Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim

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by

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In the fifteen years since researchers introduced the theory that rape victims commonly suffer from rape trauma syndrome (RTS), prosecutors nationwide have begun to use evidence of the victim's post-rape behavior to provide a context in which to evaluate evidence substantiating rape charges. Although RTS evidence may appear to be most helpful to prosecutors, defense attorneys recently have begun to seek its introduction. In 1989 the Supreme Court of Indiana became the first court to review whether a rape defendant could attempt to prove that a woman was not raped by alleging that her post-rape behavior was inconsistent with that of a "normal" victim.1 The court held that the lower court's exclusion of defense expert testimony regarding the fact that the victim was witnessed drinking and dancing the night after the alleged rape was reversible error because it tended to prove that the victim's behavior was inconsistent with that of a person who had suffered a traumatic rape.2 Thus, the Court explained, the evidence tended to "make it less probable that a rape in fact occurred," and therefore was relevant.3

The case is sure to evoke criticism because it compels the jury to focus on the behavior and lifestyle of the victim rather than of the defendant. If this type of evidence were admissible, juries presumably would be entitled to know whether a victim slept with her husband or lover on the night of the alleged rape and what type of clothing she chose to put on the next morning.

Evidence relating to a victim's behavior prior to the alleged rape has been expressly excluded for policy reasons at both the state and federal levels.4 In deciding whether use of RTS evidence by the defense is acceptable, courts probably will analyze policy arguments similar

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2. Id. at 1191.
3. Id.
4. See infra notes 141-162 and accompanying text.

[1143]
to those advanced when a woman's pre-rape behavior was at issue. Now, as then, courts will be forced to face the problems inherent in a rape prosecution: who is to be believed when the defendant's word conflicts with the victim's, and what type of scientific and medical evidence is useful to the jury in making that critical decision?

In the last decade the defense generally raised the evidentiary issues of scientific reliability and potential prejudice to the defendant in cases in which the prosecution introduced an RTS expert. Courts generally resolved these cases by relying on established precedents and applicable rules of evidence. If an RTS expert is introduced by the defense, however, a host of political and social issues arise that are not addressed by current legislation or rules of evidence. To date, no court has considered the legal and social ramifications of allowing the defense to use RTS evidence to negate a victim's claim. This Note argues that when courts consider these volatile issues, they should look beyond existing precedents to the policies of encouraging crime prevention and respect for victims in addition to promoting fundamental fairness for the defendant.

Part I of this Note describes RTS and provides background information on how and why researchers identified the syndrome. Part II begins with a general discussion of the requirements for admissibility of expert testimony on scientific evidence. It then reviews court decisions regarding use of RTS evidence by the prosecution to corroborate the victim's testimony. Next, it discusses and analyzes Henson v. State, the first reported case in which the defense attempted to introduce RTS evidence. Part II concludes with a warning to the prosecution to exercise cautiously its right to use RTS evidence. Part III argues that the defense should be restricted categorically from using the evidence to disprove rape and that the prosecution should be entitled to use the evidence to balance inequities in the legal system that work injustice on women as a class. Finally, Part IV suggests that


7. The use of rape trauma syndrome evidence does not appear to have been at issue in any cases in which the alleged victim was male. Because so few males report being rape victims, see, e.g., Forman, Reported Male Rape, 7 Victimology 235, 235 (1982) (5.7% of reported rapes in Columbia, S.C. involved male victims in a two year period), the overwhelming majority of the literature and this Note focus on rapes that involve a female victim and a male perpetrator. See, e.g., J. Dressler, Understanding Criminal Law § 33.05(A), at 523 (1987) ("commentators, courts, and statutes often speak of rape in terms of a male having sexual intercourse with a female"); Massaro, Experts, Psychology, Credibility, and Rape: The
even if fairness dictates that neither the defense nor the prosecution may use evidence of the syndrome on the issue of consent, the prosecution at least should be able to use it to explain bizarre behavior.

I. Description of Rape Trauma Syndrome

In 1974 social workers Ann Burgess and Lynda Holmstrom coined the term Rape Trauma Syndrome or RTS to describe symptoms frequently experienced by rape victims. Their goal was to increase the effectiveness of clinical treatment for rape victims. For one year Burgess and Holmstrom analyzed the emotional and physical reactions of ninety-two people who sought treatment at the emergency room of a Boston hospital for alleged rapes. All of the subjects were women; approximately one-half were white, and most of the remainder were black. The socioeconomic status and educational background of the women were diverse. The youngest woman was seventeen; the oldest seventy-three.

The researchers interviewed each woman immediately after she complained of the rape to the hospital staff. They then conducted follow-up interviews at the victim’s home, over the telephone, or both.

Burgess and Holmstrom concluded that the syndrome typically is manifested in a two-phase reaction. Phase I, referred to as the “acute phase,” is a period of disorganization characterized by one of two emotional styles: the expressed style, in which the victim cries,

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Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 Minn. L. Rev. 395, 401 n.37 (1985) (citing only cases that involve rape of a female by a male).

8. Burgess & Holmstrom, Rape Trauma Syndrome, in FORCIBLE RAPE—THE CRIME, THE VICTIM, AND THE OFFENDER 315 (1977) [hereinafter FORCIBLE RAPE]. Research on the emotional after-effects of rape was conducted first by Sutherland and Scherl and reported in their article, Sutherland & Scherl, Patterns of Response Among Victims of Rape, 40 Am. J. Orthopsychiatry 503 (1973).

9. See Burgess & Holmstrom, supra note 8, at 315. The authors describe the origins of their rape treatment program:

In response to the problem of rape in the greater Boston area, the Victim Counseling Program was designed as a collaborative effort between Boston College School of Nursing and Boston City Hospital to provide a twenty-four-hour crisis intervention to rape victims, and to study the problems the victim experiences as a result of being sexually assaulted.

Id.

10. Id. at 316.
11. Id.
12. Id. at 317. Burgess and Holmstrom reported that they followed up with 85% of the study population by telephone or home visit; another five percent were followed indirectly through the victims' families or reports of police and other service agencies. Id.
13. Id. at 318.
sobs, smiles, is restless, or is tense; and the controlled style, in which the victim is calm, composed, or subdued. Physical symptoms associated with Phase I often include general soreness, bruising, headaches, fatigue, sleep disturbances, gastrointestinal irritability, and genitourinary disturbance. Emotions experienced during this first phase range from fear, humiliation, and embarrassment to anger, a desire for revenge, and self-blame.

Phase II is referred to as the "long-term reorganization process." This phase begins at different times for victims and is characterized by nightmares, phobic reactions, and sexual fears. Many of the interviewed victims reported increased motor activity, such as taking trips, changing addresses or telephone numbers, or contacting friends and family normally not seen daily.

Burgess and Holmstrom reported that all of the victims in their sample experienced Phase II symptoms, though to differing degrees and in varying sequence. The researchers attributed variations in coping behavior to factors such as ego strength, social network support, and the treatment the victims received from others.

Further studies of RTS have confirmed and expanded on the initial findings of Burgess and Holmstrom. Researchers have suggested that each victim's reaction depends on factors such as the victim's age, her personality style, the circumstances surrounding the rape, and the relationship between the victim and the assailant. The results of Burgess and Holmstrom's work have been confirmed even in studies conducted by critics of their methods.

II. Rape Trauma Syndrome and the Courts

Although fairly well entrenched in the medical and psychiatric literature, rape trauma syndrome is a phenomenon that has not been...
fully accepted by the courts. Most courts have held expert testimony regarding the syndrome inadmissible when introduced to prove a rape occurred. A significant number of courts, however, allow the evidence as a means of rehabilitating the victim's credibility. The Indiana Supreme Court is the first court to find that evidence of the syndrome offered by the defense tended to prove that a traumatic rape could not have occurred. This Part outlines the disparate responses of courts to RTS evidence.

A. The Admissibility of Expert Testimony on Scientific Evidence

Until a court determines that the standards for admissibility of both expert testimony and scientific evidence are met, expert testimony on rape trauma syndrome may not be admitted as evidence.

