DISILLUSIONING THE PROSECUTION: THE UNFULFILLED PROMISE OF SYNDROME EVIDENCE

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I
INTRODUCTION

From a quick scan of the news and television crime shows in recent years, it is apparent that mental conditions recognized by a distinct pattern of behavior, known as "syndromes,"[1] have entered the courtroom setting.[2] The medical community has recognized most of these syndromes for decades. For example, post-traumatic stress disorder (PTSD) and rape-trauma syndrome (RTS) are generally accepted syndromes in the field of medicine.[3] Despite this general acceptance, evidence that an individual suffers from PTSD or RTS is seldom used in the courtroom, and when it is used, courts limit its admissibility.[4] Thus,

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1. Charles Bleil, *Evidence of Syndromes: No Need for a Better "Mousetrap,"* 32 S. TEX. L. REV. 37, 38 (1990).

2. David McCord, *Syndromes, Profiles, and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 24 (1987) ("Before the mid-1970s, cases discussing the admissibility of nontraditional psychological evidence were few and far between. During the last decade, however, a flood of nontraditional psychological evidence has inundated the courts in criminal cases. Several of these types of evidence are known as 'syndromes.'").

3. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*), an authoritative manual on psychiatric disorders, includes post-traumatic stress disorder, and the most recent edition, *DSM-5*, categorizes sexual assault as an event that can lead to post-traumatic stress disorder. AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER (2013) [hereinafter AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER], *available at* http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf. Also, literature demonstrates the acceptance of rape-trauma syndrome in the medical community. *See* State v. Allewalt, 517 A.2d 741, 754 (Md. 1986) (citing THE RAPE CRISIS INTERVENTION HANDBOOK124–26 (Sharon L. McCombie ed., 1980)); ANN W. BURGESS & LYNDA L. HOLMSTROM, RAPE: CRISIS AND RECOVERY 35-47 (1979); ANN WOLBERT BURGESS & LYNDA LYTLE HOLMSTROM, RAPE: VICTIMS OF CRISIS 37–50 (1974); ELAINE HILBERMAN, THE RAPE VICTIM 36 (1976); HAROLD I. KAPLAN, ALFRED M. FREEDMAN & BENJAMIN J. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY § 21.1d, at 1519, § 24.15, at 1804–05 (3d ed. 1980); SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 215–31 (1979).

4. *See* Bleil, *supra* note 1, at 63 (discussing the general unwillingness of courts to accept a liberal approach toward the admissibility of syndrome evidence in the form of expert testimony).

syndrome evidence[5] is an area of the law that lags behind science.[6]

Courts differ greatly in their approaches to the admissibility of syndrome evidence.[7] Admissibility varies with the purpose for which the evidence is offered; defensive use of syndrome evidence is more widely accepted than offensive use, which is rare.[8] In this note, I seek to delineate the mechanics of the common rule that syndrome evidence may be allowed defensively but generally may not be admitted offensively.[9]

I begin by defining syndrome evidence, describing the various judicial approaches to analyzing its admissibility, and suggesting a coherent and uniform way to analyze its admissibility. Then, I will compare offensive and defensive use of syndrome evidence in the courtroom. I will focus largely on evidence of PTSD and RTS in sexual-assault cases. Finally, I will argue that the use of syndrome evidence in the courtroom, particularly in sexual-assault cases, often has a counterintuitive effect: instead of fervently protecting victims of sexual assault the way one might expect, syndrome evidence adds an additional dimension of uncertainty to sexual-assault cases because of the way in which courts have limited its use. Moreover, the use of syndrome evidence in the courtroom raises the possibility that defendants may use syndrome evidence against victims.

II
DEVELOPMENT OF SYNDROME EVIDENCE

A. Syndrome Evidence Defined

Syndrome evidence generally appears as expert testimony in the form of a qualified mental-health professional's opinion.[10] The Supreme Court of Vermont has defined syndrome evidence as "evidence elicited from an expert that a person is a member of a class of persons who share a common physical, emotional, or mental condition. The condition must be one that is generally recognized in the field."[11] Therefore, syndrome evidence is usually considered a

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5. Syndrome evidence has been defined as "a type of proof designed to educate jurors about typical human behavior in response to specified conditions." Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53, 96 n.243 (2012).

6. *See id.* at 62–63 (discussing doubts about the validity of evidence of post-traumatic stress disorder and the difficulties of advancing post-traumatic stress disorder as a defense or mitigating factor, even though the syndrome has gained acceptance in the scientific community and general populace).

7. Bleil, *supra* note 1, at 38.

8. *Id.* at 63–64; *see* Holly Hogan, *The False Dichotomy of Rape trauma syndrome*, 12 CARDOZO J.L. & GENDER 529, 535 (2006) (finding that offensive use of rape-trauma syndrome testimony is atypical).

9. Hogan, *supra* note 8, at 538 (discussing courts' reluctance to admit offensive testimony of rape-trauma syndrome).

10. Bleil, *supra* note 1, at 38.

11. State v. Kinney, 762 A.2d 833 (Vt. 2000) (quoting State v. Gokey, 574 A.2d 766, 768–70 (Vt.

type of expertise.[12]

In this note I will analyze evidence from two syndromes: post-traumatic stress disorder and rape-trauma syndrome. Both syndromes have been recognized by the medical community and used in the courtroom.[13]

1. Post-traumatic Stress Disorder

PTSD is an anxiety disorder that is triggered by a stressor.[14] PTSD has been listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*) since 1980.[15] Symptoms of PTSD include intrusive memories, flashbacks, sleep disturbance, social dysfunction, numbing of emotions, hypervigilance, and avoidance of traumatic stimuli.[16] The stressor is generally a triggering event, such as a sexual assault, abuse assault, car crash, or combat situation.[17] The person's response to the stressor consists of "intense fear, helplessness, or horror."[18] "Although PTSD was originally conceived to address the trauma experienced by combat veterans, it was soon recognized that the diagnosis had broad applications to all types of trauma, including 'interpersonal stressors' such as rape, sexual abuse, and physical battering."[19]

2. Rape-Trauma Syndrome

RTS is a type of post-traumatic stress disorder[20] that consists of "post-rape physical and emotional traits that many rape victims share."[21] In 1974 doctors Ann Burgess and Linda Holmstrom first brought RTS to the attention of the medical community, and, later, prosecutors, with their two-year study of forcible-rape victims.[22] They defined RTS as "the acute phase and long-term

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1990)).

