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THE ADMISSIBILITY OF EXPERT TESTIMONY ON RAPE TRAUMA SYNDROME

I. INTRODUCTION

Rape trauma syndrome is the label attached to the post-traumatic stress disorder experienced by rape victims.¹ As such, rape trauma syndrome encompasses the emotional, behavioral, and psychological reactions common to victims of sexual assault.² Expert testimony on rape trauma syndrome is introduced in both civil and criminal trials. In civil actions,³ the plaintiff may introduce expert testimony on rape trauma syndrome to help jurors assess damages.⁴

¹ The label "rape trauma syndrome" was coined by Ann Burgess and Linda Holmstrom in their article *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 986 (1974).

² See *infra* text accompanying notes 15-40.

³ A rape victim may bring an action in tort against the rapist for compensatory and punitive damages. Though historically such civil actions were rare, several commentators recently have suggested that civil suits against rapists are a viable means of educating rapists about the gravity of their offenses and punishing those rapists who escape punishment under the criminal justice system. See LeGrand & Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U.L. REV. 479 (1979); Comment, *The Civil Action for Rape: A Viable Alternative for the Rape Victim?*, 1978 S. ILL. U.L.J. 399.

In addition, several state statutes allow rape victims to receive monetary compensation from the state. Remuneration by a state is conditioned upon the victim demonstrating before a court that she meets the statutory eligibility requirements. See, e.g., CAL. GOVT. CODE § 13959.1 (West Supp. 1978); ILL. REV. STAT. ch. 70, §§ 71-84 (1977); MASS. GEN. LAWS ANN. ch. 258A (West Supp. 1978); N.J. STAT. ANN. § 52:4B (West Supp. 1978).

⁴ For example, in *Division of Corrections v. Wynn*, 436 So. 2d 446 (Fla. Dist. Ct. App. 1983), a woman raped by a work-release inmate sued the Florida Department of Corrections for damages arising from the rape. The district court upheld the trial court's admission of expert testimony on rape trauma syndrome. The plaintiff introduced expert testimony to explain to the jury the nature and extent of the damages that she sustained.

Other courts also have recognized the existence of rape trauma syndrome and its relevance in civil suits to determining damage awards for rape victims. In *White v. Violent Crimes Compensation Board*, 76 N.J. 368, 388 A.2d 206 (1978), the New Jersey Supreme Court demonstrated sensitivity towards the continuing emotional damage experienced by rape victims despite the healing of the physical injury—in this case, a broken jaw.

The court stated that:

[I]t cannot be realistically contended that the residual physical and psychological effects of her traumatic experience were miraculously dissipated by the mere removal of the wiring from her jaw. . . . Moreover, it has been observed that a

The testimony educates jurors on "the nature of the trauma suffered by a rape victim."⁵ In criminal rape trials,⁶ the prosecution may introduce evidence about rape trauma syndrome to corroborate the complainant's assertion that she did not consent to intercourse.⁷

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. [cites omitted] We do not doubt that the totality of these factors effectively incapacitated plaintiff from normal social functioning for an extensive period of time.

White, 76 N.J. at 387-88, 388 A.2d at 215-16. See also *Alphonso v. Charity Hospital of Louisiana*, 413 So. 2d 982 (La. Ct. App. 1982)(woman who was raped twice while in custody of defendant hospital was awarded damages for suffering from post-traumatic stress disorder and rape trauma syndrome).

⁵ *Division of Corrections v. Wynn*, 438 So. 2d (Fla. Dist. Ct. App. 1983). In *Terrio v. McDonough*, 16 Mass. App. Ct. 163, 450 N.E.2d 190 (1983), for example, expert testimony "to the general effect that medical science recognized a rape trauma syndrome and that certain kinds of conduct would be consistent with that syndrome" was introduced in a civil action for assault and battery.

In a civil action for damages brought under U.S.C. § 1983 by a prison inmate who had been raped by another inmate, the plaintiff introduced expert testimony to describe the psychological and emotional disturbances experienced by the rape victim and to establish that these disturbances were caused by the rape. *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979).

⁶ Use of rape trauma syndrome testimony in criminal actions is not limited to rape cases, however. In a first degree murder case, for example, the defense introduced testimony about rape trauma syndrome to establish that the defendant, a woman suffering from rape trauma syndrome, was incapable of forming the mental state necessary for malice aforethought. *People v. Mathews*, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (1979). See also *State v. Cruickshank*, 105 A.D.2d 325, 484 N.Y.S.2d 328 (1985) (use of expert testimony on rape trauma syndrome by defense to explain inconsistencies in defendant's testimony); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984) (testimony intended to explain rape complainant's inconsistent behavior).

⁷ Consent has various roles in statutory definitions of rape. Several states include lack of consent as an element of the crime. See, e.g., DEL. CODE ANN. tit. 11, § 767 (1979); KAN. STAT. ANN. § 21-3502 (1981); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1982); WIS. STAT. ANN. § 940.225 (West 1982).

Several other state statutes, without explicitly mentioning consent as an element of the crime, require the prosecution in rape cases to prove beyond a reasonable doubt that the victim did not consent to intercourse. See, e.g., COLO. REV. STAT. § 18-3-402 (1978); CONN. GEN. STAT. ANN. § 53-70 (West Supp. 1982); DEL. CODE ANN. tit. 11, § 767 (1979); IND. CODE ANN. § 3542-4-1 (Burns 1979); MASS. GEN. LAWS ANN. ch. 265, § 22 (West supp. 1982); MONT. CODE ANN. § 45-5-501 (1983); N.H. REV. STAT. ANN. § 632-A:2 (Supp. 1981); N.D. CENT. CODE § 12.1-20-03 (Supp. 1983); OHIO REV. CODE ANN. § 2907.02 (Baldwin 1979); WYO. STAT. § 6-2-302 (1977).

In a third approach, Michigan has enacted a statute that does not mention consent as an element of rape and does not require consent to be proved beyond a reasonable doubt as an element of the crime. See MICH. COMP. LAWS ANN. § 750.520(a)-(1) (West Supp. 1982). Though the Michigan statute does not expressly authorize an affirmative defense of consent, Michigan courts have interpreted the statute to allow such a defense. See *People v. Hearn*, 100 Mich. App. 749, 755, 300 N.W.2d 396, 398 (1980); *People v. Kahn*, 80 Mich. App. 605, 619 n.5, 264 N.W.2d 360, 366-67 n.5 (1978).

At least one state has proposed legislation making lack of consent an affirmative

This Comment focuses upon the use of expert testimony on rape trauma syndrome in rape trials where consent is at issue.

The admissibility of expert testimony on rape trauma syndrome to show lack of consent in rape trials is controversial. Though several state courts admit such testimony,⁸ three state supreme courts have rejected the admissibility of expert testimony on rape trauma syndrome. The California,⁹ Missouri,¹⁰ and Minnesota¹¹ Supreme Courts held that rape trauma syndrome testimony was inadmissible.¹² The Missouri and Minnesota Courts stated that the evidence would not help the jury to decide whether intercourse was consensual but would, instead, mislead the jury and unfairly prejudice the defendant.¹³ The California Supreme Court concluded that rape trauma syndrome is not a scientifically reliable method for proving that a rape occurred.¹⁴

Contrary to these state supreme courts, this Comment concludes that rape trauma syndrome testimony is admissible evidence. The Comment first examines the medical and scientific foundation of rape trauma syndrome. Next, the Comment examines the requirements for admissible evidence in general and for admissible expert testimony in particular, and analyzes the admissibility of rape trauma syndrome testimony under these requirements. This Comment argues that expert testimony on rape trauma syndrome meets the criteria for admissible expert testimony and thus should be admissible in rape cases to help prove lack of consent.

defense. See P.A. 1067, 83d Ill. Gen. Ass. (1983). See generally Comment, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518 (1983).

Rape trauma syndrome testimony, thus, would most often be introduced by the prosecution to help establish that the complainant did not consent to intercourse when lack of consent must be proved beyond a reasonable doubt. In certain states, rape trauma syndrome testimony also can be used by the prosecution to rebut the affirmative defense of consent raised by the defendant.

⁸ State v. Radjenovich, 138 Ariz. 270, 674 P.2d 333 (Ct. App. 1983); State v. McQuillen, 236 Kan. 161, 689 P.2d 822 (1984); State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982); State v. Liddell, — Mont. —, 685 P.2d 918 (1984); People v. Reid, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984); State v. Whitman, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984); State v. LeBrun, 37 Or. App. 411, 587 P.2d 1044 (1978).

⁹ People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

¹⁰ State v. Taylor, 663 S.W.2d 235 (Mo. 1984).

¹¹ State v. McGee, 324 N.W.2d 232 (Minn. 1982); State v. Saldana, 324 N.W.2d 227 (Minn. 1982).

¹² The Court of Special Appeals of Maryland also has held that expert testimony on rape trauma syndrome is inadmissible. *Allewalt v. State*, 61 Md. App. 503, 487 A.2d 664 (1985).

¹³ State v. Taylor, 663 S.W.2d 235 (Mo. 1984); State v. McGee, 324 N.W. 2d 232 (Minn. 1982); State v. Saldana 324 N.W.2d 227 (Minn. 1982).

¹⁴ People v. Bledsoe, 36 Cal. 3d. 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

A. MEDICAL AND SCIENTIFIC FOUNDATION OF
RAPE TRAUMA SYNDROME

Mental health professionals¹⁵ agree that rape is a stressful situation that may have an immediate and disruptive impact on a victim's emotional and psychological state.¹⁶ Rape trauma syndrome is the label attached to the acute stress reaction experienced by rape victims.¹⁷ The syndrome describes the behavioral, physical, and psychological reactions of rape victims.¹⁸ Though mental health professionals recognize that individual reactions to rape may vary according to the victim's age,¹⁹ access to supportive friends or relatives,²⁰ ability to cope with disruptive events,²¹ and the circumstances of the rape,²² the professionals have observed patterns of

¹⁵ The Comment uses the phrase "mental health professionals" to describe the medical doctors, psychiatrists, psychologists, nurses, and sociologists who have conducted studies on the psychological, emotional, and behavioral consequences of rape.

¹⁶ Rape is described as a crisis situation. As such, it has been likened to other stressful, potentially life-threatening situations such as wars, surgical procedures, and community disasters. See E. HILBERMAN, *THE RAPE VICTIM* 33 (1976); S. KATZ & M. MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 230 (1979); NADELSON & NOTMAN, *Emotional Repercussions of Rape*, *MED. ASPECTS HUM. SEXUALITY*, at 16 (March 1977); Shrier, *Rape—Myths, Misconceptions, Facts and Interventions*, 78 *J. Med. Soc'y N.J.* 668, 669 (1981).

¹⁷ Burgess & Holmstrom, *supra* note 1, at 982; Ellis, Atkeson & K. Calhoun, *An Assessment of Long-Term Reaction to Rape*, 90 *J. ABNORMAL PSYCHOLOGY* 263, 263 (1981) [hereinafter cited as Ellis, *Long-Term Reaction*]; Nadelson & Notman, *Emotional Repercussions of Rape*, *supra* note 16, at 19.

¹⁸ Burgess & Holmstrom, *supra* note 1, at 982.

¹⁹ Older women may recover from rape more slowly than younger women. They may harbor traditional notions about rape and a victim's responsibility for the rape. They may be less resilient, or they may receive less support from friends and relatives. Atkeson, Calhoun, Resick & Ellis, *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 *J. CONSULTING & CLINICAL PSYCHOLOGY* 96, 101 (1982) [hereinafter cited as Atkeson, *Victims of Rape*]; Burgess & Holmstrom, *supra* note 1, at 983; Nadelson & Notman, *supra* note 16, at 16.

²⁰ Women who have strong social support networks are more likely to recover faster than those without such networks. Burgess & Holmstrom, *supra* note 1, at 983. See also E. HILBERMAN, *supra* note 16, at 33; Atkeson, *Victims of Rape*, *supra* note 19, at 101; Nadelson & Notman, *supra* note 16, at 16.

²¹ In their study *Life Change and Rape Impact*, 21 *J. HEALTH & SOC. BEHAV.* 248 (1980) [hereinafter cited as Ruch, *Life Change*], Ruch, Chandler and Harter found a connection between a woman's ability to adapt to changes of life such as marriage, divorce, career change, death, or geographical relocation, and a woman's response to rape. The study found that "women experiencing a high level of change in their lives will suffer higher levels of rape impact than those with more stable lives. An explanation for this predicted relationship is that prior stress increases the vulnerability of the individual and so makes coping with the added trauma of a sexual attack more problematic. By implication, women experiencing less prior stress may have more resources to cope with a rape and recover more quickly." *Id.* See also Atkeson, *Victims of Rape*, *supra* note 19, at 101.

²² The degree of violence involved in the rape and the relationship between the victim and the rapist may affect the victim's reaction. A victim who is related to or acquainted with her attacker may be more severely damaged psychologically by the rape

response in rape victims. They have identified these patterns as the rape trauma syndrome.

Two early studies by Sutherland and Scherl²³ and by Burgess and Holmstrom²⁴ described the stages of response and recovery that rape victims experience. Although Sutherland and Scherl divided victims' reactions into three phases²⁵ whereas Burgess and Holmstrom described only a two phase reaction,²⁶ the two studies provide consistent descriptions of the behavioral patterns and psychological responses characteristic of rape victims. Both studies emphasize the wide range of emotional and physical reactions that a rape may produce.²⁷ Rape victims may display feelings of fear, anger, shock, and anxiety in an overt, hysterical fashion immediately following the attack,²⁸ or may appear stable, calm, or subdued.²⁹ As

than a victim whose attacker is a stranger. Nadelson & Notman, *supra* note 16, at 16, 23. See also Queen's Bench Foundation, Rape Victimization Study State of California, Office of Criminal Justice (June 1975); A study by Frank, Turner and Stewart found that women who were assaulted with a weapon were more easily able to readjust to their immediate family setting following the rape than those who were not assaulted with a weapon. And those who had been assaulted previously were less able to readjust socially than those who were assaulted for the first time. Resick, Calhoun, Atkeson & Ellis, *Social Adjustment in Victims of Sexual Assault*, 49 J. CONSULTING & CLINICAL PSYCHOLOGY 705, 706 (1981) [hereinafter cited as Resick, *Social Adjustment*].

²³ See Sutherland & Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503 (1970).

²⁴ See Burgess & Holmstrom, *supra* note 1.

²⁵ According to Sutherland and Scherl, the first phase—the victim's acute reaction—occurs immediately after the rape and may last for a few days or a few weeks. A victim's acute reaction "may take a variety of forms including shock, disbelief, and dismay," and may result in agitated, incoherent or highly volatile behavior. Sutherland & Scherl, *supra* note 23. Extreme anxiety may follow shock and dismay, as the victim must confront problems such as notifying parents, deciding whether to press charges, and facing friends. The second phase of a victim's reaction, that of "pseudoadjustment," occurs when a victim outwardly resolves the traumatic effects of rape by returning to her regular lifestyle, which may include work or school activities. During this second phase, a rape victim typically denies or suppresses feelings of anger or resentment in the interest of returning to ordinary daily life. *Id.* The final phase of integration and resolution "begins when the victim develops an inner sense of depression and of the need to talk. It is during this period that the resolution of the feelings aroused by the rape usually occurs." *Id.* at 504-07.

²⁶ According to Burgess and Holmstrom:

[t]he first [phase] is the acute phase. This is the period in which there is a great deal of disorganization in the woman's lifestyle as a result of the rape. Physical symptoms are especially noticeable, and one prominent feeling noted is fear. The second phase begins when the woman begins to reorganize her lifestyle. Although the time of onset varies from victim to victim, the second phase often begins about two to three weeks after the attack. Motor activity changes and nightmares and phobias are especially likely during this phase.

Burgess & Holmstrom, *supra* note 1, at 982.

²⁷ *Id.* at 982, 983; Sutherland & Scherl, *supra* note 23, at 504, 505.

²⁸ Burgess & Holmstrom, *supra* note 1, at 982; Sutherland & Scherl, *supra* note 23, at 504.

they begin to deal with the aftereffects of rape, victims may feel afraid, humiliated, and embarrassed, as well as angry, vengeful, and blameworthy.³⁰ During the first few weeks following the rape, victims also experience a variety of somatic reactions including physical trauma,³¹ skeletal muscle tension,³² gastrointestinal irritability,³³ and genitourinary disturbance.³⁴

These early studies also described the long-term process of recovery that follows a rape.³⁵ During the period of recovery, a victim typically resolves her feelings about the rape by accepting the event, appraising realistically her complicity in the rape, and expressing her anger toward the rapist.³⁶ Disruptive events, such as residence changes,³⁷ upsetting dreams, and nightmares frequently accompany this period.³⁸ As a defensive reaction to the traumatic circumstances of the rape, victims also develop phobias³⁹ including fear of sexual relations, fear of crowds, fear of being alone, fear of people, fear of the indoors or fear of the outdoors.⁴⁰

In recent studies of rape victims' reactions, researchers have criticized the methodology used in the early studies by Burgess and Holmstrom and by Sutherland and Scherl.⁴¹ These researchers

²⁹ Burgess & Holmstrom, *supra* note 1, at 982; S. Sutherland & Scherl, *supra* note 23, at 504-08.

³⁰ Burgess & Holmstrom, *supra* note 1, at 983; Sutherland & Scherl, *supra* note 23, at 507.

³¹ "Physical trauma" is defined broadly as including "general soreness and bruising from the physical attack in various parts of the body such as the throat, neck, breasts, thighs, legs and arms." Burgess & Holmstrom, *supra* note 1, at 982.

³² "Skeletal muscle tension" includes symptoms such as tension headaches, fatigue, sleep pattern disturbances, and startled reactions over minor incidents. *Id.*

³³ "Gastrointestinal irritability" includes stomach pains, appetite disorders, and nausea. *Id.*

³⁴ "Genitourinary disturbances" include gynecological symptoms such as vaginal discharge, itching, generalized pain, and vaginal infection. *Id.* at 982, 983.

³⁵ The studies describe the long-term recovery process as a period of "reorganization." *Id.* at 983; Sutherland & Scherl, *supra* note 23, at 508.

³⁶ Sutherland & Scherl, *supra* note 23, at 508.

³⁷ Burgess & Holmstrom, *supra* note 1, at 983.

³⁸ Women experienced two types of dreams. In one type, women were in frightening situations and wished to do something to change the situation, but woke up before acting. In the other type, women were able to master the situation and fight off the assailant. *Id.* at 984.

