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THE FALSE DICHOTOMY OF RAPE TRAUMA SYNDROME

*HOLLY HOGAN**

I. INTRODUCTION: WOULD YOU BELIEVE THIS ALLEGED RAPE VICTIM'S STORY?

An alleged rape victim, a high school student named Cassie, tells you that she was staying at her boyfriend's apartment while he was away at his mother's wedding. Her boyfriend's cousin, a popular college basketball player named James, came into the room where Cassie was sleeping, and suggested that he and Cassie go out to buy alcohol because he had just turned twenty-one. James purchased a can of beer for Cassie, who agreed to drive around the town with him for fifteen minutes or so. After fifteen minutes passed, he filled up his car with gas and began driving out of town, even though Cassie says she told him that she was tired and wanted to go home. As they drove out of town, Cassie says that James asked her whether she would report a rape or physical assault to the police if she were ever raped or beat up. Cassie responded that she would not because she felt like she had a lot to lose and did not want her life to be turned upside-down. James drove to a motel and rented a room to which Cassie went voluntarily although she says she felt shaky. She tells you that she protested James's sexual advances and tried to leave, but James would not let her and raped her.

James drove Cassie back to her boyfriend's apartment at sunrise. Later that day, James called Cassie and told her that her boyfriend would be calling him, and she could come over to James's house to talk to her boyfriend. Cassie tells you she went to James's apartment because he told her that his roommate was there, and nothing would happen. Cassie says that James gave her a shot of brandy and then raped Cassie again. Cassie did not scream because she was afraid James would

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harm her. Later that day, Cassie reluctantly told her cousin about what had happened, and her cousin called the police. James claims that Cassie willingly had sex with him and fabricated the rape charge because she was jealous upon finding out that he, a popular college basketball player, was having sex with multiple other women.¹

What would help you decide whether Cassie was telling the truth? Do you think that a rape victim would report the rape right away? Do you think that a rape victim would never go back to the home of her attacker? Would you think that a fifteen-year-old drinking with a college student, going to a motel with him, and meeting him at his apartment, must have been willing to have sexual intercourse with him? What if a psychiatrist explained to you that during the rape and post-rape, victims act in ways counter to what one might expect because of a trauma syndrome? Would that be additional information to consider in light of your decision? What if the psychiatrist told you that Cassie suffered from the syndrome? Would this diagnosis make you believe Cassie much more than if you only knew that her behavior *could* be explained by the syndrome?

Rape Trauma Syndrome (“RTS”) is a variety of post-rape physical and emotional traits that many rape victims share. It encompasses the counterintuitive behaviors that many rape victims display—behaviors that are the opposite of how one would expect a rape victim to act. Since the behaviors are inapposite to common intuition, it often leads factfinders to disbelieve the victim. Testimony about RTS has improved the treatment of rape cases in the justice system by providing the factfinder with better information when deliberating on the victim’s behavior during and after the rape. Courts, however, have failed to create an appropriate framework from which to consider the admissibility of RTS during trial.

Courts have found that RTS testimony appears in two forms—as a diagnosis that the victim has RTS or as an explanation of RTS without referring to the victim in the case. On the basis that it infringes on the factfinder’s role, courts generally disallow the former offensive function of RTS because a diagnosis implies that the victim was raped. Nonetheless, courts permit the latter defensive or rehabilitative function because it describes the syndrome without infringing on the factfinder’s role.² This dichotomy has failed.

The difference between offensive and defensive functions remains very slight. Specifically, questions posed as hypotheticals demonstrate that some testimony which is formally defensive but functionally offensive sneaks into trials, thereby infringing on the factfinder’s role and the defendant’s constitutional trial rights. Such inappropriate uses of RTS harm victims by allowing defendants to “un-diagnose” victims via hypotheticals, and by pressuring the legal system to

¹ Facts are taken from *People v. Hall*, No. F038772, 2003 Cal. App. Unpub. LEXIS 3905 (5th Dist. Apr. 18, 2003).

² Either party before the court in a criminal or civil case may use RTS both offensively and defensively. Defensively within the context of this article does not refer to the defendant.

require victims to submit to mental and physical examinations. As attorneys continue to push on the upper limits of RTS admissibility, the courts must reconsider this false dichotomy. This article proposes a new framework to determine RTS admissibility.

II. BACKGROUND

After conducting a year-long study of rape victims in a Boston emergency room in 1974, Ann Burgess and Lynda Holmstrom found enough consistency among the victims' emotional and physical reactions to identify a syndrome called Rape Trauma Syndrome ("RTS").³ RTS explains the behavior of a victim immediately after the rape, as well as the long-term impact of the rape on the victim. This explanation aids mental health professionals and others who counsel rape victims in designing and implementing treatment programs.

The syndrome manifests itself in two response phases. In the first phase, immediately following the attack until several hours after it, victims display one of two reactions: "emotional excitement" or "emotional flatness."⁴ Fifty percent of rape victims display "emotional excitement," demonstrated by crying, anxiety, and inappropriate smiling.⁵ The other half exhibit "emotional flatness," remaining subdued, calm, and non-emotional.⁶ The physical symptoms for both reactions are the same, ranging from soreness and bruising, to tension headaches, sleeplessness, fatigue, stomach pains, and genitourinary disturbance, i.e., disturbance of the genital and urinary areas, such as vaginal discharge, itching, a burning sensation when urinating, chronic vaginal infections, and possibly rectal bleeding and pain if forced anal-rape occurred.⁷

The second response stage is a long-term reorganization process that all victims experience, regardless of whether they fell into the "emotional flatness" or "emotional excitement" categories during the first phase. The timing of the onset of the second stage varies, and can occur even years after the rape.⁸ Symptoms include sexual fears, nightmares, and phobic reactions.⁹ For example, victims typically have two types of dreams—one in which the victim wants to do something, whether related to the rape or not, but wakes before she is able to do so, and one in which the victim, over time, is able to overcome her attacker or a symbol of him.¹⁰

³ See Cynthia F. Feagan, *Rape Trauma Syndrome Testimony as Scientific Evidence Evolving Beyond State v. Taylor*, 61 UMKC L. REV. 145, 151 (1992).

⁴ 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, 631 (2000).

⁵ *Id.* at 596.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 597.

⁹ Garrison, *supra* note 4.

¹⁰ *Id.*

The specific behavioral and emotional symptoms that a particular victim exhibits in the two response stages are influenced by various factors, including the personality of the victim, the nature of the rape, the life experience of the victim, the support system that the victim possesses, and the victim's relationship with the offender.¹¹ Subsequent studies on RTS uncovered more detailed information about how these factors influence the victim's response. For example, the Layman study differentiated the fears of rape victims depending on the type of attack they experienced. The study distinguished the behavioral responses of those victimized by confidence rapes (date rape or acquaintance rape) and blitz rapes (stranger rape). Blitz rape victims feared their rapist attacking them again, whereas confidence rape victims were concerned about their ability to judge the character of others.¹²

Furthermore, RTS has identified many victim behaviors that are counterintuitive. The controlled response, for example, is a clear counterintuitive behavior. Some will assume that a rape did not occur because the victim is not crying and hysterical, but rather calm and subdued. Without more knowledge about the response stages, and the controlled and expressive reactions, one might assume that rape victims consistently behave hysterically after such a traumatic event. The fact that many victims behave in exactly the opposite way is an example of a counterintuitive behavior that RTS helps explain.