12. *See* McCord, *supra* note 2, at 31 (describing a shift towards using expert testimony as syndrome evidence).

13. Dr. Brett C. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes: Avoiding the Battle of the Experts by Restoring the Use of Objective Psychological Testimony in the Courtroom*, 27 SEATTLE U. L. REV. 453, 458–64 (2003).

14. Grey, *supra* note 5, at 58.

15. *Id.* at 58–59 ("Clinicians welcomed the introduction of PTSD into the DSM, but a number of critics argued that it should not be recognized as a diagnosis, citing problems with validity, reliability, and ubiquity, among others."). *Id.* at 59. Heavy lobbying by Vietnam veterans' groups and the women's movement helped to bring attention to PTSD. *Id.*

16. *Id.* at 58.

17. *Id.* at 61 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–64 (4th ed., text rev. 2000)).

18. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed., text rev. 2000).

19. Trowbridge, *supra* note 13, at 459.

20. Kenneth Winchester Gaines, *Rape trauma syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227, 228 (1997).

21. Hogan, *supra* note 8, at 530.

22. Ann Wolbert Burgess & Linda Lytle Holmstrom, *Rape trauma syndrome*, 131 AM. J. PSYCHIATRY 981 (1974); Gaines, *supra* note 20, at 228–29.

reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation."[23] The victim goes through the acute phase immediately after the incident.[24] Reactions vary during this phase; some victims will express fear and anger, while others will appear calm and subdued.[25] Victims will also experience a number of physical reactions during the acute phase, such as headaches, disturbed sleep, and fatigue.[26] During the long-term reorganizational phase, the victim may decide to make a major change in her life.[27] This phase may also be characterized by nightmares or phobias relating to the circumstances of the rape.[28]

Rape-trauma syndrome includes many counterintuitive victim behaviors.[29] For example, some expect a victim to be hysterical after a rape and may assume that a rape did not occur if a victim is calm and subdued after the incident.[30] One might also expect a victim to report a rape immediately after it occurs.[31] Studies indicate, however, that victims with rape-trauma syndrome will often refuse to acknowledge they have been raped.[32] Similarly, although one might expect the victim of a traumatic experience to recall the event in vivid detail, victims may not have a clear memory of the rape.[33] Thus, rape-trauma syndrome helps to explain a victim's counterintuitive behavior that might otherwise lead a jury to believe that a victim was not raped.

The *DSM* does not mention rape-trauma syndrome or other common syndromes such as battered person syndrome or child abuse syndrome, but it does include sexual assault as a traumatic event that can lead to post-traumatic stress disorder.[34] Although RTS initially developed as a tool intended to aid in diagnosis and treatment of psychiatric patients, prosecutors have attempted to use RTS to establish causation between a rape and specific symptoms that rape victims exhibit.[35] One commentator argues, "[C]onsidering the difficulties involved in rape prosecutions, RTS . . . has great appeal as an evidentiary tool."[36] Most states allow at least some expert testimony about the psychological

23. Burgess & Holmstrom, *supra* note 22, at 982.

24. People v. Taylor, 552 N.E.2d 131, 134 (N.Y. 1990) (citing Burgess & Holmstrom, *supra* note 22, at 982).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Hogan, *supra* note 8, at 532.

30. *Id.*

31. *Id.*

32. *Id.* (citing Arthur H. Garrison, *Rape trauma syndrome: A Review of a Behavioral Science Theory and its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 613 (2000)).

33. *Id.* at 533.

34. AM. PSYCHIATRIC ASS'N, POSTTRAUMATIC STRESS DISORDER, *supra* note 3.

35. Gaines, *supra* note 20, at 230.

36. *Id.* "However, the most extensive rape reform is also the most controversial: the introduction

effects of rape, but "there is a continuing scientific and legal controversy about such expert testimony."[37]

B. Judicial Approaches to Analyzing Syndrome Evidence

One commentator described the entrance of syndrome evidence into the courtroom as "chaos" because courts vary to great extremes in their approaches to the admissibility of syndrome evidence.[38] Judicial approaches to analyzing the admissibility of syndrome evidence often differ because courts define syndrome evidence differently. Courts disagree, first, on whether syndrome evidence constitutes expertise in a given case and, second, whether the evidence is scientific or nonscientific. These definitions have important ramifications for the way courts analyze syndrome evidence.

Some courts have found that certain syndrome evidence is inadmissible for any purpose. For example, at least three states have held that syndrome evidence for rape-trauma syndrome in particular is inadmissible as expert testimony[39] because the testimony will not help the jury,[40] the evidence unfairly prejudices the defendant,[41] or the evidence is not credible.[42] Although these states are in the minority, other jurisdictions express similar concerns over the admissibility of syndrome evidence.[43] Those jurisdictions do not bar syndrome evidence altogether, but limit the scope of the evidence when these concerns are present.[44]

Courts must also decide whether syndrome evidence is scientific or nonscientific because scientific testimony has "traditionally been required to meet more stringent standards of admissibility than nonscientific expert testimony."[45] Syndrome evidence is scientific in the sense that it is closely related to medicine,[46] which is generally perceived as a "hard" science, but it is nonscientific in other respects.[47] For example, syndrome evidence is subjective

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of rape trauma syndrome as evidence." *Id.* at 227.

37. Trowbridge, *supra* note 13, at 462.

38. Bleil, *supra* note 1, at 38.

39. Minnesota, Washington, and Pennsylvania have each held that expert testimony on rape-trauma syndrome for any purpose is inadmissible. Gaines, *supra* note 20, at 233–35.

40. *See, e.g.*, State v. Saldana, 324 N.W.2d 227, 229–30 (Minn. 1982) (finding that testimony of rape-trauma syndrome would not add to the jury's understanding of the case).

41. *See, e.g.*, Commonwealth v. Gallagher, 547 A.2d 355, 358–59 (Pa. 1988) (holding that admission of rape-trauma syndrome evidence would invade the province the jury).

42. *See, e.g.*, State v. Black, 745 P.2d 12, 18 (Wash. 1987) (holding that rape-trauma syndrome is not a scientifically reliable method admissible in evidence).

43. Gaines, *supra* note 20, at 235.

44. *Id.*; *see also* discussion *infra* Part III.

45. McCord, *supra* note 2, at 30. For example, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), "requires that the scientific evidence be generally accepted in the scientific community from which it arose before it is admissible." McCord, *supra* note 2, at 30.