³⁹ *Id.*

⁴⁰ *Id.* Women who were attacked indoors while sleeping developed fear of the indoors. Those who were attacked outside of their homes developed fear of the outdoors. *Id.*

⁴¹ See, e.g., Kilpatrick, Veronen & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658, 658 (1979) [hereinafter cited as Kilpatrick, *Aftermath of Rape*]; Resick, *Social Adjustment*, *supra* note 22, at 705. These researchers also have criticized the methodology used in the following studies about rape trauma syndrome: McCombie, *Characteristics of Rape Victims Seen in Crisis Situations*, 46 SOC. WORK 137 (1976);

have pointed out that the early studies did not compare the reactions of victims to the reactions of a control group of nonvictims, nor did they use "standardized, reliable instruments for measuring responses to rape."⁴² The researchers also expressed concern that the sample of victims in the early studies were selected improperly or described poorly.⁴³

Despite one researcher's assertion that the early studies "provide little, if any, scientifically valid data regarding the effects of a rape experience,"⁴⁴ the results of recent, methodologically sound,⁴⁵

Notman & Nadelson, *The Rape Victim: Psychodynamic Consideration*, 133 AM. J. PSYCHIATRY 408 (1976); Peters, *Social, Legal, and Psychological Effects of Rape on the Victim*, 78 PA. MED. 34 (1975); Queen's Bench Foundation, *Rape Victimization Study*, *supra* note 22. See, e.g., Kilpatrick, *Aftermath of Rape*, at 658.

⁴² Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 658. See also Resick, *Social Adjustment*, *supra* note 22, at 705. The early studies relied on interviews with rape victims for gathering information. The information collected from rape victims was never compared with information from a control group of women who had not been raped to determine whether victims' levels of fear, anxiety, or depression were higher than those of non-victims.

⁴³ See, e.g., Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 658.

⁴⁴ *Id.* at 659.

⁴⁵ In the recent studies, the researchers collected information not only during interviews with the victims but also through self-administered, standardized questionnaires. See Atkeson, *Victims of Rape*, *supra* note 19, at 96, 97 (a structured interview as well as the Beck Depression Inventory—a pencil-and-paper questionnaire—were used to measure the depressive symptoms of rape victims); Ellis, *Long-Term Reaction*, *supra* note 17, at 263 (participants were given the Beck Depression Inventory, the Profile of Mood States, the short-form of the Pleasant Events Schedule, and the Modified Fear Survey; participants were also given a semi-structured interview); Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 661 (victims' and nonvictims' anxiety, fear, mood states, and psychological distress were measured by standardized tests); Norris & Feldman-Summers, *Factors Related to the Psychological Impacts of Rape on the Victim*, 90 J. ABNORMAL PSYCHOLOGY 562 (1981) (victims were required to fill out a self-administered questionnaire) [hereinafter cited as Norris, *Psychological Impacts*]; Resick, *Social Adjustment*, *supra* note 22, at 706 (victims and nonvictims completed the Social Adjustment Scale—Self Report to measure their immediate and long-term social adjustment).

The researchers also compared information collected from rape victims with information collected from a control group of women who had not been raped. See Atkeson, *Victims of Rape*, *supra* note 19, at 96, 97 (the women in the victim group were rape victims who had visited a hospital rape crisis center; the nonvictims were women recruited from social services agencies, public housing projects, and the YWCA; the control group approximated the victim group in terms of age, race and socioeconomic background); Ellis, *Long-Term Reaction*, *supra* note 17, at 263 (the victims were recruited for the study through newspaper ads, rape crisis center counselors, or public speaking by the research staff; a matched group of nonvictims was recruited through the YWCA and human service agencies); Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 660 (victims were women who had sought counseling at a rape crisis center; the nonvictim group was chosen from among women living in the victims' neighborhoods and matching the victims' ages and races); Resick, *Social Adjustment*, *supra* note 22, at 706; (victims were selected from among rape victims seen at a hospital rape crisis center; the control group was recruited from social service agencies, housing projects, and the YWCA).

Furthermore, the researchers collected information at regular intervals following

empirical research reinforce the findings of the early studies. The recent studies conclude, as did the early studies, that rape has an immediate, profoundly disruptive effect on the victim's emotional and psychological state.⁴⁶ The recent studies confirm that during the period immediately following the rape, victims commonly experience fear, anxiety, and depression. Sleep and eating disturbances, guilt, shame, irritability, fatigue and decreased libido are some characteristics of victims' depression.⁴⁷ Recent findings also support earlier findings that victims typically begin to recompose themselves and return to normal levels of functioning between two to six months after the rape.⁴⁸

In addition, the recent studies empirically support the early researchers' conclusion that rape produces long-term psychological consequences for victims.⁴⁹ According to recent studies, rape victims continue to experience "nervousness, tension and trembling, . . . panic attacks, feelings of terror, feelings of apprehension and dread, and some somatic correlates of anxiety" for a long time following the rape.⁵⁰ A year following the rape, victims "are more depressed, get lesser enjoyment from their daily lives, report being more tense and fatigued and report more interpersonal problems"⁵¹ than women who have not been raped.⁵²

the rape. See Atkeson, *Victims of Rape*, *supra* note 19, at 96, 97 (victims and members of the nonvictim control group were assessed at six intervals after the rape); Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 660, 661 (victims and nonvictims were assessed at four points following the rape); Resick, *Social Adjustment*, *supra* note 22, at 706 (the victim and control group were assessed six times following the assault).

⁴⁶ Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 667. See also Resick, *Social Adjustment*, *supra* note 22, at 710-11 (victims' social adjustment—work life, leisure activities, and relationships with friends and family—disrupted); Ruch, *Life Change*, *supra* note 21, at 248.

⁴⁷ Atkeson, *Victims of Rape*, *supra* note 19, at 96.

⁴⁸ See Atkeson, *Victims of Rape*, *supra* note 19, at 100 (depressive symptoms in rape victims diminished to normal levels within two and four months); Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 664 (after three months, victims' distress eased substantially); Resick, *Social Adjustment*, *supra* note 22, at 705 (victims' social adjustment improved to the levels reported by nonvictims).

⁴⁹ See Atkeson, *Victims of Rape*, *supra* note 19, at 101; Ellis, *Long-Term Reaction*, *supra* note 17, at 264-66; Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 668; Norris, *Psychological Impacts*, *supra* note 45, at 562; Resick, *Social Adjustment*, *supra* note 22, at 710, 711 (victims' social adjustment at work continued at an impaired level relative to nonvictims); Ruch, *Life Change*, *supra* note 21, at 248.

⁵⁰ Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 668. See also Atkeson, *Victims of Rape*, *supra* note 19, at 101 (a number of victims continue to have depressive symptoms 12 months after the rapes); Ellis, *Long-Term Reaction*, *supra* note 17, at 264-66 (victims were more depressed and got less enjoyment out of daily activities than did nonvictims); Resick, *Social Adjustment*, *supra* note 22, at 710-11 (victims' ability to function at work and to adjust socially remain impaired up to eight months following the rape).

⁵¹ "Interpersonal problems" include difficulties communicating and relating to

Mental health professionals studying the physical, emotional, and psychological consequences of rape agree that rape is a traumatic event and that rape victims experience a wide variety of reactions.⁵³ Researchers do not purport to be able to predict with precision which of the many features of rape trauma will be experienced by an individual rape victim. But they have collected reliable information on victim reactions and have identified patterns of response. Although this research has not focused on developing a method for distinguishing an actual rape victim from a person with a falsified complaint of rape,⁵⁴ a mental health professional who is familiar with the findings of rape trauma research and who has experience treating and counselling rape victims should be able to discuss accurately the nature and variety of responses of rape victims. The professional also could identify in a rape complainant the characteristic symptoms of rape victims, in whatever form they may be.

B. DISAGREEMENT AS TO ADMISSIBILITY

State courts disagree over whether expert testimony on rape trauma syndrome is admissible in criminal rape cases to show that the victim did not consent to intercourse. State courts in Montana,⁵⁵ Kansas,⁵⁶ Oregon,⁵⁷ Ohio,⁵⁸ and New York⁵⁹ have held that

friends and family. See Ellis, *Long-Term Reaction*, *supra* note 17, at 264; Resick, *Social Adjustment*, *supra* note 22, at 711.

⁵² Ellis, *Long-Term Reaction*, *supra* note 17, at 266.

⁵³ See Atkeson, *Victims of Rape*, *supra* note 19, at 96; Ellis, *Long-Term Reaction*, *supra* note 17, at 263; Norris, *Psychological Impacts*, *supra* note 45, at 562; Resick, *Social Adjustment*, *supra* note 22, at 705; Ruch, *Life Change*, *supra* note 21, at 248.

⁵⁴ See Atkeson, *Victims of Rape*, *supra* note 19, at 101; Kilpatrick, *Aftermath of Rape*, *supra* note 41, at 658, 668; Norris, *Psychological Impacts*, *supra* note 45, at 566-67.

⁵⁵ In *State v. Liddell*, ___ Mont. ___, 685 P.2d 910 (1984), the Montana Supreme Court upheld the admission of testimony by a psychiatric nurse about rape trauma syndrome. The prosecution offered the testimony in a rape trial to assist the jury in determining whether the complainant consented to intercourse.

⁵⁶ In *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982), the Supreme Court of Kansas upheld the admission of a psychiatrist's testimony on rape trauma syndrome during a rape prosecution where the complainant's consent was at issue. A board certified psychiatrist who had examined the victim two weeks after the rape, testified about post-traumatic stress disorders, and rape trauma syndrome in particular. The psychiatrist gave his opinion that the victim suffered from the post-traumatic stress disorder known as rape trauma syndrome.

⁵⁷ In *State v. LeBrun*, 37 Or. App. 441, 587 P.2d 1044 (1978), the Oregon Court of Appeals upheld the admission of testimony about rape trauma syndrome at a rape trial where the complainant's consent was at issue.

⁵⁸ An Ohio Court of Appeals upheld the admission of expert testimony on rape trauma syndrome at a rape trial. *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984).

⁵⁹ In *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 741 (1984), a New York supreme court granted the prosecution's pre-trial motion requesting permission to in-

this testimony is admissible in such cases. These courts found testimony about rape trauma syndrome to be probative on the issue of consent, and they were satisfied that the experts who testified were qualified to provide helpful information on rape trauma syndrome to the jury. The Supreme Courts of California, Minnesota, and Missouri, however, have found that such testimony would not help the jury to determine whether the complainant consented to intercourse and, therefore, have held that such testimony is not admissible.⁶⁰

roduce expert testimony on rape trauma syndrome. The prosecution planned to introduce the testimony in a rape trial to explain that the complainant's inconsistent behavior was attributable to the rape trauma syndrome.

⁶⁰ See *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984).

In *People v. Bledsoe*, the California Supreme Court overturned the superior court's and court of appeals' decision that expert testimony on rape trauma syndrome was admissible. The prosecution had offered testimony by a licensed marriage, family, and child counselor to show that the victim suffered from rape trauma crisis syndrome. The California Supreme Court objected to the use of the testimony as a means of proving that a rape had occurred. The court ruled that the syndrome is not a scientifically reliable means of proving that a rape occurred. 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

In *State v. Saldana*, the trial court had admitted testimony by a counselor for sexual assault victims about rape trauma syndrome. The prosecution offered the testimony to rebut the defendant's contention that intercourse was consensual. In addition to testifying about the emotional and psychological stages that a rape victim typically undergoes, the expert described the complainant's reaction. The expert concluded that the complainant had been raped and had not fantasized the incident.

The Minnesota Supreme Court held that the counselor's testimony regarding rape trauma syndrome should have been excluded for two reasons. First, the testimony could not help decide the consent issue. Second, the testimony produced an extreme danger of unfair prejudice to the defendant. *State v. Saldana*, 324 N.W.2d at 231.

In *State v. McGee*, decided the same day as *Saldana*, the Minnesota Supreme Court held that the trial court's admission of expert testimony regarding rape trauma syndrome was reversible error. The testimony in *McGee* was offered by the prosecution to show that intercourse was not consensual. The testimony in *McGee*, unlike the testimony in *Saldana*, did not include the expert's conclusion that the victim had been raped. Instead the expert physician simply described rape trauma syndrome and stated his opinion that the victim's behavior subsequent to the incident was consistent with rape trauma syndrome. *McGee*, 324 N.W.2d at 233.

The Missouri Supreme Court, in *State v. Taylor*, rejected the admissibility of an expert's testimony that the prosecutrix suffered from rape trauma syndrome. The court stated that an expert may testify that the prosecutrix exhibits and possesses "the characteristics consistent with those resulting from a traumatic stress reaction, such as rape." 663 S.W.2d at 240. The court held, however, that an expert's conclusion that the victim suffered from rape trauma syndrome improperly bolstered the victim's credibility and unnecessarily tampered with the jurors' decision process. *Id.* at 240-41.

The Maryland Court of Special Appeals has also held that expert testimony on rape trauma syndrome was inadmissible to prove that the rape complainant did not consent to intercourse. *Allewalt v. State*, 61 Md. App. 3d 503, 516, 487 A.2d 664, 670 (1985). The court agreed with the prosecution that such testimony was relevant and material to the issue of whether a rape occurred. The court, however, held the testimony to be

The division among states over the admissibility of expert testimony on rape trauma syndrome stems from disagreement about the qualifications of the expert witness,⁶¹ the relevance of such testimony in establishing that intercourse was not consensual,⁶² the scientific community's general acceptance of rape trauma syndrome,⁶³ and the helpfulness of such testimony to the jury.⁶⁴

II. ADMISSIBILITY OF EXPERT TESTIMONY ON RAPE TRAUMA SYNDROME AND THE FEDERAL RULES OF EVIDENCE

This Comment examines the admissibility of expert testimony on rape trauma syndrome under the Federal Rules of Evidence. Although rape prosecutions typically are subject to state rules of evidence, many states have adopted the Federal Rules,⁶⁵ and the requirements of other state rules are similar to those of the Federal Rules. To be admissible under the Federal Rules of Evidence, ex-

inadmissible because of its prejudicial impact on the defense and because it unduly corroborated the victim's testimony. *Id.*

⁶¹ See *People v. Stanley*, 36 Cal. 3d 253, 261, 681 P.2d 302, 307, 203 Cal. Rptr. 461, 466 (1984); *State v. Marks*, 231 Kan. at 653-54, 647 P.2d at 1299; *State v. McGee*, 324 N.W.2d at 234 (Wahl, J., dissenting); *State v. Saldana*, 324 N.W.2d at 229, 232; *State v. Taylor*, 663 S.W.2d at 235, 236; *State v. LeBrun*, 37 Or. App. at 415-16, 587 P.2d at 1047.

⁶² See *People v. Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301 203 Cal. Rptr. at 460; *Allewalt v. State*, 61 Md. App. at 514, 487 A.2d at 669 (testimony on rape trauma syndrome is relevant and material to issue of whether rape occurred); *State v. Saldana*, 324 N.W.2d at 230 (testimony about other victims' reactions not helpful to deciding issue of consent in this case); *State v. Whitman*, 16 Ohio App. 3d at 247, 475 N.E.2d at 488 (testimony clearly relevant and material to alleged rape).

⁶³ See *People v. Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460 (rape trauma syndrome is not a generally accepted method of proving that a rape occurred); *State v. Marks*, 231 Kan. at 654, 647 P.2d at 1299 (rape trauma syndrome is generally accepted to be a common reaction to sexual assault); *State v. McGee*, 324 N.W.2d at 233 & n.1 (Wahl, J., dissenting)(concludes that substantial data base supports the existence of rape trauma syndrome); *State v. Saldana*, 324 N.W.2d at 230 (rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred); *State v. Taylor*, 663 S.W.2d at 240 (literature supports testimony that rape trauma syndrome is generally accepted as a reaction to rape); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 241 (citing scientific support for the rape trauma syndrome).

⁶⁴ See *People v. Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460 (jurors are as capable as an expert to consider evidence and decide whether rape occurred); *State v. McGee*, 324 N.W.2d at 234 (Wahl, J., dissenting)(testimony on rape trauma syndrome is probative on the issue of consent and is thus helpful to jury); *State v. Saldana*, 324 N.W.2d at 230, 231; *State v. Taylor*, 663 S.W.2d at 241 (testimony about rape trauma syndrome is inimicable to the operation of the jury system); *People v. Reid*, 123 Misc. 2d 1084, 475 N.Y.S.2d 241 (rape and victims' reactions are not within common knowledge of jurors); *State v. Whitman*, 16 Ohio App. 3d at 247, 475 N.E.2d at 488 ("[e]xpert opinion is necessary to properly interpret the reactions [of rape victims]").

⁶⁵ Twenty-six states have adopted the Federal Rules of Evidence in some form: Alaska, Arizona, Colorado, Delaware, Florida, Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

pert testimony on rape trauma syndrome must satisfy the requirements of three rules: the requirement of Rule 402 that the testimony be relevant; the requirement of Rule 403 that the probative value of the testimony not be substantially outweighed by the danger of unfair prejudice; and the requirements of Rule 702 that the testimony be given by a qualified expert and that it be a proper subject for expert testimony. This Comment concludes that expert testimony on rape trauma syndrome satisfies the requirements of these rules. The testimony, therefore, should be admissible in rape cases where the complainant's consent is at issue.

A. RELEVANCE REQUIREMENT

Expert testimony regarding rape trauma syndrome first must meet the relevance requirement of Federal Rule of Evidence 402, which provides that only relevant evidence is admissible.⁶⁶ Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁶⁷ The trial court has the discretion to decide whether evidence is relevant.⁶⁸

Expert testimony regarding rape trauma syndrome generally is offered by the prosecution to establish that the complainant did not consent to intercourse with the defendant.⁶⁹ To be admissible,

⁶⁶ Rule 402 of the Federal Rules of Evidence states:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

⁶⁷ FED. R. EVID. 401. See also *United States v. Federico*, 658 F.2d 1337, 1342 n.5 (9th Cir. 1981) (relevance is established by any showing, however slight, which makes it more likely than it was before the admission of evidence that the defendant committed the crime in question); *United States v. Carter*, 522 F.2d 666, 685 (D.C. Cir. 1975) ("The basic relevancy test is whether proffered evidence has a tendency to make the existence of a fact more or less probable than would be the case without benefit of the evidence"); *United States v. Hobson*, 519 F.2d 765, 766 (9th Cir.), cert. denied, 423 U.S. 931 (1975). McCormick describes a similar test for relevance: "whether the evidence offered renders the inference desired by the offering party more probable than it would be without the evidence." C. MCCORMICK, § 185 at 437 (2d ed. 1972).

