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Jeffrey T. Waddle
Jeffrey.Waddle@chicagounbound.edu

Mark Parts
Mark.Parts@chicagounbound.edu

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Jeffrey T. Waddle† and *Mark Parts*††

Rape Trauma Syndrome (RTS) consists of the emotional, behavioral and physical symptoms that are common among victims of nonconsensual sexual intercourse.[1] RTS received attention first from the psychiatric community in the mid-1970s[2] and then from the legal community in the early 1980s.[3] Although its use in courtroom proceedings is not wholly accepted, the existence of RTS is undeniably often part of the aftermath of rape. "Rape is primarily an act of violence with sex as the weapon. Thus it is not surprising that the victim experiences a syndrome with specific symptomology as a result of the attack made upon her."[4] While the existence of RTS is today generally accepted, there are still difficulties with the use of evidence concerning RTS.

The most frequently discussed and most controversial use of RTS evidence is for the purpose of demonstrating lack of consent in a rape trial. Typically, the prosecution presents expert testimony about the presence of RTS in the victim's psychological profile. The presence of RTS suggests an incident of nonconsensual sexual intercourse. When deciding whether to admit testimony, a court will decide whether the expert testimony will help the jury reach a conclusion on a subject beyond its experience. A trial court will also weigh the expert testimony's probative value against whether the testimony will be prejudicial, confusing, or misleading to the jury.[5] While there is still substantial disagreement about ad-

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† A.B. 1986, Dartmouth College; J.D. Candidate 1990, University of Chicago.

†† B.A. 1983, Butler University; M.S. 1984, Northwestern University; J.D. Candidate 1990, University of Chicago.

[1] See Part I below for a complete medical and psychological description of RTS.

[2] The term "Rape Trauma Syndrome" was coined by Ann Wolbert Burgess and Linda Lytle Holmstrom in a report of their study of rape victims who were patients at Boston City Hospital's emergency room. Ann Wolbert Burgess and Linda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 Am J Psych 981 (1974).

[3] Kansas was the first state to allow the admission of RTS evidence. In *State v Marks*, 231 Kan 645, 647 P2d 1292 (1982), the Kansas Supreme Court upheld the admission of RTS evidence as relevant to the issue of consent.

[4] Burgess and Holmstrom, 131 Am J Psych at 982 (cited in note 2).

[5] See *State v Saldana*, 324 NW2d 227, 229 (Minn 1982). Note that the usual standard

missibility, both courts[6] and commentators[7] have provided exhaustive discussions of the scientific and legal issues involved in this threshold inquiry. Thus, this comment does not directly address the issue of admissibility. Instead, this comment discusses the consequences for the rape victim of allowing discovery and admission of RTS evidence and argues that the use of court-appointed experts could mitigate some of the negative effects that the procedures for admitting RTS evidence can have on the victim in a rape trial.

This comment has three parts. Part I examines RTS, how it is diagnosed, the controversy regarding its reliability, and its evidentiary significance. Part II analyzes the defendant's constitutional rights of access to and use of RTS evidence under the Due Process and Confrontation and Compulsory Process Clauses, as well as the

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for the admissibility of scientific evidence is the *Frye* test, first set out in *Frye v United States*, 293 F 1013 (DC Cir 1923). Under the *Frye* test, to be admissible scientific evidence must be derived from a scientific principle "sufficiently established to have gained general acceptance in the particular field in which it belongs." Id at 1014. In *Spencer v General Elec. Co.*, 688 F Supp 1072, 1076 (E D Va 1988), the court held that RTS evidence did not satisfy the *Frye* test, nor did it merit admission under the FRE 403 balancing test. For state cases applying the *Frye* test to RTS evidence, see *Saldana*, 324 NW2d at 230; *People v Bledsoe*, 203 Cal Rptr 450, 681 P2d 291, 297 (1984) (holding RTS was a therapeutic tool that did not meet the *Frye* test as a means of proving a rape had occurred); *People v Hampton*, 746 P2d 947, 955 (holding RTS failed to meet the *Frye* test). For a discussion of RTS and the *Frye* test, see David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 BC L Rev 1143, 1181-97 (1985).

[6] Other states besides Kansas in *Marks*, 647 P2d at 1299, allow admission of RTS evidence on the issue of consent. These states include Montana, *State v Liddell*, 211 Mont 180, 685 P2d 918, 923 (1984); Arizona, *State v Huey*, 145 Ariz 59, 699 P2d 1290, 1294 (1985); West Virginia, *State v McCoy*, 366 SE2d 731, 737 (W Va 1988); Maryland, *State v Allewalt*, 308 Md 89, 517 A2d 741, 752 (1986) (allowing RTS evidence under the name Post-Traumatic Stress Disorder, a tactic which could legitimately serve to combat an overvaluation problem). See also decisions from Pennsylvania, *Com. v Gallagher*, 353 Pa Super 426, 510 A2d 735, 744 (1986); and Colorado, *Hampton*, 746 P2d at 952, which allow RTS evidence to explain a delay in reporting a rape.

For cases barring admission of RTS evidence, see decisions from Minnesota, *Saldana*, 324 NW2d at 230; and Washington, *State v Black* 46 Wash App 259, 730 P2d 698, 701 (1986), aff'd en banc, 109 Wash 2d 336, 745 P2d 12 (holding RTS not well enough accepted in relevant scientific community to be generally accepted). See also cases from Missouri, *State v Taylor*, 663 SW2d 235, 240 (Mo 1984) (disallowing evidence using RTS terminology, but allowing evidence of trauma or stress); Michigan, *People v Pullins*, 145 Mich App 414, 378 NW2d 502, 505 (1985) (withholding judgment on RTS, but confirming the *Frye* test as the standard); and California, *Bledsoe*, 681 P2d at 297 (disallowing RTS evidence, but allowing testimony on emotional and psychological trauma).

[7] For analyses adopting opposite positions, compare McCord, 26 BC L Rev 1143 (cited in note 5) (advocating admissibility of RTS evidence) with Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 Va L Rev 1657 (1984) (advocating inadmissibility of RTS evidence).

defendant's statutory rights under rape shield laws. Part II concludes that the defendant has rights to discover and introduce negative RTS results only where the prosecution has introduced positive RTS results in the trial. Finally, Part III proposes the court appointment of a neutral expert, under the provisions of Federal Rule of Evidence 706, to minimize the harm to the victim when a party wishes to introduce RTS evidence at trial. This section of the comment argues that both the victim's and the defendant's interests would be properly protected through such a rule.