(1) Expert Testimony

Expert testimony, like lay testimony, is not admissible unless relevant. In addition, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." The test essentially is whether a lay person can understand the facts without the help of an expert. Even if needed under this test, expert testimony is admissible only to the extent that it does not create a danger of unfair prejudice, confusion of the issues, misleading of the jury, wasting of time, or needless presentation of cumulative evidence.

(2) Scientific Evidence

That the results of Burgess and Holmstrom's research have been mirrored by various studies conducted since 1970 is significant because the admissibility of expert testimony regarding novel scientific evidence, as stated in the landmark case of Frye v. United States,
depends upon whether the relevant scientific community recognizes the "scientific principle or discovery" that informs the expert's opinion. General acceptance of scientific evidence can be shown by its widespread use in scholarly or scientific treatises, and in judicial opinions.

A minority of jurisdictions have replaced the Frye test with a more liberal test for reliability, wherein a showing of scientific consensus is unnecessary if the court itself is satisfied that the evidence is reliable. For example, in United States v. Baller, the Fourth Circuit held that the use of spectrographic evidence for voice identification was sufficiently reliable to be admissible in court despite a lack of absolute agreement among scientists that the evidence was accurate.

Many commentators believe that the principle that rape victims commonly suffer from RTS is sufficiently recognized by the medical establishment to support its use as expert testimony in court even under the stricter standards of Frye. One commentator, however, argues that regardless of the test used, judges often arbitrarily exercise broad discretion in deciding whether to admit novel scientific evidence. She posits that judges frequently forsake the Frye analysis and state their unsubstantiated opinions on the admissibility of RTS evidence. Unfortunately, until there is a more uniform judicial con-

33. Id. at 1014. The Frye court held that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. This test has been criticized as vague for its failure to identify specifically whether the relevant scientific community must accept "the underlying scientific principle, the technique, or both before scientific evidence is admissible." See Comment, supra note 31, at 432-33; see also Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 Colum. L. Rev. 1197, 1211-12 (1980).


35. See Massaro, supra note 7, at 435 & n.179 (jurisdictions applying the reliability test include Connecticut, the District of Columbia, Illinois, Iowa, Louisiana, Montana, North Carolina, Ohio, and Oregon). For a discussion regarding the relative merits of each test, see Comment, supra note 31, at 433-34, n.133.


38. See Massaro, supra note 7, at 435-37.

39. See id. at 437. Massaro cites as examples, among others, State v. Marks, 231 Kan.
sensus, the fate of both rape victims and rape defendants will depend a good deal on the jurisdiction in which the alleged rape occurred.

B. The Prosecution's Use of RTS Evidence

Although research on RTS has been conducted primarily to increase the effectiveness of clinical treatment for rape victims, evidence of the syndrome has been introduced by the prosecution in criminal rape trials and by the plaintiff in civil cases since research on the subject first was published in 1974.

Because researchers apparently did not identify or investigate RTS either to substantiate or to discredit rape claims in a judicial setting, its admissibility for such use has been questioned. In both civil and criminal cases, however, RTS evidence has been admitted to substantiate the rape claim and to prove damages.

In criminal trials, the use of RTS evidence typically is limited to rebutting the affirmative defense of consent. Some courts have admitted RTS evidence to corroborate the victim's testimony or to com-

40. See supra note 9 and accompanying text.
43. See People v. Bledsoe, 36 Cal. 3d 236, 249, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984) ("Unlike fingerprints, blood tests, [and] lie detector tests . . . rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool . . . .").
46. See supra note 41.
pare the victim's symptoms with those of other rape victims. Some courts have allowed expert testimony only when the syndrome is not referenced by name or when the testimony is given by a psychiatrist rather than a social worker. Other courts have held RTS evidence to be inadmissible for a variety of reasons.

In *State v. Saldana* the Minnesota Supreme Court held that admitting the testimony of a rape counselor who had counseled the victim for ten weeks constituted reversible error. The counselor, a rape crisis center director who held a bachelor's degree in psychology and social work, testified regarding the general incidence of RTS and gave her opinion that the complaining witness had been a "victim of 'acquaintance rape,'" and that the victim, in her opinion, had not "made it up."

In reversing the conviction of the defendant, the court stated that RTS evidence "is not the type of scientific test that accurately and reliably determines whether a rape has occurred." The jury, the court indicated, is competent to consider the victim's testimony without the interpretation of an expert. According to the court, allowing evidence that "has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations . . . would inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity." Moreover, the court determined that even if it believed RTS evidence were scientifically sound, admission of this evidence would be error under


48. *See, e.g.*, Allewalt, 308 Md. at 109, 517 A.2d at 751 (not referring to the syndrome by name reduces prejudice to the defendant); People v. Reid, 123 Misc. 2d 1084, 1087-88, 475 N.Y.S.2d 741, 743 (1984) (RTS admissible to rebut eleven-year-old complainant's renouncement of the charges).

49. *E.g.*, People v. Coleman, 48 Cal. 3d 112, 144, 768 P.2d 32, 49, 255 Cal. Rptr. 813, 830 (1989) (expert erroneously testified that he thought victim suffered from RTS); People v. Bledsoe, 36 Cal. 3d 236, 248, 681 P.2d 291, 299, 203 Cal. Rptr. 450, 458 (1984) (RTS evidence inadmissible to prove rape occurred); People v. Jeff, 204 Cal. App. 3d 309, 251 Cal. Rptr. 135, 153 (1988) (expert may not offer opinion regarding occurrence of rape); *State v. McGee*, 324 N.W.2d 232, 233 (Minn. 1982) (doctor's opinion that victim's conduct was consistent with RTS was highly prejudicial and therefore inadmissible); *State v. Danielski*, 350 N.W.2d 395, 397 (Minn. Ct. App. 1984) (expert testimony on trauma caused by intrafamilial sexual abuse disallowed because not "any more scientifically accurate than rape trauma syndrome evidence").

50. 324 N.W.2d 227 (Minn. 1982).

51. *Id.* at 229.

52. *Id.*

53. *Id.*

54. *Id.* at 230.
the majority rule that a physician may not give an opinion whether the complainant was raped. The court explained that because the rape counselor was not a physician, had never physically examined the victim, and did not meet the victim until ten days after the alleged rape, the majority rule against opinions was especially applicable.

Similarly, the Missouri Supreme Court, in State v. Taylor, held RTS evidence inadmissible to prove the rape occurred for the limited reason that an expert goes "too far" when expressing his opinion "that the victim suffered rape trauma syndrome as a consequence of the incident with the defendant." The court emphasized that by stating a victim suffers from RTS, the expert presupposes that a rape occurred, giving an "implied opinion that the victim had told the truth in describing the rape."

The California Supreme Court, in People v. Bledsoe, concluded that RTS evidence is inadmissible on the issue of consent for different reasons. The court conceded that RTS is recognized generally in the scientific community. The court, however, reasoned that RTS evidence should not be admitted to prove rape because evidence of RTS is used by doctors and counselors for therapeutic reasons rather than to determine whether a patient in fact has been raped. The court pointed out that legal counsel and rape counselors take a very different approach toward the victim:

Rape counselors are taught to make a conscious effort to avoid judging the credibility of their clients . . .; [they] do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital in their task.

Although courts have been reluctant to admit RTS evidence to prove a rape occurred, they have been less resistant to the admission of RTS evidence to explain what appears to be bizarre or inconsistent

55. Id. at 231.
56. Id. The Washington Supreme Court, in State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987), also found RTS evidence inadmissible for the two reasons elucidated in Saldana: lack of scientific reliability and potential for unfairly prejudicing the jury. Id. at 350, 745 P.2d at 19.
57. 663 S.W.2d 235 (Mo. 1984) (en banc).
58. Id. at 240.
59. Id. at 241.
61. Id. at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.
62. Id.
63. Id. at 250, 681 P.2d at 300, 203 Cal. Rptr. at 459.
behavior of the complaining party. For example, when a victim delayed reporting the rape for eighty-nine days, a Colorado court held that expert testimony on RTS was admissible to show that hesitancy in reporting is a common reaction among rape victims and should not be construed necessarily as evidence that the rape did not occur. In New York an expert on RTS was allowed to explain to the jury that an eleven-year-old rape victim's letters to the defendant recanting her accusations could have been a manifestation of the common syndrome reactions of "shame or guilt or fear of public embarrassment" rather than evidence that the girl had made false charges of rape. In Oregon expert testimony was admitted to give the victim credibility after the defense showed she had made inconsistent statements regarding the alleged rape. In each of these cases expert testimony on RTS was admissible not to prove directly that a rape occurred but to assist the jury in evaluating the credibility of the victim. Indeed, the California Supreme Court has suggested in dicta that RTS evidence can "disabuse[e] the jury of widely held misconceptions about rape and rape victims."