⁶⁸ Federal Rule of Evidence 104(a) states, "[p]reliminary questions concerning the . . . admissibility of evidence shall be determined by the court . . ." See also *Goff v. Continental Oil Co.*, 678 F.2d 593, 596 (5th Cir. 1982).

⁶⁹ See, e.g., *State v. Radjenovich*, 138 Ariz. 270, 674 P.2d 333 (Ct. App. 1983); *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *Allewalt v. State*, 61 Md. App. 503, 514, 487 A.2d 664, 669 (1985); *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984); *State v. Liddell*, ___ Mont. ___, 685 P.2d 918 (1984); *State v. Whitman*, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488

expert testimony regarding rape trauma syndrome must make the inference that the complainant did not consent to intercourse and thus was raped, more probable than it would be without the expert testimony. As will be shown, expert testimony on rape trauma syndrome supports such an inference.

Expert testimony on rape trauma syndrome is probative on the issue of consent for two reasons. First, rape trauma syndrome testimony provides information on an individual victim's emotional and psychological response to the alleged rape. Second, the testimony provides information on group behavior patterns in response to similar events.

Expert testimony regarding rape trauma syndrome typically covers two areas. First, the expert testifies about the characteristic responses to rape experienced by rape victims. Second, the expert describes the complainant's psychological and behavioral state after the alleged rape.⁷⁰ In addition, the expert may offer an opinion as to whether the complainant's symptoms are consistent with rape trauma syndrome.⁷¹ Some courts also have allowed the expert to offer an opinion as to whether the complainant was raped⁷² or suffers from rape trauma syndrome.⁷³ Thus, the expert's testimony provides the trier of fact with information about the complainant's emotional and psychological condition.

Testimony about a complainant's emotional and psychological condition following the alleged rape tends to make the inference that a rape occurred more probable or less probable than it would be without the testimony. Courts have recognized repeatedly the

(1984); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978). For examples of other uses of expert testimony on rape trauma syndrome, see notes 4-6.

⁷⁰ The expert's observations and conclusions about the victim's behavior and psychological condition often are culled from counselling sessions with the victim or from treating the victim. See, e.g., *People v. Bledsoe*, 36 Cal. 3d at 240-41, 681 P.2d at 293, 203 Cal. Rptr. at 452 (therapist counseled victim in three or four sessions within the month before trial); *State v. Marks*, 231 Kan. at 653, 647 P.2d at 1299 (psychiatrist examined victim two weeks after the rape); *State v. McGee*, 324 N.W.2d at 233 (Wahl, J., dissenting)(physician examined victim immediately after incident and on two later occasions); *State v. Saldana*, 324 N.W.2d at 229 (counselor met with complainant over a 10 week period).

⁷¹ See, e.g., *State v. Radjenovich*, 138 Ariz. at 272, 674 P.2d at 335; *State v. McQuillen*, 236 Kan. at 169-70, 689 P.2d at 829; *State v. Marks*, 231 Kan. at 653-54, 647 P.2d at 1299; *State v. McGee*, 324 N.W.2d at 234 (Wahl, J., dissenting); *State v. Saldana*, 324 N.W.2d at 229; *State v. Taylor*, 663 S.W.2d at 240-41; *State v. LeBrun*, 37 Or. App. at 415, 587 P.2d at 1047.

⁷² See, e.g., *State v. Taylor*, 663 S.W.2d at 240; *State v. Saldana*, 324 N.W.2d at 229. But see *State v. Taylor*, 663 S.W.2d at 239-40.

⁷³ See, e.g., *People v. Bledsoe*, 36 Cal. 3d at 244, 681 P.2d at 296, 203 Cal. Rptr. at 455; *State v. Taylor*, 663 S.W.2d at 240; *State v. Liddell*, ___ Mont. at ___, 685 P.2d at 922.

relevance of the victim's emotional and psychological condition after an alleged rape to the question of whether a rape actually occurred.⁷⁴ In *Morgan v. State*,⁷⁵ for example, a relative with whom the victim lived following the alleged rape provided "[e]vidence as to the conduct, appearance, and reaction of the rape victim during a period beginning two days after the alleged attack and continuing for a period of approximately six weeks . . ."⁷⁶ The court held that such evidence was relevant to the question of whether an attack occurred.⁷⁷ Similarly, the Georgia Court of Appeals upheld the admission of testimony concerning a victim's inability to sleep immediately following the alleged rape, a symptom of the rape trauma syndrome.⁷⁸ The court reasoned that such testimony was "of at least some evidentiary value as tending to prove force and lack of consent. . . ."⁷⁹ Additionally, in cases where consent is at issue, courts have accepted evidence regarding the victim's emotional state following the alleged rape as partial corroboration of the victim's testimony that she was raped.⁸⁰ Moreover, in cases in which courts have permitted doctors to testify that intercourse was against the will of the victim, the doctors considered the emotional condition of the victim following the attack as one of the factors contributing to their conclusion.⁸¹

⁷⁴ Even jurisdictions that reject the admissibility of expert testimony on rape trauma syndrome accept testimony about the complainant's mental and emotional condition following the alleged rape. See, e.g., *People v. Stanley*, 36 Cal. 3d 253, 681 P.2d 302, 203 Cal. Rptr. 461 (1984) (police officers and doctor testified about complainant's emotional condition following alleged incident); *State v. Booker*, 384 N.W.2d 753 (Minn. 1984) (court admitted testimony about complainant's emotional condition following alleged rape); *State v. Thompson*, 668 S.W.2d 179 (Mo. App. 1984) (complainant testified about psychological condition following rape); *State v. Ogle*, 668 S.W.2d 138 (Mo. App. 1984) (court allows complainant's mother to testify about complainant's psychological and mental state following alleged rape; allowing such testimony is consistent with the *Taylor* decision barring use of testimony about rape trauma syndrome).

⁷⁵ *Morgan v. State*, 229 Ga. 532, 192 S.E.2d 338 (1972). See also *State v. Radjenovich*, 138 Ariz. 270, 674 P.2d 333 (1983)(victim's marked personality change after her encounter with the defendant was relevant to the issue of consent in that it corroborated the credibility of the victim).

⁷⁶ *Morgan v. State*, 229 Ga. at 535, 192 S.E.2d at 341.

⁷⁷ *Id.*

⁷⁸ *Toole v. State*, 146 Ga. App. 305, 246 S.E.2d 338 (1978).

⁷⁹ *Id.* at 308, 246 S.E.2d at 341.

⁸⁰ See, e.g., *Wallace v. United States*, 362 A.2d 120 (D.C. Ct. App. 1976)(the victim's appearance, behavior, and emotional state following the alleged rape, as well as her prompt disclosure of the attack were sufficient to corroborate her testimony); *Tucker v. State*, 243 Ga. 683, 256 S.E.2d 365 (1979)(the victim's testimony was partially corroborated by other witnesses who testified that the victim was upset and crying following the alleged attack).

⁸¹ See, e.g., *People v. LaPorte*, 103 Mich. App. 444, 303 N.W.2d 222 (1981)(examining physician's expert opinion that there had been penetration against the will of the

Expert testimony on rape trauma syndrome is relevant to the issue of whether a rape occurred not only because it provides information on an individual victim's emotional and psychological response to the alleged rape, but also because it provides information on group behavior patterns in response to similar events.⁸² Courts have recognized the relevance of testimony on the behavior patterns and psychological characteristics of identifiable groups to the issue of whether a particular individual was the victim of crime or the participant in a crime. In *State v. Cavallo*,⁸³ for example, a defendant charged with rape sought to introduce psychiatric testimony comparing his psychological characteristics with those of the typical rapist. The defense hoped to establish that the defendant did not possess the psychological characteristics of a rapist.⁸⁴ Although the court ultimately held the testimony to be inadmissible,⁸⁵ the court did hold that the testimony was relevant.⁸⁶

[T]he fact that Cavallo has the character of a non-rapist is used to draw the inference that he did not commit rape on this occasion. Assuming the reliability of Dr. Kuris' [the psychiatrist] conclusions, his testimony makes it more likely than otherwise that Cavallo did not rape S.T. [the victim]. Consequently, the proffered evidence is relevant.⁸⁷

The court's reasoning implies that a comparison between the character traits of the defendant and those of the group of people known

victim was based upon the physical and emotional characteristics of the victim whom physician had examined shortly after the alleged rape); *People v. Wells*, 102 Mich. App. 558, 302 N.W.2d 232 (1980)(doctor's testimony that this was a legitimate case of sexual assault was based upon his physical findings in examining the victim, the history received from the patient, the emotional condition of the patient, and his experience examining victims of alleged sexual assaults).

⁸² See *State v. Saldana*, 324 N.W.2d at 229.

⁸³ 88 N.J. 508, 443 A.2d 1020 (1982).

⁸⁴ *Id.* at 512, 443 A.2d at 1021-22. See also *State v. Radjenovich*, 138 Ariz. 270, 674 P.2d 333 (1983)(prosecution offered testimony by a psychiatrist about the behavior of rapists and the fact that the defendant's actions were consistent with acts of a "power rapist").

⁸⁵ The New Jersey Supreme Court rejected the admissibility of the evidence on the following grounds: (1) the defense failed to establish that the scientific community generally accepts the existence of identifiable character traits of rapists; and (2) the defense failed to show that psychiatrists are able to determine whether an individual is likely to be a rapist. *State v. Cavallo*, 88 N.J. at 526, 443 A.2d at 1029.

⁸⁶ The New Jersey court applied Rule 1(2) of the New Jersey Rules of Evidence. "Rule 1(2) defines relevant evidence as 'evidence having any tendency in reason to prove any material fact.' . . . [T]he test [for relevance] . . . is whether the evidence 'renders the desired inference more probable than it would be without the evidence.'" *Id.* at 516, 443 A.2d at 1023. Thus, the test for relevance under the New Jersey Rules of Evidence is consistent with the test applied under the Federal Rules of Evidence. See *supra* note 67 and accompanying text.

⁸⁷ *Id.* at 515, 443 A.2d at 1024.

to be rapists—if such traits can be accurately defined—is relevant to the issue of whether the accused raped the complainant.

Courts also have admitted expert testimony to show the similarities between an individual's physical and emotional characteristics and those who suffer from battered wife syndrome,⁸⁸ familial child sexual abuse syndrome,⁸⁹ and battered child syndrome.⁹⁰

⁸⁸ See *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. App. 1979)(testimony of a clinical psychologist offered by defense in a murder trial to describe the phenomenon of "wife battering" and to give an opinion of the extent to which the defendant's personality and behavior were consistent with those of battered women held to be admissible to help jury evaluate the validity of defendant's claim of self defense); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981)(testimony of a clinical psychologist describing the phenomenon of "wife battering" and giving an opinion as to whether the defendant's personality and behavior were consistent with those of the battered women studied by the psychologist was held to be admissible to help the jury evaluate the defendant's claim of self-defense); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980)(testimony by domestic violence expert offered by the prosecution to show that defendant's assault on his wife was not produced by mental illness, but instead was consistent with the pattern of physical abuse in battered wife syndrome held to be admissible).

See also *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982)(trial court's exclusion of expert testimony on battered wife syndrome was reversible error where defendant raised claim of self-defense); *Mullis v. State*, 248 Ga. 338, 282 S.E.2d 334 (1981)(trial court's exclusion of expert testimony on battered wife syndrome was reversible error where defendant raised claim of self-defense); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983)(trial court's exclusion of testimony by psychologist and psychiatrist on battered wife syndrome was reversible error); *State v. Anaya*, 438 A.2d 892 (Me. 1981)(trial court's exclusion of testimony by psychologist about consistency of defendant's conduct as a battered woman with claim of self-defense was reversible error).

Some courts, however, have held that expert testimony on battered wife syndrome is inadmissible. On remand in *Ibn-Tamas v. United States*, 455 A.2d 893, 895 (D.C. App. 1983), the District of Columbia Court of Appeals ruled that evidence regarding battered women syndrome was properly excluded because the syndrome lacked adequate scientific documentation. See *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980)(testimony by doctor as to whether "battered women" tend to remain with their mates was properly excluded); *State v. Thomas*, 66 Ohio St. 2d 518 (1981)(testimony by a psychiatric social worker to support defendant's claim of self-defense was properly excluded). *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981)(testimony by clinical psychologist explaining discrepancies between the defendant's behavior and that of the typical battered woman and expressing opinion that defendant shot her husband in self-defense was properly excluded). See also Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 HASTINGS L.J. 895 (1981); Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982); Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 Nw. U.L. REV. 348 (1982)[cited hereinafter as Comment, *Battered Wife Syndrome*]; Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213 (1978).

⁸⁹ See, e.g., *State v. Kim*, 64 Hawaii 598, 645 P.2d 1330 (1982)(testimony by child psychiatrist stating that child-complainant's conduct and mental and emotional conditions were similar to those of other child rape victims whom the psychiatrist had interviewed was admissible); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (expert permitted to testify about characteristics typically observed in sexually abused children and about the characteristics of sexually abused children observed in complainant); *State v. Carlson*, 360 N.W.2d 442 (Minn. Ct. App. 1985) (testimony permitted as to whether

Objections to testimony in these areas generally do not focus on the relevance of information regarding the physical, behavioral, emotional, and psychological characteristics of a group to the determination of the facts in an individual's case.⁹¹ In fact, courts accept the testimony on group characteristics for its usefulness to the factfinder in assessing the credibility of the victim or the defendant.⁹² Similarly, an expert's testimony on the common reactions of rape victims would provide a factual background against which the factfinder could evaluate better the complainant's assertion that she was raped.

children's behavior was consistent with sexual abuse); *People v. Benjamin*, 103 A.D.2d 663, 481 N.Y.S.2d 827 (1984) (expert testimony permitted on sexual abuse in family settings); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983) (testimony by social workers—who were familiar with typical response of rape victims and children sexually abused by their own family—that daughter's behavior was consistent with typical behavior of sexually abused children, was admissible at trial where defendant was charged with first degree rape of his daughter). *But see* *State v. Danielski*, 350 N.W.2d 395 (Minn. App. 1984) (expert testimony on familial sexual abuse syndrome held inadmissible).

⁹⁰ *See, e.g.*, *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) (testimony by doctors stating that deceased child's bruises did not fit the pattern of bruises normally sustained by children in day-to-day activities and giving opinion that deceased child was a "battered child" was admissible in a trial where defendant was charged with second degree murder of his two year old son). The court in *State v. Wilkerson* stated: "As far as our research reveals, all courts which have considered the question, including our own Court of Appeals, have concluded that such expert medical testimony concerning the battered child syndrome as was offered in this case is properly admitted into evidence." *State v. Wilkerson*, 295 N.C. 559, 570, 247 S.E.2d 905, 912 (1978) (citations omitted).

⁹¹ *See, e.g.*, *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. App. 1983) (expert testimony on battered wife syndrome properly is excluded until the court is convinced of the sufficiency of the syndrome's scientific underpinnings); *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980) (isolated testimony whether battered women tend to remain with their spouses was excluded for having no direct bearing on defendant's claim of self-defense); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (expert testimony on battered wife syndrome properly was excluded where there was inadequate foundation to show that this case involved a battered woman's self-defense claim and where there was inadequate demonstration that the state of the study of the psychology of battered women permits a reasonable opinion to be given by an expert).

Though each of these cases excludes the expert's testimony about group characteristics, each case either explicitly or implicitly recognizes that expert testimony on battered wife syndrome could be admissible when the facts of the case warrant the testimony and when the scientific foundation of the testimony is adequately demonstrated. *Ibn-Tamas v. United States*, 455 A.2d at 895; *People v. White*, 90 Ill. App. 3d at 1072, 414 N.E.2d at 200; *Buhrle v. State*, 627 P.2d at 1378. *See also* Comment, *Battered Wife Syndrome*, *supra* note 88, at 355-61. *But see*, *State v. Thomas*, 66 Ohio St. 2d 518 (1981) (testimony by a psychiatric social worker on battered wife syndrome would tend to stereotype the defendant, causing the jury to become prejudiced and to decide facts based on typical facts rather than the actual facts of the case).

⁹² *See, e.g.*, *Ibn-Tamas v. United States I*, 407 A.2d at 632; *Smith v. State*, 247 Ga. at 619, 277 S.E.2d at 683; *State v. Kim*, 64 Hawaii at 775-76, 645 P.2d at 1334; *State v. Baker*, 120 N.H. at 775-76, 424 A.2d at 173; *State v. Middleton*, 657 P.2d at 1219-21.

Though not all courts have found expert testimony on rape trauma syndrome to be admissible at rape trials,⁹³ most courts that have considered the relevance of testimony on rape trauma syndrome to the issue of consent have concluded that such testimony is relevant.⁹⁴ In *State v. Marks*,⁹⁵ for example, the Kansas Supreme Court reasoned that "if the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault did take place, it is relevant when a defendant argues the victim consented to sexual intercourse."⁹⁶ Because the Kansas Supreme Court found that rape trauma syndrome generally is accepted to be a common reaction to sexual assault,⁹⁷ the court concluded that testimony regarding the existence of rape trauma syndrome is relevant in a case where the complainant's consent is at issue.⁹⁸

Information about a complainant's psychological, behavioral, and emotional state following the alleged rape bears directly on the question of whether the complainant was a voluntary participant in a sexual encounter or instead was raped. Accurate information on reactions to rape educates the jury and provides a factual foundation upon which jurors can evaluate the evidence of the complainant's psychological, behavioral, and emotional response to the alleged rape. Together these two types of information make the inference that the complainant was raped more probable or less probable than it would be without the information. Rape trauma syndrome testimony provides both of these types of information and is, therefore, relevant to the issue of whether a rape occurred.

B. PREJUDICIAL EVIDENCE

Expert testimony on rape trauma syndrome, even though relevant, may be excluded if its probative value⁹⁹ is substantially outweighed by the danger of unfair prejudice,¹⁰⁰ confusion of is-

⁹³ See *People v. Bledsoe*, 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460; *Allewalt v. State*, 61 Md. App. at 516, 487 A.2d at 670; *State v. McGee*, 324 N.W.2d at 233; *State v. Saldana*, 324 N.W.2d at 230; *State v. Taylor*, 663 S.W.2d at 240.

⁹⁴ See *State v. Radjenovich*, 138 Ariz. at 273, 674 P.2d at 336; *State v. Marks*, 231 Kan. at 654, 647 P.2d at 1299; *Allewalt v. State*, 61 Md. App. at 514, 487 A.2d at 669 (testimony relevant but inadmissible because of prejudicial effect); *State v. Liddell*, ___ Mont. at ___, 685 P.2d at 922-23; *State v. Whitman*, 16 Ohio App. 3d at 247, 475 N.E.2d at 488.