I. MEDICAL AND PSYCHOLOGICAL DESCRIPTION OF RTS

Researchers have divided RTS into two phases.[8] The first phase of RTS is known as the acute phase. It is marked by extreme fear. The victim sometimes openly expresses this fear and sometimes controls her observable reactions and appears calm.[9] Physical symptoms can include skeletal muscle tension, sleep disturbances, and gastrointestinal and genitourinary problems.[10] The second phase of RTS often begins two to three weeks after the attack.[11] This is the period when the victim attempts to reorganize her life. Women during this phase often develop specific fears connected with the events of the rape. For example, women who were raped in open spaces may develop a fear of the outdoors while those raped at home may develop a fear of indoors. These phobias are often accompanied by nightmares involving specific incidents of the rape. Many women move during this phase, change telephone numbers or take other steps to hide their identity. During the second phase of RTS, many women change their sexual behavior and attitudes.[12]

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[8] See, for example, Burgess and Holmstrom, 131 Am J Psych at 982 (cited in note 2). Some researchers have broken RTS into three stages, with the second stage consisting of a denial that the rape occurred. This is a transitional phase between the two major phases which are widely recognized. See Bonnie J. Buchele and James P. Buchele, *Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome*, 25 Washburn L J 26, 28 (1985).

[9] See Burgess and Holmstrom, 131 Am J Psych at 982 (cited in note 2), and *The Rape Victim in the Emergency Ward*, 73 Am J Nursing 1741, 1743 (1973).

[10] Burgess and Holmstrom, 131 Am J Psych at 982-83 (cited in note 2).

[11] Id at 982.

[12] Id at 984. See *In Matter of Pittsburgh Action Against Rape*, 428 A2d 126, 138 (Pa 1987) (Larsen dissenting). The dissent recounted the following, typical RTS experience:

> I experienced so much during those first two months: hurt, anxiety, anger, frustration, humiliation, and worst of all, the sense that I was having a nervous breakdown. I thought that my feelings were not normal. I couldn't even sleep with my husband—a man to whom I had been married for nine years. I couldn't understand what was happening. Would I ever be able to put this ordeal behind me?

Evidence of RTS is elicited primarily through the establishment of a patient/therapist relationship.[13] The psychological symptoms can be elicited through standard psychological examinations. The diagnostician would look for such factors as intrusive reexperiencing of the event (through dreams or flashbacks), a numbing of emotional responses, memory impairment or trouble concentrating, and avoidance of situations which recall the event.[14] Physical symptoms, such as acute startle reflex, can also be identified through a physical examination. All victims do not exhibit the same symptoms in the same order. Symptoms may vary as a result of conditions under which the rape occurred; such factors include the degree of violence involved in the rape and the victim's familiarity with the rapist.[15] This fact does not destroy the usefulness and validity of RTS to prove lack of consent. The fact that many physical ailments provoke a wide variety of symptoms in different patients does not create insuperable barriers to the physician's diagnosis.[16]

RTS can only be induced through a nonconsensual sexual incident.[17] There is, however, a related syndrome, Post-traumatic Stress Disorder (PTSD), which can be provoked by a variety of traumatic incidents.[18] Rare, traumatic incidents which can trigger

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See also Catharine A. MacKinnon, *Feminism Unmodified* 87 (Harvard University Press 1987).

[13] Buchele and Buchele, 25 Washburn L J at 38 (cited in note 8). One of the reasons courts have refused to admit RTS evidence in the past is that RTS is sometimes perceived as a therapeutic tool rather than as a fact-finding tool. See *Saldana*, 324 NW2d at 230. In *Bledsoe*, 681 P2d at 300-01, the court stated that RTS "does not consist of a relatively narrow set of criteria or symptoms whose presence demonstrates that the client or patient had been raped; rather . . . it is an 'umbrella' concept, reflecting the broad range of emotional trauma experienced by clients of rape counselors." One of the original uses of RTS, however, was to recognize that a woman had been raped when she did not voluntarily report it. See Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn L Rev 395, 449 (1985).

[14] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 238 (3d ed 1980) ("DSM-III"). Note that the factors listed in DSM-III apply to Post-traumatic Stress Disorder (PTSD). The relation between RTS and PTSD is explored in notes 17-24 and accompanying text.

[15] Massaro, 69 Minn L Rev at 429 (cited in note 13).

[16] Id at 429 n 148.

[17] Note, however, that victims of attempted rape may experience symptoms very similar to those suffered by rape victims. Becker, Skinner, Abel, Howell and Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 Victimology 106, 112 (1983).

[18] Some researchers classify RTS as simply a subset of PTSD. See Buchele, 25 Washburn L Rev at 29 (cited in note 8). Furthermore, some diagnosticians list rape as an event which can trigger PTSD. See DSM-III at 236 (cited in note 14). Some courts refer to RTS as PTSD; see *Allewalt*, 517 A2d at 748 ("RTS is the terminology used by some for a PTSD

the disorder include earthquakes, airplane crashes or torture.[19]

There are ways of pinpointing a rape as the source of a traumatic reaction, thereby ruling out other events as the cause. For example, the development of phobias related specifically to the circumstances surrounding an attack may suggest that a victim was raped.[20] Many women with RTS lose interest in sexual relations[21] and develop a fear of men, both of which would be unusual symptoms for people exposed to other forms of trauma.[22] In *Pittsburgh Action Against Rape*,[23] Judge Larsen described the unique nature of the trauma suffered by rape victims:

> The depth and range of emotional and psychological disturbance is not felt by the victims of most other crimes. Trauma is the natural consequence of *any* violent crime. However, many of the symptoms of rape trauma syndrome will not be experienced with any degree of regularity by victims of non-rape crimes. Little anguish over the role the non-rape victim might have played is likely (except, perhaps, for a feeling that one might have been careless or gullible). Rarely is a robbery, or even assault, victim traumatized over possible contributory behavior. Certainly no social rebuke is forthcoming for the usual non-rape victim—society will not look askance at that victim . . . .[24]

Despite these distinctive diagnostic aspects, there are two methodological problems with RTS evidence. The first arises in the case where the rape victim has been raped in the past, an unfortunately common occurrence.[25] One study has indicated that even four to six years after a rape, 26% of the victims had not recovered from or adjusted to the assault.[26] Because the presence

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subset in which the trauma is rape").