Expert testimony on RTS thus has found its niche in the courts, if only to the limited extent of rebutting attacks on the credibility of a victim. Even courts critical of the reliability of RTS evidence in substantiating rape claims acknowledge its usefulness to the jury in interpreting a victim's behavior. To date, however, the controversy over RTS has been one-dimensional. With the exception of one court, the issue of whether RTS evidence may be used by a rape defendant to prove consent has never been confronted.

C. The Defense and RTS: Henson v. State

Despite vigorous debate among the courts on the issue whether the prosecution may use RTS evidence to prove rape, the Indiana Supreme Court is the only court that has considered whether the defense may use RTS evidence to show that a lack of syndrome symptoms reduces the probability that an alleged rape occurred. In Henson v. State, the issue on appeal was whether the trial court erred in ex-

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68. The New York Court of Appeals recently joined the ranks of courts holding that RTS evidence may be admitted to assist the jury's understanding of the victim's post-assault behavior, but not as evidence that a rape actually occurred. See People v. Taylor, 75 N.Y.2d 277, 293, 552 N.E.2d 131, 138, 552 N.Y.S.2d 883, 890 (1990).
69. 535 N.E.2d 1189 (Ind. 1989).
cluding the defense expert's testimony "that the victim's conduct after an alleged rape was inconsistent with that of a person who had suffered a traumatic forcible rape."  

The *Henson* case revolved around the following facts: The defendant, who had earlier in the evening shared a table with the victim at a crowded bar, followed her out of the tavern and ambushed her in her car. He forced her to have sexual intercourse with him at knife-point, tore her blouse, and inflicted superficial lacerations on her chest. At the trial a witness testified that the victim was drinking and dancing at the same bar the evening after the rape. The defense then introduced an expert in the study and treatment of post-traumatic stress syndrome and asked the following hypothetical question:

Doctor, in your professional opinion, a person who has allegedly suffered a traumatic, forcible rape, would it be consistent in your experience that a person who had gone through a situation such as that would go back to the same place the act allegedly occurred and socialize, drink, dance, on the same day of the alleged act? 

The prosecution objected to the question on the grounds that the expert had never consulted with the victim and had no firsthand knowledge of the incident in question. Stating that the testimony was not relevant and that a proper foundation had not been laid, the trial court sustained the objection.

The Indiana Supreme Court held that the trial court had erred in excluding the expert testimony because the victim's post-rape behavior would have been probative on the issue whether a traumatic rape occurred. The court reasoned that material evidence having "any tendency" to make a fact "more or less probable than it would be without the evidence" is relevant. In addition, the court held that

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70. *Id.* at 1191. A traumatic rape generally is defined as one in which there are "aggravating circumstances," such as when the rape is committed by a total stranger, by several assailants, or in conjunction with other violence. The difference between a traumatic rape and simple rape has particular impact in the courtroom, where juries are adverse to returning a guilty verdict absent evidence of aggravating circumstances. V. Hans & N. Vdmar, *Judging the Jury* 210 (1986).


72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Interestingly, the court did not address whether introduction of the evidence would cause unfair prejudice to the complainant, a counter balancing factor which courts generally consider in determining the probative value of relevant evidence. See C. McCormick, *supra* note 33, § 185, at 438-39.
because two years earlier, in *Simmons v. State*, it had allowed the prosecution to use RTS evidence to explain inconsistencies in the victim's testimony, it would be "fundamentally unfair" to deny the defense its use in this case.80

The Indiana Supreme Court's analysis fails for two reasons. First, its syllogism regarding the relevancy of RTS evidence is both logically flawed and unsophisticated in light of available medical evidence; second, its reliance on *Simmons* is misplaced.

The court's conclusion that the expert testimony was relevant was based on the following syllogism: behavior inconsistent with that of most rape victims creates a logical inference that a rape did not occur; drinking and dancing at the location of and soon after a rape is inconsistent with behavior of most rape victims; therefore, drinking and dancing after a rape creates a logical inference that a rape did not occur.81

Existing medical evidence cannot substantiate the assumptions that there can be an "inconsistent" reaction to rape and that drinking (or even dancing) on the day after a rape is inconsistent behavior. The American Psychiatric Association reports that

[diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event . . . . Symptoms may begin immediately or soon after the trauma. It is not unusual, however, for the symptoms to emerge after a latency period of months or years following the trauma.82

Thus, what might appear to a layperson to be an inconsistent reaction actually could be symptomatic of RTS.83 A conclusion that a stoic victim is less likely to have been raped than an hysterical victim therefore is not as simple or obvious as the *Henson* court declares it to be.

79. 504 N.E.2d 575 (Ind. 1987).
80. *Henson*, 535 N.E.2d at 1193. In DeMotte v. State, 555 N.E.2d 1336, 1338, 1339 (Ind. App. 1990), the Indiana Court of Appeals found this reasoning persuasive and applied it in determining whether denying the defense an opportunity to impeach the victim who charged the defendant with child molesting was an abuse of the trial court's discretion.
81. See *Henson*, 535 N.E.2d at 1191. The court stated, Dr. Gover's testimony would have tended to prove that [the victim]'s behavior after the incident was inconsistent with that of a victim who had suffered a traumatic rape such as that which [the victim] recounted. The evidence therefore would have a tendency to make it less probable that a rape in fact occurred, clearly a matter in issue at trial, and was therefore relevant.
82. *American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders* § 309.81, at 236-37 (3d ed. 1980) [hereinafter APA Manual].
83. See Comment, *supra* note 31, at 461 n.364 ("[e]xaminations, however, may lead to a diagnosis of rape trauma syndrome in many rape victims whose symptoms might otherwise go undetected").
In *State v. Black*, one justice warned that RTS evidence could be misapplied if a lack of symptoms was viewed in this fashion:

The defense could seize upon [the victim's] apparently incongruous lack of hysteria to allege that no attack occurred, or that the woman consented. The intuitive response of the average juror may well be to assume that a woman could not possibly respond calmly to such an assault. In such a case, the evidence presented to the jury by both parties concerning the victim’s mental state and behavior is counterintuitive, and may appeal to the unconscious assumptions and prejudices of the average juror—or judge.

The justice who authored the *Henson* opinion apparently based his holding in part on his intuitive assumptions about rape. At one point, he states that “[t]here is little doubt that an alleged rape victim’s conduct after the fact is probative of whether a rape in fact occurred.” Actually, courts are nowhere near a consensus on whether or not evidence of such conduct is reliable on the issue of consent.

As one court recently noted, the inference “that because [a] victim was not upset following the attack, she must not have been raped . . . runs contrary to the studies [of rape trauma syndrome,] which suggest that half of all women who have been forcibly raped are controlled and subdued following the attack.”

The Indiana Supreme Court’s misapplication of medical data is demonstrated further by its argument that the prosecution’s introduction into evidence of the victim’s post-rape behavior necessarily rendered probative the defense expert’s testimony that such behavior negated RTS. The court failed to recognize, however, that a negative reaction, as alleged by the State, and the lack of a reaction, as alleged by the defense, do not give rise necessarily to inverse conclusions.