Denying that a rape occurred illustrates another counterintuitive behavior. One might expect a rape victim to contact the police immediately after an attack, just as victims often do in other crimes. The Layman study, however, identified a large number of unacknowledged rapes—rapes in which the victims do not believe that they were raped when circumstances indicate otherwise.¹³ A victim's acknowledgement that a rape occurred is correlated with the level of violence during the rape because many people incorrectly believe that rape only occurs when the rapist injures the victim or threatens to do so.¹⁴ Although a high level of violence often exists when victims are raped by a family member, generally, more violence occurs in stranger rapes.¹⁵ Hence, victims of acquaintance rapes are less likely to experience violence when raped, and because the level of violence is correlated with the level of acknowledgement, acquaintance rape victims are less likely to acknowledge that a rape occurred.¹⁶ Not acknowledging that a rape occurred leads to further counterintuitive behaviors. While only ten percent of acknowledged rape victims in the study had sexual intercourse with the offender after the incident, thirty-two percent of the unacknowledged victims did so.¹⁷

¹¹ *Id.*

¹² *Id.* at 612.

¹³ *Id.* at 613.

¹⁴ Garrison, *supra* note 4 at 614.

¹⁵ *Id.* at 615.

¹⁶ *Id.*

¹⁷ *Id.* at 616.

Victims' memory of the rape can also be counterintuitive. The Koss study found that memories of rape "were less clear and vivid, were less likely to occur in a meaningful order, were less well remembered, and were less thought and talked about" than other types of unpleasant memories.¹⁸ Moreover, the Mechanic study found that women who were victims of acquaintance rape were more likely than victims of stranger rape to report significant levels of amnesia about the rape.¹⁹ These studies demonstrate that rape victims may have trouble remembering and may even give inconsistent statements about the rape, which may be counterintuitive behavioral responses to some who believe that one would never forget such a traumatic experience. However, this response makes sense under Freud's theory of betrayal trauma. When someone's trust in another person is violated, which happens when a victim is raped by someone she knows, the mind may hide the memory from consciousness as a means of protection against the emotional trauma.²⁰ Instead of enduring the emotional trauma of changing a belief system post-rape, the mind, as a protective mechanism, may deem the rapist worthy of confidence in order to fit the person into a current belief system, thus further complicating memories of the rape.²¹

These counterintuitive behaviors can devastate a victim's credibility because in many non-rape contexts, such behavior would be interpreted as strong evidence that the victim is lying. The controlled response is counterintuitive to an expectation that the rape victim should be crying hysterically, denial that a rape occurred is counterintuitive to an expectation that the rape victim should be quick to seek justice after an attack, and inconsistent memories about the rape are counterintuitive to an expectation that the rape victim should never forget the details of such a traumatic event. Therefore, RTS testimony plays a vital role in rape trials by providing much-needed knowledge about these behaviors to the factfinder so that he or she is better informed to determine the credibility of the victim.

III. COURTROOM FUNCTIONS

A. Offensive RTS Testimony

First, the State may utilize RTS in its case-in-chief to prove that a rape occurred. In other words, after an expert diagnoses the victim with RTS, the State may argue that because the victim suffers from RTS, she must have been raped. Courts categorize this diagnostic testimony as offensive testimony, even though a diagnosis may be introduced in the prosecution's case-in-chief either offensively without any credibility attacks by the defendant, or defensively in response to

¹⁸ *Id.* at 619.

¹⁹ Garrison, *supra* note 4 at 619.

²⁰ *Id.*

²¹ *Id.*

attacks on the victim's credibility during cross-examination. Note that despite this testimony, the question of who raped the victim will, arguably, remain open.

In *State v. Marks*, the Kansas Supreme Court allowed diagnostic RTS testimony in an acquaintance rape case.²² The victim there met the defendant at a private club. The defendant, Elmore Marks, Jr., convinced the victim that he held medical and doctorate degrees, and was authoring a book.²³ Marks expressed interest in interviewing the victim for his alleged book.²⁴ The victim accompanied Marks to what she thought was the home of Marks's friend to arrange travel details for an interview.²⁵ The location was actually Marks's home.²⁶ There, he gave her a drug that made her dizzy and unable to physically fight him as he raped and orally sodomized her.²⁷ Dr. Herbert Modlin, a certified forensic psychiatrist and board-certified psychiatrist and neurologist, examined the victim approximately two weeks after the attack.²⁸ At trial, Dr. Modlin testified that the victim suffered a "frightening attack, an assault" and was suffering from a form of Post-Traumatic Stress Disorder (PTSD) known as RTS.²⁹

Although RTS was a newly-discovered syndrome at the time, the Kansas Supreme Court found that the presence of RTS is detectable, reliable, and helpful where the defendant argues that the victim consented to the sexual encounter, and that RTS possessed the requisite scientific validity to allow an expert to testify about an RTS diagnosis.³⁰ The Court noted that like any other type of evidence, RTS remains subject to cross-examination and to the consideration of its weight by the jury.³¹ The expert may therefore testify about his opinion that the victim was raped, but the jury ultimately decides whether to accept the expert's opinion. Cross-examination by the defense may expose weaknesses in the RTS expert's testimony and lead the jury to doubt the expert's opinion. Therefore, RTS does not infringe on the jury's province.³² The Kansas Supreme Court later cautioned that Marks is not applicable to all rape 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."³³

²² *State v. Marks*, 647 P.2d 1292 (Kan. 1982).

²³ *Id.* at 1294.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Marks*, 647 P.2d at 1294.

²⁸ *Id.* at 1299.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Marks*, 647 P.2d at 1299.

³³ *State v. Bressman*, 689 P.2d 901, 908 (Kan. 1984).

Nonetheless, this admission of diagnostic testimony is atypical among jurisdictions in the United States.

B. Defensive RTS Testimony

Second, the State may introduce RTS in its case-in-chief and/or rebuttal to rehabilitate the victim's credibility after attack by the defense, but not to specifically diagnose the particular victim in the case as suffering from RTS. The courts categorize this non-diagnostic, rehabilitative testimony as defensive. As noted previously, rape victims often display behaviors that are counterintuitive to how one would expect victims to act following a rape—behaviors which, if applicable to the case at hand, the defense will likely highlight as demonstrative of the victim's lack of credibility. Defensive RTS expert testimony explains counterintuitive behaviors generally, and hence rehabilitates the victim's credibility without a diagnosis.