[19] DSM-III at 236 (cited in note 14).

[20] See note 12.

[21] Burgess and Holmstrom, 131 Am J Psych at 984 (cited in note 2).

[22] Massaro, 69 Minn L Rev at 447 (cited in note 13).

[23] 428 A2d 126.

[24] Id at 140.

[25] Concerning the frequency of multiple rapes, see Ruch and Hennessy, *Sexual Assault: Victim and Attack Dimensions*, 7 Victimology 94, 103 (1982). While the authors focused on the interaction of various life stresses with the stress generated by a rape, it is important to note that 17% of the subjects were victims of earlier sexual assaults. Other studies have estimated the frequency of multiple rapes to more than 60%. See P. Frazier and E. Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 Law and Human Behavior 101, 109 (1988).

[26] Ann Wolbert Burgess and Linda Lytle Holstrom, *Rape: Crisis & Recovery* 407-48

of RTS in a victim of a prior rape could result from the first rape rather than the incident at trial, it may not prove the absence of consent in a particular instance. Second, some researchers have argued that although the presence of RTS indicates that a person has been a victim of rape, the absence of the syndrome does not necessarily indicate that a person has not been raped. These researchers feel that because a significant percentage of rape victims do not exhibit symptoms of RTS,[27] the absence of RTS does not necessarily indicate that a woman has not been raped.[28] Others have argued that because most victims of rape do show symptoms of RTS, the fact that RTS is not present is important evidence that the woman has not been raped.[29]

II. Defendant's Constitutional and Statutory Rights to Use RTS Evidence

A. Constitutional Rights

1. *Due Process*

The Supreme Court has stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[30] Due process concerns are implicated by the use of RTS evidence when the prosecution seeks to restrict pretrial examination of the complaining witness regarding RTS-related issues or limit discovery and use of the state's RTS evidence.

There are two basic scenarios involving the use of RTS evidence that give rise to due process considerations. If an examination for RTS is positive, due process may demand that the defendant have some effective means of rebutting the testimony of the prosecution's expert. If an examination for RTS is negative, the defendant may seek to discover this fact and the Due Process Clause may provide him a means to do this. There is uncertainty in both situations, however. In the former, while there is a clear tradition of allowing defendants the opportunity to have their own

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(1979), cited in Massaro, 69 Minn L Rev at 426 n 133 (cited in note 13).

[27] See Burgess and Holmstrom, 131 Am J Psych at 983 (cited in note 2) (14 out of 90 rape victims in the Boston City Hospital study did not exhibit RTS symptoms).

[28] See Massaro, 69 Minn L Rev at 455 n 247 (cited in note 13); *State v McQuillen*, 236 Kan 161, 689 P2d 822, 830 (1984) ("[t]here are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim").

[29] See McCord, 26 BC L Rev at 1210-11 (cited in note 5).

[30] *Chambers v Mississippi*, 410 US 284, 294 (1973).

experts rebut the testimony of prosecution witnesses, there is confusion concerning exactly what RTS evidence proves and to what degree the defendant is entitled to rebut it. In the latter case, when the prosecution does not seek to enter evidence concerning RTS, the defendant's right to discover this evidence and enter it himself will depend upon how significant the evidence might have been.

When prosecutors use expert testimony against defendants, there is a long history of courts allowing the defendant an opportunity to rebut the testimony when, for example, the defense claims the right to answer the prosecution's expert testimony with its own expert testimony.[31] Thus, when the prosecution plans to use expert testimony suggesting the presence of RTS, this long-standing principle would suggest that the defendant may present his own RTS expert to rebut. In *State v McQuillen*,[32] the Kansas Supreme Court announced, without citing any particular authority, that where the state introduces expert testimony on RTS the defense may offer its own expert witness in rebuttal, in addition to cross-examining the prosecution's expert witness.[33] The court wrote, "[w]hen consent to intercourse is the issue and the state's expert has testified that the victim is suffering from rape trauma syndrome . . . [t]he defendant may bring in his own expert witness in rebuttal to testify that the victim is not suffering from rape trauma syndrome."[34]

The New Mexico Supreme Court confronted a similar issue in *State v Garcia*,[35] although the case did not specifically involve RTS evidence. In *Garcia*, the prosecution claimed that the complainant suffered mental anguish as a result of the alleged rape.[36] The allegation that the victim suffered a personal injury (mental anguish) elevated the charge to a second degree from a third degree felony.[37] The New Mexico Supreme Court ruled that once the prosecution made mental anguish an essential element of the crime charged, the complaining witness' mental condition was relevant to

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[31] See *United States v Caserta*, 199 F2d 905, 908-09 (3d Cir 1952) (defendant in a tax evasion case wrongfully denied the opportunity to have his expert rebut government's expert testimony); *State v Fendler*, 127 Ariz 458, 622 P2d 23, 33 (1980). See also Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecutions*, 33 Am U L Rev 417, 459 (1984).

[32] 689 P2d 822.

[33] Id at 830.

[34] Id.

[35] 94 NM 583, 613 P2d 725 (1980).

[36] 613 P2d at 727.

[37] Id.

the charge, and the defendant had the right to conduct a psychological examination of the complaining witness, subject to protective orders in conformity with the rape shield law.[38]

It should be noted, however, that not all states have ruled that the defense can rebut the prosecution's RTS evidence through a psychiatric examination of its own. In *State v Liddell*,[39] for example, the Montana Supreme Court held that even though the prosecution had introduced RTS evidence into the trial, the defense could cross-examine the prosecution's expert but could not examine the victim with its own psychologist.[40] Using rather confusing reasoning, the court held that because the *act* of rape was at issue (rather than the victim's state of mind), the trial court was not required to order a psychological examination.[41]

Thus, when the prosecution places RTS evidence into issue, courts may allow the defense to have its own psychiatrist examine the victim. This is less true where the prosecution does not offer RTS evidence or the complaining witness's mental condition is in issue. The *McQuillen* court refused to allow the defense to present RTS evidence where the prosecution had not introduced evidence of RTS. The court concluded that negative test results had no probative value because no meaning could be attached to negative test results.[42]

An alternative line of reasoning supporting the *McQuillen* approach is founded on the trial court's discretion in ordering mental examinations of witnesses.[43] Under this theory, the defendant has no absolute right to a mental examination of an opposing witness. It is within the trial court's equitable discretion to compel such an examination; the power to order the examination should be exercised sparingly given its intrusiveness. Once the prosecution offers RTS evidence, however, fundamental fairness requires that the defendant be afforded an opportunity to rebut that evidence through his expert's examination.