Although evidence of the degree to which a woman suffered physical or emotional injuries does tend to corroborate a rape charge, a lack of perceptible injuries or trauma does not demonstrate that a woman was not raped. One problem with the *Henson* court’s juxtaposition of the RTS evidence introduced by the defense and the prosecution is that it assumes that both offers of evidence were scientifically ac-

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85. Id. at 352, 745 P.2d at 21 (Utter, J., concurring).
86. *Henson*, 535 N.E.2d at 1193.
87. See supra notes 43–67 and accompanying text.
89. The court reasoned that if the prosecution’s offer of evidence of the victim’s emotional trauma was relevant to prove rape, the defense expert’s testimony regarding her alleged nonsensitivity on the day after the rape was equally probative of whether a rape in fact occurred. *Henson*, 535 N.E.2d at 1193.
90. See supra Part I.
accurate and therefore acceptable. They were not. Experts agree that a sexual attack can cause physical and emotional injuries. They also agree that "psychic numbing" or apparent indifference can be symptoms of a sexual attack. There is no medical foundation as yet, however, for the assertion that the victim's apparent indifference proves that a rape did not occur.

The second prong of the court's analysis in Henson is that it would be "fundamentally unfair" to preclude defensive use of RTS evidence since previously the court had allowed the prosecution to use RTS evidence in other criminal trials. In Simmons, the Henson court stated, The Indiana Supreme Court had allowed the use of expert testimony on RTS to show that the victim's behavior was consistent with that of a person who had suffered a traumatic rape and thus to prove that a rape had occurred. The Henson court errs, however, in its reading of how the RTS evidence actually was used at the Simmons trial.

In Simmons the victim's credibility was at issue because she originally told the police an entirely different story about her abduction and rape than she related a month later. At the trial there was an inconsistency regarding whether the victim and the defendant had stopped at a particular supermarket to cash a check. To rebut the defense counsel's challenge to the victim's story, the prosecution introduced two experts to testify that the victim's inability to recall the sequence of events on the day of the rape was consistent with RTS.

91. More than half of the reported cases involve some type of force: 25% involve weapons. J. DRESSLER, supra note 7, at 519. According to psychologist Nicholas Groth, promulgator of a typology of rapists that has been considered a standard for the last ten years, The Mind of the Rapist, NEWSWEEK, Jul. 23, 1990, at 48, "anger rapists" attack impulsively in a vengeful rage and use excessive force—punching, choking, and kicking their victims into submission. Groth, The Rapist's View, in RAPE—CRISIS AND RECOVERY 24-5 (Burgess & Holmstrom ed. 1979)

Infection with the AIDS virus is another physical injury a rape victim could suffer. "'A sex offender walking around HIV-positive is like a loaded shotgun.'" A Frightening Aftermath—Concern About AIDS Adds to the Trauma of Rape, NEWSWEEK, Jul. 23, 1990, at 53 (quoting Gerald Kaplan, executive director of Alpha Human Services, a sex-offender treatment center in Minneapolis).

92. See supra notes 13-25 and accompanying text.
93. APA MANUAL, supra note 82, § 309.81, at 236.
94. It is one commentator's opinion, however, that "[b]ecause virtually all rape victims experience at least an acute reaction to rape, the absence of such a reaction would be probative of consent, assuming that the victim had been examined within a short time after the rape." See Comment, supra note 31, at 460-61.
96. Id. at 1192.
98. Id. at 578.
99. Id. at 578-79.
The prosecution's reason for using RTS evidence, therefore, was to give the jury an appreciation for why the complainant may have forgotten or lied about the facts surrounding the alleged rape. The prosecution did not use RTS evidence in its case in chief, but rather to rebut attacks on the victim's credibility made by the defense. This use of RTS evidence was particularly appropriate because, in the words of the California Supreme Court (which ultimately held RTS evidence inadmissible to prove a rape occurred), when used to rebut the inference of consent that arises when the alleged rapist suggests that the victim's post-rape conduct is inconsistent with her claim of rape, RTS evidence can serve to "disabuse[e] 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."[102]

Although the Simmons court only admitted the RTS evidence for the limited purpose of explaining bizarre behavior to support the credibility of the witness, the Henson court incorrectly interpreted Simmons as holding that the state may introduce RTS evidence to prove a rape occurred. Arguably, therefore, prohibiting the defense from introducing RTS evidence to prove a rape did not occur would not in fact have caused the defendant to suffer the "fundamental injustice" predicted by the Henson court.

D. A Warning to the State: Use RTS Evidence with Care

A fine line divides the prosecution's objective in Simmons and the defense's objective in Henson. The prosecution may be well advised to avoid the use of expert testimony on RTS because once the matter is in issue, the court may permit the defense to order the victim to submit to a psychiatric examination and call its own RTS expert. In many cases, however, RTS evidence may constitute an essential part of the state's case, as for example, when there is no physical evidence. The tension between these two concerns should be resolved carefully by prosecutors on a case-by-case basis.

100. Id. One of the experts testified that in her opinion the defendant was a "power rapist" who used death threats to force the victim to make up a false story about her whereabouts on the night of the rape. Id. at 579.
101. See supra notes 60-62 and accompanying text.
103. See Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989). The Henson court thus accorded the Simmons decision more breadth than the Simmons court seems to have intended.
104. See Comment, supra note 31, at 459.
105. See id. at 423-24 (circumstantial evidence of the complainant's psychological condition is very important because in many cases physical evidence is unavailable).
(1) RTS Evidence as the Losing Factor

A rape conviction is most likely in cases such as Henson, in which there is evidence of force and physical injury. In these cases, the prosecution probably can win its case without resorting to RTS evidence. In fact, in such cases the prosecution even may jeopardize its chances of winning by introducing expert testimony on RTS. In State v. Taylor, for example, the Missouri Supreme Court found that the State had sufficiently established the elements of force and nonconsensual intercourse. The victim testified that she had been knocked to the floor by a blow between the eyes; the hospital report indicated "a cut lip, bruises and swelling of [the] forehead, and scratches on [the] neck." The defendant offered no evidence at the trial and was convicted. On appeal the defendant based his entire argument on the prosecution's introduction of RTS evidence. Arguably, had the prosecution not introduced expert testimony on RTS the prosecution could have won on the basis of the physical evidence alone and the defense would have had no basis for an appeal.

Because a victim's physical injuries are so helpful in securing a conviction, prosecutors may be tempted to introduce evidence of emotional injury as routinely as evidence of bruises, scratches, or swelling. One commentator has characterized emotional injuries as "psychological bruises" and asserts that they are as relevant as physical bruises on the issue of consent. In many cases, however, although RTS ev-

106. Juries are reluctant to convict when there is no evidence of aggravating circumstances. See V. Hans & N. Vidmar, supra note 70, at 210 (one study showed that juries acquitted 60% of the rape defendants that judges would have convicted).

107. 663 S.W.2d 235 (Mo. 1984) (en banc).

108. Id. at 241.

109. Id. at 236.

110. Id. The defendant claimed that an improper foundation was laid for the expert testimony and that the expert's opinion was based on hearsay statements, invaded the province of the jury, and was irrelevant and immaterial.

111. Cf. People v. Bledsoe, 36 Cal. 3d 236, 252, 681 P.2d 291, 301-02, 203 Cal. Rptr. 450, 461 (1984) The California Supreme Court, though it found expert evidence of RTS should not have been admitted, affirmed the conviction because "the testimony did little more than provide the jury with information that it either already had or that was not particularly pertinent to the facts of this case." Id. Interestingly, the prosecution, in its own closing argument, stated that the rape counselor's testimony was unnecessary:

[The rape counselor] described what she called rape crisis syndrome trauma. "Do we need to produce an expert for you to figure that out? I mean it's almost like producing an expert to come in here to tell you the sky is blue, usually, unless it's cloudy. Wouldn't you expect someone who's been subjected to this brutal, animalistic assault to have some sort of trauma, some sort of disorganization? We really didn't need her testimony, but it put a little light on things, didn't it?"

Id. at 252 n.15, 681 P.2d at 302 n.15, 203 Cal. Rptr. at 461 n.15.