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

⁹⁶ *Id.* at 653, 647 P.2d at 1299.

⁹⁷ *Id.*

⁹⁸ *Id.* at 653-54, 647 P.2d at 1299-1300.

⁹⁹ Probative value is the tendency of the evidence to prove any issue of consequence to the case. P. ROTHSTEIN, *RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* 72 (1980).

¹⁰⁰ The Advisory Committee Note to Federal Rule of Evidence 403 describes unfair

sues, or misleading the jury.¹⁰¹ Rule 403 provides for such an exclusion¹⁰² to promote correct factual determinations and fairness in the judicial process by excluding evidence that may cause the case to be decided on an improper basis.¹⁰³ Trial courts have broad discretion in balancing the probative value of expert testimony with the counterweights of prejudice, confusion, and tendency to mislead.¹⁰⁴

prejudice as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." McCormick provides a similar explanation.

It should be emphasized that prejudice, in this context, means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions; but that cannot be ground for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.

C. McCORMICK, *supra* note 67, § 185 at 439 n.31. See also *United States v. Bailleaux*, 685 F.2d 1105, 1112 (9th Cir. 1982); *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980).

¹⁰¹ Confusion of the issues or misleading the jury may occur when the admission of evidence creates a side issue that will unduly distract the jury from the main issues of the case. C. McCORMICK, *supra* note 67, § 185 at 439; J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 403 [04], at 403-36 (1982) [hereinafter cited as J. WEINSTEIN & M. BERGER]. Evidence may be excluded as misleading when it is seemingly plausible, persuasive, conclusive and significant, but would need detailed rebuttal evidence or complicated judicial instructions to show the jury that the "evidence actually has little probative value." J. WEINSTEIN & M. BERGER 403 [04] at 403-39. Courts may also exclude evidence having an aura of scientific infallibility because the jury may be misled by the evidence and be likely to attach undue weight to the evidence. J. WEINSTEIN & M. BERGER, ¶ 403 [04] at 403-27. See also *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977) ("inherent danger that expert testimony admitted without proper foundation may tend to confuse or mislead the trier of fact and thus, defeat a defendant's right to a fair trial"); *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977) (quoting *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1972)) (trial court abused discretion in admitting Government expert witnesses' testimony having dubious relevance and prejudicial impact); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) (expert testimony on voice spectrograms properly admitted where adequate safeguards taken against misleading the jury).

¹⁰² Rule 403 of the Federal Rules of Evidence states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

¹⁰³ *United States v. Robinson*, 544 F.2d 611, 618 (2d Cir. 1976), *cert. denied*, 435 U.S. 905 (1977). "Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers mainsprings of human action may cause a jury to base its decision on something other than the established propositions of the case. J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 403 [04], at 403-42 (1982). See also *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979), *cert. denied*, 444 U.S. 862 (1979); FED. R. EVID. 403 advisory committee note; Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 GEO. WASH. L. REV. 774, 794 (1980) [hereinafter cited as Note, *Expert Testimony*].

¹⁰⁴ See *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States v. Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); *United States v. Weir*, 575 F.2d 668, 670 (8th Cir. 1978); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973); *Bridger v. Union Railway Co.*, 355 F.2d 382, 387 (6th Cir. 1966).

The trial court's discretion will not be disturbed on appeal unless it is manifestly

Yet appellate courts and commentators advise trial courts to apply this rule sparingly and to admit relevant evidence where there is doubt about the existence of countervailing factors.¹⁰⁵

Expert testimony on rape trauma syndrome does not create dangers of unfair prejudice¹⁰⁶ or confusion of the issues.¹⁰⁷ Evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other main-springs of human action"¹⁰⁸ typically causes unfair prejudice. Expert testimony on rape trauma syndrome consists of a description of the victim's emotional and psychological condition, as well as background information that places the description in context. It is a professional's detached description of a victim's injuries and, therefore, has none of the inflammatory content that typifies unfairly prejudicial evidence.¹⁰⁹ Moreover, the introduction of rape trauma syndrome testimony does not place new issues before the jury. The testimony is inferentially related to the main issue at hand—whether the complainant consented to intercourse—¹¹⁰ because it addresses the emotional and psychological condition of the victim after the alleged rape.

The counterweight to the probative value of expert testimony on rape trauma syndrome is the danger of misleading the jury. In

erroneous. See *Salem v. United States Lines Co.*, 370 U.S. at 31; *Spring Co. v. Edgar*, 99 U.S. 645 (1878); *United States v. Amaral*, 488 F.2d at 1152.

¹⁰⁵ *United States v. Thevis*, 665 F.2d 616, 633 (5th Cir. 1982), cert. denied, 656 U.S. 1008; *United States v. Dennis*, 625 F.2d at 797; J. WEINSTEIN & M. BERGER, *supra* note 101, at 4037; P. ROTHSTEIN, *supra* note 99, at 72.2. Rothstein notes that there is a presumption in favor of admissibility in Rule 403. "[E]xclusion will not result if the counterweights merely 'outweigh' probativeness—they must 'substantially outweigh.' In addition, 'prejudice' is not enough—it must be 'unfair' prejudice." P. ROTHSTEIN, *supra* note 99, at 72.2. Weinstein agrees that the Federal Rules favor admissibility. J. WEINSTEIN & M. BERGER, *supra* note 101, at 403-7.

¹⁰⁶ Unfair prejudice here refers exclusively to the undue tendency of evidence to suggest a decision on an improper, typically an emotional, basis. See *supra* note 100. Some courts refer to unfair prejudice as the cumulative effect of confusion, misleadingness, or unfair prejudice. But see *Allewalt v. State*, 61 Md. App. 3d at 514, 487 A.2d at 669 (expert testimony on rape trauma syndrome creates danger of unfair prejudice).

¹⁰⁷ Confusion here refers exclusively to the tendency of evidence to suggest side issues that distract the jury from the proper issue to be decided.

¹⁰⁸ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 403[03] at 403-19 to 20.

¹⁰⁹ See, e.g., *United States v. McRae*, 593 F.2d 700 (5th Cir.), cert. denied, 444 U.S. 862 (1979); *Betancourt v. J.C. Penney Co.*, 554 F.2d 1206, 1207 n.1 (1st Cir. 1977) (evidence of violent visits by her alcoholic ex-husband admitted ostensibly to explain why plaintiff did not seek medical care after accident had obvious potential to inspire sympathy and cause inflated verdict); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 769 (2d Cir. 1962) (a reference to the dependent children of the plaintiff merely for inducing sympathy from the jury is inadmissible); C. McCORMICK, *supra* note 67, § 185 at 439; P. ROTHSTEIN, *supra* note 99, at 72.4; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 403[03] at 403-20.

¹¹⁰ See *supra* notes 66-98 and accompanying text.

criminal trials, expert or scientific evidence runs the risk of misleading the jury because of its "'aura of special reliability and trustworthiness.'"¹¹¹ The commonly expressed fear is that jurors will be overly impressed by an expert's credentials or by the scientific trappings of the testimony. Jurors might, therefore, accept uncritically the conclusions of the expert, or attach undue weight to the testimony, despite weaknesses in the scientific foundation of such testimony.¹¹²

The concerns about jurors' undue reliance on an expert's testimony about rape trauma syndrome arise because such testimony derives from the psychological sciences.¹¹³ The psychological sciences, unlike the biological sciences, observe, measure, and describe nothing but invisible derivatives of mental processes. Unlike biological experimentation, psychological experimentation rarely consists of rigorously controlled experiments. Rather, psychologists and psychiatrists rely on careful observations in partially controlled situations for their experimental opportunities and rely on themselves and their abilities to observe as the research instrument.¹¹⁴ Psychiatry and psychology are not considered exact sciences. Thus, the fear that jurors will abdicate their factfinding duties in favor of experts' testimony, where the bases for such testimony are inexact, subjective, and evaluated only with difficulty by jurors, applies to expert testimony regarding rape trauma syndrome.

Courts weighing the probative value of expert testimony on rape trauma syndrome against the danger of misleading the jury have established two positions: (1) the probative value of expert testimony on rape trauma syndrome is always substantially outweighed by the danger of misleading the jury;¹¹⁵ and (2) the probative value of expert testimony on rape trauma syndrome must be weighed with the danger of misleading the jury on a case-by-case basis.¹¹⁶ Whereas the first approach mandates the exclusion of ex-

¹¹¹ *United States v. Green*, 548 F.2d at 1268 (quoting *United States v. Amaral*, 488 F.2d 1148, 1152 (1973)). See also *United States v. Brown*, 557 F.2d at 556; *United States v. Baller*, 519 F.2d at 466.

¹¹² See *United States v. Brown*, 557 F.2d at 556; *United States v. Green*, 548 F.2d at 1268 (quoting *United States v. Amaral*, 488 F.2d at 1152); *United States v. Baller*, 519 F.2d at 466.

¹¹³ See *supra* notes 15-54 and accompanying text. In contrast to testimony from the psychological sciences, courts accept routinely the value of expert testimony based on the medical sciences. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 *MERCER L. REV.* 463, 475 (1977).

¹¹⁴ Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 *MICH. L. REV.* 1335, 1341 (1965).

¹¹⁵ See *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

¹¹⁶ See *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982); *State v. Mc-*

pert testimony on rape trauma syndrome,¹¹⁷ the second approach, a case-by-case approach, admits the testimony under appropriate circumstances.¹¹⁸

The Minnesota Supreme Court struck a permanent balance against the admissibility of expert testimony on rape trauma syndrome in *State v. Saldana*¹¹⁹ and its companion case, *State v. McGee*.¹²⁰ In both cases, the Minnesota Supreme Court ruled that the testimony did not help the jury and produced an extreme danger of unfair prejudice to the defendant.¹²¹ The testimony had no probative value because jurors are able to consider the question of whether the complainant consented to intercourse without an expert's testimony and because evidence of characteristic responses of rape victims does not help jurors to decide what happened in this particular case.¹²² Moreover, the court found that the danger of misleading the jury counterbalanced any probative value of the testimony.¹²³

Permitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness. . . . [The expert's] testimony "gave a stamp of scientific legitimacy to the truth of the complaining witness's factual testimony."¹²⁴

Other courts, however, have adopted the case-by-case approach, balancing probative value against the danger of misleading the jury.¹²⁵ In *State v. Marks*,¹²⁶ the Kansas Supreme Court struck the balance in favor of admitting expert testimony on rape trauma syndrome. The only factor the court considered in measuring probative value was the relevance of the evidence. As a counterweight to unfair prejudice, the court considered the availability of cross-

Gee, 324 N.W.2d 232, 233 (Minn. 1982) (Wahl, J., dissenting); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978).

¹¹⁷ See *State v. McGee*, 324 N.W.2d at 233; *State v. Saldana*, 324 N.W.2d at 230.

¹¹⁸ See *State v. Marks*, 231 Kan. at 654, 647 P.2d at 1299; *State v. McGee*, 324 N.W.2d at 233-34 (Wahl, J., dissenting); *State v. LeBrun*, 37 Or. App. at 415-16, 587 P.2d at 1047.

¹¹⁹ 324 N.W.2d 227, 230 (Minn. 1982).

¹²⁰ 324 N.W.2d 232 (Minn. 1982).

¹²¹ *State v. McGee*, 324 N.W.2d at 233; *State v. Saldana*, 324 N.W.2d at 229-30.

¹²² *State v. Saldana*, 324 N.W.2d at 230.

¹²³ *Id.* at 230-31. See also *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (inherent danger of prejudice caused by witness' status as expert outweighs probative value of testimony).

¹²⁴ *State v. Saldana*, 324 N.W.2d at 230-31 (quoting *People v. Izzo*, 90 Mich. App. 727, 730, 282 N.W.2d 10, 11 (1979)).

¹²⁵ See *State v. Marks*, 231 Kan. at 653-54, 647 P.2d at 1299; *State v. McGee*, 324 N.W.2d at 233 (Wahl, J., dissenting); *State v. LeBrun*, 37 Or. App. at 415, 587 P.2d at 1047.

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

examination and the ability of the jury to weigh the credibility of the testimony.¹²⁷ As the courts that have adopted a case-by-case approach recognize, expert testimony on rape trauma syndrome should not be inadmissible under all circumstances. Indeed, as will be shown, rape trauma syndrome testimony almost always should be admissible. The danger of such testimony misleading the jury rarely should outweigh the probative value of the testimony.

Courts that exclude rape trauma syndrome testimony on the ground that it will mislead the jury do not appreciate the jury's recognized ability to evaluate testimony by mental health professionals. Rape trauma testimony can be provided by physicians,¹²⁸ psychologists, psychiatrists,¹²⁹ trained social workers,¹³⁰ and other mental health professionals.¹³¹ Jurors frequently are required to evaluate testimony given by these professionals in criminal trials. Mental health professionals, particularly psychiatrists and psychologists, testify in cases involving the defense of insanity,¹³² the defenses of automatism and unconsciousness,¹³³ and the defense of diminished capacity.¹³⁴ In rape trials, the defense may present psychiatric evaluations of the mental and emotional condition of the complainant to

¹²⁷ *Id.* at 654, 647 P.2d at 1299. The dissent in *State v. McGee* agreed that cross-examination would prevent the expert testimony from becoming an 'unwarranted reinforcement of [complainant's] testimony' or from giving a 'stamp of scientific legitimacy to the truth [of complainant's] factual testimony concerning the rape.' *State v. McGee*, 324 N.W.2d at 234 (Wahl, J., dissenting).

¹²⁸ *State v. McGee*, 324 N.W.2d at 233 (Wahl, J., dissenting)(testimony by medical doctor).

¹²⁹ *State v. Marks*, 231 Kan. at 653, 647 P.2d at 1298-99 (testimony by board certified psychiatrist).

¹³⁰ *State v. Saldana*, 324 N.W.2d at 229 (testimony by a counselor of sexual assault victims); *State v. LeBrun*, 37 Or. App. at 415-16, 587 P.2d at 1047 (testimony by "Rape Victim Advocate" holding master's degree in social work).

¹³¹ *People v. Bledsoe*, 36 Cal. 3d at 241-44, 681 P.2d at 293-95, 203 Cal. Rptr. at 452-55 (testimony by a licensed marriage, family, and child counselor).

¹³² Experts may testify whether a defendant meets the test of insanity by lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to law. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW, § 40 at 304 (1972); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 448 (1980) [hereinafter cited as Bonnie & Slobogin]; Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 602 (1978) [hereinafter cited as Morse, *Crazy Behavior*]; Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201 (1977).

¹³³ These defenses are raised when people lose conscious awareness of the control over their behavior, for example, during epileptic seizures or concussions. The defenses "negate the 'voluntariness' dimension of the actus reus requirement." Bonnie & Slobogin, *supra* note 132, at 447. See also W. LAFAVE & A. SCOTT, *supra* note 132, § 44 at 337.

¹³⁴ The diminished capacity defense allows a "defendant to show that because of intoxication or endogenous causes, he lacked the conscious awareness, belief, or intention

help jurors determine whether the complainant is capable of telling the truth.¹³⁵ The psychiatric and psychological techniques and expertise brought to bear on these well-accepted courtroom presentations by experts are not different than those involved in

required by the substantive law." Bonnie & Slobogin, *supra* note 132, at 446. See also W. LAFAVE & A. SCOTT, *supra* note 132, §42 at 325-27.

¹³⁵ Defendants in rape cases may request psychiatric examinations of complainants. The judge has the discretion to grant or deny such requests. *Virgin Islands v. Scuito*, 623 F.2d 869, 874-75 (3d Cir. 1980). These examinations are thought to be appropriate where the defendant raises the issue of the effect of the complaining witness' mental or emotional condition on her veracity: "if an examination suggests that the woman is mentally disturbed or distorts reality, the defendant is allowed to prove these highly relevant facts." *Id.* at 875 n.15. See also Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 68-69 (1977)[hereinafter cited as Berger].

Courts may require the complaining witness in a rape case to submit to a psychiatric examination because of an antiquated concern about women's tendencies to suffer from delusions about sexual activity. 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, 120 (1978)[hereinafter cited as O'Neale]. For example, Wigmore stated that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A J. WIGMORE EVIDENCE § 924a at 737 (Chadbourn rev. 1970). Other commentators also have encouraged the use of psychiatric examinations of rape complainants to detect false complaints. See Note, *Psychiatric Aid in Evaluating Credibility of a Prosecuting Witness Charging Rape*, 26 IND. L.J. 98 (1950); Note, *Psychiatric Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 750 (1949); Comment, *Pre-Trial Psychiatric Examination as Proposed Means for Testing the Complainant's Competency to Allege a Sex Offense*, U. ILL. L.F. 651 (1957).

Recently, the practice of allowing such examinations has been criticized and at least one state, California, has legislatively barred their use. Comment, *Psychiatric Examinations of Sexual Assault Victims: A Re-evaluation*, 15 U. CAL. DAVIS L. REV. 973 (1982)[hereinafter cited as Comment, *Psychiatric Examinations of Sexual Assault Victims*]. See also O'Neale, at 119-53.

The attacks on the use of court-ordered psychiatric examinations of complaining witnesses are inapplicable to the use of expert testimony on rape trauma syndrome. The considerations weighing against the use of such examinations are several: (1) a court-ordered examination impinges upon the victim's right to privacy; (2) such an examination places an additional emotional hardship on the victim because of the indignity of the exam; (3) the defendant may use the examination as a tool of harassment; (4) requiring such an exam would deter victims from reporting the rapes; (5) a psychiatric examination of an uncooperative complaining witness is unreliable; and (6) presenting the results of such an examination focuses the jurors' attention on the victim to the exclusion of the defendant, resulting in the victim's behavior and emotional state being on trial. See, e.g., *Virgin Islands v. Scuito*, 623 F.2d 869, 875 (3d Cir. 1980); *United States v. Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1973); *Ballard v. Superior Court of San Diego County*, 64 Cal. 2d 159, 176-77, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 310-13 (1966); see also O'Neale, at 150; Comment, *Psychiatric Examinations of Sexual Assault Victims*, at 995.

