions that an expert witness is not allowed to express an opinion concerning the credibility of another witness.⁴⁰⁰ At least two exceptions to this general rule, designed to meet what courts see as extraordinary cases, have recently developed. The first is with respect to expert comment on the credibility of a child complainant in a sexual abuse case, given the perceived extraordinary credibility problems involved with child witnesses.⁴⁰¹ The second concerns eyewitness identifications, where courts appear to be becoming convinced that extraordinary credibility problems exist that are not apparent to jurors without such evidence.⁴⁰² Given the jaundiced view held by many jurors regarding rape complainants, it would not be unreasonable to suggest that rape constitutes another extraordinary circumstance in which expert testimony regarding the credibility of the complainant should be allowed. However, it is not necessary to go to that extreme to find the most probative levels of rape trauma syndrome testimony not to be violative of the general rule.

The first three levels of rape trauma syndrome testimony, that is, an explanation of the general symptoms, a comparison of the complainant's symptoms to those of the syndrome, and an opinion that the cause of the complainant's symptoms is rape, do not constitute an improper bolstering of the complainant's credibility. There is no direct assertion that the expert believes the complainant to be truthful. Admittedly, to the extent that an expert believes a complainant's statements and bases an opinion on them, the expert is indirectly "bolstering" the credibility of the complainant. However, as the Oregon Supreme Court noted in *State v. Middleton*, "[m]uch expert testimony will tend to show that another witness either is or is not telling the truth. . . . This, by itself, will not render evidence inadmissible."⁴⁰³ Mental health experts have always been allowed to base their diagnoses in part or in full upon their belief in what the subject tells them,

⁴⁰⁰ See, e.g., *United States v. Jackson*, 576 F.2d 46, 49 (5th Cir. 1978); *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

⁴⁰¹ See, e.g., *People v. Ashley*, 687 P.2d 473, 475 (Colo. Ct. App. 1984).

⁴⁰² See, e.g., *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

⁴⁰³ 294 Or. 427, 435, 657 P.2d 1215, 1219 (1983) (citation omitted). See also *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984).

without having that testimony ruled inadmissible because it improperly bolsters the testimony of the subject. For example, in a criminal case where the defendant has asserted the defense of insanity and has testified on his own behalf that he was insane at the time of the alleged crime, it would probably never occur to a prosecutor to lodge an "improper bolstering" objection to the testimony of a defense expert that, based upon what the defendant told him, diagnoses the defendant as having been insane at the time of the alleged crime.

The fourth level of rape trauma syndrome evidence, where the expert directly comments upon the believability of the complainant by testifying that the complainant did not fantasize the occurrence, does constitute a direct bolstering of the complainant's testimony and should not be admitted in the jurisdiction following the rule that experts cannot give opinions regarding the credibility of witnesses. As was previously noted, a plausible case can be made for creating an exception to this general rule with respect to rape complaints.⁴⁰⁴ Such an exception, however, appears unnecessary if the first three levels of rape trauma syndrome evidence are admitted, because the most important and reliable rape trauma syndrome evidence is presented through those three levels. Accordingly, it appears that courts which have held the admission of testimony on the fourth level to be error are correct.⁴⁰⁵

⁴⁰⁴ See *supra* text accompanying notes 401-02.

⁴⁰⁵ An interesting subsidiary issue with respect to bolstering credibility is the effect that rape trauma syndrome testimony will have on the fresh complaint doctrine. The "fresh complaint doctrine" is a doctrine applicable to sex crimes prosecutions that permits the prosecution in the case-in-chief to prove that the complainant made a prompt complaint about the offense to the authorities or a third party. The doctrine permits evidence that might otherwise arguably be barred by the rule that no bolstering can be made before a witness' credibility is attacked, or by the hearsay rule. See 4 J. WIGMORE, *supra* note 343, §§ 1134-1140; Note, *The Admissibility of Extrajudicial Rape Complaints*, 64 B.U.L. REV. 199 (1984). The only court to have examined a similar issue was the Virginia Supreme Court in the pre-rape trauma syndrome case of *Carter v. Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1984). In that case it was held that the examining physician's testimony regarding what the complainants had told him went beyond what was allowed by the fresh complaint doctrine. *Id.* at 518, 248 S.E.2d at 786. Virginia, like a majority of the states which recognize the fresh complaint doctrine, limits the testimony to the fact that a prompt complaint was made, *without* allowing the details of the offense, including the identity of the assailant and the injuries claimed to have been sustained to be testified to. See, e.g., *Cady v. State*, 455 So. 2d 101, 105 (Ala. Crim. App. 1984); *State v. Van Doren*, 657 S.W.2d 708, 716 (Mo. Ct. App. 1983); *Broun v. State*, 649 S.W.2d 160, 162 (Tex. Crim. App. 1983). In a majority of jurisdictions, the fact that a complaint was made is not even considered to be hearsay because it is not being admitted to prove the truth of the matter asserted, but merely to rebut any inferences that might be drawn from the failure to complain. See, e.g., *Matter of Cheryl H.*, 153 Cal. App. 3d 1098, 1120, 200 Cal. Rptr. 789, 802 (1984). Thus, it is a limited tool for bolstering the credibility of the complainant.