When the results of an examination for RTS evidence are negative, the prosecutor will presumably not enter the results into evi-

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[38] Id at 729.

[39] 211 Mont 180, 685 P2d 918 (1984).

[40] Id at 923-24. The *Liddell* court also reasoned that "[t]o hold otherwise would permit the defense to try the victim of the crime and divert the jury's attention from the primary issue—guilt or innocence of the defendant." Id at 924. See text accompanying notes 69-77.

[41] Id at 924.

[42] 689 P2d at 830.

[43] McCord, 26 BC L Rev at 1211 (cited in note 5), citing *United States v Roach*, 590 F2d 181 (5th Cir 1979), and *United States v Jackson*, 576 F2d 46 (5th Cir 1978).

dence. The defendant might want this evidence admitted giving rise to the issue of whether, according to the Due Process Clause, the prosecution must furnish the evidence to the defendant. In a rape trial where the only issue is consent, if sufficient weight is accorded a negative finding, then the evidence might well be considered exculpatory. The Supreme Court has ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ."[44]

The Supreme Court's latest explanation of the prosecution's duty to disclose came in *United States v Bagley*.[45] In *Bagley*, a plurality held that both the failure to disclose exculpatory evidence after a specific request and the failure to disclose exculpatory evidence after no request (or a general request) would constitute a due process violation only if there was a reasonable probability that, had the evidence come in, it would have altered the outcome of the trial.[46]

Whether a negative finding of RTS would undermine the outcome would then depend on the circumstances of the case, including what other evidence there was concerning the issue of consent. At least one court has found that negative RTS evidence, unlike positive RTS evidence, is inadmissible because it is irrelevant.[47] If the only evidence on the issue of consent, apart from relatively credible but contradictory testimony by the defendant and the victim, is a negative RTS examination it is quite conceivable that entering the evidence would undermine the outcome of a conviction. This would provide the defendant the right to obtain and use this evidence, and suggests again the need for a way to use RTS evidence that minimizes harm to the victim.

2. *Confrontation Clause*

The Sixth Amendment to the Constitution guarantees a defendant in a criminal prosecution the right "to be confronted with the witnesses against him . . . ."[48] In the RTS context, the defense

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[44] *Brady v Maryland*, 373 US 83, 87 (1963).

[45] 105 SCt 3375 (1985).

[46] Id.

[47] *McQuillen*, 689 P2d at 830. The court wrote:

> Nor may a defendant present evidence that the victim was not suffering from rape trauma syndrome where the state has not first introduced evidence that the victim was suffering from rape trauma syndrome. There are no statistics to show that there is any value to a negative finding that the rape trauma syndrome is not exhibited by the alleged victim.

See also notes 27-28 and accompanying text.

[48] US Const, Amend VI. See *Pennsylvania v Ritchie*, 107 SCt 989, 998 (1987) ("[t]he

could assert Confrontation Clause rights to: (1) effectively cross-examine the prosecution's witnesses; (2) have its own psychiatrist examine the victim for RTS; and (3) obtain psychiatric information and reports in preparation for cross-examination at trial.[49]

In *Chambers v Mississippi*,[50] however, the Supreme Court indicated that the right to confront and cross-examine was not absolute but sometimes limited by competing interests in the trial.[51] The Court has not clearly defined under what circumstances competing interests outweigh Confrontation Clause rights. In RTS cases, the rape victim's privacy rights are weighed against the defendant's Confrontation Clause rights of access to RTS evidence. The Court held in *Davis v Alaska*,[52] a decision with some analogies to the privacy concerns in a rape case, that the state's interest in keeping private a witness' record as a juvenile offender could not overcome the defendant's Confrontation Clause rights. The Court noted that "[w]hatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness."[53]

But in a rape trial, there are at least two reasons why the victim's privacy interest is stronger than the privacy interest of a juvenile offender acting as a witness. First, when a rape victim's privacy is invaded at trial, the use of the evidence elicited directly from the witness benefits the defendant by strengthening his consent defense. This use is more serious and damaging than adverse inferences regarding credibility of a witness. Second, much more than the "temporary embarrassment" mentioned in *Davis* is at stake when a rape victim is forced to reveal her past sexual history on the stand. As Susan Estrich has asserted, "[w]hat makes rape . . . different from other crimes is that rape is a sexual violation—a violation of the most personal, most intimate, and most offensive kind."[54] It therefore seems reasonable for a court to find that a

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Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination").

[49] See *Pittsburgh Action Against Rape*, 428 A2d at 133 (court held rape crisis center in contempt for refusing to turn over a report containing details of complainant's rape and subsequent request for counseling services).

[50] 410 US 284 (1973).

[51] Id at 295.

[52] 415 US 308 (1974).

[53] Id at 319-20.

[54] Susan Estrich, *Real Rape* 103-04 (Harvard University Press, 1987).

victim's privacy interests, coupled with society's interest in encouraging more rape prosecutions, trumps the defendant's Confrontation Clause rights.

There are, nevertheless, two contexts in which the victim's privacy rights must be balanced against the defendant's Confrontation Clause rights in RTS cases: when the defense seeks to have its own psychiatrist examine the victim for RTS and when it seeks to obtain psychiatric information and reports in preparation for cross-examination at trial. Because the former was explored earlier as part of closely-related due process considerations,[55] this discussion will concentrate on the latter problem of discovery of RTS evidence.

In a recent case, *Pennsylvania v Ritchie*,[56] the Supreme Court considered a defendant's pretrial rights under the Confrontation Clause. A plurality ruled that the Confrontation Clause granted only a trial right, not a pretrial right.[57] In *Ritchie*, a father was prosecuted for incest and the rape of his 13-year-old daughter. The prosecution sought to keep the defendant from reading the victim's file compiled by a child abuse agency. The Court found that because the defense was able to fully cross-examine the witness at trial, no Confrontation Clause violation occurred.[58] The plurality noted that extending the effect of the Confrontation Clause in the manner the defendant suggested would "transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery."[59] *Ritchie*, then, provides a constitutional basis on which to assert that a defendant may not be able to obtain discovery of the result of an RTS examination performed by a complainant's therapist.[60]

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[55] See pp 404-07.

[56] 107 SCt 989.