46. McCord, *supra* note 2, at 29–30.

47. *Id.* at 29.

and cannot always be scientifically verified.[48] Because syndrome evidence so often consists of a professional's opinion, some commentators have concluded that syndrome evidence is not scientific evidence at all.[49] Others argue that syndrome evidence is "scientific, but not 'hard' scientific."[50] A court's decisions on this distinction may determine the test the court applies to the evidence.[51]

Whether syndrome evidence is scientific or nonscientific expertise, a federal court's decision regarding admissibility will in either case be guided by rule 702 of the Federal Rules of Evidence, pertaining to testimony by expert witnesses,[52] and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[53] Moreover, many states have evidence laws on the books that are similar to rule 702.[54] Under rule 702, courts will only admit expert testimony if it will help the jury understand the evidence, the testimony is based on sufficient facts or data, the testimony is the product of reliable principles, and the expert has reliably applied the principles to the case.[55]

Daubert adds factors to rule 702 that federal courts should consider in deciding whether syndrome evidence is admissible.[56] Under *Daubert*, the expert's methodology must be reliable and relevant, and there must be a "fit" between the expert's analysis and the issues.[57] The *Daubert* factors, which are exemplary rather than exhaustive, are (1) whether the technique or theory can be or has been tested, (2) whether the technique or theory has been subjected to peer review and publication, (3) what the known or potential rate of error of the technique or theory is when applied, (4) whether standards are maintained to control the technique's operation, and (5) whether the technique or theory has been generally accepted in the relevant scientific community.[58]

Many state courts have concluded that syndrome evidence is scientific expertise, and, like federal courts, apply *Daubert*.[59] Other state courts, however, have decided whether syndrome evidence is admissible at trial by utilizing the

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48. Bleil, *supra* note 1, at 40.

49. *See, e.g.*, *id.* ("Although syndrome evidence is something akin to 'soft' scientific evidence, it clearly is not scientific evidence.").

50. McCord, *supra* note 2, at 29–30 ("Psychological research is somewhat of a hybrid . . . While most people would admit that psychological research is more 'scientific' than other social sciences . . . most would also contend that it is nowhere near as 'scientific' as the physical sciences.").

51. *Id.*

52. FED. R. EVID. 702.

53. 509 U.S. 579 (1993). *Daubert* only applied to scientific expertise, *id.* at 597, but the Supreme Court extended *Daubert*'s holding to non-scientific expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

54. *See* Bleil, *supra* note 1, at 52 (citing State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (noting the similarity between Minnesota's state rule 702 and the federal rule)); *see also* N.C. R. EVID. 702.

55. FED. R. EVID. 702.

56. *Daubert*, 509 U.S. at 592.

57. *Id.*

58. *Id.*

59. *See, e.g.*, State v. Kinney, 762 A.2d 833, 841 (Vt. 2000) (announcing that Vermont has adopted the *Daubert* standard).

test laid out in *Frye v. United States*,[60] rather than the *Daubert* test.[61] The Supreme Court held in *Daubert* that the Federal Rules of Evidence superseded *Frye* as the standard for the admissibility of expert testimony in federal courts,[62] but that holding—premised on the federal rules—had no binding precedential value in state courts.[63] The *Frye* test only applies to scientific expertise and requires the trial judge to find that the expert testimony is based on a scientific principle that has gained "general acceptance in the particular field in which it belongs."[64] In *Frye*, when the defendant offered an expert witness to testify to the result of a systolic blood pressure test, the D.C. Circuit determined that the test had not gained such standing.[65]

Although the *Frye* test is limited to scientific expertise, *Daubert* applies to both scientific and nonscientific expert testimony. In *Kumho Tire Company v. Carmichael*, the Supreme Court extended the *Daubert* analysis to nonscientific testimony, namely testimony based on "technical" and "other specialized knowledge."[66] The Court applied the *Daubert* factors to nonscientific expertise concerning a tire blowout.[67] Thus, in federal courts, the standard for nonscientific and scientific expertise is the same, so a court need not determine whether syndrome evidence is scientific or nonscientific. However, in some state courts, including those using the *Frye* test, the standard for scientific expertise may be more stringent.[68]

The differing judicial approaches to the admissibility of syndrome evidence have "created chaos in the courts."[69] Commentators argue that courts treat syndrome evidence as "extraordinary, requiring special rules."[70] However, judicial approaches to the admissibility of syndrome evidence need not vary in such extreme ways, and special rules may not be necessary.[71] Although many states have not adopted the unified federal approach for scientific and nonscientific evidence, rule 702 of the Federal Rules of Evidence and the

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60. 293 F. 1013 (D.C. Cir. 1923), *superseded by rule*, FED. R. EVID. 702, *as stated in Daubert*, 509 U.S. 579.

61. For example, Washington utilizes the *Frye* test. Trowbridge, *supra* note 13, at 456.

62. *Daubert*, 509 U.S. at 589 (1993).

63. Trowbridge, *supra* note 13, at 456. On the other hand, other courts have followed the Supreme Court's line of reasoning and abandoned the *Frye* test. *See, e.g.*, State v. Alberico, 861 P.2d 192, 194 (N.M. 1993) ("Today we abandon the *Frye* test as a predicate for the admissibility of scientific evidence by way of expert opinion testimony, relying instead on our Rules of Evidence.").

64. *Frye*, 293 F. at 1014.

65. *Id.*

66. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

67. *Id.*

68. *See* McCord, *supra* note 2, at 30 (discussing the traditional rule that scientific expertise must meet more stringent standards than nonscientific expertise).

69. Bleil, *supra* note 1, at 38.

70. *Id.* at 62.

71. *See id.* at 76 ("Perhaps the most significant improvement which would follow from the adoption of a 'no special rules' approach is increased certainty and rationality in the judicial rulings on the admissibility of various types of syndrome evidence.").