The Virginia Supreme Court was correct in realizing that the testimony of the doctor in that case, which was a pale shadow of current rape trauma syndrome testimony, would tend to obliterate the limitations on the fresh complaint doctrine. When rape trauma syndrome testimony is admitted, the expert can recite the details of the alleged offense given to him by the complainant far beyond the limits of what is allowed by the fresh complaint doctrine. Further, the complainant may well have made those statements long after the deadline for "promptness" under the fresh complaint doctrine. The defendant's only solace in such a case would be a limiting instruction from the court that the jury is not to treat the statements made by the complainant to the expert as substantive evidence, but merely as the basis of the expert's opinion. The extent to which a jury can or will comply with such a subtle instruction is questionable, although generally courts indulge in the presumption that juries will follow such instructions.

Even though rape trauma syndrome testimony will tend to undermine the limits of the fresh

G. Do Hearsay Objections Exist to Rape Trauma Syndrome Evidence?

It seems fair to say that under any set of evidence rules closely akin to the Federal Rules of Evidence, rape trauma syndrome evidence will not run aground on the shoals of the hearsay rule. Any argument by a defendant that the out-of-court statements by the complainant to the expert constitute inadmissible hearsay would be defeated by Federal Rule of Evidence 703, which allows an expert to formulate an opinion on the basis of facts or data that are not otherwise admissible in evidence and relate those otherwise inadmissible bases of his opinion to the jury. When such otherwise inadmissible hearsay is admitted as the basis of an expert opinion, it is admitted for the limited purpose of disclosing the basis for the opinion and does not constitute substantive evidence of the facts asserted.⁴⁰⁶ Accordingly, experts are not allowed to express an opinion that one of the underlying hearsay statements is true and thereby convert inadmissible hearsay into admissible opinion.⁴⁰⁷

Under Federal Rule of Evidence 703, there is no basis for treating statements made by a patient for purposes of diagnosis and treatment any differently from any other statements. They are equally admissible as the basis of the expert's opinion. Thus, the courts have held that rape complaints testified to by experts such as an examining physician, are proper bases of expert opinion and do not violate the hearsay rule.⁴⁰⁸ Consistent with these precepts, no court with evidentiary rules akin to the Federal Rules of Evidence has held rape trauma syndrome evidence inadmissible on hearsay grounds. Even in Kansas, which has a rule of hearsay law that a doctor cannot base an opinion on statements made to him by a patient unless those statements are independently admissible and admitted into evidence at trial,⁴⁰⁹ rape trauma syndrome evidence has not been barred by the hearsay rule since the complainant through her testimony can independently put the necessary facts into evidence upon which the expert can base an opinion.⁴¹⁰

Seemingly the only precedent that a defendant could rely on in seeking to have rape trauma syndrome evidence declared inadmissible on a hearsay basis is the pre-rape trauma syndrome case of *Cartera v. Commonwealth*.⁴¹¹ There, the Virginia Supreme Court held that opinion testimony of a physician that the complainants had been raped, which was in part based upon out-of-court statements made by the complainants to him, was inadmissible because it did not fall within the hearsay exception for statements for

complaint doctrine, this does not constitute a sufficient reason for its exclusion. A general principle of evidence law is that if evidence is admissible for one purpose but inadmissible for another, it is to be admitted for the permitted purpose and the jury instructed not to use it for the impermissible purpose. C. McCORMICK, *supra* note 380, § 59. Accordingly, even in jurisdictions following a strict fresh complaint doctrine rule, rape trauma syndrome evidence should not be excluded because of its practical conflict with that doctrine.