[57] Id at 999. The Court wrote: "The opinions of this Court show that the right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."

[58] Id at 1003. In his concurring opinion, Justice Blackmun asserted that the Confrontation Clause provides greater rights in preparation for trial. Id at 1004-06. He concurred rather than dissented because, under its due process analysis, the plurality found that the trial judge should review the files to decide whether any of the information was material to the defense. Justice Blackmun concluded that this in camera determination was sufficient to protect the defendant's Confrontation Clause rights. Id at 1006.

[59] Id at 999. Note that the compelled discovery the Court avoids in *Ritchie* can be distinguished from that contained in Federal Rule of Criminal Procedure 16(a)(1)(D), which is a right of discovery the defendant has against the prosecution, not against a third party such as the agency involved in *Ritchie*.

[60] The jurisprudence in this area is strongly influenced by rape shield laws. See pp 411-14. It should be noted, however, that the privacy interests involved in an RTS examination

3. *Compulsory Process*

Compulsory process rights are closely related to rights under the Confrontation and Due Process Clauses. The Compulsory Process Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[61] In the RTS context, a defendant may argue that his compulsory process rights entitle him to: examine the report to see if any information may lead to exposing a favorable witness;[62] call the complainant's examining psychiatrist as a defense witness when the report is negative, or determine if there is any favorable evidence in the report.

The Supreme Court has rarely considered the extent and limits of the Compulsory Process Clause.[63] In interpreting rights of compulsory process, the Court has sometimes relied on the fairness notions of the Due Process Clause.[64] In *Ritchie*, the Court used a due process analysis to analyze a compulsory process claim in a rape case.[65] The Court concluded that although "compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment."[66] The Court has also compared the Confrontation Clause rights to compulsory process rights in that they both derive from the Due Process Clause.[67]

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may be less compelling than some of the broader privacy interests protected by rape shield laws. If properly supervised and limited by the court, an examination simply to determine the presence or absence of RTS would be much less intrusive than some of the procedures that the rape shield laws were originally intended to exclude, such as detailed examination of a woman's sexual history and attitudes. For a review of the rationale and design of rape shield laws, see Comment, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U Chi Legal F 219.

[61] US Const, VI Amend. See *U.S. v Nixon*, 418 US 683, 709 (1974), in which the Court noted that "[t]o ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense."

[62] *Ritchie*, 107 SCt at 1000.

[63] Id at 1000.

[64] See Charles H. Whitebread and Christopher Slobogin, *Criminal Procedure* 685 (The Foundation Press, Inc., 2d ed 1986). In *Washington v Texas*, 388 US 14, 19 (1967), the Court used the Due Process Clause to extend compulsory process rights to defendants in state criminal actions by finding a Texas law disqualifying testimony of an accomplice violative of the Sixth Amendment.

[65] 107 SCt at 1001.

[66] Id.

[67] "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington*, 388 US at 19.

In summary, the rape defendant's right to a fair trial inherent in the Due Process Clause only allows him to have his expert examine a complaining witness when the prosecution intends to introduce positive RTS evidence. The Confrontation Clause affords him no additional rights during the pretrial period. The Compulsory Process Clause gives the defendant no rights not contained in his Due Process rights. The totality of the defendant's rights, moreover, are weighed against the significant, recognized interests of rape victims, as well as of society, in protecting the privacy of victims' past sexual history and supporting their efforts to recover from the trauma of rape.

B. Statutory Rights: Rape Shield Laws

Rape shield laws are designed to guard the privacy interests of complaining witnesses.[68] While they vary widely in their specific provisions, these laws primarily operate to protect the witness by restricting inquiry into her past sexual history.[69] The general exclusion of sexual history evidence is justified on the grounds that its slight relevance is outweighed by concerns for the privacy interests of rape victims. Admitting RTS evidence could open up inquiry into a victim's past sexual history, contrary to the prohibitions of shield laws.

One court has ruled that the limited nature of the RTS inquiry prevents it from violating that state's rape shield statute.[70] The unique nature of RTS evidence would require only a limited examination of one aspect of a person's sexual history—the existence of prior incidents of nonconsensual intercourse. RTS evidence, however, demonstrates only that a victim has experienced a prior incident of nonconsensual sexual intercourse. The presence of RTS does not link any specific sexual act to the observed symptoms.[71] As a result, evidence of a previous rape becomes relevant

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[68] See, for example, Federal Rule of Evidence 412. For a comprehensive analysis of the provisions and purposes of rape shield statutes, see J. Alexander Tanford and Anthony J. Bocchino, *Rape Shield Laws and the Sixth Amendment*, 128 U Penn L Rev 544 (1980).

[69] For categorizations of rape shield laws and analysis of the impact and effectiveness of those statutes, see Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, 78 J Crim L & Criminol 645 (1987), and Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 Wis L Rev 1219 (1985).

[70] *McQuillen*, 689 P2d at 830.

[71] Holmstrom and Burgess indicate that there may be special problems with victims of multiple rapes. Ann Wolbert Burgess and Linda Lytle Holmstrom, *Assessing Trauma in the Rape Victim*, in D. Nass, ed, *The Rape Victim* 111-12 (Kendall/Hunt Publishing Co., 1977). They identify these problems as compounded and silent reactions. Compounded reactions

for its power to explain the existence of RTS.[72] Any wider inquiry would run the risk of violating the intention of rape shield statutes. One court indicated that if the prosecution's expert bases his or her RTS diagnosis on a wide-ranging inquiry into the victim's past sexual history, the defendant's expert can bring in past sexual conduct to rebut the prosecution expert's testimony; the court implied, however, that this would be an unusual case.[73]

Another potential use of RTS evidence to circumvent the purposes of rape shield statutes is illustrated by the defendant's tactics in *Spencer v General Electric Co.*.[74] In that case the defendant attempted to introduce evidence that, since the time of the alleged rape, the complaining witness had participated in consensual sexual activity. Because a common symptom of RTS is loss of interest in sexual activity, evidence of post-rape sexual activity would be inconsistent with a finding of RTS. The court, however, did not reach the issue of the relation between the evidence offered and the purposes of rape shield statutes, ruling instead that the RTS testimony was inadmissible because it was scientifically suspect[75] and because its prejudicial effect outweighed its probative value.[76]

While, due to the nature of RTS evidence, inquiry into past nonconsensual intercourse is more legitimate than inquiry into past sexual history of consensual sex, any examination of prior sexual history is contrary to both the spirit behind statutory provisions prohibiting inquiry into past sexual history and previous decisions holding that evidence of past rapes should be excluded.[77] Those statutes and decisions justify exclusion based on a balancing of the minimal relevance of such evidence against the privacy in-

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occur when a subsequent assault reactivates previous symptoms. Silent reactions occur in victims who experience symptoms but have not revealed that there was a prior rape. With a complaining witness who has previously been victimized, the problem for the court is determining whether the symptoms are a silent reaction from a previous rape or a product of the incident giving rise to the complaint.