Unlike court-ordered psychiatric examinations, the prosecution offers rape trauma testimony to bolster its case. Typically, someone whom the victim has sought out for treatment or counselling services provides the testimony. The use of such testimony in a rape trial, therefore, does not have a similar potential for invading the victim's privacy, producing unreliable results, or unnecessarily directing jurors' attention to the witness' condition as a defensive subterfuge.

presentations on rape trauma syndrome. Both involve psychological testing, trained observation, and precise explanation of behavioral and emotional processes.¹³⁶

The admission of testimony by mental health professionals in criminal trials and civil commitment proceedings, admittedly, has been heavily criticized.¹³⁷ These criticisms, however, cannot be transferred automatically to the admission of expert testimony on rape trauma syndrome.¹³⁸ On the contrary, some of the most vigorous opponents of the widespread use of psychiatric and psychological testimony accept and encourage the limited use of such testimony for many of the same reasons that expert testimony on rape trauma syndrome is valuable.¹³⁹ As one critic explains,

Mental health professionals . . . are constantly concerned with observing behavioral processes. They may be especially able to identify efficiently and precisely thought processes. . . . There seems little reason to exclude expert evidence that efficiently identifies and describes rele-

¹³⁶ The clinical method used by psychiatrists and psychologists involves a psychiatric interview, history taking, and psychological testing. 1 J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 159 (3d ed. 1981). Though an expert testifying on rape trauma syndrome may or may not follow one or another of these steps, the expert would be using the same trained observational skills that are involved in psychiatric and psychological diagnosis.

¹³⁷ See, e.g., J. ZISKIN, *supra* note 136; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 *COLO. L. REV.* 693 (1974) [hereinafter cited as Ennis & Litwack, *Flipping Coins*]; Morse, *Crazy Behavior*, *supra* note 132; Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 *VA. L. REV.* 971 (1982) [hereinafter cited as Morse, *Failed Explanations*]; Comment, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 *MD. L. REV.* 539 (1979).

¹³⁸ For example, one criticism is that psychiatrists and psychologists are allowed to express opinions that are legal and ethical conclusions rather than scientific ones. Morse, *Crazy Behavior*, *supra* note 132, at 601, 602. Expert testimony on rape trauma syndrome, however, is introduced to support a factual proposition—that the woman did not consent to intercourse—rather than to establish a legal or ethical conclusion.

Another common criticism is that psychiatrists and psychologists do not possess the ability to predict dangerous behavior and cannot diagnose behavior reliably. J. ZISKIN, *supra* note 136, at 16, 17; Ennis & Litwack, *Flipping Coins*, *supra* note 137, at 696; Morse, *Crazy Behavior*, *supra* note 132, at 607-11; Rape trauma testimony does not involve predicting dangerous behavior nor does it involve placing an individual in a diagnostic category such as schizoid, paranoid, depressive, or passive-aggressive.

¹³⁹ See J. ZISKIN, *supra* note 136, at 36 (psychiatric workers' testimony should be limited to their observations regarding the current mental state of the person); Ennis & Litwack, *Flipping Coins*, *supra* note 137, at 742 (psychiatrists should be allowed to provide descriptive statements at civil commitment hearings); Morse, *Crazy Behavior*, *supra* note 132, at 601, 605, 611, 616 (mental health experts should be limited to testifying about behavior they observe and in limited cases about relevant, reasonably hard scientific data; experts' special skill is observational—to perceive behaviors that non-experts may fail to notice). Although some rape trauma syndrome experts have included their conclusions as to whether a complainant was raped, most of the testimony by experts on rape trauma syndrome is a description of the complainant's condition and of the syndrome itself.

vant behavior processes or patterns. Here again, experts can function as acute observers of behavior. They can help the factfinder understand an actor by describing in commonsense language his reasoning and control processes.¹⁴⁰

Not only do mental health professionals possess observational skills that allow them to perceive behavior and emotional responses that nonexperts may fail to notice,¹⁴¹ they also have access to hard data about group behavior that may assist factfinders.¹⁴² Testimony on rape trauma syndrome that describes the victim's psychological and emotional responses to an attack and that provides jurors with information about characteristic responses to rape conforms with the well-accepted use of psychiatric and psychological testimony for descriptive information. The argument that jurors will be misled by expert testimony on rape trauma syndrome is unconvincing because jurors routinely are required to evaluate similar psychiatric and psychological testimony offered in commitment hearings, insanity defense cases, and rape trials.

Another reason jurors will not be misled by rape trauma syndrome testimony is that jurors are capable of evaluating the methods used by rape trauma experts. Unlike much expert testimony that relies on the results of scientific tests conducted with technological equipment,¹⁴³ rape trauma syndrome testimony does not involve any mysterious and unfathomable testing procedures. Experts' descriptions and conclusions about the emotional and psychological conditions of victims are based on observations made during face-to-face examinations of the victim, during counseling sessions, and through self-administered psychological tests.¹⁴⁴ Jurors reasonably can be expected to understand and to evaluate the significance of defects in the clinical method¹⁴⁵ employed during these sessions. Rather than automatically defer to a mental health

¹⁴⁰ Morse, *Crazy Behavior*, *supra* note 132, at 616.

¹⁴¹ *Id.* at 612; J. ZISKIN, *supra* note 136, at 28.

¹⁴² Morse, *Crazy Behavior*, *supra* note 132, at 616-17.

¹⁴³ Testimony based on the results of scientific tests is accused of misleading jurors because of the "aura of mystic infallibility" that accompanies the testimony. Courts fear that jurors will accept the results of the tests and the expert's conclusions based on those test results without questioning the validity of the testing procedure or the expert's conclusions. See *United States v. Williams*, 583 F.2d 1194, 1199 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973).

¹⁴⁴ See *supra* note 70.

¹⁴⁵ These defects include the great variation in interpretation of data because of a clinician's theoretical orientations, personal values, biases, and personalities or because of the "soft" knowledge and "soft" data underlying psychiatry and psychology (J. ZISKIN, *supra* note 136, at 38), and the inability of psychiatrists or psychologists to make accurate predictions (Ennis & Litwack, *Flipping Coins*, *supra* note 141, at 696).

professional's testimony, jurors may in fact view such testimony with a healthy amount of skepticism.¹⁴⁶ Jurors may think all psychologically-based information is unreliable, they may distrust a particular expert, or they may be unimpressed by the validity of rape trauma syndrome.

Effective cross-examination¹⁴⁷ also will reduce the danger that rape trauma testimony will mislead jurors.¹⁴⁸ Cross-examination of the expert may reveal biases that slant the expert's findings and opinions. Cross-examination also may expose weaknesses in the underlying study of rape trauma syndrome or in its application to the case at hand.¹⁴⁹

In addition, judges may guard against the danger of misleading the jury without excluding the expert testimony by providing limit-

¹⁴⁶ See *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984); *Bonnie & Slobogin*, *supra* note 132, at 464, 465 n.121. "We think laymen are naturally skeptical about the scientific nature of psychiatric and psychological expertise, especially when it is offered in exculpation or mitigation of criminal liability. Although our opinion is based only on casual empiricism from courtroom experience and surveys of appellate opinions, we feel the risk of 'expert dominance' is grossly exaggerated." *Id.*

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 a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite is 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.

Id.

¹⁴⁷ To present an effective cross-examination, the defense attorney will have to be familiar with clinical psychology, post-traumatic stress disorders, or rape trauma syndrome. But "the corrective value of skilled cross-examination is much more dependable when the witness is relying on his own observations (including psychological test instruments) and clinical wisdom [as would be the case with rape trauma testimony] than when he reports the results of a test which is said to speak for itself." *Bonnie & Slobogin*, *supra* note 132, at 465-66 n.121.

¹⁴⁸ See *United States v. Baller*, 519 F.2d 463 (4th Cir. 1975)(spectrographic analysis admissible where competent witnesses were available to expose weaknesses and limitations in expert's analysis, where defense counsel demonstrated thorough knowledge of subject in detailed cross-examination, and where court instructed jury that expert analysis could be disregarded if they found expert had inadequate education or experience to provide analysis); *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971)(prosecution's testimony on neutron activation analysis was proper where defendant presented well-qualified witnesses who developed fully their criticisms of prosecution's evidence); *Coppolino v. State*, 223 So. 2d 68 (Fla. App. 1968)(defendant produced scientific witnesses to challenge conclusions of the state's witnesses and the methods and test used to reach those conclusions).

¹⁴⁹ See *State v. McGee*, 324 N.W.2d 232 (Minn. 1982)(Wahl, J., dissenting)(cross-examination of expert revealed that the complainant's symptoms suggesting rape trauma syndrome could have been caused by events in her life prior to the rape). In *Allewalt v. State*, 61 Md. App. 3d 503, 487 A.2d 664 (1985), for example, defense counsel's cross-examination of the expert could have explored whether the complainant's post-traumatic stress disorder was caused by marital difficulties and emotional problems that predated the alleged rape.

ing instructions.¹⁵⁰ The Advisory Committee's Note accompanying Rule 405 encourages the use of limiting instructions.¹⁵¹ Such an instruction might remind jurors of their responsibility to weigh all the evidence, to reject any evidence they consider to be unreliable, and to make an independent judgment as to the facts of the case.¹⁵²

A case-by-case balance of the probative value of rape trauma syndrome testimony against the tendency of the evidence to mislead is the correct approach for courts to adopt. Because jurors can evaluate the underpinnings of rape trauma syndrome testimony, cross-examination can reveal defects in testimony, and limiting instructions can warn jurors not to rely unquestioningly on the testimony, rape trauma syndrome testimony will not mislead jurors in every case. Wholesale exclusion of rape trauma syndrome testimony, therefore, is inappropriate. Instead, courts should weigh the probative value of the testimony with its tendency to mislead on a case-by-case basis and exclude rape trauma syndrome testimony only in the rare cases where its tendency to mislead substantially outweighs its probative value.¹⁵³

C. EXPERT TESTIMONY UNDER RULE 702

In recognition of the fact that "an intelligent evaluation of facts [by a jury] is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge,"¹⁵⁴ the Federal Rules of Evidence provide for the admission of testimony by expert witnesses.¹⁵⁵ Under Rule 702 the test for admissibility of expert testimony is whether the testimony will assist the trier of

¹⁵⁰ *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978) (evidence was properly admitted because trial judge took steps to minimize prejudicial impact of evidence through jury instructions); C. McCORMICK, *supra* note 67, § 185, at 440 n.32; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 403[01], at 403-8.

¹⁵¹ FED. R. EVID. 403 advisory committee note.

¹⁵² J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 403[01], at 403-8.

¹⁵³ Excluding the testimony because it is misleading may be appropriate where the expert is unqualified to discuss rape trauma syndrome, the expert has had too little opportunity to observe the complainant, or the complainant suffered from a post-traumatic stress disorder prior to the alleged rape. *See Allewalt v. State*, 61 Md. App. 503, 487 A.2d 664 (1985) (court excluded testimony as unduly prejudicial in case where complainant received counseling for depression prior to alleged rape).

¹⁵⁴ FED. R. EVID. 702 advisory committee note.

¹⁵⁵ Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

fact.¹⁵⁶ An examination of the admissibility of an expert's testimony under this test can be broken down into three parts.¹⁵⁷ First, expert testimony must satisfy a "helpfulness requirement."¹⁵⁸ Second, the testifying witness must qualify as an expert.¹⁵⁹ Third, the subject matter of the testimony must meet a reliability or general acceptance requirement.¹⁶⁰

1. The "Helpfulness" Requirement

The primary requirement of Rule 702 is that the expert testimony assist the factfinder in understanding the evidence or determining a fact in issue.¹⁶¹ The Advisory Committee's Note suggests that helpfulness is determined by 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.'"¹⁶² Rule 702 is phrased broadly¹⁶³ and permits greater use of expert testimony than does the common law.¹⁶⁴

Because trial courts determine whether expert testimony is

¹⁵⁶ FED. R. EVID. 702 advisory committee note; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[01] at 702-6.

¹⁵⁷ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[01] at 702-7, 702-8. Courts that have enumerated the necessary considerations for admissibility under Rule 702 have included a fourth requirement: the probative value of the expert's testimony must not be substantially outweighed by its prejudicial effect. *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977); *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977) (citing *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973)). This fourth requirement is considered in the discussion of Rule 403, *supra* text accompanying notes 99-153.

¹⁵⁸ See, e.g., *Taenzler v. Burlington Northern*, 608 F.2d 796, 798 n.3 (8th Cir. 1979); *United States v. Brown*, 557 F.2d at 556 (6th Cir. 1977); *United States v. Green*, 548 F.2d at 1268 (6th Cir. 1977).

¹⁵⁹ See *United States v. Brown*, 557 F.2d at 556 (6th Cir. 1977); *United States v. Green*, 548 F.2d at 1268 (6th Cir. 1977) (citing *United States v. Amaral*, 488 F.2d at 1152 (9th Cir. 1973)).

¹⁶⁰ Rule 702 does not explicitly embody this requirement. Courts, however, demand some assurance that the proffered testimony has an accepted scientific foundation. Testimony by an expert "is not admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert." C. McCORMICK, *supra* note 67, § 14 at 31. For further discussion of this requirement, see *infra* text accompanying notes 229-93.

¹⁶¹ FED. R. EVID. 702. See *Taenzler v. Burlington Northern*, 608 F.2d at 798 n.3; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[01] at 702-6 and -7.

¹⁶² FED. R. EVID. 702 advisory committee note (quoting, Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

¹⁶³ FED. R. EVID. 702 advisory committee note; *Mannino v. International Mfg.*, 650 F.2d 846, 849 (6th Cir. 1981) (Rule 702 is to be broadly interpreted).

¹⁶⁴ *United States v. Brown*, 557 F.2d at 556 (the trend is towards admissibility under the

properly admissible on a case-by-case basis,¹⁶⁵ there are few blanket rules excluding or admitting such testimony. Courts regularly accept expert testimony in certain fields because it is helpful to the jury.¹⁶⁶ Medicine and engineering are two such fields.¹⁶⁷ But the variety of expert testimony admitted outside these areas establishes that expert testimony need not be linked to universally recognized sciences to be admissible. Courts have admitted expert testimony on the modus operandi of pickpockets,¹⁶⁸ the "ways and language" of bookmakers,¹⁶⁹ the meaning of gambling jargon,¹⁷⁰ the geographic source of certain marijuana,¹⁷¹ and code words and the meaning of certain language used in drug trafficking.¹⁷²

In addition, expert testimony is admissible even when jurors could draw conclusions without the expert's help. For example, prosecutors use experts to compare the features of defendants and their possessions with those of persons and articles found in surveil-

Federal Rules); P. ROTHSTEIN, *supra* note 99, at 264, 267; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[03] at 702-21.

The traditional test for helpfulness under the common law is whether the subject matter of the testimony is "so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average laymen." C. McCORMICK, *supra* note 67, § 13 at 29-31. The Federal Rules are much broader than traditional tests for admissibility. See McElhaney, *supra* note 113. A test that admits expert testimony only when the evidence is beyond the comprehension of the jurors without such testimony "is incompatible with the standard of helpfulness expressed in Rule 702." J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[02] at 702-9; see also P. ROTHSTEIN, *supra* note 99, at 264. *But see* United States v. Foshier, 590 F.2d 381, 383 (1st Cir. 1979) (expert testimony must provide jurors with a system of analysis that is likely to add to jurors' common understanding of the issue); Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977), *cert. denied*, 434 U.S. 973 (1977) (court applies the traditional "beyond the ken of the average layman" test for admissibility).

¹⁶⁵ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702 [02] at 702-11, 702-12.

¹⁶⁶ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[02] at 702-8, 702-9; McElhaney, *supra* note 113, at 475.

¹⁶⁷ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[02] at 702-8, 702-9; McElhaney, *supra* note 113, at 475 (citing 2 JONES ON EVIDENCE § 423 (5th ed. 1958)). In medical malpractice cases and design defect cases, plaintiffs may fail to meet their burdens of proof unless expert testimony is offered. See *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848 (10th Cir. 1979) (only a qualified engineer was capable of testifying as to the design defect of a pressure cooker); *Huddell v. Levin*, 537 F.2d 726, 736 (3d Cir. 1976) ("where the issue concerns a product's design . . . expert opinion is the only available method to establish defectiveness, at least where the design is not patently defective"); Comment, *Medical Malpractice—Expert Testimony*, 60 Nw. L. REV. 834 (1966).

¹⁶⁸ *United States v. Jackson*, 425 F.2d 574 (D.C. Cir. 1970).

¹⁶⁹ *United States v. Barletta*, 565 F.2d 985 (8th Cir. 1977).

¹⁷⁰ *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979); *United States v. Alfonso*, 552 F.2d 605 (5th Cir.), *cert. denied*, 434 U.S. 857 (1977).

¹⁷¹ *United States v. Johnson*, 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

¹⁷² *United States v. Dawson*, 556 F. Supp. 418 (E.D. Pa. 1982), *aff'd*, 727 F.2d 1101 (1984).

lance photographs.¹⁷³ Rule 702 thus does not forbid the use of expert testimony when jurors have the skills or common understanding to draw conclusions without the testimony.¹⁷⁴ Rather, it focuses on whether expert testimony will *assist* the factfinder by adding precision or depth to the jury's ability to reach conclusions.¹⁷⁵

Whether expert testimony on rape trauma syndrome meets the helpfulness requirement is in dispute. Several courts have ruled that rape trauma syndrome testimony is relevant to the issue of consent and, therefore, is helpful to the trier of fact in determining whether a rape occurred.¹⁷⁶ Another court has held, however, that rape trauma syndrome testimony is of no help to the jury.¹⁷⁷ The court found that rape trauma syndrome is not an accurate or reliable test for whether a rape occurred and that evidence about typical reactions to rape would not help the jury to decide whether a particular individual was raped.¹⁷⁸

An understanding of the content of expert testimony on rape trauma syndrome, combined with an appreciation of the pervasive societal misperceptions of rape victims, supports the conclusion that rape trauma syndrome testimony meets the helpfulness requirement. The testimony satisfies the requirement by bringing greater

¹⁷³ See, e.g., *United States v. Barrett*, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983)(expert permitted to testify regarding similarities between clothing seized from defendant and that worn by robber in surveillance photograph); *United States v. Collins*, 559 F.2d 561, 565 (9th Cir.), cert. denied, 434 U.S. 907 (1977)(expert permitted to testify that shoes and briefcase found in defendant's apartment were most probably the same as those shown in surveillance photograph); *United States v. Snow*, 552 F.2d 116 (6th Cir. 1977)(expert permitted to compare photographs). But see *United States v. Brown*, 501 F.2d 146, 148-50 (9th Cir. 1974)(error to allow comparison in this particular case because facts were not beyond jury's common experience). See also J. WEINSTEIN & M. BERGER, *supra* note 101, 702[02] at 702-10, 702-11.