In *People v. Robinette*, the prosecution introduced defensive RTS testimony to rehabilitate the victim's credibility.³⁴ The victim, V.L., had been dating the defendant for three years and had a son with him.³⁵ On the day of the rape, V.L. and Robinette used methamphetamines and had sexual intercourse three times.³⁶ Later, they began fighting because V.L. suspected Robinette was cheating on her and because she was searching through his belongings.³⁷ V.L. left the house and went outside where she sat in her car for an hour before she returned inside to gather her belongings so that she could pick up their son from a babysitter.³⁸ Robinette repeatedly told her that he wanted to have sexual intercourse, but each time she responded “no,” and stated that she wanted to pick up their son.³⁹ Eventually, Robinette became angry and told her to “give it up, bitch[,]” took off her pants, and attempted to take off her shirt.⁴⁰ He initially tied her up with fabric he ripped off from a towel, but it was not tight enough so he also used a belt.⁴¹ V.L. freed herself after Robinette put his finger in her anus and raped her.⁴² She began crying and repeated that she wanted to go pick up their son.⁴³ Robinette responded by saying that all he wanted was for V.L. to love him. Soon after, he again became angry, telling V.L. that he hated her, that he hated women, and that she had trapped him by becoming pregnant.⁴⁴ He charged at her and tightly

³⁴ *People v. Robinette*, No. C040249, 2003 Cal. App. Unpub. LEXIS 3576 (3d. Dist., Apr. 11, 2003).

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ *Id.* at *3.

³⁸ *Id.*

³⁹ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *4.

⁴³ *Id.*

⁴⁴ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *4.

squeezed her temples with his thumbs.⁴⁵ Robinette calmed down again and asked V.L. to forgive him and have sexual intercourse with him.⁴⁶ When she continued to refuse, Robinette said, “screw it” and drove with V.L. to pick up their son.⁴⁷ V.L. allowed Robinette to stay the night at her house when he requested to do so because he had calmed down, and she did not want to argue with him.⁴⁸ While in V.L.’s bed, Robinette again asked her to have sexual intercourse with him, and she again refused.⁴⁹ Robinette left at 4:00 a.m. and V.L. called her mother and told her about the assault.⁵⁰

The day after the rape, a visibly upset V.L. reported the incident to the police.⁵¹ At a hospital, she underwent a sexual assault examination that revealed purple marks on her lower right leg and inner thighs, a scrape on her elbow, and tender areas around her belt line and on her neck.⁵² At the hospital, V.L. made a recorded, pretextual phone call to the defendant.⁵³ Robinette stated that he had already apologized to her, a quasi-admission that he had raped her.⁵⁴ After the defendant’s arrest and release from jail, V.L. saw the defendant nearly every day until his trial as the two were still together in a relationship, and having sexual intercourse.⁵⁵ At times, V.L. hoped that the charges against Robinette would be dropped.⁵⁶ Robinette pressured V.L. to drop the charges and was present when she wrote a letter to him on the subject.⁵⁷

At trial, Dr. Linda Barnard testified about domestic violence and sexual abuse. Dr. Barnard stated that more than fifty percent of such cases are reported after some delay, and that a delay of twelve hours was not as delayed as the reports in many other cases.⁵⁸ She explained that victims of domestic sexual abuse delay reporting because of self-blame, fear of retaliation, fear of blame by others, fear that the police will not take them seriously, and love for the abuser.⁵⁹ Dr. Barnard described how victims commonly continue a relationship with an abuser because of mixed feelings of fear, love, and self-blame.⁶⁰ Victims who do report rape often do so because it is the first time the family violence involved a child, the violence escalated, or the victims realize that a support system exists for them.⁶¹ Dr.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at *5.

⁴⁹ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *5.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at *6.

⁵³ *Id.*

⁵⁴ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *6.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *7.

⁵⁸ *Id.* at *8.

⁵⁹ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *8.

⁶⁰ *Id.*

⁶¹ *Id.*

Barnard noted that the fact that a woman reported an incident does not mean that the report is true.⁶² She further testified that domestic rape victims commonly recant after reporting a rape to the police, and in fact, some studies found that up to seventy-one percent of women recant after making a truthful report.⁶³

The Appellate Court rejected Robinette's claims that Dr. Barnard's testimony was prejudicial. The Court referred to precedent that permitted admission of RTS testimony after the defense suggested that the victim's behavior post-rape demonstrated that the victim was not raped.⁶⁴ That precedent limited RTS testimony to discussing victims generally, and forbade discussing or diagnosing the victim in the case at issue.⁶⁵ *Robinette* reflects the understanding of defensive RTS testimony in the legal system as testimony that rehabilitates the victim's credibility after an attack by the defense, but does not opine on the victim's credibility directly or indirectly by relating RTS to the facts in the particular case. Defensive testimony remains distinct from offensive testimony because of these characteristics.

C. Defensive/Offensive Combination RTS Testimony

Some RTS testimony combines elements of both defensive and offensive testimony by offering the testimony to rehabilitate the victim, but not after attack by the defense. Prosecutors seek to introduce testimony because even though the defense, either tactically or mistakenly, does not highlight the victim's credibility weaknesses induced by RTS, the jury may still have noticed these weaknesses. The jurors' perceptions of such weaknesses may be influenced by popularly-held myths about rape victims. Combination RTS testimony seeks to address these myths.

Such testimony is offensive in the sense that it is not offered in defense to an attack by the defendant; it is defensive because it is rehabilitative and defends against something less precisely identifiable—possible juror misperceptions about rape victims. A direct attack on the victim's credibility is not necessary to allow defensive testimony because of widely-held beliefs about rape victims. Courts have not generally recognized this form of combination RTS testimony as a separate category, and have instead considered it as part of defensive RTS testimony. Therefore, throughout this article, the term defensive or rehabilitative RTS testimony will refer to both defensive testimony in its purest form and this combination form since the purpose of both is to rehabilitate the victim's credibility, which has been attacked by the defense or by the inherent facts of the case.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Robinette*, 2003 Cal. App. Unpub. LEXIS 3576 at *9.

⁶⁵ *Id.* at *10.

D. Actual Courtroom Function

Despite a handful of cases to the contrary, such as *Marks*, the courts remain reluctant to admit offensive RTS testimony to prove that a rape occurred. Nevertheless, courts will generally admit RTS to rehabilitate a victim's credibility defensively and non-diagnostically. For example, as articulated in *George v. Edwards*, RTS testimony does not make a trial unfair nor a violation of due process, if it is offered to educate jurors about "a common but seemingly puzzling reaction (delay in reporting) to an unusual occurrence unlikely to have been experienced by the jurors (violent rape)."⁶⁶ The defendant, George, was convicted of raping his thirteen-year-old neighbor. On a Sunday afternoon, he arrived at the victim's home while she was alone, accusing her of seducing him with her clothing.⁶⁷ The victim attempted to ward him off with a knife but George overpowered her.⁶⁸ The victim did not report the rape to anyone until two months after the attack.⁶⁹

At trial, an expert testified that victims of acquaintance rape frequently do not immediately report a rape.⁷⁰ This testimony was rehabilitative and defensive rather than diagnostic and offensive. The Court highlighted that cultural myths about rape still exist, thus making victims' patterns of response beyond the limits of knowledge of a lay juror.⁷¹ The expert's testimony did not exceed the bounds of defensive testimony, as it appropriately explained the common behavior of rape victims and merely put the victim's behavior in context. The expert testified only about general reactions to RTS, and not about how it applied to the particular case, thereby allowing the jury to make that connection and come to its own conclusions.

Why do courts, as in *George*, 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.