112. See Massaro, supra note 7, at 439-40.
idence may not hamper the prosecution’s case as it did in *Taylor*, the prosecution might add nothing to its case by introducing expert testimony on RTS.\footnote{See *Bledsoe*, 36 Cal. 3d at 252, 203 Cal. Rptr. at 461, 681 P.2d at 301-02 (stating that although it should not have been admitted, the RTS testimony did nothing more than provide the jury with information it already had or with irrelevant material); *see also* State v. Saldana, 324 N.W.2d 227, 231 (Minn. 1982) (in absence of unusual circumstances jury can assess victim’s credibility without expert assistance).}

Lay testimony regarding a victim’s physical and emotional state after the rape is admissible\footnote{See, e.g., *State v. Shaw*, 694 S.W.2d 857 (Mo. App. 1985) (evidence from a hospital sexual assault report that the prosecutrix was quiet, subdued, and crying quietly was admissible); *State v. Black*, 109 Wash. 2d 336, 349, 745 P.2d 12, 19 (1987) ("The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.").} and probably is sufficient in most cases to assist the jury in determining whether a complainant was a victim of rape.\footnote{See *Bledsoe*, 36 Cal. 3d at 251, 203 Cal. Rptr. at 460 (stating that lay jurors are "fully competent" to consider nonexpert testimony in determining whether a rape occurred).} In most cases jurors and judges are capable of making rational inferences about typical trauma reactions without the "scientific cachet"\footnote{In *State v. Pollard*, 719 S.W.2d 38, 41 (Mo. Ct. App. 1986) (on appeal, defendant contended that expert’s opinion that the victim was sexually abused gave a "scientific cachet" to the victim’s testimony).} lent by the testimony of an expert.\footnote{In *State v. Thompson*, 668 S.W.2d 179, 181 (Mo. Ct. App. 1984), the court stated that the jury could infer that the sexual activities charged had been nonconsensual from lay testimony that the victims had made major life changes since the alleged rape.} A jury can understand the implications of a swollen lip, a black eye, lacerated breasts, or emotional reactions such as nightmares, nausea, or phobias. The prosecution probably would gain no psychological edge by introducing such evidence through an expert rather than a lay person. Furthermore, despite concern to the contrary, studies show that jurors do not accord inordinate weight to the opinion of an expert.\footnote{*See* Massaro, *supra* note 7, at 444-45.}

Thus, after hearing lay evidence of the victim’s physical and emotional trauma, the judge and jury will expect the defense to provide a "plausible, innocent explanation" for the victim’s injuries.\footnote{*Bledsoe*, 36 Cal. 3d at 252, 203 Cal. Rptr. at 461, 681 P.2d at 301-02 (victim’s case was strong enough without RTS evidence because her distress was severe and defendant offered no explanation for her physical and emotional trauma).} The prosecution’s calling an expert witness accomplishes little more, yet risks objections from the defense that ultimately could confuse the jury or form the basis for an appeal. In short, in a case in which jury sympathy is with the victim because her injuries are apparent, the state’s best strategy may be to let the victim’s testimony or that of a lay observer speak for itself.
(2) RTS Evidence as the Crucial Factor

One of the unfortunate realities of a rape prosecution is that often there is no physical evidence.120 The victim may have yielded to the rapist for fear of being seriously injured, or any physical injuries sustained may have subsided by the time the rape was reported.121 In these cases, evidence of RTS may be the prosecution's only corroborating evidence.

A second unfortunate fact about the typical rape prosecution is that the sympathy of the jurors generally lies with the defendant.122 As one commentator observed, "[D]own deep, people feel there is some reason why women are raped. Men believe women can't be raped. And I don't find women sympathetic or understanding toward victims. There seems to be a general social feeling against victims of rape."123 Thus, in cases in which there is little or no evidence of physical injury, allowing the state to introduce expert testimony on RTS could reduce the substantial inequities the state faces in prosecuting its case. The expert testimony on "psychological bruises" could illustrate for the jury that there is more than one type of corroborating evidence to consider and could help the jurors better to understand the victim.

Thus, when there is little or no physical evidence to corroborate the rape charge, or when the defense has challenged the victim's credibility by alluding to inconsistencies between her conduct and her allegations, the prosecution should be entitled to call an RTS expert. The state should refrain from doing so, however, when there is a substantial amount of physical evidence; in such a case, the jury generally does not need the additional evidence and the state runs the risk of confusing the jury or prejudicing the defendant.

III. Proposed Solution: Admissible for the Prosecution; Denied to the Defense

In the interest of protecting victims, states should be convicting accused rapists at the same rate as defendants accused of other serious crimes.124 Rape cases are difficult to prosecute successfully because

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121. Id.
122. Massaro, supra note 7, at 404-08.
123. V. Hans & N. Vidmar, supra note 70, at 216.
124. See LeGrand, Rape and Rape Laws: Sexism in Society and Law, in FORCIBLE RAPE, supra note 8, at 67, 71 (in California there is a higher acquittal rate for rape than for any
there are rarely eyewitnesses;¹² five “[c]ircumstantial evidence and the complainant’s word, therefore, often constitute the only proof available to the state.”¹² The first section of this Part illustrates why the prosecution needs and should be allowed to use RTS evidence to increase its chances of winning a conviction.

At the same time, it is appropriate in most cases to deny the defense’s offer of RTS evidence. The second section of this Part argues that depriving the defense of the opportunity to use evidence of a woman’s post-rape behavior as a means to establish its defense or to cross-examine the witness is not unfair and is supported by policy reasons analogous to those supporting the enactment of rape shield statutes. Further, the section reiterates that the defense is not entitled to evidence of the victim’s subsequent behavior because it is not probative on the issue of consent if the behavior in question is a lack of RTS symptoms.

A. Why the State Should Be Allowed to Use RTS Evidence

In a rape prosecution, a prosecutor not only must do battle with very little evidence but also must wage war against a general feeling of distrust and distaste for rape victims.¹² In addition, she must present her case to a jury that may entertain various misconceptions about women and rape. Jurors tend to believe, for example, that the victim was “asking for it,”¹²⁸ that she actually wanted to be raped,¹²⁹ or that she was not raped at all.¹³⁰ Implicit in these beliefs is the assumption that the woman bringing formal criminal charges against the defendant is not to be believed.¹³¹ This fundamental lack of faith in a woman’s

other felony). The overall rape conviction rate in the 20-year period from 1961 to 1980 was 61.4%, much lower than the average conviction rate for other serious crimes. V. HANS & N. VIDMAR, supra note 70, at 211.

¹²6. Id.
¹²7. See Weis & Borges, Victimology and Rape: The Case of the Legitimate Victim, in RAPE VICTIMOLOGY 91, 99 (1975) (“The victim of a crime against the person is often stigmatized. He or she will be avoided as though people are seeking to avoid the danger of contagion.”).
¹²⁸. One theory is that our society, and therefore the average jury, has a need to construct elaborate rationalizations to prove why the victim was worthy of blame and got what she deserved. See id. at 98.
¹²⁹. See Griffin, Rape: The All-American Crime, in FORCIBLE RAPE, supra note 8, at 47, 50-51.
¹³⁰. The opinion in Henson v. State, 535 N.E.2d 1189, 1192-93 (Ind. 1989), indicates that the justices believed inconsistent behavior after the incident in question tends to prove that the victim was not raped.
¹³¹. See S. BROWN MILLER, supra note 21, at 369 (referring to the “cherished male assumption that female persons tend to lie”).
rape charge is in sharp contrast with the unquestioned credibility accorded victims who bring charges of, for example, robbery.132

The belief that a rape charge is to be viewed with suspicion is a vestige of Lord Hale's famous warning that a rape charge is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."133 Many commentators have asserted that Hale's epitaph is no longer viable today for various reasons.134 First, modern psychologists no longer diagnose young girls and women as suffering from "multifarious psychic complexes" or "abnormal instincts" that would drive them to "contrive false charges of sexual offenses by men."135 Second, the theory that women fantasize about rape or that a rape charge is the product of repressed sexuality has been criticized consistently.136 Third, because it is no longer a social stigma to be sexually active or to be involved in an interracial relationship, women purportedly have no need to claim rape to preserve their reputations.137

Reporting a rape is generally so stressful and traumatic for the victim that, as one commentator has observed, "it is amazing that any rape cases ever come to trial."138 Lord Hale's instruction must yield to the more modern interpretation that an accusation of rape is made with great difficulty. Indeed, a rape charge may be easier to defend against than it is to prosecute successfully.139 Thus, allowing the prosecution to use RTS evidence could be an effective way to neutralize the bias against the rape victim without causing undue prejudice to the defense.140

132. Although most rape victims who testify in court will have to prove they did not consent, and in practice will have to prove this by demonstrating that force was used, see S. ESTRICH, REAL RAPE 18, 19 (1987) (the degree of force used by the defendant and the level of resistance on the part of the victim is critical for conviction), robbery victims are never asked the degree to which they resisted the robber. See id. at 383.