¹⁷⁴ See *Bonnie & Slobogin*, *supra* note 132, at 463-64.

¹⁷⁵ *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980).

¹⁷⁶ See, e.g., *State v. McQuillen*, 236 Kan. 161, 689 P.2d 822 (1984); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292, 1299 (1982); see also *State v. McGee*, 324 N.W.2d 232, 234 (Minn. 1982)(Wahl, J., dissenting); *State v. Liddell*, ___ Mont. ___, 685 P.2d 918 (1984); *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984).

¹⁷⁷ *State v. McGee*, 324 N.W.2d at 232; see also *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (rape trauma syndrome is not generally used or relied upon by scientific community to prove that a rape has occurred); *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982).

¹⁷⁸ Rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred. The characteristic symptoms may follow any psychologically traumatic event. . . . At best, the syndrome describes only symptoms that occur with some frequency, but makes no pretense of describing every single case. . . . The jury must not decide this case on the basis of how most people react to rape or on whether Fuller's [the victim's] reactions were the typical reactions of a person who has been a victim of rape. Rather, the jury must decide what happened in *this case*, and whether the elements of the alleged crime have been proved beyond a reasonable doubt.

State v. Saldana, 324 N.W.2d at 229-30 (emphasis in original).

precision and depth to the jury's determination of whether the complainant consented to intercourse. First, an expert can assist jurors in understanding the emotional and psychological consequences experienced by the complainant as a result of the alleged rape.¹⁷⁹ Though the complainant could be questioned directly about these consequences or lay witnesses could describe the reactions they observed in the complainant,¹⁸⁰ an expert will be able both to perceive these consequences more accurately and fully, and to describe them more precisely than could lay witnesses.¹⁸¹ Experts are trained observers¹⁸² who treat and observe rape victims regularly.¹⁸³ Courts, therefore, can expect them to perceive or inquire about conditions that might go unnoticed by laypersons.¹⁸⁴

Additionally, an expert testifying on rape trauma syndrome can assist jurors by providing them with reliable information on characteristic responses and behavior of rape victims.¹⁸⁵ Though there may be general public awareness of the traumatizing effect of rape on its victims, jurors are unlikely to be familiar with the findings of the extensive studies on rape victims. Nor is it likely that each juror will have had first-hand experience working with rape victims. It is likely, however, that the jurors' general knowledge regarding the emotional and psychological consequences of rape to some extent will be influenced by pervasive societal misperceptions about rape.¹⁸⁶

Expert testimony on rape trauma syndrome will enhance the accuracy of jurors' deliberations in rape cases by exposing myths about rape.¹⁸⁷ Several myths about rape are particularly significant in cases where consent is at issue. One myth is that "interaction between friends or relatives does not result in rape."¹⁸⁸ Another

¹⁷⁹ See *supra* text accompanying notes 128-142.

¹⁸⁰ See *supra* notes 75-80 and accompanying text.

¹⁸¹ See *supra* text accompanying notes 139-42.

¹⁸² Diamond & Louisell, *supra* note 114, at 1341; Morse, *Crazy Behavior, supra* note 132, at 612, 616.

¹⁸³ See *infra* notes 128-31.

¹⁸⁴ Morse, *Crazy Behavior, supra* note 132, at 611.

¹⁸⁵ See *supra* text accompanying notes 15-54.

¹⁸⁶ See *infra* text accompanying notes 193-95.

¹⁸⁷ The California Supreme Court, which rejected the admissibility of expert testimony on rape trauma syndrome to prove lack of consent, conceded that such testimony "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." *People v. Bledsoe*, 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

¹⁸⁸ A. BURGESS & L. HOLMSTROM, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 176 (1983). In fact, as various studies show, rapists may be strangers attacking by surprise or they may be well known to the victim. *Id.* See also Berger, *supra* note 135, at 24

relevant myth is that women charge rape after fantasizing such an event.¹⁸⁹ Other myths that could color jurors' thinking on the issue of consent are that women desire to be raped,¹⁹⁰ that women cannot be raped against their will and thus are merely consenting partners in a sexual encounter,¹⁹¹ and that all legitimate rape victims possess certain attributes and demonstrate identical reactions immediately following the rape.¹⁹²

Several studies show that jurors bring to the courtroom definitions of rape that differ from legal definitions of the crime.¹⁹³ Studies also suggest that these understandings and misperceptions influence jurors' determinations of whether the complainant consented to intercourse.¹⁹⁴ In fact, defense attorneys often specifically

(citing Weis & Borges, *Victimology and Rape: The Case of the Legitimate Victim*, in *RAPE VICTIMOLOGY* 91 (L. Schultz ed. 1975).

¹⁸⁹ A. BURGESS & L. HOLMSTROM, *supra* note 188, at 193; Berger, *supra* note 135, at 21-22.

¹⁹⁰ S. BROWNMILLER, *AGAINST OUR WILL* 311, 312 (1975).

¹⁹¹ *Id.*; Weis & Broges, *Victimology and Rape: The Case of the Legitimate Victim*, 8 *ISSUES CRIMINOLOGY* 71, 85 (1971).

¹⁹² One commentator describes a "genuine" rape victim as follows:

Like negligence's reasonable man, the true victim of rape exercises due care and caution for her own safety. She possesses a reputation for chastity in her community. Additionally, she copes well with aggression, usually meeting force with force. Should she fail to overpower her aggressor and rape occurs, she will make an immediate complaint in a hysterical state.

Berger, *supra* note 135, at 23-24 (quoting Comment, *Rape in Illinois, A Denial of Equal Protection*, 8 *JOHN MARSHALL J. PRAC. & PROC.* 457, 469 (1975).

¹⁹³ A. BURGESS & L. HOLMSTROM, *supra* note 188, at 168. A study by Klemmack and Klemmack asked a sample of women if seven situations, each meeting the legal definition of rape, constituted a rape. "An especially striking result was the importance of the degree of interpersonal relationship between assailant and victim. 'If any relationship is known to exist between the victim and the accused, no matter how casual, the proportion of those who consider the event rape drops to less than 50 percent.'" *Id.*

Kalven and Zeisel, in their study on the jury process, conclude "that the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk." H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 254 (1966). They explain that

[t]he jury, as we come to see it, does not limit itself to this one issue [consent]; it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.

Id. at 249.

¹⁹⁴ Kalven and Zeisel found that in "aggravated rape" cases (cases in which there was evidence of violence, in which there were several assailants, or in which the defendant and victim were strangers at the time of attack) judges disagree with the jury's decision to acquit the defendant in 12% of the cases. But in "simple rape" cases (cases in which none of the aggravating circumstances is present) judges disagreed with the jury's decision to acquit the defendant in 60% of the cases. H. KALVEN & H. ZEISEL, *supra* note 193, at 252-53. The increased discrepancy between the judge's and jury's decisions suggest that jurors may be swayed by the absence of the mythical attributes of a genuine rape victim in simple rape cases.

Feild's study found that one factor influencing jurors' decisions was whether the

design their trial strategies to exploit jurors' misperceptions about rape.¹⁹⁵ An expert's testimony regarding rape trauma syndrome could be an important tool with which to educate the jury about actual characteristics of rape victims, to limit the influence of jurors' misperceptions about legitimate rape victims, and thereby to ensure that the jurors' evaluation of the facts is as accurate as possible.

In addition to being helpful in limiting the effect of misperceptions about rape on the factfinding process, rape trauma syndrome testimony helps jurors to evaluate the complainant's psychological and emotional condition following the alleged rape. The helpfulness of rape trauma syndrome testimony to jurors' evaluations of the complainant is analogous to the helpfulness of expert testimony on complainants' or defendants' mental and emotional conditions in other criminal cases and commitment proceedings. Although factfinders may be able to draw inferences about the nature, extent, and consequences of mental disorders without the help of expert witnesses,¹⁹⁶ expert testimony by psychiatrists and psychologists is admitted routinely in insanity defense cases, competency hearings,

rape was "precipitatory." Precipitatory rapes were those rapes in which the actions of the victim suggested that she "was asking for it." Feild found anecdotal evidence that "precipitatory rapes" were treated more leniently than "nonprecipitatory" rapes. Feild, *Rape Trials and Jurors' Decisions: A Psychological Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUMAN BEHAV. 261, 264-65 (1979). In other words, when a victim fails to act as jurors expect a "legitimate" rape victim to act, jurors are less likely to decide that the victim was raped.

A study of rape arrests in the District of Columbia from 1971 to 1976 found that the closer the relationship between the victim and defendant, the less likely it was the defendant would be convicted. Williams, *Few Convictions in Rape Cases: Empirical Evidence Concerning Some Alternative Explanations*, 9 J. CRIM. JUST. 29, 37 (1981).

¹⁹⁵ Defense attorneys skillfully play upon the societal myths surrounding rape.

The defense presents the victim in the worst possible light. In the strategy of blaming the victim, defense lawyers trade on current normative expectations for sex roles. They trade on the tendency of the public at large and apparently also many jurors to blame the victim. Rape is not seen by the public as the result of social expectations in which females are defined as the appropriate objects of male violence. Rather, certain girls or women are seen as 'asking for it,' 'fantasizing about it,' or 'just plain lying.'

A. BURGESS & L. HOLMSTROM, *supra* note 188 at 172, 173.

Because of common misperceptions about rape victims' involvement in the assault on them and the popular defense strategy of blaming the victim, researchers and writers have suggested that in a rape trial, "the rape victim becomes the defendant, that is, she is on trial to prove her innocence." Feild, *supra* note 194 at 281; O'Neale, *supra* note 135, at 142, 143 & 150.

¹⁹⁶ See, e.g., *Hunter v. State*, 335 So. 2d 194 (Ala. Crim. App. 1976)(error to exclude lay testimony on defendant's sanity); *Alexander v. State*, 358 So. 2d 379 (Miss. 1978)(lay witness may testify regarding defendant's sanity only when witness has had opportunity to observe defendant at a time when defendant was insane); *Bonnie & Slobogin, supra* note 132, at 463.

and civil commitment proceedings.¹⁹⁷ Expert testimony on battered wife syndrome is offered to explain the behavior and psychological condition of the batterer¹⁹⁸ or the battered spouse.¹⁹⁹ Although factfinders may be "acquainted with interspousal conflicts and the effect of these conflicts upon the persons involved,"²⁰⁰ courts have held that expert testimony on battered wife syndrome satisfies the

¹⁹⁷ State statutes allow or require the court to appoint psychiatrists to examine a defendant who raises the insanity defense. See, e.g., IND. STAT. CODE ANN. §35-5-2-2 (BURNS 1979) ("when notice of insanity defense is filed, the court shall appoint two [2] or three [3] competent disinterested psychiatrists to examine the defendant, and to testify at trial"); Tex. Code Crim. Proc. Ann. Art. 46.03 §3(a) (Vernon 1979) (mental health experts may be appointed by court to examine defendant and testify regarding insanity defense at trial).

In addition to admitting testimony by psychiatrists on the issue of insanity, many states admit freely testimony by psychologists on the issue of defendants' sanity or mental condition. See *People v. Whitaker*, 87 Ill. App. 3d 563, 410 N.E.2d 166 (1980) (psychologist testified about defendant's mental condition); *People v. Lewis*, 75 Ill. App. 3d 568, 393 N.E.2d 1380 (1979) (psychologists may testify about defendant's competence to stand trial); *Burgess v. Commonwealth*, 564 S.W.2d 532 (Ky. 1978) (clinical psychologist may testify regarding defendant's mental condition); *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980) (psychologist may testify as an expert witness); Md. Cts. & JUD. PROC. CODE ANN. §9-120 (Supp. 1979) (qualified psychologists "may testify on ultimate issues, including insanity, competency to stand trial, and matters within the scope of that psychologist's special knowledge, in any case in any court").

For other cases involving testimony by psychiatrists and psychologists, see *United States v. Bilson*, 648 F.2d 1238 (9th Cir. 1981); *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962).

For a discussion criticizing the courts' current practice of admitting freely testimony by psychologists and treating equally testimony by psychiatrists and psychologists, see Comment, *The Psychologist as Expert Witness*, *supra* note 137.

See, e.g., *United States v. Portis*, 542 F.2d 414, 418-20 (7th Cir. 1976) (expert testimony by psychologist about defendant's sanity); *Blunt v. United States*, 389 F.2d 545 (D.C. Cir. 1967) (psychologist testifying on defendant's competence to stand trial); *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (testimony by psychologist in insanity defense case); *People v. Crawford*, 66 Mich. App. 581, 239 N.W.2d 670 (1976) (psychologist testifying on defendant's competence to stand trial).

Not all courts will permit psychologists to testify about the ultimate issue of a defendant's sanity. Some courts reserve this issue for testimony by psychiatrists. See, e.g., *People v. Manning*, 61 Ill. App. 3d 558, 378 N.E.2d 227 (1978) (dictum), *rev'd on other grounds*, 390 N.E.2d 903 (1979). See also Comment, *The Psychologist as Expert Witness*, *supra* note 137, at 549.

¹⁹⁸ See *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980) (expert testimony on battered wife syndrome offered in husband's trial for attempted murder to show that his behavior was consistent with that of wife batterers and was not caused by insanity).

¹⁹⁹ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (expert testimony on battered wife syndrome offered in wife's trial for murder of husband to substantiate her claim that she acted in self-defense); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981) (expert testimony on battered wife syndrome offered in woman's trial for murder of her boyfriend to substantiate her claim of self-defense); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983); *State v. Anaya*, 438 A.2d 892 (Me. 1981).

²⁰⁰ *Ibn-Tamas v. United States*, 407 A.2d 626, 654 n.20 (D.C. Ct. App. 1979) (Nebeker, J., dissenting).

helpfulness requirement.²⁰¹

Courts also have found that expert testimony on familial child sexual abuse syndrome assists the factfinder.²⁰² A concurring opinion in *State v. Middleton*²⁰³ drew a helpful comparison between the use of expert testimony on battered wife syndrome and of familial child sexual abuse syndrome:

Battered woman syndrome testimony is said to enhance the jury's understanding of the defendant's state of mind at the time of the criminal act. Evidence of familial child sexual abuse syndrome could provide an explanation of the victim's reluctance to pursue prosecution after the criminal event. The former explains the psychological effect on the defendant of a pattern of aggression against her preceding her criminal act. The latter illuminates the psychological effect on the victim of the criminal act itself.²⁰⁴

If factfinders are assisted by expert testimony on the psychological effects of sexual abuse on child victims, and the psychological state of battered women, it is entirely consistent to conclude that

²⁰¹ *Id.* at 634-635; *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980).

But see *People v. White*, 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980) (doctor's opinion as to whether battered women "tend to remain with their mates served no useful purpose in woman's trial for murder of boyfriend"); *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981) (testimony on battered wife syndrome inadmissible where inadequate foundation existed for proposition that defendant was a battered wife).

See generally Eber, *The Battered Wife's Dilemma: To Kill or to be Killed*, 32 HASTINGS L.J. 895 (1981); Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982); Comment, *The Admissibility of Expert Testimony on Battered Wife Syndrome*, *supra* note 88, at 361-65.

²⁰² In *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983), testimony on familial child sexual abuse syndrome was offered to explain why the 14-year old complainant denied her previous allegations that she had been raped by her father. In holding the testimony to be admissible the court stated:

Because the jurors said they had no experience with victims of child abuse, we assume they would not have been exposed to the contention that it is common for children to report familial sexual abuse and then retract the story. Such evidence might well help a jury make a more informed decision in evaluating the credibility of a testifying child.

Id. at 437, 657 P.2d at 1220. *See also* *State v. Kim*, 64 Hawaii 598, 645 P.2d 1330 (1982) (psychiatrist's testimony that complainant in rape prosecution demonstrated behavior consistent with that of sexually abused children held to be admissible); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (expert testimony about child sexual abuse is helpful to lay jurors and is admissible); *State v. Carlson*, 360 N.W.2d 442 (Minn. Ct. App. 1985) (psychiatric testimony on whether behavior of children is consistent with sexual abuse is admissible); *People v. Benjamin*, 103 A.D.2d 663, 481 N.Y.S.2d 827 (1984) (average juror does not have general awareness of children's reactions to sexual abuse; expert testimony on child sexual abuse thus is helpful to jury). *But see* *State v. Danielski*, 350 N.W.2d 395 (Minn. Ct. App. 1984) (expert testimony on typical familial sexual abuse symptoms and behavior inadmissible).

²⁰³ 294 Or. at 439-40, 657 P.2d at 1221-22 (Roberts, J., concurring).

²⁰⁴ *Id.*

factfinders will be assisted by expert testimony on the psychological and emotional state of rape victims.

2. *Qualification as an Expert*

Before testimony on rape trauma syndrome can be admitted under Rule 702, the witness providing the testimony must demonstrate that he or she has the requisite qualifications to be considered an expert.²⁰⁵ The purpose of this requirement is to ensure that an expert witness' testimony will assist the factfinder.²⁰⁶ The trial court has broad discretion in judging a person's qualification as an expert.²⁰⁷ The Advisory Committee's Note to Rule 702 clarifies the standard to be applied under the Federal Rules:

The Rule [702] is broadly phrased. . . . [T]he expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.' Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.²⁰⁸

Commentators emphasize that Rule 702 was designed to allow liberal decisions regarding the qualifications of experts.²⁰⁹ Moreover, cases have established that a person need not be the best or most experienced possible witness to qualify as an expert,²¹⁰ nor does an

²⁰⁵ FED. R. EVID. 702.

²⁰⁶ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[04] at 702-28, 702-29.

²⁰⁷ FED. R. EVID. 104(a); *United States v. Bilson*, 648 F.2d 1238 (9th Cir. 1981); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979); *N.V. Maatschappij, etc. v. A.O. Smith Corporation*, 590 F.2d 415 (2d Cir. 1978); J. WEINSTEIN & M. BERGER, *supra* note 101, 702[04] at ¶ 702-22, 702-23.

The trial court's discretion will not be disturbed on appeal unless it is shown to be manifestly erroneous. *Berdeaux v. Gamble Alden Life Insurance Co.*, 528 F.2d 987 (5th Cir. 1976).

²⁰⁸ FED. R. EVID. 702 advisory committee note. The standard set forth in Rule 702 is at least as broad as that applied under the common law. Wigmore suggests that the only true criterion for determining the expertness of the witness is whether "[o]n this subject can a jury receive from this person appreciable help." 7 WIGMORE ON EVIDENCE § 1923 (1978). McCormick's test for the qualifications of an expert is only slightly less broad. A person must establish that he or she has the requisite skill, knowledge, or experience in a particular field so as to be able to render an opinion in that field that will probably aid the trier of fact in arriving at the truth. The source of an expert's skill, knowledge, or experience may be solely reading, practice, or both. And though a court may disqualify as an expert one who is not a member of a certain profession, such as a doctor, engineer, or chemist, an expert usually will not need to be a specialist within his or her profession. C. McCORMICK, *supra* note 67, § 13 at 30.