First, there are several deficiencies in current knowledge about RTS. The initial and most important study on RTS is the Burgess and Holmstrom study. However, critics have argued that the authors' methodology is highly flawed, as the results were based on a small and homogeneous group of rape victims, with self-selection, no control group, and no public information regarding the content of interviews with the victims, how the authors analyzed their findings, and how the

⁶⁶ *George v. Edwards*, No. 01-CV-6481, 2003 U.S. Dist. LEXIS 22602 at *12 (E.D.N.Y. Sept. 4, 2003).

⁶⁷ *Id.* at *1.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at *2.

⁷¹ *George*, 2003 U.S. Dist. LEXIS 22602 at *12.

authors defined the two response stages.⁷² Because of such problems in methodology, most courts do not find RTS scientifically sufficient to offer a diagnosis.

In addition to these methodological problems, the post-rape behavior of victims varies widely. A rape victim may report a rape immediately, or wait a longer period of time. Immediately after the rape, the victim may be inappropriately smiling, crying, or showing no emotion. The symptoms of RTS vary so much that critics claim the only unifying characteristic is a report of a rape.⁷³ Consequently, the courts are concerned that the diagnoses admitted at trial may be over-inclusive. Since a diagnosis of RTS carries the implication that the victim is telling the truth—that the defendant raped her—such over inclusiveness is fatally problematic.

Finally, RTS was not developed so that physicians, mental health professionals, and courts can diagnose someone with RTS; rather, it was developed as a tool for those helping rape victims with their recoveries.⁷⁴ Therefore, it is thought that information created for the purpose of treatment rather than diagnosis cannot provide a reliable means of diagnosis where the effect of that diagnosis—a likely guilty verdict—is so serious.

These scientific sufficiency concerns are not as troublesome when RTS is offered for defensive purposes. The expert, via rehabilitative testimony, gives the jury an additional factor to consider. He or she does not portray RTS as conclusively demonstrating that the victim was raped; instead, the expert speaks generally about RTS. It is the jury that relates the general information about RTS to the victim in the case before it. Granted, such a process makes the jury a body of amateur psychologists, but juries already frequently play this role. For example, juries often determine whether a party in a civil tort case experienced emotional damages or whether a defendant was legally insane. The information before the jury is not tainted by an offensive, expert diagnosis based on faulty behavioral science. A description of a syndrome that possibly applies to the case, rather than a diagnosis of a victim with the syndrome, does not require as high a standard for scientific sufficiency. The current knowledge of RTS is sufficiently reliable and certain to describe the syndrome generally, including that of counterintuitive reactions to rape.

Further, offensive uses of RTS raise concerns about fairness in the courtroom. Even if experts can diagnose victims based on reliable and certain information, such a diagnosis interferes with the jury's role. By testifying that a

⁷² See Sally Melnick, *An Aura of Reliability: An Argument in Favor of Daubert*, 1 FLA. COASTAL L.J. 489, 499 (2000).

⁷³ See Janet C. Hoeffel, *The Gender Gap: Revealing Inequities in Admission of Social Science Evidence in Criminal Trials*, 24 U. ARK. LITTLE ROCK L. REV. 41, 51 (2001).

⁷⁴ See 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, 453 (2003).

victim suffers from RTS, the expert is vouching for the victim's credibility; thereby stating that science proves that the victim is telling the truth. This concern is furthered by the belief that expert testimony strongly influences the jury, perhaps too strongly. California courts have contended that expert testimony can carry an aura of infallibility,⁷⁵ though some studies have suggested the contrary. These studies demonstrate that although expert syndrome evidence influenced the judgments of the jurors, jurors have considered expert testimony as less important and less helpful than lay testimony.⁷⁶

Although how the jury perceives expert evidence remains an important consideration, the argument that an RTS diagnosis infringes on the jury's role stems from the testimony that the expert gives rather than how a particular jury evaluates it. By stating that a victim suffers from RTS, the expert evaluates matters that only the jury should evaluate. The jury, not the expert, should determine the victim's credibility and the ultimate issues of fact. In contrast, defensive testimony that rehabilitates the victim does not infringe upon the jury's role. It helps disabuse the jury from misconceptions about rape victims, and place the victim's counterintuitive behaviors in context so that the jury may reach a more informed decision. At the same time, the expert's testimony gives the jury enough "room" to make an independent judgment since the expert does not furnish a credibility judgment via a diagnosis.

E. RTS Testimony Offered by the Defendant

The same dichotomy between offensive and defensive RTS testimony applies when the defense utilizes RTS. In *People v. Wells*, the defendant, Wells, was convicted of sexually assaulting his niece and her half-sister.⁷⁷ The girls, J. and M., began living with J.'s paternal grandmother, Barr, after their mother was convicted and imprisoned for federal drug trafficking offenses.⁷⁸ Barr allowed her son, Wells, to live with her as well.⁷⁹ On two occasions prior to sexually assaulting the girls, Wells engaged in sexual intercourse with his girlfriend in front of J. and M.⁸⁰ He then began inappropriately touching M., and confronted J. in the laundry room as well as the girls' bedroom to force her to touch his penis.⁸¹ His actions escalated and he began raping J.⁸² Wells ordered J. to remove her clothing, forced her legs open with his knee, and covered her mouth when she tried to scream.⁸³ He

⁷⁵ See, e.g., *People v. Therrian*, 6 Cal. Rptr. 3d 415 (Ct. App. 3d Dist. 2003); *People v. Mitchell*, 2 Cal. Rptr. 3d 49 (Ct. App. 2d Dist. 2003).

⁷⁶ See Sanja Kutnjak & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 446 (2003).

⁷⁷ *People v. Wells*, 12 Cal. Rptr. 3d 762 (Ct. App. 1st Dist. 2004).

⁷⁸ *Id.* at 764.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 764-65.

⁸² *Wells*, 12 Cal. Rptr. 3d at 765.

⁸³ *Id.*

threatened her not to tell anyone, or he would tell her grandmother that J. had been having sex with her boyfriend.⁸⁴ J. did not reveal the rape to her grandmother because she feared that her grandmother would believe Wells, and that her mother would kill Wells.⁸⁵ At some point, J. watched a television show where rape victims talked about rape experiences that lasted over several years.⁸⁶ Fearing that Wells would rape her again and again, she took a butcher knife and held it over his head while he was sleeping.⁸⁷ Wells woke up and took the knife away from her.⁸⁸

When a custody dispute over J. eventually developed between J.'s parents, it led to a physical argument during which J.'s mother called the police.⁸⁹ A sheriff's deputy responding to the scene noticed that J. was withdrawn and very upset.⁹⁰ When he checked on J., she revealed the rape to him and told him she was afraid that her mother would kill Wells.⁹¹ In the subsequent investigation, M. also revealed to the police that Wells had fondled her.⁹² As the investigation progressed, both girls revealed more events of sexual assault in greater detail, and they corrected the timeline of the events.⁹³

At trial, Dr. Anthony Urquiza, the prosecution's expert, testified that child victims of rape and sexual abuse generally do not report abuse immediately because the assaulters coerce and manipulate children into hiding the assault.⁹⁴ He further testified that when a child does report sexual abuse, he or she may take a long time to disclose all the details of assault.⁹⁵ As time progresses, the child may feel more comfortable talking about the assault though details may vary each time he or she talks about it.⁹⁶ The defense called its own expert, Dr. Diane Sullivan Eversteine, and sought to introduce her testimony that based on her review of videotapes of J.'s interviews, J. "did not exhibit the emotional reaction one would expect from a petite girl who had been raped by a large man."⁹⁷ The trial court excluded the latter testimony and the appellate court upheld the ruling, rejecting the defendant's argument that Dr. Eversteine's testimony was necessary to rebut the prosecution expert.⁹⁸

The appellate court noted that Dr. Urquiza's testimony was far different from Dr. Eversteine's proposed testimony, as Dr. Urquiza did not testify as to whether

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Wells*, 12 Cal. Rptr. 3d. at 765.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 765-66.