It should be noted that this problem of deciding from which rape RTS arises is not without parallel in rape prosecutions. Physical bruises are used as evidence in rape trials even though it is not always certain from which event the bruises arose. Massaro, 69 Minn L Rev at 441 (cited in note 13).

[72] See DePaul, *The Rape Trauma Syndrome: New Weapon for Prosecutors*, Natl L J 21 (Oct 28, 1985). This article notes that a defendant's showing that the victim's history revealed RTS prior to the rape could possibly destroy the probative value of RTS evidence.

[73] *McQuillen*, 689 P2d at 830.

[74] 688 F Supp 1072 (E D Va 1988).

[75] Id at 1076.

[76] Id at 1077.

[77] See, for example, *Hollis v State*, 380 S2d 409 (Ala Crim App 1980) (court held that a prior rape trial is irrelevant to the issue of consent in a later rape trial).

terest of the complaining witness. That balance is shifted when the prosecution introduces RTS evidence on the issue of consent and that evidence can be explained by another rape in the victim's past. Thus, the discoverability of past rapes in the RTS situation is more likely than the discoverability of general sexual history for two reasons: First, the scope of the inquiry is more narrow and, second, the existence of a past rape is more relevant to RTS than general sexual history is to the issue of consent.

It is important to note that many rape shield laws would not bar evidence of past nonconsensual sexual conduct if it is used in response to RTS evidence. While very few rapes are federal offenses, reference to the federal rape shield statute is instructive, as many state rape shield laws are modeled on it.[78] Evidence of prior, nonconsensual intercourse may be admissible to rebut RTS evidence through two exceptions to the general prohibitions of rape shield statutes.[79] First, the evidence may be "constitutionally required to be admitted" according to FRE 412(b)(1). The defendant could avail himself of the constitutional guarantees of the Due Process Clause and the Sixth Amendment.[80] In *Government of Virgin Islands v Jacobs*,[81] the court held that the defendant's Confrontation Clause rights entitled him to cross-examine the alleged rape victim on prosecution evidence asserting she was a virgin before the alleged assault.[82] Second, the defendant could make a motion to offer evidence of prior nonconsensual intercourse according to the procedure provided in FRE 412(c).[83] In summary, rape shield laws may not provide complete protection against admission of evidence regarding prior nonconsensual intercourse, but the victim's interests in privacy would, at the least, be weighed by a balancing of interests in a constitutional analysis or be considered by a judge in a mini-trial on the probative value of the defense's proposed offering.

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[78] See Jack B. Weinstein, *Weinstein on Evidence*, 412-14 - 412-27 (1981) ("Weinstein").

[79] A third plausible exception to the general rule is that which allows admission of evidence to prove that the accused was not the source of "injury." FRE 412(b)(1(A). For the purposes of this rule, "injury" does not apply to "emotional injuries unaccompanied by a cognizable physical consequence." *United States v Shaw*, 824 F2d 601, 603 n 3 (8th Cir 1987), citing 124 Cong Rec 34913 (1978). RTS would fall into this category.

[80] See pp 404-10.

[81] 634 F Supp 933 (D Virgin Islands 1986).

[82] Id at 938.

[83] The court would then hold a mini-trial to determine the relevancy and probative value of the evidence the defendant seeks to admit. The court may decide to have the evidence admitted pursuant to restrictions in a court order. See FRE 412(c)(2), (3).

III. Examination for RTS by a Court-Appointed Neutral Expert

A. The Problem With the Current Practice of Eliciting RTS Evidence

Psychological examinations are by nature intrusive. In order to assess a person's psychological state, psychologists must ask probing questions that can cause a person to relive unpleasant experiences. Rape victims have been invaded and traumatized by the initial assault. Thus, the potential for further damage during psychological examinations should be minimized whenever possible.

The victim is exposed to the most risk of continued trauma when the court allows multiple psychological examinations to take place. Separate examinations performed by experts chosen by the prosecution and by the defense pose two potential problems. The first is simple multiplication: the more exams, the greater the intrusion.[84] The second problem lies in the nature of the exams. Although theoretically neutral, an expert secured by the defense can pose a greater danger to the interests of the victim than one secured by the prosecution:

> While a mental health professional does conduct the examination, no prior treatment relationship has been established and the expert is a stranger to the victim. Examination by the defendant's expert can be especially excruciating and terrorizing. This examiner is perceived by the victim as an extension of the defendant and she can feel as though she were being raped emotionally by the defendant once again.[85]

In an analogous situation, that of an examination of a rape victim for competency to be a witness, Massachusetts has recognized that a partisan psychiatrist can use "the examination as an adversarial tool, to harass or embarrass the person examined."[86]

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[84] Note that if the sole objection is to the number of exams, a possible solution could be a single examination by both sides' experts at once. Such an examination, however, could be stressful for reasons discussed below.

[85] Buchele, 25 Washburn L J at 39 (cited in note 8).

[86] *Commonwealth v Gibbons*, 393 NE2d 400, 402 (Mass 1979). Massachusetts has enacted a statute to provide for appointment of a neutral psychiatrist in this situation. See Mass Gen Laws Ann ch 123, §19 (West 1970).

B. Court Appointment of a Neutral Expert

To combat the problem of multiple intrusive and traumatic examinations by a defense psychiatrist, a judge could appoint a neutral expert to administer a single RTS examination to the complainant.[87] Federal judges have the inherent power to appoint neutral experts,[88] and this power has been codified in FRE 706.[89] Rule 706 allows the court to appoint an expert witness on its own motion or on the motion of a party. In a criminal case the expert is compensated "from funds which may be payable by law."[90] Judges rarely use Rule 706.[91] It is used most often in complex technical situations where partisan experts arrive at divergent conclusions and the fact-finder has a difficult time determining how to evaluate the truth of the expert testimony.[92] This is most often the case in civil trials.[93] The proposed use of the rule in RTS cases, to protect the victim from the intrusions inherent in multiple psychological examinations, is unusual.[94] In both cases, however, Rule 706 has the potential to increase the efficiency of a trial by reducing the amount of information a fact-finder must review and, in the RTS case, by reducing the psychic cost shouldered by the victim.[95]

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[87] See Comment 33 Am U L Rev 417, 456 n 329 (cited in note 31).