Daubert factors provide a uniform, liberal approach to analyzing admissibility. First, syndrome evidence generally appears as expert testimony and should be analyzed pursuant to rule 702 when offered as such in a federal case. Moreover, syndrome evidence should not qualify as scientific testimony when it is in the form of an expert's opinion because it cannot be scientifically verified. Accordingly, syndrome evidence should be analyzed pursuant to *Kumho Tire Company v. Carmichael*, in which the Court held that the *Daubert* analysis extends to nonscientific expert testimony. Federal courts can follow rule 702 and the *Daubert* factors to create greater coherence and consistency in analyzing the admissibility of syndrome evidence.[72]

III
DEFENSIVE USE OF SYNDROME EVIDENCE

Syndrome evidence is more frequently admitted defensively[73] than offensively in sexual-assault cases; that is, the prosecution may often use syndrome evidence to rebut the defense's claim, but this evidence is less often admitted to prove the existence of the sexual assault itself.[74] Defensive use of syndrome evidence generally bolsters the victim after an attack by the defense, but it does not go directly to the credibility of the victim.[75]

Syndrome evidence is generally used defensively in three ways: (1) to rehabilitate the victim, (2) to explain the victim's counterintuitive behavior, and (3) to rebut a defense of consent.[76] Rehabilitating the victim and explaining the victim's counterintuitive behavior can be viewed as ways that syndrome evidence is used to support the victim. In contrast, rebutting a defense of consent is the only way that syndrome evidence is used as a true defense for the victim.

A. Rehabilitating the Victim

The prosecution may introduce syndrome evidence to rehabilitate the

72. Many courts have abandoned the *Frye* test and rely instead on *Daubert* and state or federal rules of evidence. *See* Hogan, *supra* note 8, at 244. Many federal courts have thus reevaluated evidence that was inadmissible under *Frye* and determined that the evidence is now admissible; therefore, the *Daubert* standard may be more flexible and inclusive than *Frye*. *Id.*; *see also*, Bleil, *supra* note 1, at 76 ("Pursuant to an approach which essentially follows the codified rules of evidence, whenever a proper foundation for admissibility is laid, there will be more syndrome evidence admitted than under the current hodgepodge of approaches taken by the courts.").

73. Defensive testimony usually constitutes testimony that the state introduces in its rebuttal or case in chief to help bolster the victim after attack by the defense. Hogan, *supra* note 8, at 535. Defensive testimony is nondiagnostic. *Id.*

74. Bleil, *supra* note 1, at 63–64.

75. Hogan, *supra* note 8, at 537.

76. Although in this note I group defensive use of syndrome evidence into these three categories, there will often be overlap between them. For example, syndrome evidence that is used to support defensive claims can also be used to rehabilitate the victim after the defense has attacked it. Thus, these categories are fluid and not mutually exclusive.

victim's credibility if the defense has attacked it.[77] Some states have allowed expert testimony to rehabilitate the victim when the testimony shows that the victim's behavior is consistent with rape-trauma syndrome.[78] However, this evidence cannot go to the victim's credibility because vouching for credibility may invade the province of the jury.[79] At the same time, the evidence must help the jury better understand the case.[80] Thus, courts must narrow the scope of the evidence that is admitted.

Although rehabilitating a victim's credibility typically occurs after the defendant has attacked it, expert testimony of syndrome evidence sometimes attempts to rehabilitate a victim *before* the attack.[81] In *Hutton v. State*, for example, the Court of Appeals of Maryland held that expert testimony regarding PTSD from which the victim allegedly suffered was inadmissible.[82] In this case, the defendant, the victim's stepfather, was accused of sexually abusing the victim when she was seven years old.[83] The state called, in its case in chief, a qualified clinical social worker, who was not allowed to diagnose or give an opinion regarding PTSD but was allowed to describe the general characteristics of children who have been sexually abused and to relate those characteristics to the victim in the case.[84] The state also called, in its case in chief, a clinical psychologist who opined that the victim was suffering from PTSD.[85]

The *Hutton* court held that the expert testimony from both the clinical social worker and the clinical psychologist invaded the province of the jury because it addressed the credibility of the victim; therefore, the evidence was inadmissible.[86] However, the court also found that PTSD testimony could have come in to rebut a defense of consent or to explain counterintuitive behavior, but this case did not fit within either of those exceptions.[87] *Hutton* stands for the proposition that syndrome evidence is more readily admitted when it is primarily defensive in nature,[88] and the evidence must be limited so that it is helpful to the jury without invading the province of the jury.[89]

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77. Hogan, *supra* note 8, at 535.

78. *See* Gaines, *supra* note 20, at 238.

79. Hutton v. State, 663 A.2d 1289, 1296 (Md. 1995).

80. FED. R. EVID. 702.

81. Hogan, *supra* note 8, at 537. Hogan calls this type of testimony a "defensive/offensive combination" because it is offered offensively (in the case in chief), but it is rehabilitative and defends the victim before attack. *Id.* However, Hogan finds that courts consider this testimony as defensive. *Id.*

82. *Hutton*, 663 A.2d at 1296 (Md. 1995).

83. *Id.* at 1291.

84. *Id.* at 1291–92.

85. *Id.* at 1292–93.

86. *Id.* at 1296.

87. *Id.* at 1301.

88. *See* Hogan, *supra* note 8, at 538 (finding that courts are more likely to admit syndrome evidence defensively because it is "scientifically sound, helpful to the jury, and not overly prejudicial").

89. *See Hutton,* 663 A.2d at 1301 ("The evidence might be offered, for example, to show lack of consent or to explain behavior that might be viewed as inconsistent with the happening of the event, such as a delay in reporting or recantation by the child.").

Courts have had trouble drawing a line between rehabilitating the victim and bolstering the credibility of the victim in sexual-assault cases. For example, in *State v. McCoy*,[90] the West Virginia Supreme Court of Appeals noted that expert testimony regarding symptoms consistent with rape-trauma syndrome is relevant and admissible, especially when the defense has attacked the victim's credibility and the prosecution is attempting to rehabilitate the victim.[91] However, the court cautioned that only the jury could examine the credibility of witnesses.[92] "We, therefore, must draw a distinction between an expert's testimony that an alleged victim exhibits post-rape behavior consistent with rape trauma syndrome and expert opinion that bolsters the credibility of the alleged victim by indicating that she was indeed raped."[93] The court held, however, that in this case the expert's opinion on whether the victim's actions after the incident conformed to "typical post-rape behavior"[94] was inadmissible because her testimony was tantamount to an opinion that the defendant had raped the victim.[95] The court found that an "expert may testify that the alleged victim exhibits behavior consistent with rape-trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped."[96]