⁹² *Wells*, 12 Cal. Rptr. 3d. at 766.

⁹³ *Id.*

⁹⁴ *Id.* at 768.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Wells*, 12 Cal. Rptr. 3d. at 768.

⁹⁸ *Id.*

the victims' behavior was consistent with that of being sexually-assaulted.⁹⁹ The court highlighted that the proposed testimony was "precisely the sort of backward-focused, judgmental analysis of victim behavior that *Bledsoe* prohibited."¹⁰⁰ The court further argued that "[b]ecause the defense identified no common misperception the jury might hold about victim behavior that Dr. Eversteine's testimony was narrowly tailored to rebut [i.e. counterintuitive behaviors], her proposed testimony was little more than expert opinion as to J.'s credibility."¹⁰¹ Just as the State cannot call an RTS expert to diagnose the victim with RTS, the defense cannot call an expert to testify that the victim does not suffer from the syndrome.¹⁰² Thus, the distinction between offensive and defensive testimony exists whether it is the prosecution or the defense that introduces RTS expert testimony.¹⁰³

IV. THE FAILURE OF THE OFFENSIVE/DEFENSIVE DICHOTOMY

Despite the dichotomy, offensive testimony continues to sneak into rape trials through the use of hypotheticals. RTS evidence that is formally defensive but functionally offensive is admitted through such testimony. The failure of this dichotomy harms not only defendants but rape victims as well.

A. Hypotheticals

Hypotheticals demonstrate that the line between offensive and defensive uses of RTS remains difficult to determine. Prosecutors frequently pose hypothetical questions to ask the expert whether a victim is suffering from RTS when she acts in a particular fashion. Where the facts of the hypothetical are specific, particular, and identical to the case at hand, the expert is in effect offensively diagnosing the victim with RTS, and vouching for her credibility.

In *State v. Freeney*, the Connecticut court permitted the prosecution to pose hypotheticals that paralleled the specific circumstances of the rape case.¹⁰⁴ Responding to the hypotheticals, the expert testified that in her experience, it would

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 770. *Bledsoe* is the California precedent that allowed for the defensive but not offensive use of RTS expert testimony. *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984).

¹⁰¹ *Wells*, 12 Cal. Rptr. 3d at 770 (alteration added).

¹⁰² Note that except in very unusual circumstances, a defendant in a rape case has little reason to call an RTS expert for defensive testimony since the defendant will not want to rehabilitate the victim's credibility.

¹⁰³ This case, similar to many cases involving child sexual assault victims, considers both RTS and Child Abuse Accommodation Syndrome (CAAS). CAAS differs from RTS in that CAAS describes the effect of usually repeated sexual abuse—which includes rape, fondling, and other forms of sexual abuse—of a child victim. In contrast, RTS describes the effect of rape of a child or adult victim. The courts use the terms interchangeably where the case involves a child rape victim because in the legal context, the two syndromes are very similar. Both syndromes are often used to describe counterintuitive behaviors and courts make the same offensive/defensive distinction for both syndromes. Additionally, when a child is raped, the two syndromes overlap in the legal and psychological contexts. Cases with child victims mentioned in this article all involve this overlap.

¹⁰⁴ *State v. Freeney*, 637 A.2d 1088 (Conn. 1994).

not be unusual for a victim to walk down the street with her rapist and fail to cry for help due to the victim's fear.¹⁰⁵ The expert further testified, again through hypotheticals, that where the rapist locked the victim in a room, it would not be unusual for her to fall asleep as a coping mechanism, or to fail to call out for help out of fear that the rapist may hear her.¹⁰⁶ The court found that

[t]he sole purpose of the expert's testimony was to establish that the victim's behavior was generally consistent with that of a victim of sexual or physical abuse. The distinction between testimony about the general behavior of victims and an opinion as to whether the instant victim is telling the truth is critical.¹⁰⁷

One must question, however, whether the expert's response to the prosecutor's hypothetical is truly distinguishable from credibility testimony. The prosecutor asked:

Assume that a women [sic] has taken a walk with and had drinks with a casual male acquaintance who turns suddenly violent against that woman, physically violent against that woman without warning. Assume that that acquaintance is physically much larger than the woman, assume that that acquaintance hits and threatens her and issues her orders telling her that she belongs to him, or words to that effect at this point, and she's to do what he says.

Would it be consistent with the patterns of behavior associated with physical and sexual assault trauma for the woman to walk down the street, a public street in the company of this man and for her not to call out for help or try to flee?¹⁰⁸

The expert responded that such behavior would be consistent with RTS, and described how fear of the rapist can control a victim's behavior.¹⁰⁹

The root of the problem is the prosecutor's question. The prosecutor did not ask a rehabilitative question such as, "Is it uncommon for victims to walk with their rapists on a public street after an attack and not call out for help? Why?" A positive response to that question would explain the counterintuitive behavior of the victim. Rehabilitative, defensive questions are more general in nature, and they focus on explaining unusual behavior rather than providing diagnoses through hypotheticals. In *Freney*, however, the prosecutor's hypothetical question differed from a true defensive question in two respects. First, the prosecutor asked the expert whether the hypothetical victim's behavior was consistent with RTS, clear "buzz words" for a diagnosis. Second, the question mirrored many of the unusual details of the case with specificity, which inevitably makes one think that the

¹⁰⁵ *Id.* at 1092.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1093.

¹⁰⁸ *Id.* at 1095.

¹⁰⁹ *Freney*, 637 A.2d at 1095.

hypothetical victim is the victim in the case. Therefore, the expert diagnosed not only the hypothetical victim, but also the actual victim, and effectively told the jury that the victim was raped while vouching for her credibility. Indeed, the expert did not directly testify that *this* particular victim had RTS, but the expert's testimony was defensive only in form, and actually diagnostic in function.

Courts have justified the use of diagnostic hypotheticals on the basis that experts are careful in their choice of language, and that defense attorneys negate the problem with effective cross-examinations. In *State v. Barraza*, the RTS expert witness, Ms. Curtis, carefully chose words that adhered to the adage of "innocent until proven guilty."¹¹⁰ Defense counsel objected to the hypothetical question that the prosecution posed to Ms. Curtis, arguing that the hypothetical suggested that a rape occurred.¹¹¹ The defense did not preserve this objection for appellate review, and hence, the New Mexico Court of Appeals reviewed the objection for plain error.¹¹² The Court highlighted that Ms. Curtis never testified that the victim had been raped, and in fact referred to the "alleged rape." It concluded that "the chief risk of RTS testimony—that the jury will improperly conclude that someone with the symptoms of RTS is in fact a rape victim"—was not present because of Ms. Curtis's choice of words.¹¹³ The Court further opined that it was very unlikely that the jury perceived Ms. Curtis's testimony as diagnostic.¹¹⁴ Although such language is not sufficient to eradicate all impermissible prejudice, it does alter the tone and substance of an expert's testimony. Referring to an assault as an "alleged rape" mitigates the diagnosis of the "hypothetical" victim with RTS, and in turn, limits the expert's infringement on the factfinder's role.