[88] See, for example, *Scott v Spanger Bros., Inc.*, 298 F2d 928, 930 (2d Cir 1962) (court held that appointment of an impartial medical expert by trial court was within its sound discretion).

[89] Again, most rapes are state, not federal, crimes. Many states have adopted FRE 706 verbatim or virtually verbatim. See Theodore I. Botter, *The Court-Appointed Impartial Expert*, in Melvin D. Kraft, ed, *Using Experts in Civil Cases* 68-69 (Practicing Law Institute, 1982) ("[o]f the 20 states that have largely adopted the Federal Rules of Evidence, all but five . . . have adopted Rule 706, either verbatim or a variant thereof . . . "). For an in-depth examination of state adaptations of Rule 706, see Weinstein at 706-29-39 (cited in note 78).

[90] FRE 706(b).

[91] See Weinstein at 706-10 (cited in note 78).

[92] See Botter, *Court-Appointed Impartial Experts* at 75-76 (cited in note 89).

[93] For example, one of the leading cases concerning the use of Rule 706 involved the appointment of a seismic safety expert to evaluate the safety of the location of a school for the blind. *Students of Cal School for the Blind v Honig*, 736 F2d 538 (9th Cir 1984), vacated on other grounds, 471 US 148, 105 SCt 1820 (1985). In approving the appointment of the neutral expert, the court noted that the district court's decision to exercise its power under Rule 706 was reviewable only for abuse of discretion. 736 F2d at 549.

[94] Courts have used neutral experts in other types of cases, such as those in which the state has an interest (for example, commitment of mental incompetents or child custody cases). See Botter, *Court-Appointed Impartial Experts* at 78-79 (cited in note 89).

[95] The procedural efficiency of court-appointed experts is accompanied by safeguards that ensure the cost (in terms of due process rights) is not shifted to the defendant.

C. Complainant's Interests and Rule 706 Experts

Although the appointment of an impartial expert under Rule 706 would meet some of the concerns arising from multiple examinations of a rape victim, this procedure could also create problems. One problem that might arise is victim resentment of the proceeding if it were perceived as a continuation of the tradition of routinely ordering rape complainants to undergo a psychiatric examination at the outset of a trial. In the past, all courts required rape victims to take psychiatric examinations because of a belief that the rape charge was the result of delusions.[96] This practice has been sharply criticized and curtailed.[97]

The proposed examination for evidence of RTS would be less objectionable, in terms of both scope and purpose, than a psychiatric examination to determine the stability of a rape victim. An examination for the presence of RTS is far more limited than an examination of past and present sexual attitudes and experiences. It is focused on current behavioral responses or attitudes, many of which are unrelated to sex. Moreover, while any psychological examination may be intrusive, an examination designed to bolster the victim's claims seems unlikely to be perceived as intrusive as one designed to challenge them. Even an examination for RTS that is negative would not necessarily be used to impeach the complainant's charge. Like all examinations of a victim for evidence, a psychological examination for RTS necessarily involves some intrusion.

Despite the limited scope of the RTS examination, the complainant might not wish to undergo the examination. Under Rule 706, either party can request the expert or the court can order the expert on its own motion. Thus a woman could find herself with less control over whether or not to undergo the exam at all than

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[96] "Today it is *unanimously* held . . . by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases . . ." 3A J. Wigmore, *Evidence* § 924a, 746-47 (Chadbourne Rev., 1970), cited in Roberta J. 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).

[97] See *State v Romero*, 94 NM 22, 606 P2d 1116, 1121 (1980): "While some authorities have taken the position that psychological examinations should be routinely ordered in rape cases . . . we feel that this rule is based on outmoded notions of the instability and duplicity of women in general and, as such, should be discarded altogether."

For a good summary of various jurisdictions' rulings on court-ordered psychiatric examinations, see *Ballard v Superior Court of San Diego County*, 49 Cal Rptr 302, 410 P2d 838 (1966).

she would have under the present system. This is because under the present system many jurisdictions refuse to admit RTS evidence unless the prosecution introduces it, and the prosecution will probably be more responsive to the victim's wishes than the defense will be.[98] It is not clear that the same rule would hold under a Rule 706 system. However, since some courts only consider positive, and not negative, RTS evidence admissible, the defense should have no legitimate interest in requesting an RTS examination in the absence of such a request by the prosecution. Thus courts would be justified in ordinarily appointing neutral experts only upon the prosecution's request.

Even if a judge were to order a victim to undergo an RTS examination against her wishes, the sanctions that a court could apply against both her and the prosecution would probably be limited if she refused to submit to the order.[99] In addition, courts have held that the simple fact that a victim has refused to submit to a psychiatric examination is not grounds for dismissal of the sex of-

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[98] One proposal for dealing with the situation where the prosecution is not responsive to the wishes of the victim is the interlocutory appeal. In *Doe v United States*, 666 F2d 43 (4th Cir 1981), the Fourth Circuit held that the victim had a right to pursue an interlocutory appeal of the trial court's decision to allow the admission of evidence of past sexual behavior. The determination that the victim had standing was based upon the provisions of FRE 412, which the court held implicitly gave her a right to interlocutory appeal.

In the absence of the prosecution's introduction of RTS evidence, federal and state rape shield statutes and court decisions would bar the defense from introducing evidence of a previous rape. As the prosecution has no right to present RTS evidence, and the presentation of such evidence opens up inquiry by the defense into the witness's sexual history, the only effective remedy is to allow the victim to appeal the court's initial decision to allow the introduction of RTS.

For a discussion of interlocutory appeals under rape shield laws, see Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 Wis L Rev 1219, 1225 n 22 (1985), and sources cited therein.

[99] Note that there are viable policy reasons for not forcing a rape victim to submit to an examination. See *State v Clontz*, 305 NC 116, 286 SE2d 793, 797 (1982) ("[t]o order the victim of a sex crime to unwillingly submit to a psychiatric examination would be a profound invasion of her privacy which, in our opinion, would deter innocent victims of such crimes from ever making complaints"); *State v Miller*, 35 Wis2d 454, 151 NW2d 157, 165 (1967); Annotation, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 ALR4th 310, 328-30 (1986).