Similarly, the Wisconsin Supreme Court has found that syndrome evidence used to rehabilitate the victim is admissible when it does not include an opinion as to whether the victim was raped.[97] In *State v. Robinson*, a sexual-assault case, the Wisconsin Supreme Court allowed expert testimony that explained the victim's behavior when the defendant attempted to rebut the complainant's testimony.[98] The court found that the testimony was helpful because the defendant had pointed out that the victim was not crying after the assault and was composed when writing a statement at the police station concerning the assault.[99] The expert offered no opinion testimony on the victim, but testified only as to her observations of the victim's behavior and symptoms and her observations of other sexual-assault victims.[100] The court held that this testimony assisted the trier of fact in understanding the evidence because it helped the jury understand "reactions with which it perhaps was unfamiliar."[101] Because the expert's testimony did not include the expert's opinion, there was

90. 366 S.E.2d 731 (W. Va. 1988).
91. *Id.* at 736–37.
92. *Id.* at 737.
93. *Id.*
94. *Id.* at 733.
95. *Id.* at 737.
96. *Id.*
97. State v. Robinson, 431 N.W.2d 165, 172 (Wis. 1988).
98. *Id.* at 172.
99. *Id.* Note that the expert testimony in this case also explained counterintuitive behavior, and is therefore included in part III.B as well.
100. *Id.*
101. *Id.*

no discussion of the expert invading the province of the jury in rehabilitating the victim.[102]

Thus, if syndrome evidence is used to rehabilitate a victim in a sexual-assault case, the evidence should generally not include an opinion from the expert as to whether the victim was, in fact, sexually assaulted.[103] Rather, rehabilitation can occur through expert testimony that merely describes generally the characteristics and symptoms of the victim's behavior and observations of other victims of sexual assault.[104] Moreover, expert testimony cannot address the credibility of a victim because that is a question that is solely for the jury.[105]

B. Explaining Counterintuitive Behavior

Courts generally allow evidence of rape-trauma syndrome if it explains how a victim's behavior that seems inconsistent with a claim of rape is actually consistent with the claim.[106] Several jurisdictions limit RTS evidence to that purpose alone.[107] "The goal of the courts using this approach is to allow expert testimony on RTS to rebut widely-held misconceptions about the presumed behavior of sexual assault victims."[108] RTS symptoms that may seem inconsistent with a claim of sexual-assault include a delay in reporting, an inability to identify the attacker, inconsistent statements to the police, an initial denial of being raped, and a calm and subdued demeanor after the attack.[109] Courts that only allow expert testimony to explain counterintuitive behavior do not allow the expert to opine on whether a rape actually occurred.[110]

In *State v. Kinney*[111] expert testimony as to rape-trauma syndrome and "the behavioral patterns of victims of sexual assault"[112] was admissible to explain

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102. *Compare id.* at 172–73 ("[T]he use of expert testimony in relating observations of the way other sexual assault victims actually behave serves a particularly useful role by disabusing the jury of some widely held misconceptions about sexual assault victims."), *with* State v. McCoy, 366 S.E.2d 731, 736–37 (W. Va. 1988) (noting that an expert should not give an opinion on whether the victim was raped because a victim's credibility is a question for the jury).

103. *See, e.g.*, *McCoy*, 366 S.E.2d at 731; *see also*, Hogan, *supra* note 8, at 535.

104. *Robinson*, 431 N.W.2d at 172.

105. Hutton v. State, 663 A.2d 1289, 1301 (Md. 1995).

106. *See* McCord, *supra* note 2, at 43 ("Courts have unanimously upheld the admissibility of such testimony, reasoning that such evidence will assist the jury because these children's reactions to sexual abuse are not within the common experience of the jury.").

107. Gaines, *supra* note 20, at 235 (citing People v. Bledsoe, 36 Cal. 3d 236 (1984); People v. Hampton, 746 P.2d 947 (Colo. 1987), *overruled by* People v. Shrek, 22 P.3d 68 (Colo. 1987) (en banc); Goodwin v. State, 573 N.E.2d 895 (Ind. Ct. App. 1991); State v. Gettier, 438 N.W.2d (Iowa 1989); Commonwealth v. Mamay, 553 N.E.2d 945 (Mass. 1990); People v. Taylor, 552 N.E.2d 131 (N.Y. 1990); State v. Hall, 412 S.E.2d 883 (N.C. 1992); State v. Robinson, 431 N.W.2d 165 (Wis. 1988)).

108. Gaines, *supra* note 20, at 235 (citing *Robinson*, 431 N.W.2d at 172–73).

109. *Id.* at 235–36.

110. *Id.* at 236–37.

111. 762 A.2d 833 (Vt. 2000).

112. *Id.* at 839.

counterintuitive victim behavior.[113] The victim claimed that the defendant raped her, while the defendant claimed that the victim consented.[114] The expert had no contact with the victim and did not offer an opinion on whether the victim had been raped.[115] Instead, the expert generally described the symptoms of rape-trauma syndrome and testified that it was not unusual for a rape victim to delay reporting a rape and fall asleep after the assault.[116] The court held that expert evidence of rape-trauma syndrome was admissible to "assist the jury in evaluating the evidence, and frequently to respond to defense claims that the victim's behavior after the alleged rape was inconsistent with the claim that the rape occurred."[117]

C. Rebutting a Defense of Consent

The prosecution may introduce syndrome evidence to defend the victim against a claim of consent from the defendant. The Supreme Court of Kansas, the Court of Appeals of Maryland, and the Supreme Court of Arizona have all allowed syndrome evidence for this purpose.[118] Although the Court of Appeals of Maryland and the Supreme Court of Arizona seemed to place limitations on what the evidence would be admissible to prove, the Supreme Court of Kansas broadly allowed expert testimony of rape-trauma syndrome.[119]

State v. Marks[120] was the first reported case in which the prosecution used syndrome evidence to defend the victim against a claim of consent.[121] In this case, the defendant allegedly raped the victim, the victim related the story to her roommate, and her roommate called the police and took her to the hospital.[122] The defendant did not deny having sexual intercourse with the victim and instead based his entire defense on consent.[123] The prosecution used the expert testimony of a psychiatrist and neurologist who discussed the diagnosis and treatment of post-traumatic stress disorder and rape-trauma syndrome, which he described as a type of post-traumatic stress disorder that results from

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113. *Id.* at 842.

114. *Id.* at 837.

115. *Id.* at 839.

116. *Id.* at 839–40.

117. *Id.* at 842.