Courts have granted defense attorneys the same leeway to introduce diagnostic hypotheticals. For example, the Indiana Supreme Court in *Henson v. State* concluded that it would be unfair not to allow the defense to pose hypotheticals.¹¹⁵ Henson met his victim, J.O., at a bar in Kokomo, Indiana. He attempted to speak with her, but J.O. only offered him her name.¹¹⁶ J.O. left the bar and walked to her car, but before she was able to safely shut the car door, Henson overpowered her with a knife, forcing her into the passenger seat.¹¹⁷ Henson drove J.O. to a secluded area where he cut her blouse off with the knife, superficially lacerating her chest, and then raped her.¹¹⁸

RTS symptoms remain so broad, ranging from sullen to hysterical, that defense counsel would normally find it difficult to identify behavior inconsistent with RTS. Nevertheless, in *Henson*, the defense identified something unusual. The

¹¹⁰ *State v. Barraza*, 791 P.2d 799 (N.M. Ct. App. 1990).

¹¹¹ *Id.* at 803.

¹¹² *Id.*

¹¹³ *Id.* at 803-04.

¹¹⁴ *Id.* at 804.

¹¹⁵ *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989).

¹¹⁶ *Id.* at 1191.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

night after the rape, J.O. returned to the same bar and spent two hours dancing and drinking.¹¹⁹ The defense called a PTSD expert witness, Dr. David Gover, and asked him:

[If] a person [] has allegedly suffered a traumatic, forcible rape, would it be consistent in [his] 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?¹²⁰

Before the prosecution objected to the question, Dr. Gover explained that he had not examined J.O., nor was he familiar with the particular facts of the case.¹²¹ The trial court sustained the objection, holding that the hypothetical question was irrelevant and lacked foundation.¹²²

The Indiana Supreme Court overturned the trial court's finding, and held that a clear probative value existed as to whether J.O. had been raped, and thus the question was relevant. The court also ruled that a proper foundation existed because the hypothetical stemmed from facts in evidence, providing the expert requisite information on which to form an opinion.¹²³ The court noted that if the prosecution believed that the hypothetical did not include sufficient facts from the case, it could highlight the absence of such facts in a hypothetical on cross-examination.¹²⁴ Finally, the court rejected the prosecution's argument that Dr. Gover's response to the hypothetical would be equivalent to testimony on the victim's credibility:

The record shows that Dr. Gover would have testified merely that some of J.O.'s behavior was inconsistent with that of a person who had suffered a traumatic rape. While this would have tended to show that J.O.'s testimony was not credible, it was not direct testimony as to her credibility. All testimony which contradicts one party's version of a set of events raises questions about that party's credibility; however, that does not make the testimony inadmissible. If that were the case, a defendant would be hard pressed to ever present any sort of defense in his own behalf since the core of any defense usually involves a denial that the alleged criminal conduct occurred.¹²⁵

Therefore, the court equated what would have been Dr. Gover's testimony with a dispute over the facts. Granted, when Witness A offers one version of the facts, and Witness B offers another version, the credibility of one or both of these witnesses is diminished. In that situation, however, the jury is making that determination. The expert does not testify that in her professional opinion, based

¹¹⁹ *Id.*

¹²⁰ *Henson*, 535 N.E.2d 1189.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1191, 1192.

¹²⁴ *Id.* at 1192.

¹²⁵ *Henson*, 535 N.E.2d at 1193.

on her review of the facts, Witness A is not behaving like someone who witnessed the events. However, in *Henson*, Dr. Gover would have testified that J.O. did not behave like someone who was raped, a clear opinion on the victim's credibility.

In some cases, as in *United States v. Cox*, both the defense and the prosecution push the upper limits of RTS testimony. During his service as a hospital corpsman at the Naval Hospital in Texas, Cox raped three patients and one hospital co-worker.¹²⁶ One of the victims, Linda B., was an in-patient recuperating from a post-polio kidney infection.¹²⁷ Cox entered her hospital area behind the curtains and performed his normal duties in caring for her.¹²⁸ At some point, however, he began to sexually assault her.¹²⁹ Linda B. did not call out for help during the attack, did not report it until several days after it occurred, and made several inconsistent statements about the extent to which Cox had raped her.¹³⁰

The prosecution called Dr. Nelson, an RTS expert, at the trial to explain why it is not unusual for rape victims to delay reporting the rape and to offer different versions of the incident.¹³¹ On cross-examination, defense counsel asked Dr. Nelson the following questions and received the following answers:

Q: Let me ask you a hypothetical. Would it be possible for a woman, say especially a woman who has suffered characteristic depression in the past, caused by, say, a disability in our case, who has already had feelings of helplessness, loss of self-esteem, caused by this disability, would it be impossible for such a woman with some knowledge of rape trauma syndrome to convincingly exhibit symptoms of rape trauma?

A: I think anything is possible.

Q: The field of rape, child abuse, rape, rape trauma has been a pretty largely aired issue lately, hasn't it? I mean, TV shows, TV movies, talk shows, magazine articles, newspapers, it has really been inundated by that haven't they?

A: That is true, it has.

Q: It is possible that Mrs. B[] could have seen a number of TV shows or articles, and read up on rape trauma syndrome, is it not?

A: I'm sure she could have.

Q: And since you hadn't seen her right away after the rape, there was quite an elapsed time between April 28th and when you finally saw her in August?

A: There was an elapsed time, yes.

Q: She could have, in fact, become rather knowledgeable regarding the symptoms of rape trauma syndrome, correct?

A: Yes.¹³²

¹²⁶ U.S. v. Cox, 23 M.J. 808 (N.M.C.M.1986).

¹²⁷ *Id.* at 811.

¹²⁸ *Id.* at 812.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Cox, 23 M.J. at 812.

¹³² *Id.* at 812-13.

The prosecution, on re-direct, asked Dr. Nelson, “In your opinion, after all your experience and knowledge in the field, has Mrs. Linda B. fabricated anything to you, and if not, how can you say that?”¹³³ Dr. Nelson responded:

I don’t believe she has fabricated anything to me. In particular, looking at her background history, and the kind of person she has been in the past, there has been nothing I have been able to come upon that would indicate that she would not only have the capability, but she is not the type of personality or character that would do that kind of thing.¹³⁴

This response constituted a direct and clear opinion on the victim’s credibility, and as such, the Navy-Marine Military Court of Review found that such testimony was inadmissible.¹³⁵ However, the court also found that the testimony was harmless error because the defense opened the door by posing a hypothetical with the facts of the case.¹³⁶ Specifically, counsel referred to “a woman, say especially a woman who has suffered characteristic depression in the past, caused by, say, a disability in our case . . .”¹³⁷

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.