⁴⁰⁶ See, e.g., *State v. Jessen*, 130 Ariz. 1, 7 n.1, 633 P.2d 410, 416 n.1 (1981); *Matter of Cheryl H.*, 159 Cal. App. 3d 1098, 1119-20, 200 Cal. Rptr. 789, 802 (1984); *Attorney Grievance Comm. v. Northstein*, 300 Md. 667, 678-79, 480 A.2d 807, 813 (1984).

⁴⁰⁷ See, e.g., *Matter of Cheryl H.*, 153 Cal. App. 3d 1098, 1120, 200 Cal. Rptr. 789, 802 (1984).

⁴⁰⁸ See, e.g., *State v. Esposito*, 192 Conn. 166, 175-76, 471 A.2d 949, 954 (1984); *Redfield v. State*, 240 Ga. 460, 461, 241 S.E.2d 217, 219 (1978).

⁴⁰⁹ See *Klein v. Wells*, 194 Kan. 528, 400 P.2d 1002 (1965).

⁴¹⁰ See *Marks*, 231 Kan. at 655, 647 P.2d at 1300.

⁴¹¹ 219 Va. 516, 248 S.E.2d 784 (1978).

purposes of medical diagnosis and treatment.⁴¹² But under the Federal Rules of Evidence, the statement need not fall within that exception because it is being used for the non-hearsay purpose of showing the basis of the expert's opinion.

H. *Will the Admission of Rape Trauma Syndrome Testimony Lead to the Evisceration of Rape Shield Statutes?*

The argument that admitting rape trauma syndrome testimony would lead to the evisceration of rape shield statutes arose from an unlikely source. The defendant in *State v. McQuillen*⁴¹³ argued that allowing defense experts in general to examine complainants prior to trial in order to determine whether they exhibited rape trauma syndrome would result in a substantial diminution in the protections of the rape shield statute. Although it can hardly be supposed that the defendant who raised that argument had any great solicitude for either the complainant or the rape shield statute, the argument does merit consideration.

The Kansas Supreme Court in *McQuillen* dealt with this issue by first noting that under the statute, "[a] showing of relevancy is still necessary before the complaining witness' prior sexual conduct may be admitted into evidence on behalf of the defendant."⁴¹⁴ The court then noted that even if the showing of relevancy is made, such evidence "would not allow wholesale admittance of a victim's past sexual conduct, unless that information was used by the state's expert to make his determination of rape trauma syndrome."⁴¹⁵ In practical effect, this means that the defense expert should not be allowed to delve into the complainant's past sexual history, because there is no reason for the state's expert to do so. The research does not indicate any relationship whatsoever between prior sexual behavior and the existence or severity of rape trauma syndrome. Thus, a defendant could not make the necessary showing of relevance which would overcome the rape shield statute.

In summary, then, in any rape prosecution the prosecution should be allowed to present any of the first three levels of rape trauma syndrome evidence through any qualified witness. Prosecutors should not, however, use such evidence automatically, but rather should give serious consideration in the circumstances of each case to whether it is in the best interests of the state and the complainant to present such evidence. Such careful consideration is necessary because the decision to use such evidence, as will be argued below, should result in the defendant being given an opportunity to have his expert conduct a psychological evaluation of the complainant.⁴¹⁶ Such an examination will merely add to the already substantial trauma that rape victims undergo in seeing a complaint through the judicial system. In fact, the trauma inflicted by the judicial system has been viewed as so severe as to be characterized as "the second assault."⁴¹⁷ The prosecutor will want to be sure that a particular complainant has the psychic resources to cope with such an examination.

⁴¹² *Id.* at 518, 248 S.E.2d at 786.

⁴¹³ 236 Kan. 161, 689 P.2d 822 (1984).

⁴¹⁴ *Id.* at 172, 689 P.2d at 830.

⁴¹⁵ *Id.*

⁴¹⁶ See *id.*

⁴¹⁷ See J. WILLIAMS & K. HOLMES, *THE SECOND ASSAULT — RAPE AND PUBLIC AUTHORITIES* (1981).