118. Gaines, *supra* note 20, at 237–41.

119. *See* State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985) (en banc) (holding that evidence of rape-trauma syndrome is admissible to prove the victim's lack of consent); State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982) (holding that expert testimony of rape-trauma syndrome is admissible to prove the existence of the rape itself); State v. Allewalt, 517 A.2d 741, 751 (Md. 1986) (holding that evidence of post-traumatic stress disorder is admissible in a sexual-assault case to prove the victim's lack of consent where the expert did not explicitly refer to rape-trauma syndrome).

120. 647 P.2d at 1292.

121. *See* Gaines, *supra* note 20, at 241–42.

122. *Marks*, 647 P.2d at 1295.

123. *Id.* at 1298.

sexual assault.[124] The expert examined the victim two weeks after the rape and testified that she was suffering from rape-trauma syndrome.[125]

State v. Marks is unique in that the Kansas Supreme Court allowed the expert testimony to prove the rape itself; therefore, this case is also an illustration of offensive use of syndrome evidence.[126] Despite the court's recognition that rape-trauma syndrome at the time was a new development in psychiatry, it held that the expert testimony was admissible.[127] The court stated, "[I]f the presence of rape trauma syndrome is detectable and reliable as evidence that a forcible assault did take place, it is relevant when a defendant argues the victim consented to sexual intercourse."[128] Furthermore, the court held that the expert's opinion did not invade the province of the jury.[129]

Similarly, in State v. Allewalt, the defendant raised the defense of consent.[130] Here, the state called, in its rebuttal, a psychiatrist who testified that the victim suffered from PTSD caused by rape.[131] The Court of Appeals of Maryland found that there was "no issue" over the fact that PTSD is a generally accepted anxiety disorder, and that it was reasonable for the psychiatrist to opine that the trauma causing the PTSD was the rape the victim described.[132] The court recognized the split of authority in the admissibility of rape-trauma syndrome but ultimately found that the trial court did not abuse its discretion in admitting the expert testimony.[133] The court focused its holding on the expert's failure to mention rape-trauma syndrome by name and noted that the concern with unfair prejudice is diminished when the syndrome is not associated exclusively with rape.[134] Moreover, the court noted that cross-examination and proper jury instructions can reduce prejudice.[135]

The Supreme Court of Arizona went one step further than the Court of Appeals of Maryland and found that even evidence of rape-trauma syndrome,

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124. *Id.* at 1299.

125. *Id.*

126. I cite *Marks*, 647 P.2d 1292, for the defensive use of syndrome evidence because the prosecution used the syndrome evidence to defend the victim against a claim of consent from the defendant.

127. *Id.* at 1299.

128. *Id.*

129. *Id.*

130. 517 A.2d 741, 741 (Md. 1986).

131. *Id.* at 741–42.

132. *Id.* at 746–47. However, the dissent believed that the *Frye* test was the proper standard, and the testimony did not meet that standard for admissibility because PTSD "is not 'generally accepted' in the relevant scientific community as reliable evidence as to whether a rape in the legal sense occurred or whether a woman consented to a particular act of sexual intercourse." *Id.* at 752 (Eldridge, J., dissenting). Even if the *Frye* test was inapplicable, the dissent would have found that the unfair prejudice of the expert testimony outweighed the probative value and therefore, the expert testimony was inadmissible. *Id.*

133. *Id.* at 751.

134. *Id.*

135. *Id.*

as opposed to PTSD, would be admissible to show lack of consent.[136] In State v. Huey, the defendant raised the defense of consent when he was convicted for one count of kidnapping and nine counts of sexual assault.[137] The prosecution called, in its case in chief, a psychiatrist who treated the victim after she escaped from the defendant.[138] The psychiatrist described the victim's symptoms in general terms and referred to the victim's condition as "an adjustment reaction with mixed emotional features" which occurs when there is "a psycho–social stressor that is temporarily present," but the defendant claimed that the state was effectively introducing evidence of rape-trauma syndrome.[139]

The Supreme Court of Arizona, as an initial matter, disagreed with the defendant and found that the expert testimony did not describe rape-trauma syndrome but instead consisted of general observations of stress.[140] Moreover, the expert did not use the term "rape-trauma syndrome."[141] Holding that the evidence was admissible,[142] the court further stated that testimony from a psychiatrist who examined the victim would have been admissible to show lack of consent, even if the testimony did concern rape-trauma syndrome.[143] The court recognized that cross-examination would allow the jury to properly weigh the evidence and therefore, testimony of rape-trauma syndrome would not invade the province of the jury.[144] Because this case involved an issue of consent, evidence of rape-trauma syndrome would have been admissible, and the expert could have therefore referred to rape-trauma syndrome directly instead of describing the victim's symptoms in general terms.[145]

IV
OFFENSIVE USE OF SYNDROME EVIDENCE

A. Diagnostic Testimony

Offensive use of syndrome evidence in sexual-assault cases generally involves a diagnosis to establish that the sexual assault occurred.[146] Thus, offensive use generally occurs in the prosecution's case in chief.[147] "[A]fter an expert diagnoses the victim with [rape-trauma syndrome], the State may argue

136. State v. Huey, 699 P.2d 1290, 1295 (Ariz. 1985) (en banc).

137. *Id.* at 1291–92.

138. *Id.* at 1293. Although the prosecution called the expert in its case in chief, I cite *Huey* as a case illustrating defensive use of syndrome evidence because the evidence is used to respond to a claim of consent. *Id.*

139. *Id.*

140. *Id.* at 1293–94.

141. *Id.* at 1293.

142. *Id.* at 1294.

143. *Id.* at 1295.

144. *Id.* at 1294–95.

145. *Id.* at 1295.