Review of RTS case law, however, reveals that most courts do allow prosecution and defense hypotheticals that indirectly call for an opinion on the victim’s credibility through a diagnosis of a “hypothetical” victim. Nonetheless, some judges have argued, usually in dissenting opinions, that hypotheticals often do not fit within the established dichotomy of offensive versus defensive testimony.

In *State v. Svihl*, Svihl was convicted for raping his live-in girlfriend’s daughter, E.U.¹³⁸ E.U. revealed each of the sexual assaults to another person. Initially, she denied that she was raped but she eventually admitted that it occurred.¹³⁹ E.U. also told several inconsistent versions of the details of the sexual assaults.¹⁴⁰ Additionally, E.U.’s RTS symptoms did not all emerge until some time after the sexual abuse began.¹⁴¹

At trial, the prosecution called Dr. Peil to testify regarding RTS. The prosecution asked a series of hypotheticals that tracked the facts of the case. For example, the prosecution questioned,

¹³³ *Id.* at 813.

¹³⁴ *Id.*

¹³⁵ *Id.* at 816.

¹³⁶ *Cox*, 23 M.J. at 817.

¹³⁷ *Id.* at 812.

¹³⁸ *State v. Svihl*, 490 N.W.2d 269 (S.D. 1992).

¹³⁹ *Id.* at 270.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 271.

Would you find it unusual that this girl's grades, E.U.'s grades, continued to be rather good, B's and A's, for almost two years after the point at which she indicated the sexual intercourse began? In other words, she continued to be a good student for a period of two years?¹⁴²

The South Dakota Supreme Court recognized the danger of these hypotheticals, stating that "[t]he questions actually asked of this witness came perilously close to an attempt on the part of the State to bolster the credibility of the complaining witness."¹⁴³ The court gave many reasons as to why the testimony was "perilously close," but failed to explain why the testimony did not cross the line into credibility testimony. Ultimately, the court found that Svihl did not preserve his objection to this testimony for appeal, and that the evidence at trial was sufficient to convict him, despite the potential error in admitting RTS testimony.

The dissent argued that Dr. Peil's testimony, and the questions that the prosecution asked, did in fact cross the line of credibility testimony: "Peil's answers to hypothetical questions embraced ultimate issues of fact. Peil became the jury."¹⁴⁴ The RTS hypotheticals made a clear connection to the case by referring to the case at hand and even to the victim's name.¹⁴⁵ In some sense, the hypotheticals were not hypotheticals at all because they referred directly to the victim.¹⁴⁶ The dissent highlighted that this form of testimony is inadmissible. The prosecution can ask hypotheticals that generate testimony about general RTS characteristics, but should not tie the facts of the case at hand to RTS via hypotheticals.¹⁴⁷ The dissent sharply criticized the prosecution and the majority for accepting testimony that linked the hypothetical directly to the case:

Before it was all over, the State, under its questioning, and Peil, by her answers, established by testimony, before the jury:

E.U. was sexually abused;

E.U. exhibited behavioral signs, from this specific sexual abuse that she lost self-esteem, trust, and became powerless.

The predicate was this: Svihl was guilty. Instead, you see, of testifying in generalities, Peil connected Svihl to the sexual abuse. And over and over and over. This is an evidentiary defilement.¹⁴⁸

. . . [I]t appears to me that social experts are preempting the constitutional right of a trial by jury. It poses a great danger to the Bill of Rights.¹⁴⁹

The majority in *People v. Bennett* also recognized that hypotheticals that match the facts of the case may result in the admission of expert opinion about

¹⁴² *Id.*

¹⁴³ *Svihl*, 490 N.W.2d at 272.

¹⁴⁴ *Id.* at 274.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 275.

¹⁴⁸ *Svihl*, 490 N.W.2d at 275.

¹⁴⁹ *Id.* at 276 (citations omitted).

credibility.¹⁵⁰ State trooper Robert Bennett, the defendant, pulled over the victim's car for making a lane change without signaling.¹⁵¹ After conducting sobriety tests, he instructed her to sit in the passenger seat of the patrol car.¹⁵² There he began fondling her and told her that he was going to have sexual intercourse with her but needed to retrieve a condom from the police barracks.¹⁵³ Bennett retained the victim's license and registration while the victim followed him back to the police barracks in her own car.¹⁵⁴ At trial, the victim testified that because she was in an unfamiliar area and Bennett was armed, she feared what Bennett would do if she attempted to escape.¹⁵⁵ When they arrived at the police barracks, the victim waited in the passenger seat of the patrol car while Bennett entered the barracks.¹⁵⁶ The victim testified that she remained fearful of what would happen if she attempted to escape, particularly because she was unsure as to whether in the barracks, Bennett had friends who would harm her as well.¹⁵⁷ When Bennett returned to the car, he drove the victim in the patrol car to a secluded area.¹⁵⁸ While driving, the victim conversed with Bennett, believing that it was important to her safety.¹⁵⁹ When they reached the secluded area, Bennett raped the victim.¹⁶⁰

Dr. Ann Burgess, co-author of the first study on RTS, testified for the prosecution at trial.¹⁶¹ The prosecution presented Dr. Burgess with a series of hypotheticals tracking the victim's testimony, and asked how a victim would react under those circumstances.¹⁶² The New York Court of Appeals noted that the hypotheticals in this case focused on the victim's behavior during the rape, while prior cases dealt with the victim's post-rape behavior.¹⁶³ In other words, the prior cases centered on how the victim responded to the rape rather than how the victim acted during the rape. Therefore, the point at which the trauma begins to set in, and whether such trauma may begin to form during the rape, is a matter of consideration. The court highlighted that prior case law explicitly stated that expert testimony on RTS may not provide an opinion regarding whether the victim suffered from RTS, and thus, in fact had been raped.¹⁶⁴ The court remanded the case for a retrial and directed the lower court to determine whether the testimony on

¹⁵⁰ *People v. Bennett*, 593 N.E.2d 279 (N.Y. 1992).

¹⁵¹ *Id.* at 280-81.

¹⁵² *Id.* at 281.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Bennett*, 593 N.E.2d at 281.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Bennett*, 593 N.E.2d at 281.

¹⁶¹ *See id.* at 283.

¹⁶² *Id.* at 284.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 285.

behavior during the rape had the requisite scientific basis, and whether it would interfere with the jury's role.¹⁶⁵

The *Bennett* dissent and *Svihl*, nevertheless, remain anomalies in the case law regarding the admissibility of RTS hypotheticals. Courts routinely admit hypotheticals as well as the responses that vouch for the victim's credibility on the basis that they are formally defensive, but as demonstrated above, these hypotheticals have the same practical effect as offensive testimony.

V. DEFENSE EXPERT EXAMINATIONS OF VICTIMS

The courts' lax treatment of offensive RTS testimony has allowed prosecutors to push on the upper limits of RTS admissibility. This treatment has also carved opportunities for defense counsel to abuse RTS testimony in ways that are unique to the defense. While defense counsel may already abuse RTS testimony on direct and/or cross-examination via hypothetical testimony, future areas of concern exist in the form of psychological examinations of victims by defense experts.