133. 1 M. HALE, HISTORIA PLACITORUM CORONAE *635.

134. See, e.g., S. BROWNMILLER, supra note 21, at 369 ("Hale's quaint homily has poorly stood the test of time despite its popularity"); Massaro, supra note 7, at 418-23 ("some writers see Hale’s comment . . . as an indictment of the law’s insensitivity to the victims of rape"); Wood, The Victim in a Forcible Rape Case: A Feminist View, in RAPE VICTIMOLOGY, supra note 127, at 194-203 (responding to arguments that women fabricate stories of forcible rape to trap innocent men).

135. S. BROWNMILLER, supra note 21, at 370 (quoting 3A J. WIGMORE, EVIDENCE § 924a (1970)).

136. Massaro, supra note 7, at 419-20.

137. See LeGrand, supra note 124, at 74-75.

138. See Wood, supra note 134, at 195; see also Massaro, supra note 7, at 422-23 (discussion of the unpleasant after-effects on the victim’s relationships with friends, acquaintances, and lovers).

139. See, e.g., State v. Walgraeve, 243 Or. 328, 330, 412 P.2d 23, 24 (1966) ("[I]n cases involving adults it [may be] difficult to prove that a sex act was the culmination of force exerted by the male rather than the mutual act of the participants.").

140. Because jurors are not overcome with sympathy for the victim they will not accord
On the other hand, the defense should be restricted from using RTS evidence for the same reasons it generally is restricted from using evidence of a victim’s pre-rape sexual conduct: namely, to protect the victim’s privacy and encourage her to report and prosecute the rape. A second but equally important justification for such a restriction is to mitigate the prejudicial effect such testimony can have on the average judge or juror.

B. Why the Use of RTS Evidence Should Be Denied the Defense

The federal government, the military, and nearly every state in the nation have enacted legislation to protect a victim’s privacy during the course of a prosecution for rape. These laws, commonly referred to as “rape shield” statutes, were passed as a result of widespread criticism by feminist activists and law enforcement officials.

The feminist interest in rape legislation reform was manifold. Feminists believed that the law of rape, which originally was conceived as a means of protecting the property rights of a father or husband, should be rewritten to expunge the influence of oppressive male attitudes toward rape. Specifically, reformers wished to eliminate several assumptions in the common law: that a rape charge was manifestly suspect due to a woman’s vindictive nature or susceptibility to rape fantasies, that a woman’s sexual history reflected on her credibility as a witness, that a woman’s chastity was relevant because it tended to prove whether she would consent to a sexual advance, and that a woman by her conduct or appearance could have contributed to the sexual assault. In short, feminist reformers wanted to ensure that all rape victims were treated with respect and civility and protected undue weight to the victim’s allegations of emotional trauma. See generally V. HANS & N. VEDMAR, supra note 70, at 216. Furthermore, jurors are competent to evaluate expert testimony and do not accord it inordinate value. See id. at 196.

141. See Fed. R. Evid. 412.
142. See Mil. R. Evid. 412.
143. Forty-eight states have enacted rape shield legislation. The exceptions are Utah, which has no rape shield statute, and Arizona, which has restricted sexual conduct evidence by judicial decision. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 MINN. L. REV. 763, 765 n.3 (1986).
144. Id. at 765.
145. Id. at 767-68.
146. J. DRESSLER, supra note 7, at 520.
147. See Galvin, supra note 143, at 791.
148. See id. at 792.
149. See id. at 787.
150. See id. at 783-84.
151. See id. at 794.
from outdated misconceptions about women. In addition, they wanted to increase rape conviction rates.\textsuperscript{152}

The resulting state and federal rape shield statutes vary substantially in both substantive and procedural content.\textsuperscript{153} The federal statute generally excludes past sexual conduct evidence except evidence presented at an in camera hearing\textsuperscript{154} regarding sexual acts between the defendant and the complainant,\textsuperscript{155} or conduct between the complainant and other individuals when used to prove that the defendant could not have been the source of semen or physical injury.\textsuperscript{156} Both types of evidence pertain not to the complainant's character but rather to the defenses of consent or mistaken identity. In addition, the statute has a "catch-all" provision that allows the court to admit sexual conduct evidence on a case-by-case basis upon a showing that the evidence is "constitutionally required to be admitted."\textsuperscript{157}

In contrast, California's rape shield law simply prohibits evidence relating to the victim's past sexual conduct if used to prove consent.\textsuperscript{158} The effect of this legislation has been questioned because past sexual conduct evidence still is admissible if used to attack the victim's credibility.\textsuperscript{159} The distinction in the statute between the use of such evidence to establish consent and its use to discredit the witness has been criticized because, as one commentator stated:

[S]exual conduct evidence does not neatly break down into "consent" or "credibility" uses. In most cases, the testimony of the complainant establishes the crucial element of nonconsent; the two terms thus are functional equivalents. Evidence that establishes consent by the complainant will simultaneously impeach her credibility, and evidence that impeaches her credibility will raise the likelihood of consent. Thus, the statutory prohibition of either consent or credibility evidence often can be circumvented depending upon the circumstances of the case.\textsuperscript{160}

Yet, despite the flaws of the California statute, it is clear that the legislature intended to protect women by increasing rape reporting and conviction rates.\textsuperscript{161} That legislators have attempted, albeit imperfectly,
to address the injustices inherent in the common-law attitudes toward rape is cause for optimism. According to one commentator, "it is arguable that the major contribution of the rape reform movement has been symbolic rather than practical—that is, the reforms have raised public consciousness regarding the violent nature of rape."162

To the extent that the public is somewhat more conscious of the need for rape victim protection, so is today's judiciary more sensitive to the justification for rape shield statutes that exclude evidence of pre-rape behavior. The policy arguments that contributed to the enactment of these statutes also support the exclusion of evidence relating to a woman's behavior after the rape.

(I) The Victim Must Be Shielded from Jury Prejudice and Ignorance

Federal rules of evidence state that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.163 Even if RTS evidence were considered relevant on the issue of consent, the defense should be excluded from using it because it causes prejudice to the victim and can confuse the jury, which already has difficulty understanding a rape victim's experience.

Jurors place particular emphasis on the victim's life-style when attempting to assess the guilt of the defendant.164 An Indiana study found, after interviewing 331 jurors, that a jury was more likely to believe the defendant was innocent if the victim engaged in sex outside of marriage, was a blue collar worker, or used drugs.165 The study indicated that in cases in which the victim's testimony formed the primary foundation of the prosecution's case, jurors were influenced more by the victim's character than by either corroborative or hard evidence.166

26 Hastings L.J. 1551, 1554 (1975) (authored by Thomas E. McDermott III) (citing an interview with California State Senator Moscone in which the Senator states the aims of the legislation reform); accord People v. Jordan, 142 Cal. App. 3d 628, 633, 191 Cal. Rptr. 218, 220-21 (1983) (statutory rape case in which the court held that shield laws apply at preliminary hearings); see also Hearings Before the Senate Committee on Judiciary, Subcommittee on Violent Crime, SB574 (Rape Criminal Reform), SB575 (Rape Victim Reform), at 1, (1975) (statement of Sen. Alan Robbins, co-author of SB1678) (SB1678 passed the legislature because a large coalition of law enforcement personnel and women's organizations tirelessly worked to bring to the attention of the public the abuses suffered by rape victims in the treatment by police in the courtroom; one of the goals of SB1678 was to increase the victim's willingness to report and prosecute rape).

162. Note, supra note 37, at 1666.


164. V. Hans & N. Vidmar, supra note 70, at 213-14.

165. Id. at 213.

166. Id.
To combat this problem the federal rules of evidence allow testimony regarding a victim’s past sexual behavior only under three limited circumstances: when the evidence is constitutionally required to be admitted, when it is offered to prove the source of semen or injury, or when it pertains to conduct with the accused and is offered to prove consent to the sexual act in question. In State v. Cassidy, the Connecticut Appellate Court explained why Connecticut had adopted a similar rule:

Our legislature has determined that, except in specific instances, and taking the defendant’s constitutional rights into account, evidence of prior sexual conduct is to be excluded for policy purposes. Some of these policies include protecting the victim’s sexual privacy and shielding her from undue harassment, encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment.