146. Hogan, *supra* note 8, at 533.

147. *Id.*

that because the victim suffers from RTS, she must have been raped."[148] Offensive use of syndrome evidence is atypical.[149] Many commentators have noted that offensive use of syndrome evidence raises concerns about fairness in the courtroom and interferes with the jury's role by vouching for the victim's credibility.[150] Holly Hogan notes,

> Why do courts . . . distinguish between defensive uses and offensive uses? Courts often find that rehabilitative testimony in the form of defensive testimony is scientifically sound, helpful to the jury, and not overly prejudicial. Yet, courts generally do not believe that RTS is legally or scientifically sound to offer as offensive testimony as diagnostic proof that a rape occurred, and contend that it infringes on the defendant's constitutional protections to a fair trial.[151]

Prosecutors have attempted to use syndrome evidence offensively to corroborate evidence that abuse occurred.[152] However, most courts do not allow this type of testimony.[153] In *Hutton v. State*, expert testimony by a clinical psychologist who opined that the victim in fact suffered from PTSD was inadmissible because it invaded the province of the jury.[154] In contrast, Judge Rodowsky, concurring, admonished the majority for allowing physicians to testify as to their medical opinions in other contexts, yet holding that the opinions of mental health providers based on the diagnosis of a mental disorder were inadmissible in this case.[155] Judge Rodowsky emphasized the importance of a PTSD diagnosis in a child–sexual assault case like this one because there is generally no other eyewitness testimony or physical evidence to corroborate the child's testimony.[156]

Similarly, in *People v. Bledsoe*,[157] the Supreme Court of California found that expert testimony regarding rape-trauma syndrome was inadmissible to prove that a rape in fact occurred.[158] The court focused on the fact that rape-trauma syndrome developed as a "therapeutic tool" to identify and treat emotional problems in patients rather than as a tool to determine the truth or accuracy of past events.[159] The court emphasized that rape-trauma syndrome

148. *Id.*

149. *Id.* at 535; *see also* Hutton v. State, 663 A.2d 1289, 1301 (Md. 1995) ("Expert testimony describing PTSD or rape-trauma syndrome may be admissible, however, when offered for purposes other than to simply establish that the offense occurred."); State v. McCoy, 366 S.E.2d 731, 736 (W. Va. 1988) ("The common thread running through [several courts] is that expert testimony on rape trauma syndrome is not admissible to show whether or not the complainant was, in fact, raped.").

150. *See, e.g.*, Hogan, *supra* note 8, at 539.

151. *Id.* at 538.

152. *Hutton*, 663 A.2d at 1297.

153. Hogan, *supra* note 8, at 538.

154. *Hutton*, 663 A.2d at 1296.

155. *Id.* at 1303–04 (Rodowsky, J., concurring).

156. *Id.* at 1302.

157. 36 Cal. 3d 236 (1984).

158. *Id.* at 238.

159. *Id.* at 249.

may be generally accepted in the scientific community, but not for the prosecution's purpose of proving a rape occurred.[160]

In contrast, in *State v. Marks*, the Kansas Supreme Court allowed evidence of rape-trauma syndrome to prove the existence of the rape itself.[161] Despite this decision, however, "courts remain reluctant to admit offensive RTS testimony to prove that a rape occurred."[162] Consistent with that reluctance, the Kansas Supreme Court later limited this decision and held that *Marks* is not applicable to all sexual-assault cases:

> Our decision in *Marks* does not in any way authorize a medical expert to testify that in his opinion the complaining witness in a particular case was raped. The expert psychiatric testimony authorized by *Marks* is restricted to the victim's state of mind and the existence of the "rape trauma syndrome."[163]

Thus, in general, courts will only admit RTS and other syndrome evidence to rehabilitate a victim defensively and nondiagnostically, rather than offensively.[164]

B. Offensive Use by the Defense

The accused may wish to introduce syndrome evidence in sexual-assault cases, using the absence of post-traumatic stress disorder or rape-trauma syndrome as evidence that no rape occurred.[165] This presents the question, May the defendant compel the victim to undergo a psychological examination?[166] Although most courts have not addressed offensive use of syndrome evidence by the defense,[167] the Court of Appeals of Maryland has stated, "Lurking in the background is the nice question of whether the absence of PTSD is provable by the accused in defense of a rape charge, as tending to prove that there was consent."[168] The court has recognized that "[w]hen ruling on whether to receive State proffered evidence of PTSD a trial judge will have to weigh the benefit of the evidence not only against potential unfair prejudice, but also against the complexity of possibly accompanying issues"[169] such as the defendant's use of syndrome evidence.

Commentators have speculated as to whether offensive use of syndrome evidence by the defense should be admitted equally with offensive use by the prosecution. Holly Hogan argues,

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160. *Id.* at 251.

161. State v. Marks, 647 P.2d 1292, 1299 (Kan. 1982).

162. Hogan, *supra* note 8, at 538.

163. State v. Bressman, 689 P.2d 901, 908 (Kan. 1984).

164. Hogan, *supra* note 8, at 538.

165. Gaines, *supra* note 20, at 247.

166. *Id.*; *see also* State v. Allewalt, 517 A.2d 741, 751 (Md. 1986) ("That can, in turn, lead to issues concerning compulsory psychiatric examination of the complainant by an expert for the defense.").

167. *See, e.g.*, *Allewalt*, 517 A.2d at 751 ("In addition, we can foresee cases where the defendant will seek to counter the State's PTSD evidence with his own expert testimony.").

168. *Id.*

169. *Id.* at 751–52.

> Allowing both sides to utilize offensive testimony should not serve as the solution to the admission of such testimony. One would not argue that the prosecution should be able to admit contaminated DNA evidence as long as the defense can introduce its own contaminated evidence. Likewise, there is no reason to allow such dual admission to apply to RTS offensive testimony.[170]

In contrast, another commentator argues that offensive use of syndrome evidence by the defense should be admitted as long as offensive use by the prosecution is admitted.[171] Kenneth Gaines contends, "Due process guarantees the defendant the right to a fair trial. At the very least, the court should be mindful to afford equal treatment to both the State and the defendant on RTS evidence."[172] Given that offensive use of syndrome evidence by the prosecution is atypical,[173] courts are likely to similarly limit defendants' use of this evidence.

V
THE UNFULFILLED PROMISE OF SYNDROME EVIDENCE

In the 1980s, prosecutors who had difficulty obtaining convictions in rape prosecutions realized that expert testimony that the complainant suffered from RTS could be useful evidence, particularly when the defendant admitted to engaging in sexual acts but claimed it was consensual.[174] Syndrome evidence was particularly important "where the case boiled down to a credibility contest"[175] between the victim and the defendant.[176]

The appeal of syndrome evidence for prosecutors in sexual-assault cases results from the difficulty associated with rape prosecutions.[177] Unfortunately for prosecutors, syndrome evidence has not been as helpful to victims as one would think.[178] There are several factors that limit the admission of syndrome evidence in sexual-assault cases: Syndrome evidence is excluded when the evidence (1) is not helpful to the jury,[179] (2) invades the province of the jury,[180] or

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170. Hogan, *supra* note 8, at 547.