VII. DEFENSE USES OF RAPE TRAUMA SYNDROME EVIDENCE

The defense use of rape trauma syndrome evidence concerns whether, if the prosecution chooses to present such evidence on the issue of consent, the defendant should have a right to have the court order the complainant to submit to a pretrial examination by a defense rape trauma syndrome expert. Two courts have answered this question and have reached opposite conclusions. The Montana Supreme Court in *State v. Liddell* held that the defendant had no such right,⁴¹⁸ while the Kansas Supreme Court in dictum in *McQuillen* indicated that the defendant did have such a right.⁴¹⁹ The Kansas Supreme Court's position on this issue is clearly correct. It smacks of fundamental unfairness for the prosecution to be allowed to have the complainant examined by an expert and the expert then render an opinion on the basis of that examination, yet not allow the defendant to have the opportunity to attack that evidence through access to the same data available to the prosecution's expert. By way of analogy, when a defendant claims insanity as a defense, there is no doubt but that the prosecution has a right to have an expert examine the defendant.⁴²⁰

The old argument that in rape cases psychiatric examinations of the complainant should be widely available to a defendant has quite rightly fallen into disrepute and should be discarded in jurisdictions where it has not already been so.⁴²¹ However, the situation is different where the prosecution chooses to present psychiatric or psychological testimony, one of the main bases of which is the psyche of the complainant. If such evidence is injected into the case by the prosecution, the defendant should certainly have a right to formulate an informed response.

But resourceful defense counsel are unlikely to be satisfied with a rule that limits the defendant's right to such an examination to cases where the prosecution has chosen to use rape trauma syndrome evidence. Defense counsel will argue that the nonexistence of rape trauma syndrome is relevant on the issue of consent and thus the defendant should have a right to have his expert evaluate the complainant in *any* rape case. If courts adopted this approach, the development of rape trauma syndrome would have the perverse result of reviving the discredited and dying practice of courts ordering rape complainants to submit to psychological evaluations by defense experts. Yet, as was

⁴¹⁸ — Mont. —, 685 P.2d 918, 924 (1984).

⁴¹⁹ 236 Kan. 161, 167, 689 P.2d 822, 827 (1984).

⁴²⁰ See, e.g., FED. R. CRIM. P. 12.2(c); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 40 (1972).

⁴²¹ Wigmore again is the main culprit: he argued "that the complainant woman in a sex offense case should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found in young girls, causing distortion of the imagination in sex cases . . ." 3A J. WIGMORE, *supra* note 343, § 924a at 747. McCormick agreed as of 1972. C. MCCORMICK, *supra* note 288, § 45 at 95-96 (second edition). But by 1984, McCormick had swung to the opposite viewpoint:

But Wigmore's positions that females who testify they have been sexually molested or attacked may often report such matters falsely, and that a judge should *always* be sure that the female victim-witness's social history and mental makeup are the subject of examination and testimony by a qualified physician, have been the subject of penetrating critical analysis of the basis of these views.

C. MCCORMICK, *supra* note 380, § 45 at 106-07 (third edition). See also Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W.L. REV. 235 (1983); O'Neale, *supra* note 343.

pointed out above, the defense clearly has a valid point in arguing that if such evidence can be found, it would be relevant.

The way out of this seeming conundrum was formulated by the Kansas Supreme Court in *McQuillen*: the defendant has no right to have his expert examine the complainant unless the prosecution will be presenting rape trauma syndrome evidence at trial.⁴²² This correct result was reached, however, by incorrect reasoning. The court decided that the nonexistence of the syndrome was not relevant because "[t]here are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim."⁴²³ It is difficult to understand how the existence of the syndrome is probative of lack of consent, but nonexistence of the syndrome is not probative to show that consent existed. Most women who have been raped exhibit the syndrome. Accordingly, if a woman does not exhibit the syndrome, that is some evidence from which a jury could conclude that she falls into the category of women who have not been raped. The prosecution can then certainly point out the reasons why the complainant falls into the small category of women who have been raped yet do not suffer from the syndrome, such as extraordinary inner resources or an extraordinarily strong support network. But this merely goes to decrease the weight of the defense evidence, not to render it irrelevant.

The holding of the *McQuillen* court is supportable on another basis, however. There exists no rule of law that a defendant has an absolute right to a court-ordered mental examination of an opposition witness. Rather, the trial court has broad discretion in determining whether to order such an examination.⁴²⁴ Where, as with rape trauma syndrome, the chances of turning up relevant evidence are speculative and the intrusion into the personal affairs of the complainant is substantial, there is no reason to hold that a court is always compelled to provide the defendant with the opportunity to unearth such evidence. Fundamental fairness only dictates that the court assure the defendant of that opportunity if the prosecution intends to use rape trauma syndrome evidence against the defendant.⁴²⁵

In summary, then, if the prosecution intends to use rape trauma syndrome evidence on the issue of consent, the defendant should have the right to a court-ordered psychological examination of the complainant by a defense expert. The defendant should, however, have no such right where the prosecution does not intend to present such evidence.

⁴²² 236 Kan. 161, 172, 689 P.2d 822, 830 (1984).