The Connecticut Rape Shield Statute is noteworthy because it incorporates a relevancy balancing test like the one promulgated in Federal Rule 412(e)(3), which states that the defendant may offer evidence of the victim’s past behavior only upon a showing of probative value that outweighs the danger of unfair prejudice to the victim. This is a significant departure from the traditional interpretation that the party to be protected from prejudice in a criminal case is the defendant.

The Connecticut court’s interpretation is consistent with findings made in 1975 by a California Senate Subcommittee on Violent Crime. The committee considered whether to abolish the mandatory “cautionary instruction,” which was based on Lord Hale’s warning that a rape charge is easy to make. In recommending that the instruction be eliminated, the committee stated that “courtroom tactics which assist in the brutalization of rape victims by providing an unequal balance between their rights and the rights of the accused should be abolished.”

At the core of rape law reform is the assumption that the jury is unfairly prejudiced against the victim. The victim, according to

167. See supra notes 154-157 and accompanying text.
169. Id. at 376, 489 A.2d at 389.
170. See Galvin, supra note 143, at 806 & n.207 (“It is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf”)
171. Rape Criminal Reform, SB574, Rape Victim Reform, SB575, Calif. Legis. Senate Comm. on Judiciary, Subcomm. on Violent Crime (1975) [hereinafter Rape Reform].
172. California judges were required to advise the jury “to examine the testimony of the female person with caution and that a rape charge is a charge easily made and once made, hard to defend against.” Id. at 19.
173. See supra note 133 and accompanying text.
174. Rape Reform, supra note 171, at 23.
175. See, e.g., LeGrand, supra note 124, at 75 & n.2.
rape shield doctrine, needs protection from courtroom tactics that take advantage of the jury's bias toward the defendant. If the defense were allowed to introduce post-rape behavior evidence, defense counsel might insinuate routinely that the victim did not appear to react to the rape with anger, terror, or depression. The jury could then jump to the conclusion that the woman consented or was not actually subjected to sexual intercourse.\textsuperscript{176} Victim reports, however, indicate that victims rarely react with violence and anger, but more commonly with feelings of shock, betrayal, and self-accusatory guilt.\textsuperscript{177} Because this information is beyond the ken of the average juror, the least the legal system can do is allow limited use of RTS evidence at this juncture to inform the jury regarding the myriad possible reactions to rape. RTS evidence introduced by the state, however, may not be sufficient to overcome the jury's tendency to believe the victim consented.\textsuperscript{178} Therefore, to prevent the defense from taking advantage of jury prejudice and ignorance, the legal system should not allow defensive use of post-rape behavior evidence in the first instance.

Given that jurors are reluctant to convict when they learn of the victim's past sexual history,\textsuperscript{179} they might be equally recalcitrant when they hear that the victim's behavior after the alleged rape is inconsistent with what they would expect. \textit{Henson} provides an example: despite evidence that the victim was abducted at knifepoint and suffered lacerations on her breasts, the court determined that it was less probable that a rape occurred because of the victim's behavior the next day.\textsuperscript{180} Because the average person may misinterpret a seemingly callous reaction to rape as inconsistent with that of a "real" victim, it must be reiterated that victims suffer myriad reactions to rape and that there is no determinate timetable for predicting when a victim will manifest any particular RTS symptom.\textsuperscript{181} Furthermore, a great majority of rape victims are members of racial and ethnic minority groups.\textsuperscript{182} It is particularly unfair to expect a victim who is, for ex-

\begin{itemize}
  \item \textsuperscript{176} See supra notes 128-130 and accompanying text.
  \item \textsuperscript{177} Wels & Borges, \textit{supra} note 127, at 119.
  \item \textsuperscript{178} See supra notes 128-130 and accompanying text.
  \item \textsuperscript{179} See V. HANS & N. VDMAR, \textit{supra} note 70, at 209.
  \item \textsuperscript{180} Henson v. State, 335 N.E.2d 1189, 1191 (Ind. 1989). The \textit{Henson} court noted that the victim's "testimony was neither 'inherently improbable' nor did it embody 'incredible dubiosity,' in light of her later behavior, when evaluated in the absence of the expert testimony the appellant sought to introduce." \textit{Id.} at 1194. Apparently, it was the "scientific cachet" of the expert witness that prompted the judge to focus on the victim's post-rape behavior and to be more critical of her testimony because of it.
  \item \textsuperscript{181} See S. KATZ & M. MAZUR, \textit{UNDERSTANDING THE RAPE VICTIM} 217 (1979). The Authors' synthesis of research findings indicates that some women react to rape calmly while others become hysterical. The time frame in which women experience reactions from shock and anxiety to denial, suppression, depression, and guilt can range from days to weeks to months.
  \item \textsuperscript{182} J. DRESSLER, \textit{supra} note 7, at 518.
\end{itemize}
ample, poor, black, or a prostitute, to react to rape in the same way as a white middle class victim. Victims from different geographic areas may have diverse reactions as well. For example, the testimony of one rape victim was that "The sex was nothing at all. What do you want me to do? Be angry and hate all men? I just want to forget it. It's New York City life and I'm not going to let it destroy me." 183

Restricting the defense from using evidence of a woman's post-rape behavior need not cause undue prejudice to the defense. The restriction would not deprive the defendant of an essential defense, such as alibi, mistaken identity, or lack of semen or other physical evidence, because the victim's subsequent behavior is not relevant to these issues. The defense still would have sufficient means to successfully impeach the witness on the basis of her testimony regarding the incident in question. The defense could, for example, show inconsistency or lack of conviction in her testimony, point to a lack of physical injury, or call alibi witnesses. Perhaps of most practical importance, the defense simply could claim consent and rest on the proven assumption that the jury will be reluctant to convict. 184 In short, excluding RTS evidence from the defendant's use does not deprive the defendant of any traditional means of defense. On the other hand, excluding its use to the prosecution deprives the state of the circumstantial evidence that is so crucial when there are no physical injuries and subjects the victim's credibility to the ignorance and bias of the jury.

(2) RTS Evidence Is Not Probative on the Issue of Consent

Courts have exercised caution in allowing the prosecution to use RTS evidence to substantiate a charge of rape. 185 The same care should be exercised before allowing the defense to use RTS evidence to prove consent. Neither the prosecution nor the defense should be entitled to use medical evidence about the victim's subsequent behavior unless it is both probative and reliable.

A clear problem with RTS evidence when used by the state is that given the variety of behaviors encompassed, it would be difficult to find a symptom that would not substantiate a charge of rape. 186 A rape counselor in People v. Bledsoe, 187 for example, described victims as typically reacting in one of two "styles:"

183. S. Brownmiller, supra note 21, at 362.
184. See S. Brownmiller, supra note 21, at 372. "The defense rarely ever waives a jury trial knowing that the jury is an ally, not an enemy. Juries, which are often male-dominated, are extremely reluctant to convict." Id.
185. See supra notes 46-67 and accompanying text.
186. See supra notes 13-24 and accompanying text.
One is the stress style where the victim is obviously agitated . . . . And then there's the [controlled style] where the victim appears, in fact, very controlled, her feelings are masked, her affect is subdued. She may laugh; she may talk as though nothing has happened; she may giggle; she may look very inappropriate for someone who's just been assaulted. But those are normal defense postures for victims who fall within that range.188

Because any reaction could be characterized as "normal," the prosecution easily could bolster a rape charge by introducing an expert witness to show how the victim's reaction is illustrative of either the expressed or the subdued style. This is unfair to the defense and creates a very strong argument against the admission of RTS evidence except to explain bizarre inconsistencies between the victim's behavior and her allegation of rape.