171. Gaines, *supra* note 20, at 249.

172. *Id.*

173. Hogan, *supra* note 8, at 536.

174. McCord, *supra* note 2, at 39.

175. *Id.*

176. *Id.*

177. Gaines, *supra* note 20, at 230. Conviction rates for rape remain low, and rape has been one of the most underreported violent crimes. *Id.* at 231. "Because of the difficulties of rape prosecutions, it is understandable that prosecutors would try to use RTS as evidence." *Id.* at 232.

178. *See id.* ("But the transition of RTS from a therapeutic aid to an evidentiary tool has not been smooth.").

179. *See* discussion *supra* Part III; *see also, e.g.*, State v. Saldana, 324 N.W.2d 227, 231 (Minn. 1982) (finding that testimony of rape-trauma syndrome would not add to the jury's understanding of the case).

180. *See, e.g.*, Hutton v. State, 663 A.2d 1289, 1296 (Md. 1995) (holding that the expert testimony from both a clinical social worker and clinical psychologist invaded the province of the jury because the testimony addressed the credibility of the victim).

(3) is not credible.[181]

When syndrome evidence is admitted, courts have greatly limited the scope of the evidence. Courts will generally only allow the evidence to come in defensively, such as to rehabilitate the victim,[182] explain counterintuitive behavior,[183] or respond to a defense of consent.[184] Even when syndrome evidence is admitted for these purposes, courts limit the scope of the expert testimony; experts cannot offer a diagnosis[185] or an opinion related to the victim.[186] Thus, in the context of sexual-assault cases, generally, experts can only describe the syndrome and characteristics and behavior of victims of sexual assault.[187]

Moreover, potential offensive use of syndrome evidence by the defense further undermines the protections afforded to victims by syndrome evidence.[188] One commentator argues that courts should afford the prosecution and defense equal treatment with regard to syndrome evidence to preserve the defendant's right to a fair trial, allowing the defense to use the absence of rape-trauma syndrome as evidence that no rape occurred in a sexual-assault case.[189]

The problem with this argument is that it ignores the effects of syndrome evidence on the jury. Offensive use of syndrome evidence by the defense is problematic because it could lead to the "CSI effect." The "CSI effect" refers to the effect of forensic science in crime television shows on public perception and juror demands for scientific evidence.[190] Prosecutors assert that "the show's perfectly packaged crime stories ha[ve] created unrealistic expectations among potential jurors about the kind of evidence they will see in a real-life trial."[191] Therefore, "[p]rosecutors contend that the 'CSI effect' has made their job of

181. *See, e.g.*, State v. Black, 745 P.2d 12, 18 (Wash. 1987) (holding that rape-trauma syndrome is not a scientifically reliable method admissible in evidence).

182. *See, e.g.*, State v. McCoy, 366 S.E.2d 731, 737 (W. Va. 1988) (holding that expert testimony regarding the existence of symptoms consistent with rape-trauma syndrome is relevant and admissible to rehabilitate the victim); *see also* discussion *supra* Part III.A.

183. *See, e.g.*, State v. Kinney, 762 A.2d 833, 842 (Vt. 2000) (holding that expert testimony used to explain the victim's counterintuitive behavior after the rape was admissible); *see also* discussion *supra* Part III.B.

184. *See, e.g.*, State v. Huey, 699 P.2d 1290, 1294 (Ariz. 1985) (en banc) (holding that evidence of rape-trauma syndrome is admissible to show the victim's lack of consent in a sexual-assault case); *see also* discussion *supra* Part III.C.

185. *See, e.g.*, *Hutton*, 663 A.2d at 1301 (holding that diagnostic testimony is inadmissible).

186. *See, e.g.*, State v. Robinson, 431 N.W.2d 165, 172 (Wis. 1988) (holding that expert testimony was admissible where the testimony did not include the expert's opinion).

187. *See* Hogan, *supra* note 8, at 539 (discussing how experts merely speak generally about rape-trauma syndrome when the syndrome is used for defensive purposes). *See generally* discussion *supra* Part III.

188. *See* Gaines, *supra* note 20, at 247 (discussing defendants' use of rape-trauma syndrome evidence to show that no rape occurred).

189. *See id.* at 249.

190. Caroline L. Kinsey, *CSI: From the Television to the Courtroom*, 11 VA. SPORTS & ENT. L.J. 313 (2012).

191. Cynthia Di Pasquale, *Beyond the Smoking Gun: Maryland's Legal Community Debates the "CSI Effect,"* DAILY REC., Sept. 8, 2006, at 1B.

obtaining convictions more difficult, because resources to do sophisticated testing, such as DNA analysis, are not available in every case."[192]

Studies have shown that jurors expect the introduction of scientific evidence in criminal trials.[193] Therefore, defendants' use of the absence of a syndrome to show that no sexual assault occurred is likely to be given too much weight by a jury. Thus, the way in which courts have limited victims' use of syndrome evidence coupled with the potential offensive use of syndrome evidence by the defense has a counterintuitive effect on victims and the prosecution in sexual-assault cases.

VI
CONCLUSION

Prosecutors thought that syndrome evidence would provide a solution to the difficulties associated with rape prosecutions.[194] Although syndrome evidence has certainly impacted rape prosecutions, it has had a counterintuitive effect on victims. Syndrome evidence is no protection device for victims; rather, it has added an additional dimension of uncertainty to sexual-assault cases.

Syndrome evidence has been an area of great scientific and legal complexity, and courts have approached questions of its admissibility in a variety of ways.[195] In general, courts have been hesitant to admit expert testimony on post-traumatic stress disorder and rape-trauma syndrome. When courts have allowed syndrome evidence, they have greatly limited its scope so that the evidence is nonidentifying, and the evidence is generally only admitted defensively. Moreover, the potential for defendants to use syndrome evidence to their advantage is damaging to the prosecution and victims. Thus, the complexity associated with the admissibility of syndrome evidence has resulted in chaos in the courts, and the restrictions on its scope have limited protection for victims of sexual assault.

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192. Charles v. State, 414 Md. 726, 731 (2010). The media labeled these complaints as the "CSI effect," based on the television crime show, *CSI: Crime Scene Investigation* (CBS television broadcast). Kinsey, *supra* note 190, at 317.

193. Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 VAND. J. ENT. & TECH L. 331 (2006)

194. McCord, *supra* note 2, at 39.

195. Bleil, *supra* note 1, at 38.