²⁰⁹ P. Rothstein, *supra* note 99, at 264; J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[04] at 702-21 to 702-29.

²¹⁰ In *United States v. Portis*, 542 F.2d 414 (7th Cir. 1976), the court admitted testimony about the defendant's sanity by a psychologist who did not have a medical degree and had only three months of post-doctoral clinical experience. The court stated that

expert need to be absolutely certain about his or her testimony.²¹¹

Clear minimum qualifications for witnesses seeking to testify as experts on rape trauma syndrome have not emerged from the case-by-case²¹² decisions as to an expert's qualifications.²¹³ Though few courts have found an expert unqualified to testify about rape trauma syndrome,²¹⁴ several courts have accepted a variety of educational backgrounds and work experiences as adequate qualifications for an expert testifying on rape trauma syndrome. Courts have accepted as qualified experts persons who have experience treating²¹⁵ or observing rape victims,²¹⁶ persons who have counseling experience,²¹⁷

the best or most qualified doctor was not necessary; any defects in the expert's qualifications go to the weight attached to the testimony rather than to its admissibility.

²¹¹ See, e.g., *United States v. Oaxaca*, 569 F.2d 518, 526 (9th Cir. 1978), cert. denied, 439 U.S. 926 (expert's testimony identifying hairs from mask worn during robbery as being similar to defendant's was admissible even though expert admitted testimony was less than certain); *United States v. Baller*, 519 F.2d 463 (4th Cir.), cert. denied, 423 U.S. 1019 (1975); *United States v. Spencer*, 439 F.2d 1047, 1049 (2d Cir. 1971) (expert testimony comparing handwriting samples admitted even though expert could not be sure that the samples were prepared by the same person).

²¹² J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[04] at 702-25, 702-26.

²¹³ In the dissenting opinion in *People v. Bledsoe*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (1983), Justice Wiener suggests a few qualifications that should be required of witnesses testifying on rape trauma syndrome. Justice Wiener states that experience in treating and observing the symptoms of rape victims should not be sufficient to qualify a person as an expert. Justice Wiener suggests that an expert also must have substantive information on causes of trauma and must receive relevant data in a controlled manner. *Id.* at 734, 189 Cal. Rptr. at 734 (Wiener, J., dissenting).

²¹⁴ In *State v. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984), the court refused to allow testimony by an emergency room physician about rape trauma syndrome because there was no evidence to show that the witness-physician was qualified in psychiatry. The Ohio Court of Appeals ruled that a social worker whose only experience with rape victims or post traumatic stress disorders consisted of her work with the complainant in this case was unqualified to testify as an expert about rape crisis syndrome. *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984). In *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982), the court found that the witness' counseling experience and bachelor's degree did not qualify her to testify whether the alleged rape victim was able to distinguish between reality and fantasy or whether the alleged victim was telling the truth or fabricating a story. The witness was the director of the Mankato, Minnesota Victim Assistance Program and had counseled the alleged rape victim over a ten week period. The witness' education included a bachelor's degree in psychology and social work. The court specifically objected to the witness' lack of medical education or training. But the *Saldana* court did not state that the witness was unqualified to testify regarding rape trauma syndrome. The expert's testimony regarding rape trauma syndrome was held inadmissible on other grounds. *State v. Saldana*, 324 N.W.2d at 229-32.

In the companion case to *Saldana*, *State v. McGee*, 324 N.W.2d 232 (Minn. 1982), a dissenting justice argued that a medical doctor who as a resident had treated rape victims was qualified to testify as an expert on rape trauma syndrome. *State v. McGee*, 324 N.W.2d at 233-34 (Wahl, J., dissenting).

²¹⁵ See *State v. McGee*, 324 N.W.2d at 233-34 (Wahl, J., dissenting) (medical doctor who had examined rape victims was qualified to testify regarding rape trauma syndrome).

²¹⁶ In *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978), the Oregon appellate Court rejected the defense's challenge to the qualifications of an expert who testified

as well as persons who have extensive education and experience in psychiatry and medicine.²¹⁸

Because courts have not established uniform criteria governing the requisite qualifications for experts testifying on rape trauma syndrome, it is instructive to examine the qualifications accepted or required of experts testifying on similar matters to help define the appropriate boundaries for acceptable qualifications. First, a witness need not be a medical doctor to be qualified to testify about rape trauma syndrome. In a civil rights action brought by a prison inmate against state officers because of a rape in the prison infirmary, a medical behavioral scientist was permitted to testify about the psychological disturbances experienced by the plaintiff after being raped.²¹⁹ The expert testified that after the rape, the plaintiff was depressed, suffered rape flashbacks, could not develop friendships, and perceived himself to be a woman. The expert concluded that the rape had caused these emotional disturbances.²²⁰ Because the expert did not have a medical degree, the defendant state officials objected to the testimony as being outside the witness' realm of

that the alleged victim's emotional state comported with that of most women who are victims of sexual abuse. The court was satisfied with the expert's qualifications: the expert held a master's degree in social work; she had worked at a shelter for sexually and physically abused children; and, as a rape victim advocate, she had observed more than 100 rape victims. *Id.* at 416, 587 P.2d at 1047.

²¹⁷ In *State v. Young*, the Kansas Supreme Court permitted a licensed clinical psychologist to testify about rape trauma syndrome. *State v. Young*, slip op. (Kan. July 26, 1985). The court stated that "[b]ecause the syndrome concerns a body of knowledge common to the practice of psychiatry and psychology, psychologists may be as competent to diagnose rape trauma syndrome as psychiatrists." *Id.* The California Supreme Court ruled that the trial court had not abused its discretion by permitting a graduate student in psychology to testify as an expert regarding rape trauma syndrome. *People v. Stanley*, 36 Cal. 3d 253, 681 P.2d 302, 203 Cal. Rptr. 461 (1984). Although the court was not "overwhelmed" by the graduate student's qualifications, which included course work in rape counseling, counseling ten to twenty rape victims, and six years of clinical experience, the court focused upon the student's extensive clinical experience and permitted her to be qualified as an expert. *Id.* at 261 n.5, 681 P.2d at 307 n.5, 203 Cal. Rptr. at 466 n.5. In *State v. Radjenovich*, 138 Ariz. 270, 674 P.2d 333 (Ct. App. 1983), the trial court admitted testimony by a counselor at a mental health clinic that showed the victim's post-rape emotional reactions were consistent with other rape victims' reactions.

²¹⁸ In *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982), the Kansas Supreme Court found that a board certified psychiatrist and neurologist who practiced psychiatry and taught at the Menninger Foundation qualified as an expert to testify about post-traumatic stress disorders, rape trauma syndrome, and the alleged victim's experience with rape trauma syndrome. Although the defendant did not challenge the expert's qualifications to testify about rape trauma syndrome, the court's recital of the psychiatrist's impressive credentials implies that such a challenge would have been unsuccessful. *Id.* at 653, 647 P.2d at 1298-99. See also *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (psychiatrist specializing in diagnosis and treatment of rape victims qualified as expert).

²¹⁹ *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979).

²²⁰ *Id.* at 1121.

expertise. In rejecting this contention, the court stated that "[a]s a medical behavioral scientist Dr. Peeples perhaps would not have been qualified to testify about diagnosing or treating an illness, but he was as qualified as anyone to discuss the links between trauma (the rape in this case) and its medical complications (whether physiological, psychological, or behavioral)."²²¹

The medical behavioral scientist's descriptive testimony about the psychological and emotional condition of a rape victim and the source of the victim's disturbances corresponds closely to an expert's testimony on rape trauma syndrome. The admission of the behavioral scientist's testimony thus strongly suggests that a witness need not be a medical doctor to be qualified to discuss the traumatic aftermath of rape.²²²

A second guideline for determining an expert's qualifications was settled by the court in *State v. Middleton*:²²³ an expert may be qualified to testify about behavioral patterns and psychological reactions by virtue of appropriate work experiences.²²⁴ In *Middleton*, two social workers who worked with abused children were qualified as experts to testify about the reactions of young victims of family sexual abuse in general. The social workers also testified about the similarities between the particular child's behavior and that of the typical victim.²²⁵ One social worker was a county juvenile counselor. The other was a child protective social worker.²²⁶ Both social workers had worked with sexually abused children; one estimated that she had worked with three to four hundred children who had been raped by family members.²²⁷ If the psychological make-up of the child victim of familial sexual abuse can be understood and described by persons through practical experience alone, it is consis-

²²¹ *Id.* at 1122.

²²² The holding in *Ibn-Tamas v. United States*, 407 A.2d 626, 637 (D.C. Ct. App. 1979) supports this assertion. The court held that a clinical psychologist who did not have a medical degree could not, as a matter of law, be disqualified from testifying as an expert on battered wife syndrome. The District of Columbia Court of Appeals based its ruling on the often-cited case, *Jenkins v. United States*, 307 F.2d 637 (1962). In *Jenkins*, the court held that the defense experts, who were psychologists without medical degrees, were qualified to diagnose the presence of specific mental illnesses even though they may not have been qualified to treat those illnesses. *Jenkins*, 307 F.2d at 644. See also *State v. Young*, slip op. (Kan. July 26, 1985) (psychologist is as competent as psychiatrist to diagnose rape trauma syndrome).

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

²²⁴ *Id.* at 430-34, 657 P.2d at 1216-18.

²²⁵ *Id.* at 430, 657 P.2d at 1216. But see *State v. Whitman*, 16 Ohio App. 3d 246, 475 N.E.2d 486 (1984) (social worker who had diagnosed only one case of rape trauma syndrome was unqualified to testify as expert about rape crisis syndrome).

²²⁶ *State v. Middleton*, 294 Or. at 432, 657 P.2d at 1217.

²²⁷ *Id.* at 433 n.6, 657 P.2d at 1218 n.6.

tent to allow the psychological and emotional condition of adult rape victims to be described by persons who have extensive experience working with these victims.

The cases that directly involve the qualifications of experts testifying on rape trauma syndrome and those that are analogous permit the following conclusion: a person's extensive experience working with rape victims or a person's education combined with some experience working with rape victims²²⁸ should establish the person as an expert for the purposes of testifying on rape trauma syndrome. Medical doctors, psychiatrists, and psychologists who treat or counsel rape victims should be included in this group of experts. Social workers and rape victim counselors who do not have degrees in clinical psychology or medicine, but who have extensive experience working with rape victims should also be qualified as experts. This experience gives them the understanding and insight necessary to assist the jury.

3. Reliability Requirement

When the judiciary recognizes the subject matter of an expert's testimony as being a proper subject for expert testimony, the proffered expert testimony need only meet the requirements of helpfulness and a qualified expert.²²⁹ When the judiciary has not recognized the proffered testimony as being a proper subject for expert testimony, as when the testimony is based on a newly discovered scientific principle or a newly developed scientific technique,²³⁰ courts require a showing that the technique or principle upon which

²²⁸ In *Jenkins v. United States*, 307 F.2d 637 (1962), the court stressed that "[t]he critical factor in respect to admissibility is the actual experience of the witness and the probable probative value of his opinion." *Id.* at 646. The approach of the court in *Jenkins* remains the approved approach of courts today despite the intervening enactment of the Federal Rules of Evidence. See *United States v. Tesfa*, 404 F. Supp. 1259, 1273 (E.D. Pa. 1975), *aff'd*, 544 F.2d 138 (1976), *cert. denied*, 430 U.S. 910 (1977); J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[04] at 702-23 to 25.

Commentators considering the qualifications that should be required of psychiatrists and psychologists who testify in insanity defense cases, civil commitment cases, and sentencing hearings have stressed the need for recent, relevant, and extensive clinical experience. Bonnie & Slobogin, *supra* note 132, at 457; Morse, *Crazy Behavior*, *supra* note 132, at 622.

²²⁹ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[03] at 702-15.

²³⁰ For examples of such principles or techniques see *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979) (sound spectrometry); *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978) (forward looking infrared system); *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (neutron activation analysis); *United States v. Hearst*, 412 F. Supp. 893 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (psycholinguistics); *Chatom v. State*, 348 So. 2d 828 (Ala. Crim. App. 1976), *rev'd*, 348 So. 2d 838 (Ala.), *acq.* 348 So. 2d 843 (Ala. Crim. App. 1977) (atomic absorption).

the testimony is based is sufficiently reliable that it will increase the accuracy of the factfinder's determination.²³¹ Federal Rule of Evidence 702 does not state explicitly the standard by which reliability must be measured, nor does the Advisory Committee's Note explain the appropriate standard. In the absence of clear direction from the Federal Rules, courts have taken two approaches to determine whether expert testimony is sufficiently reliable to be admissible. Courts have applied the "general acceptance" test²³² established in *Frye v. United States*²³³ or they have applied a balancing test for admissibility.²³⁴

The first test for reliability of scientific evidence, the general acceptance test, was introduced in a decision rejecting the admissibility of the results of a lie detector examination.²³⁵ In *Frye v. United States*,²³⁶ the court found that the accuracy of the lie detection device had not received adequate recognition from physiological and psychological authorities to produce admissible evidence.²³⁷ The court reasoned that:

[j]ust 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 estab-

²³¹ J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[03] at 702-15.

²³² See, e.g., *United States v. Hendershot*, 614 F.2d 648 (9th Cir. 1980)(expert testimony based on shoeprints was shown to be generally accepted among crime technicians); *United States v. Brady*, 595 F.2d 359 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979)(expert testimony on hair comparisons done by optical microscope must be in conformity with generally accepted explanatory theory); *United States v. Kilgus*, 571 F.2d 510 (9th Cir. 1978)(Court stated that forward looking infrared system is not generally accepted by scientific community as a means of identifying remote objects); *United States v. Brown*, 557 F.2d 541, 559 (6th Cir. 1977)(court found that ion microprobiic analysis of human hair has not reached level of general acceptance in the field); *United States v. McDaniel*, 538 F.2d 408 (D.C. Cir. 1976)(voiceprint evidence not admissible for failing to meet general acceptance test).

²³³ 293 F. 1013 (D.C. Cir. 1923)(court rejected admissibility of results of a simple lie detection device because device had not gained general acceptance among physiological or psychological authorities).

²³⁴ See, e.g., *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979) (court balanced reliability and helpfulness of evidence against the tendency of the evidence to mislead or confuse the jury, or to be unfairly prejudicial); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975)(relevant scientific evidence should be admitted unless exaggerated popular opinion of the accuracy of the technique will make its use prejudicial or likely to mislead the jury). See also J. WEINSTEIN & M. BERGER, *supra* note 101, ¶ 702[03] at 702-17; Note, *Expert Testimony*, *supra* note 103, at 780.

²³⁵ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

²³⁶ *Id.*

²³⁷ *Id.* at 1041.

lished to have gained general acceptance in the field in which it belongs.²³⁸

The *Frye* test for admissibility, thus, is whether a novel scientific technique or principle is generally accepted by the relevant scientific community.²³⁹ Under the *Frye* test, three factors must be determined: (1) the relevant scientific community; (2) the underlying principle or technique; and (3) the general acceptance of the underlying principle or technique within the relevant scientific community.²⁴⁰ Determining each of these factors is problematic. Questions arise as to whether the relevant scientific community is limited to the subspecialty within a field that has "direct and empirical" experience with the underlying principle or technique, or whether a broader group of scientists may be polled to determine general acceptance.²⁴¹ How to define the degree of acceptance that constitutes "general acceptance" is unclear.²⁴² Choosing the principles or techniques that must be generally accepted may be difficult.²⁴³

Although most courts use the *Frye* test,²⁴⁴ the test is criticized sharply by some commentators²⁴⁵ and abandoned in favor of other

²³⁸ *Id.*

²³⁹ See Giannelli, *The Admissibility of Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980); see also Note, *Expert Testimony, supra* note 103, at 775-76.

²⁴⁰ Giannelli, *supra* note 239, at 1205-15.

²⁴¹ See *People v. Williams*, 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (1958); *Commonwealth v. Lykus*, 367 Mass. 191, 327 N.E.2d 671 (1975) (defining the relevant scientific community as being subspecialty with direct and empirical experience with the underlying principle and technique); Giannelli, *supra* note 239, at 1210.

²⁴² Courts have not defined precisely what constitutes general acceptance. "For example, one court has defined general acceptance as 'widespread; prevalent; extensive though not universal.' (quoting *United States v. Zeigler*, 350 F. Supp. 685, 688 (D. D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972)). Another court has conceded that 'a degree of scientific divergence of view is inevitable,' without elaborating on how much divergence would be dispositive (quoting *Commonwealth v. Lykus*, 367 Mass. at 204 n.6, 327 N.E.2d at 678 n.6)." Giannelli, *supra* note 239, at 1211.

²⁴³ "It is unresolved whether the *Frye* standard requires general acceptance of the scientific technique or of both the underlying principle and the technique applying it." Giannelli, *supra* note 239, at 1211.

²⁴⁴ The *Frye* test of "'general acceptance' in the scientific community has come to be the standard in almost all of the courts in the country which have considered the question of the admissibility of scientific evidence." *Reed v. State*, 283 Md. 374, 382, 391 A.2d 364, 368 (1978). See also *United States v. Alexander*, 526 F.2d 161, 163 n.3 (8th Cir. 1975); Giannelli, *supra* note 239, at 1205.