The use of RTS evidence by the defense is just as problematic. Research on RTS was initiated for therapeutic use and is designed to recognize and treat the spectrum of tangible reactions to rape.189 The studies have never focused exclusively on women who suffer no reaction, probably because they usually do not report rapes, place calls to rape trauma centers, or receive treatment at hospitals.190 Consequently, there is little medical data regarding women who are raped but suffer no perceptible trauma.191 Existing RTS data therefore is not reliable to prove that a woman's behavior is inconsistent with that of an average rape victim because that data only describes reactions suffered by victims who either have reported rape or have been treated for trauma. Further, existing data indicates that there is no "typical" or "consistent" reaction among rape victims. Although most victims suffer trauma, the manifestation of that trauma takes different forms and occurs at different times.192 Thus, the claim that a woman must not have been raped because she does not have a consistent reaction misuses existing medical evidence.

(3) Feminist Policy Reasons for Excluding RTS Evidence from the Defense

As was so eloquently stated by the Cassidy court, rape shield statutes have been enacted to protect the victim's privacy, to shield her

188. Id. at 242, 681 P.2d at 294-95, 203 Cal. Rptr. at 453-54.
189. See supra notes 9, 43 and accompanying text.
190. The Burgess and Holmstrom study, for example, focused only on those women who sought help at the Victim Counseling Program at Boston City Hospital. A. BURGESS & L. HOLMSTROM, RAPE, CRISIS, AND RECOVERY xii (1979). The researchers found that all of the subjects suffered some type of Phase II symptoms. See supra note 21 and accompanying text.
191. In fact, until the latter half of the twentieth century, the scientific study of rape focused mainly on the rapist, rather than the victim. S. KATZ & M. MAZUR, supra note 181, at xi.
192. See supra notes 13-24 and accompanying text.
from undue harassment, and to encourage reports of sexual assault. Evidence of a victim's behavior after the alleged rape should be excluded for similar policy reasons.

A woman's reaction to rape is particularly private and sensitive. Women should not be subjected to the ordeal of recounting how they personally reacted to one of the most humiliating and violating experiences to which a person can be subjected. This is not to suggest that women should not testify at all, but rather that they should be able to relate, at their discretion, merely the clinical facts of their physical and emotional reactions. They should not be subjected to questions about how they felt, or what they thought, or what they wore or did after the rape. This invasion of privacy cannot be justified because it yields neither reliable nor probative information.

Moreover, allowing the defense to use RTS evidence would make the prosecution of rape less efficient for no compelling reason, thus impliedly sanctioning violence against women. Because women must rely on the legal system to protect them from victimization, the legal system must do its best to avoid being governed by rules of evidence that are based on outmoded justifications. To illustrate, there is very little chance that a woman today will bring a false charge of rape. There is therefore no reason, barring unusual circumstances, to attack the credibility of a woman who brings a charge of rape. A final, and equally important reason to exclude RTS evidence from the defense is that women will be less likely to report a rape if they know their subsequent behavior will be brought in and analyzed by an expert witness to attack their claims that a rape occurred.

By allowing RTS evidence on the issue of inconsistent behavior, the court is indicating impliedly that a woman is not to be believed. If courts were to bar admission of such evidence except with a showing

194. The introduction of RTS evidence by the defense can prejudice and confuse the jury, making it more difficult for the prosecution to convict. See supra notes 163-166 and accompanying text.
195. Women who physically resist a rapist are more frequently victims of injurious physical force. J. Dressler, supra note 7, at 519. It is in a woman's best interests, therefore, to rely on the legislature and law enforcement rather than on her own resources for protection.
196. See S. Katz & M. Mazur, supra note 181, at 214 ("Evidence indicates that the actual frequency of false rape reports may be very small, 2%—about the same number of false reports as those of other crimes.").
197. When the Big Dan trial prosecuting the rape of six Massachusetts women was broadcast on cable television, the number of women willing to report rape to the police or to proceed with prosecution decreased. Several victims stated that the trial had made them fearful of wide-ranging questioning and widespread media coverage. V. Hans & N. Vidmar, supra note 70, at 201.
of special circumstances, they would be implying that a woman is as trustworthy as any complainant. Because women generally are the victims of rape, a crime that is notoriously underprosecuted, at the very least they deserve this small token of affirmation from our legal system. More fundamentally, a victim should not be placed in a position in which she must justify her own behavior. This smacks of a witch-hunt: will we accept nothing short of a drowning before we accept the fact that a woman, despite her seemingly calm exterior, has been victimized?

C. A Solution: Limited Admissibility for the Prosecution

At the core of our legal system is the tenet that the defendant is entitled to a fair trial. It is difficult, therefore, to implement a rule of evidence allowing the prosecution but not the defense to use RTS evidence. Because of the unique bias in favor of the defendant in a criminal rape proceeding, however, there is some basis for tinkering with the rules to enhance the number of rape convictions and thus reduce the number of rapes in the long term. At the very least, until the legislature recognizes the dangerous implications of RTS evidence use by the defense, it is incumbent upon the courts categorically to exclude expert testimony on RTS except when used to explain "bizarre" behavior. The prosecution thus should not be able to introduce RTS evidence for the sole purpose of substantiating a rape charge; nor should the defense be able to use such evidence to show that the woman's behavior subsequent to the rape is inconsistent with that of an "average" victim.

If, however, the defense wishes to introduce nonexpert testimony to show that the victim's behavior after the rape was intuitively inconsistent with what a lay juror would expect, the prosecution then should be entitled to call on an expert witness to educate the jury about the myriad reactions a rape victim may experience. The following scenario illustrates an appropriate use of RTS evidence:

The prosecution introduces a nonexpert to testify that the victim has been despondent and has suffered various physical injuries. To impeach this witness, the defense then introduces witnesses who testify that they saw the victim dancing and drinking the night after the alleged rape. The prosecution may then call an expert witness to explain that some rape victims do not immediately experience trauma or that

198. See supra note 7.
199. See V. HANS & N. VIDMAR, supra note 70, at 211.
200. See supra notes 127-132 and accompanying text.
some victims manifest emotional injury in a "controlled style."

Another scenario would be one in which the defense attempts to impeach the witness by identifying "bizarre behavior" that casts doubt on her reliability. For example, if the victim refused to submit to a physical examination, or recanted her accusation, or had difficulty remembering the location or time of day at which she was allegedly raped, the jury might doubt the victim's credibility. The prosecution then could introduce expert testimony that such behavior has been documented as symptomatic of RTS.

In either of these examples, the prosecution would not call upon the expert witness to give any opinions regarding the individual victim's condition or behavior. The prosecution's only goal in using the expert testimony would be to mitigate preexisting juror biases with objective medical evidence.

Conclusion

Existing medical data indicate that there is no typical reaction to rape. Although researchers contend that all victims experience RTS, symptoms begin at different times and occur in varying sequence. Because the spectrum of RTS symptoms is so wide, courts generally disagree whether the evidence should be admissible to corroborate a rape charge. Courts generally find the evidence sufficiently reliable, however, for use in the limited context of explaining "bizarre" behavior.

Henson v. State\textsuperscript{201} marked the first case in which a court was confronted with the issue of whether to allow the defense to use RTS evidence to substantiate the defense of consent. The Indiana Supreme Court reversed the rape conviction because the defense was deprived of using RTS evidence to show that the complainant's behavior after the alleged rape was inconsistent with that of an "average" rape victim.

The \textit{Henson} decision set a poor precedent because it failed to recognize the existence of medical evidence indicating stoic reaction to a rape could in fact be a manifestation of RTS. In effect, \textit{Henson} sanctioned a misapplication of available scientific evidence on RTS and completely disregarded the political significance of allowing defendants to inquire into a woman's behavior after a rape.

When confronted with a defendant who wishes to introduce RTS evidence, courts should consider carefully whether a woman's behavior subsequent to rape is a true indicator of consent and whether the

\textsuperscript{201} 535 N.E.2d 1189 (Ind. 1989).
benefit to the defendant of invading a woman’s privacy is sufficient to justify the humiliation it would cause. The courts should recognize that to balance the defendant’s right to a fair trial against the continuing inequities in the legal prosecution of rape, traditional rules of evidence must be adjusted, as they were in the case of rape shield statutes, to account for the inbred biases and misconceptions jurors have regarding victims of rape.