⁴²³ *Id.*

⁴²⁴ See *United States v. Roach*, 590 F.2d 181 (5th Cir. 1979); *United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978); C. McCORMICK, *supra* note 380, § 45 at 106-09.

⁴²⁵ *McQuillen*, 236 Kan. at 172, 689 P.2d at 630. Theoretically, the Kansas Supreme Court may have gone a bit too far in its holding when it indicated that a defendant cannot present evidence that the complainant was not suffering from rape trauma syndrome until the state has first introduced evidence that she was. This holding would prohibit the defendant from presenting such evidence obtained from sources other than a compelled examination of the complainant. If indeed the defendant can unearth evidence of lack of rape trauma syndrome from sources other than a compelled examination of the complainant, it is not clear why such evidence should be barred. In the majority of cases, however, the possibility is likely to be only theoretical since evidence of rape trauma syndrome, or lack thereof, will exist in the complainant herself or others who are not likely to be sympathetic to a defendant, such as her family, her physician and her rape counselor.

VIII. CONCLUSION

The psychological reactions of rape victims have been the subject of behavioral scientific study in this country for fifteen years. Over the last decade, this study has been relatively intense. The results of the research have been remarkably consistent. Most rape victims experience severe psychological symptoms for at least two months after the rape. Many suffer much longer-term effects. The general symptoms are manifested by more specific symptoms: a multitude of specific fears, including negative reactions to environments similar to that in which the rape occurred; worsening relationships with men, including disruption of sexual functioning; changes in eating and sleeping habits; nightmares; unease at work; curtailment of normal social activities; and a decrease in feelings of self-worth. The occurrence of these symptoms is predictable and recognizable by a person who works with rape victims. These symptoms collectively are called rape trauma syndrome. No causal factor other than rape has been found that consistently produces the same recognizable pattern of symptoms. Particularly, consensual intercourse has not been found to produce such symptoms.

Prosecutors have had mixed success in attempting to use rape trauma syndrome expert evidence to prove lack of consent in rape prosecutions. Courts have found the evidence inadmissible for a variety of reasons: it lacks general acceptance sufficient to pass the *Frye* test for scientific evidence, it is irrelevant, it is not a proper subject for expert opinion, it is unfairly prejudicial, and it is an improper bolstering of the complainant's credibility. The courts which have allowed the admission of rape trauma syndrome evidence have done so in varying degrees, and are not in agreement about the qualifications necessary to make a witness an expert on the subject. The law regarding the admissibility of expert testimony concerning rape trauma syndrome is in a state of confusion.

The causes of this confusion can for the most part be identified. Part of the confusion results from the failure of courts to delve deeply enough into the scientific literature to assure themselves that rape trauma syndrome is firmly based in substantial empirical research which has yielded the same results for the last fifteen years. Another part of the confusion results from a failure to distinguish among the four levels of testimony that can be given regarding rape trauma syndrome. Confusion also results from the failure of courts to grapple with the question whether this "soft" scientific evidence is a type to which a special test for scientific evidence should be applied. Finally, some confusion may be attributable to the courts' failure to completely rid themselves of an historical skepticism of rape complainants.

This article suggests that this confusion need not exist. Rape trauma syndrome evidence presented through a properly qualified expert should be admissible to show the general nature of the syndrome, that a complainant's symptoms match those of the syndrome, and that the likely cause of the symptoms was rape. Such evidence is not of a type to which the *Frye* rule should be applicable. But even if the *Frye* test is applied to rape trauma syndrome evidence, it passes this test. Further, the evidence is relevant, a proper subject for expert opinion, not unfairly prejudicial, not an improper bolstering of the complainant's credibility, not violative of the hearsay rule, and not destructive of the rape shield statutes. On the other hand, expert testimony explicitly affirming the credibility of the complainant should not be admissible because rape trauma syndrome experts have no special expertise in determining credibility, and such testimony would result in an improper bolstering of the complainant's credibility.

On the issue of defense use of rape trauma syndrome evidence, the article suggests that if the prosecution intends to offer rape trauma syndrome evidence, then as a matter of fundamental fairness the defense should have the right to have its expert examine the complainant. But if the prosecution does not intend to offer such evidence, the defense has no right to examine a complainant in order to attempt to show an absence of the syndrome.

Due to the confused and inconsistent judicial treatment of rape trauma syndrome evidence, the future of such evidence appears uncertain. Yet properly analyzed, the admissibility of rape trauma syndrome evidence can be dealt with clearly and consistently under traditional evidentiary principles.

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