²⁴⁵ See, e.g., 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 105, at 821-22 (*Frye* test is overly conservative); Giannelli, *supra* note 239; McCORMICK, *supra* note 67, § 203 at 491 (general acceptance is a proper condition for taking judicial notice of facts but should not be a criterion for the admissibility of evidence).

approaches by some courts.²⁴⁶ An alternative to the *Frye* general acceptance standard is a balancing test for admissibility that weighs the probative value, materiality, and reliability of the scientific evidence against its tendency to mislead, prejudice, or confuse the jury.²⁴⁷ This balancing test involves essentially the same factors as the balancing test under Rule 403, discussed previously.²⁴⁸ The test focuses on the reliability of the scientific evidence. If the evidence is not reliable, it will have no probative value and will have no relevance.²⁴⁹ The counterweight to the probative value of the evidence, as in the Rule 403 balancing test, is the danger of misleading the jury by the aura of infallibility surrounding scientific evidence.²⁵⁰ Under the balancing approach, several decisions have established that it is unnecessary to show the absolute certainty or

²⁴⁶ In *State v. Hall*, 297 N.W.2d 80, 84-85 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981), the court explained its reasons for rejecting the *Frye* test:

(1) Such a rule imposes a standard for admissibility not required of other areas of expert testimony, *McCORMICK*, *supra* § 203, at 488-89. (2) It is inconsistent with modern concepts of evidence, such as embodied in the Federal Rules of Evidence, which provide that '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine the fact in issue, a witness may testify thereto in the form of an opinion or otherwise.' *FED. R. EVID.* 702. . . . (3) Despite its apparent simplicity, distinguishing 'scientific' evidence from other areas of expert testimony is a difficult determination in many instances. *McCORMICK*, *supra* § 203, at 490. The instant case illustrates this difficulty of classifying evidence as scientific or non-scientific. The defendant says the study of blood flight characteristics is itself a science. The witness, on the other hand, testified it was based primarily upon physics and mathematics, which impart accuracy and predictability to the study. (4) 'Acceptance in the scientific community' is a nebulous concept; as it has been said, 'court records are full of the conflicting opinions of doctors, engineers and accountants, to name just a few of the legions of expert witnesses,' *United States v. Stifel*, 433 F.2d 431, 438 (6th Cir. 1970), *cert. denied*, 401 U.S. 994, 91 S. Ct. 1232, 28 L.Ed.2d 531 (1971) (neutron activation analysis evidence admitted), and '[i]n testing for admissibility of a particular type of scientific evidence, whatever the scientific 'voting' pattern may be, the courts cannot in any event surrender to scientists responsibility for determining the reliability of that evidence.' *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (spectrographic voice-identification evidence admitted).

Id.; see also *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); *Coppolino v. State*, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968), *cert. denied*, 399 U.S. 927 (1970); *cf.* *United States v. Addison*, 498 F.2d 741, 743 (D.C. Cir. 1974) (*Frye* test applied but criticized for being difficult to apply and for postponing the use of reliable evidence until general acceptance can be established).

²⁴⁷ *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1976); *United States v. Alexander*, 526 F.2d 161, 164 (8th Cir. 1975); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

²⁴⁸ See *supra* text accompanying notes 99-152.

²⁴⁹ See *United States v. Ridling*, 350 F. Supp. 90, 94-95 (E.D. Mich. 1972); *United States v. DeBetham*, 348 F. Supp. 1377, 1384 (S.D. Cal.), *aff'd*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973); *State v. Williams*, 388 A.2d 500 (Me. 1978); *Giannelli*, *supra* note 239, at 1235.

²⁵⁰ *Giannelli*, *supra* note 239, at 1237.

infallibility of the expert's testimony to establish the testimony's probative value.²⁵¹ On the opposite side of the balance must be considered the effectiveness of cross-examination at pointing out weaknesses in the testimony and the effectiveness of limiting instructions at preventing the jury from unjustifiably relying upon or being misled by the expert's testimony.²⁵²

The courts that have considered the reliability of expert testimony regarding rape trauma syndrome have arrived at varying conclusions. These courts, however, have provided little insight into the standards of reliability and general acceptance they applied, or the factors they balanced to arrive at their conclusions. The Kansas Supreme Court in *State v. Marks*²⁵³ essentially adopted the *Frye* general acceptance test by requiring that rape trauma syndrome testimony be "generally accepted as reliable within the expert's particular scientific field"²⁵⁴ before receiving it in evidence at trial. The court concluded that "an examination of the literature clearly demonstrates that the so-called 'rape trauma syndrome' is generally accepted to be a common reaction to sexual assault."²⁵⁵ The opinion does not identify in which field rape trauma syndrome must be generally accepted as reliable, nor does it specify the exact extent to which rape trauma syndrome was found to be accepted. The court did not state whether rape trauma syndrome's reliability as evidence that a forcible rape took place was generally accepted or whether only rape trauma syndrome's existence as a common reaction to a sexual assault was generally accepted.

In an opinion reaching the opposite conclusion, the Minnesota Supreme Court rejected the reliability of rape trauma syndrome as a scientific test to determine whether a rape has occurred.²⁵⁶ Without explicitly adopting either the *Frye* general acceptance test or a

²⁵¹ See *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 438 U.S. 1117 (a scientific technique unable to garner any support would have no probative value); *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1976); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

²⁵² Giannelli, *supra* note 239, at 1239-45; Note, *Expert Testimony*, *supra* note 103, at 780.

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

²⁵⁴ *Id.* at 654, P.2d at 1299.

²⁵⁵ *Id.* The court reviewed the following books to verify the general acceptance of rape trauma syndrome: S. McCOMBIE, *THE RAPE CRISIS INTERVENTION HANDBOOK* 124-26 (1980); *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* §§ 21.1d, 24.15, at 1519, 1804-05 (Kaplan, Freedman & Sadock 3d ed. 1980); C. WARNER, *RAPE AND SEXUAL ASSAULT* 145-49 (1980); A. BURGESS & L. HOLMSTROM, *RAPE: CRISIS AND RECOVERY* 35-47 (1979); S. KATZ & M. MAZUR, *UNDERSTANDING THE RAPE VICTIM* 215-31 (1979); E. HILBERMAN, *THE RAPE VICTIM* 36 (1976); A. BURGESS & L. HOLMSTROM, *RAPE: VICTIMS OF CRISIS* 37-51 (1974).

²⁵⁶ *State v. Saldana*, 324 N.W.2d at 229-30.

balancing test with reliability as a weighted factor, the Minnesota Supreme Court concluded that "[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred. The 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."²⁵⁷ Aside from the facts that the characteristic symptoms of rape trauma syndrome may follow any psychologically traumatic event and may or may not appear in a given individual's case,²⁵⁸ the court provided no support for its position that expert testimony on rape trauma syndrome will not be admissible until further evidence of the scientific accuracy of syndrome diagnoses can be established.²⁵⁹ Thus, these courts have not provided clear rationales for their decisions to accept or reject the reliability of rape trauma syndrome. Nor have they provided clear guidelines for testing the reliability of rape trauma syndrome.

A few courts have adopted positions that create a middle ground between the Minnesota and Kansas conclusions. These courts concede that rape trauma syndrome is generally accepted as a common reaction to rape within the general scientific community within which the syndrome arose.²⁶⁰ They conclude, however, that rape trauma syndrome is generally accepted only as a counseling or therapeutic tool, not as a reliable method of proving that a rape has occurred.²⁶¹ The California Supreme Court explains that rape trauma syndrome was developed by professional rape counselors to "identify, predict and treat emotional problems" rather than to verify the truth of the alleged victims.²⁶² These courts, therefore, reject the admissibility of expert testimony on rape trauma syndrome to prove that a rape occurred.²⁶³

Courts that examine the reliability of rape trauma syndrome under the *Frye* general acceptance test or a balancing test may be misapplying these tests.²⁶⁴ Close scrutiny of expert testimony's reliability is necessary only when the judiciary has not recognized that

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 229-30.

²⁵⁹ *Id.*

²⁶⁰ *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984); *State v. Taylor*, 663 S.W.2d 235, 237 (Mo. 1984).

²⁶¹ *People v. Bledsoe*, 36 Cal. 3d at 249, 251, 681 P.2d at 300, 301, 203 Cal. Rptr. at 459, 460; *State v. Taylor*, 663 S.W.2d at 240.

²⁶² *People v. Bledsoe*, 36 Cal. 3d at 249, 681 P.2d at 300, 203 Cal. Rptr. at 459.

²⁶³ The Missouri Supreme Court reached its conclusion by a balancing test. The court weighed the general acceptance of the reliability of the testimony against its tendency to create undue prejudice. *State v. Taylor*, 663 S.W.2d at 239, 240.

²⁶⁴ See *Bonnie & Slobogin*, *supra* note 132, at 464-65 n.121.

the foundation of the testimony is a proper subject for expert testimony.²⁶⁵ The foundation of rape trauma syndrome—clinical psychology—has long been recognized as a proper subject for expert testimony in criminal trials.²⁶⁶

Moreover, the types of subjects to which the *Frye* general acceptance test and the balancing test have been applied support the conclusion that the tests should not be applied to rape trauma syndrome. Polygraph evidence,²⁶⁷ sound spectrometry,²⁶⁸ neutron activation analysis,²⁶⁹ atomic absorption,²⁷⁰ and remote electromagnetic sensing²⁷¹ are some of the novel scientific techniques to which these tests are applied. These techniques are introduced to test the truth of a hypothesis through a controlled experiment involving technological equipment or chemicals. Experts then testify about the results produced from the experiment. Jurors typically will have no understanding of the scientific process that occurs during the experiment and, therefore, will have no basis for determining whether the results of the experiment are valid, or whether the expert's conclusions based on the results are justified. In these situations, a very real danger exists that laymen will be overly impressed by the accuracy of the expert's conclusions.

The testimony concerning rape trauma syndrome does not present the same problems for juror evaluation. An expert does not base testimony about rape trauma syndrome on the results of a mysterious experiment. Rather, experts base their testimony on the results of face-to-face interviews with rape victims.²⁷² Because no mysterious testing procedures are involved, jurors can assess the merits of the testimony on rape trauma syndrome in general and the merits of the expert's description of the complainant's emotional and psychological state. In fact, jurors may have an opportunity to

²⁶⁵ See *supra* text accompanying note 229.

²⁶⁶ See *United States v. Bilson*, 648 F.2d 1238 (9th Cir. 1981) (psychiatrist permitted to testify about the results of psychological testing); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc); *United States v. McNeil*, 434 F.2d 52 (D.C. Cir. 1970) (per curiam); *Jenkins v. United States*, 307 F.2d 637 (1962) (Burger, J., concurring) ("[t]he issue is not now and never was whether a psychologist's testimony is admissible in litigation where 'sanity' is at issue. Such testimony has long been admissible").

²⁶⁷ *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

²⁶⁸ *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974) (technique involves comparison of visual images produced by sound recordings).

²⁶⁹ *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

²⁷⁰ *Chatom v. State*, 348 So. 2d 828 (Ala. Crim. App. 1976), *rev'd*, 348 So. 2d 838 (Ala.), *acq.*, 348 So. 2d 843 (Ala. Crim. App. 1977).

²⁷¹ *United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

²⁷² See *supra* text accompanying notes 70, 144.

make their own judgments about the complainant through their own observations at trial.

If courts, nevertheless, decide that a *Frye* test of general acceptance within a scientific field applies to expert testimony on rape trauma syndrome, courts should focus on the general acceptance of clinical psychology. It is the methods of clinical psychology that are used to detect the presence of rape trauma syndrome.²⁷³ When considering the admissibility of expert testimony on battered wife syndrome,²⁷⁴ a District of Columbia court, in *Ibn-Tamas v. United States*, recognized that the inquiry of the *Frye* test should be focused on the general acceptance of the methodology used rather than the general acceptance of the subject matter studied.²⁷⁵ The court thus focused on the acceptance of clinical psychology rather than the acceptance of the battered wife syndrome.

The court in *Ibn-Tamas* illustrated its interpretation of the *Frye* general acceptance requirement by describing the results of the *Hearst* cases.²⁷⁶ In the first *Hearst* case, the court admitted psychiatric testimony about the impact of kidnapping and incarceration on the defendant's later mental state when she allegedly committed a crime. The expert's qualifications and methodology apparently were not questioned. In *Hearst II*, however, the psycholinguistics methodology was challenged and held by the court to be insufficiently established to warrant admissibility. These two decisions are instructive on the kinds of expert testimony that are and are not admissible and on the proper—and limited—role of the *Frye* test.²⁷⁷ Though experts may disagree as to the precise components of battered wife syndrome or as to its actual consequences, the existence of the syndrome is based on research conducted in accordance with generally accepted methods of clinical psychology.²⁷⁸ The court in *Ibn-Tamas* thus ruled that as a matter of law, the methodology used to identify and define battered wife syndrome—the methodology of

²⁷³ See *supra* text accompanying notes 144, 145.

²⁷⁴ "Battered wife syndrome" describes the pattern of physical and psychological abuse inflicted upon a woman by her mate. Comment, *Expert Testimony on Battered Wife Syndrome*, *supra* note 88, at 350.

²⁷⁵ "[T]he relevant question here is whether Dr. Walker's [the expert's] methodology for identifying and studying battered women has such general acceptance—not whether there is, in addition, a general acceptance of the battered woman concept derived from that methodology." *Ibn-Tamas v. United States*, 407 A.2d at 638.

²⁷⁶ *United States v. Hearst*, 412 F. Supp. 889 (N.D. Cal. 1976)(*Hearst I*); *United States v. Hearst*, 412 F. Supp. 893 (N.D. Cal. 1976)(*Hearst II*).

²⁷⁷ *Ibn-Tamas v. United States*, 407 A.2d at 637-38.

²⁷⁸ The court in *Ibn-Tamas* determined that the *Frye* test should be applied to make a "state of the art" inquiry rather than to make an inquiry into the amount of substantive knowledge available. *Ibn-Tamas v. United States*, 407 A.2d at 638.

clinical psychology—met the requirements of general acceptance.²⁷⁹

Likewise, the existence of rape trauma syndrome is based on research conducted in accordance with generally accepted methods of clinical psychology.²⁸⁰ Like battered wife syndrome, rape trauma syndrome describes and explains victim behavior. Unlike testimony based on novel scientific techniques, battered wife syndrome and rape trauma syndrome testimony do not require the jury to evaluate conclusions without being able to understand the scientific underpinnings of the conclusions. Jurors can understand the physical processes these experts use to arrive at the conclusions.

Even if a *Frye* general acceptance test is applied to rape trauma syndrome rather than to clinical psychology, the results of such a test should favor the admission of the testimony. Courts allow general acceptance to be established through expert testimony, scientific and legal writings, and judicial opinions.²⁸¹ There appears to be no dispute in the fields of clinical psychology, psychiatry, medicine, and rape counselling that rape can have traumatic emotional and psychological impacts on victims.²⁸² There also seems to be no dispute that victims' reactions fall into patterns and that these patterns include a wide range of victim responses.²⁸³ In fact, the variety of victim responses and the fact that not all victims will experience the same reactions are well-documented features of rape trauma syndrome.²⁸⁴ The mental health field thus has generally accepted the premises underlying rape trauma syndrome testimony—that rape can have traumatic emotional and psychological consequences, that these consequences are observable, and that patterns of behavior are identifiable. Judicial opinions also have recognized consistently the existence of a rape trauma syndrome.²⁸⁵ Because there does not appear to be any disagreement as to the existence of rape trauma syndrome, it is unnecessary to consider which particular subgroup of mental health professionals must agree upon its existence or what level of acceptance constitutes general acceptance.

²⁷⁹ *Id.* at 638-39.

²⁸⁰ *See supra* text accompanying notes 144, 145.

²⁸¹ *State v. Cavallo*, 88 N.J. 508, 521, 443 A.2d 1020, 1026 (1982); *Giannelli, supra* note 239, at 1215.

²⁸² *See supra* text accompanying notes 44-53.

²⁸³ *See supra* text accompanying notes 23-53.

²⁸⁴ *See supra* text accompanying notes 23-53.

²⁸⁵ *See, e.g., State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *White v. Violent Crimes Compensation Board*, 76 N.J. 368, 387-88, 388 A.2d 206, 216 (1978); *In the Matter of Pittsburgh Action Against Rape*, 494 Pa. 15, 38-43, 428 A.2d 126, 138-40 (1981) (Larsen, J., dissenting);

A balancing test for admissibility also should allow rape trauma syndrome testimony to be admitted. The discussion of Rule 403 involved the same balancing test, assuming the existence of the testimony's reliability.²⁸⁶ Although several standards are used to measure reliability,²⁸⁷ reliability may be established at trial by demonstrating general acceptance within the scientific community,²⁸⁸ or by producing experts to testify about the testimony's reliability.²⁸⁹ The level of reliability that must be demonstrated also varies,²⁹⁰ but some minimal level of support must be established.²⁹¹ Evidence unable to garner any support from the scientific community will be inadmissible.²⁹² As discussed previously, a strong showing can be made that there is general acceptance of rape trauma syndrome among mental health professionals and that it receives extensive support among mental health professionals and the judiciary. The use of clinical psychology methodology to observe and describe human behavior also receives extensive support among mental health professionals.²⁹³ Reliability, therefore, can be established; the previous balance in favor of admitting rape trauma syndrome testimony need not be disturbed.

Expert testimony on rape trauma syndrome thus satisfies the three-part admissibility requirement of Rule 702. Rape trauma syndrome testimony meets the helpfulness requirement because the testimony describes accurately the highly relevant emotional, behavioral, and psychological reaction of the complainant to the alleged rape; it also educates jurors about reactions of rape victims. The testimony fulfills the reliability requirement because both rape trauma syndrome and clinical psychology withstand scrutiny under the general acceptance test of *Frye* or the balancing test. And the third requirement, that of a qualified expert, can be fulfilled by a

²⁸⁶ See *supra* text accompanying notes 99-153.

²⁸⁷ See Note, *Expert Testimony*, *supra* note 103, at 786.

²⁸⁸ See *United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979); *United States v. Oliver*, 525 F.2d 731, 736 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976); *United States v. Franks*, 511 F.2d 25, 33 n.12 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975).

²⁸⁹ D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 389, at 662 (1979).

²⁹⁰ *State v. Catanese*, 368 So. 2d 975, 983 (La. 1979)(evidence must be as reliable as other admissible evidence); *State v. Williams*, 388 A.2d 500, 504 (Me. 1978)(evidence must have sufficient reliability to make it relevant); *Reed v. State*, 283 Md. 374, 501, 391 A.2d 364, 427 (1978)(Smith, J., dissenting)(evidence admissible if some degree of reliability shown, or if not totally unreliable).

²⁹¹ *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

²⁹² *Id.*

²⁹³ See *supra* text accompanying notes 19-23.

physician, psychologist, or counselor who has the requisite experience working with rape victims.

III. CONCLUSION

Expert testimony on rape trauma syndrome should be admissible in rape trials where the complainant's consent is at issue. The testimony provides highly relevant information on the complainant's emotional state following the alleged rape. The experts providing information can be trained and experienced observers of post-rape emotional and psychological states and, therefore, are eminently qualified to assist jurors in understanding the significance of a rape complainant's emotional and psychological state. Any danger of prejudice to the defendant from the admission of such testimony can be minimized by insisting that the experts are properly qualified, effective cross-examination, and appropriate limiting instructions.

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