In an analogous situation, many courts have ruled that a court cannot compel the complaining witness to undergo an examination for competency. However, it has been held that a victim who refuses to undergo a competency examination cannot testify at trial. See *People v Mills*, 151 Cal Rptr 71, 75-76 (Cal App 1978); Annotation, *Permissibility of Mental Examination*, 45 ALR4th at 376-78. Some courts have mandated competency examinations on constitutional grounds. See, for example, *Ledbetter v United States*, 350 A2d 379, 380 (DC App 1976).

fense charges.[100] To the extent that this precludes a defendant from having any effective means of countering RTS evidence, a judge in such a case can simply exclude the RTS evidence altogether.

D. Defendant's Objections

The defendant who faces a prosecution case employing RTS evidence will probably want to call his own expert witness. The RTS evidence can be crucial to the defendant because the most successful defense to rape charges may be consent.[101] To this end, the defendant will point to Rule 706(d) which provides that "[n]othing in this rule limits the parties in calling expert witnesses of their own selection."[102] The defendant will claim the right to have his psychiatrist examine the victim in addition to the court-appointed psychiatrist's examination. This would obviously negate the benefits of having a court-appointed psychiatrist.[103] Rule 706(d) merely provides, however, that nothing in that rule precludes the parties from calling their own experts. The court could nevertheless refuse to allow the parties to conduct psychological examinations relying on other authority.

There are various procedures under Rule 706 which could minimize the defendant's, as well as the prosecution's, concerns about a court-appointed expert and the effect on the parties' trial strategies. In the first place, Rule 706(a) provides that the court may appoint an expert agreed upon by the parties. As a practical matter, the prosecution and the defense might have an incentive to agree on a list of experts for the court to appoint because, if they do not, the judge can still appoint the expert of his or her own choice. It should be noted however that nothing in the rule presently *requires* the judge to appoint an expert agreed upon by the parties. One jurisdiction has experimented with a rotation system, where a judge appointing a neutral expert simply takes the next available expert on a centralized list of eligible experts.[104]

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[100] See, for example, *Mills*, 151 Cal Rptr at 75-76; Annotation, *Permissibility of Mental Examination*, 45 ALR4th at 376-78.

[101] For a study demonstrating the effectiveness of the consent defense, see Robert A. Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*, 64 Va L Rev 357, 360-62 (1978).

[102] FRE 706(d).

[103] In the alternative, a panel of three psychiatrists could examine the victim, one on the appointment of each of the parties and one appointed by the court. The neutral expert could monitor the questioning from both sides to protect the interests of each party.

[104] See Botter, *Court-Appointed Impartial Experts* at 56 (cited in note 89).

Another safeguard for the parties' interests is the fact that, under Rule 706(a), the parties have the right to depose and cross-examine the expert. This is the only place in federal criminal procedure where a deposition may be taken as of right.[105] Taking depositions before trial can help the party disfavored by the expert testimony prepare a rebuttal.[106] In addition, Rule 706 permits the parties to cross-examine the expert at trial, allowing the right to ask leading questions and bring out material beyond the expert's direct testimony.[107]

At any rate, it is not clear that the defendant can assert his right to his own psychiatric testimony. As Justice Rehnquist recently stated,

> [a] psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question that the State . . . treats as a question of *fact*. Since any "unfairness" in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a 'defense' advocate.[108]

If a defendant is not constitutionally entitled to have an expert advocate present testimony about his own mental state, surely he is less entitled to have such an advocate present testimony about the mental state of a third party.

E. Institutional Objections

There are general, institutional objections to the idea of a court-appointed expert. One is the fear that the procedure will

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[105] See Weinstein at 706-22 (cited in note 78).

[106] Note that the state's right to take depositions raises Conflict Clause questions. See Weinstein at 706-23 (cited in note 78).

[107] See *Unique Concepts, Inc. v Brown*, 659 F Supp 1008, 1011 (S D NY 1987); Weinstein at 706-25.

[108] *Ake v Oklahoma*, 470 US 68, 92 (1984) (Rehnquist dissenting). Note that in *Ake* the majority found that the defendant had the right to a psychiatrist appointed by him to testify. That case is distinguishable from the RTS situation because it was a capital case and it was the defendant who was to be examined.

lead to trial by expert rather than trial by jury if an expert declared to be neutral is accorded too much respect by the jury.[109] In a pre-Rule 706 decision, however, the Supreme Court ruled that a court does not infringe upon the right to a jury trial by appointing an expert because the jury remains the ultimate trier of fact.[110] Overvaluation of the neutral expert's testimony can be mitigated by vigorous deposition and cross-examination by the parties. Some have suggested that by concealing an expert's court-appointed status the expert's authority would not be overwhelming.[111] Under Rule 706(c) the judge has the discretion whether to disclose the expert's court-appointed status. Assuming, however, that the court-appointed expert is the only expert testifying on RTS, the jury may not understand why there is only one expert testifying. Also, the expert as sole witness on this matter may acquire an unusual air of authority regardless of whether the judge discloses the expert's "neutral" status.

Others have alleged that the court's imprimatur will give a false sense of neutrality, which is dangerous because experts will always bring biases of their own into their testimony.[112] However a good expert witness will reveal her or his own biases and the parties will ferret out these biases at trial. Careful jury instructions by the judge will also help solve this problem. A final objection is that appointing a neutral expert subverts the traditional ideals of adversarial proceedings. Others welcome this effect.[113]

CONCLUSION

RTS evidence can be an important tool in negating the defendant's consent defense. Although its use raises certain constitutional and statutory difficulties, they are not insurmountable. In order to counteract some of the negative effects the use of RTS evidence can have on complaining witnesses, courts can make psychiatric examinations less traumatic for the victim by replacing the parties' experts with a neutral expert. This proposed use of Rule 706 protects the rights of both defendants and victims and advances the truth-finding process.

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[109] See *Kian v Mirro Aluminum Co.*, 88 FRD 351, 356 (D C Mich 1980); Weinstein at 706-11 (cited in note 78).

[110] See *In re Peterson*, 253 US 300, 310-11 (1920).

[111] Weinstein at 706-13, 706-14.

[112] See id at 706-12 (cited in note 78).

[113] See id at 706-11.