The failed dichotomy of offensive and defensive uses of RTS not only potentially harms the defendants, but the victims as well. First, defense attorneys can use RTS to "undiagnose" a victim, implying that because the victim allegedly does not suffer from the syndrome, she was not raped. Moreover, if courts recognize that RTS testimony is becoming more and more like offensive testimony, then courts may be more willing to mandate that the defense expert have the opportunity to examine the victim.

In recent years, courts have vehemently opposed court-ordered defense expert examinations of the victim, particularly in sexual assault cases. In *Gilpin v. McCormick*, for example, the Ninth Circuit Court of Appeals disallowed a required examination of the victim, not because the defense had no general constitutional right to conduct one, but because of the particular facts of the case.¹⁶⁶ The defendant, Gilpin, was visiting the home of one of his co-workers on Halloween when he sexually assaulted her daughters Jamie and Jackie.¹⁶⁷ When Jamie was sitting next to Gilpin on the couch, he squeezed her buttocks and touched her upper thigh.¹⁶⁸ Jamie rose from the couch and attempted to leave the room when he grabbed her and began moving his hands up from her abdomen towards her breasts.¹⁶⁹ Jamie escaped Gilpin's hold by stepping on his toe.¹⁷⁰ At that point, Gilpin focused his attention on Jamie's sister, Jackie, who was in the bathroom preparing her Halloween costume as a prostitute.¹⁷¹ He repeatedly told Jackie that

¹⁶⁵ *Bennett*, 593 N.E.2d at 281.

¹⁶⁶ *Gilpin v. McCormick*, 921 F.2d 928 (9th Cir. 1990).

¹⁶⁷ *Id.* at 929.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 930.

¹⁷⁰ *Id.*

¹⁷¹ *Gilpin*, 921 F.2d at 930.

he wanted to become her first customer while rubbing her breasts.¹⁷² Jackie attempted to pull away from Gilpin but he grabbed her and pulled her back.¹⁷³

Gilpin argued that the trial court should have ordered a psychiatric examination of the two girls to determine the existence or absence of RTS.¹⁷⁴ He contended that because Montana courts have allowed the prosecution to present evidence on RTS as a way to aid the jury in assessing the victim's credibility, then the defense should have the opportunity to present similar evidence; not doing so would be a denial of due process, according to Gilpin.¹⁷⁵ The court noted that RTS is unlikely to be present when a victim suffered fondling rather than rape.¹⁷⁶ Even if the examination did not reveal any RTS symptoms, that absence would not impact Gilpin's defense because the existence or lack of RTS is irrelevant.¹⁷⁷ Moreover, Gilpin's reciprocity argument was misguided.¹⁷⁸ Gilpin cited to cases in which the prosecution examined the victims, but all involved rape victims who volunteered to undergo examination.¹⁷⁹ In other words, since the courts in those cases did not order victims to undergo an examination for the prosecution, there was no reciprocal duty to order an examination for the defense. No precedent exists in Montana for ordering a victim, or any other witness, to undergo a defense psychiatric examination.¹⁸⁰

People v. Brown provides another example of opposition to a claim that a defendant has a right to conduct a psychological examination of the victim.¹⁸¹ Brown raped and sodomized a developmentally-disabled woman.¹⁸² At trial, the prosecution's expert testified regarding the woman's intellectual abilities, RTS, and character for truthfulness. Brown appealed his conviction, arguing that the trial court should have compelled the victim to undergo a psychiatric examination by a defense psychiatrist so that Brown could refute this testimony.¹⁸³ The Appellate Court rejected Brown's appeal, stating that

[i]t is well settled that a criminal defendant has no statutory or constitutional right to compel a complainant to undergo a pretrial psychological examination. While a court may possess the discretion to permit such an examination under appropriate circumstances, the defendant failed to demonstrate that such circumstances were present here.¹⁸⁴

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 931.

¹⁷⁶ *Gilpin*, 921 F.2d at 931.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *People v. Brown*, 777 N.Y.S. 2d 508 (App. Div. 2d Dep't. 2004).

¹⁸² *Id.* at 509.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

Although victims are largely protected because defendants do not have a constitutional right to psychologically examine the victims, a defendant may still do so under "appropriate circumstances." The constant abuse of RTS parameters by prosecutors may eventually serve as the circumstances in which to do so.

People v. Lopez provides another example of a caveat to the legal rule that the defendant has no right to an examination, and how this caveat can erode victim privacy protections.¹⁸⁵ The court concluded that a victim does not have to submit to a defense physical or psychological examination, but if the victim chooses not to undergo such examinations, the State is limited to putting forth only defensive RTS testimony.¹⁸⁶ Thus, if the victim submits to a defense examination, the State may offer offensive RTS testimony.

In *Lopez*, Dr. E. Anderson examined a twenty-month old victim, B.B., for the prosecution and concluded that her physical injuries were evidence of sexual assault.¹⁸⁷ Dr. Anderson noted during the trial that he was unable to conduct a full examination of B.B.'s hymen because B.B. withdrew from the examination and complained of discomfort.¹⁸⁸ Dr. M. Flannery, who also examined B.B. for the prosecution, took photographs and examined her hymen, concluding that B.B. suffered sexual abuse.¹⁸⁹ Thirteen months after these examinations, the defendant presented an affidavit from his medical expert, stating that she was unable to conclude that B.B. had experienced sexual abuse and that more evidence was necessary.¹⁹⁰

Because of his medical expert's inability to form a conclusion, the defendant moved to have B.B. undergo an independent gynecological examination.¹⁹¹ The trial court granted the defendant such an examination, but B.B.'s family refused to produce her for an exam.¹⁹² The prosecution responded that the trial court should conduct an evidentiary hearing to determine the appropriate sanction for failure to produce B.B. so that the defense and prosecution may still present the testimony of their experts.¹⁹³ Such a hearing would evaluate whether the disputed physical evidence was necessary to prove that B.B. had been sexually-abused.¹⁹⁴ Whether that evidence was critical would decide the type of sanction.¹⁹⁵

The trial court rejected the State's motion for an evidentiary hearing and instead dismissed the indictment, stating that its opinion was based on "the U.S. Constitution, Illinois Constitution, effective assistance of counsel, due process and

¹⁸⁵ *People v. Lopez*, 800 N.E. 2d 1211 (Ill. 2003).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1212.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1213.

¹⁹⁰ *Lopez*, 800 N.E. 2d at 1214.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1215.

¹⁹⁵ *Lopez*, 800 N.E. 2d at 1215.

reasons more fully set out in the record.”¹⁹⁶ The State and the defendant agreed to reinstate the indictment and consider the defendant’s motion *in limine* to exclude the testimony of Dr. Anderson and Dr. Flannery about their examinations of B.B. as well as any evidence derived from those examinations.¹⁹⁷ The State then made a new motion to conduct an evidentiary hearing.¹⁹⁸ The trial court again agreed with the defendant, concluding that the body of the child was physical evidence in the case and that cross-examination of the prosecution’s witnesses would be insufficient to protect the defendant’s constitutional rights.¹⁹⁹

The Illinois Supreme Court noted that under current Illinois law, a request for victim psychiatric or physical exams by defense experts must be premised upon a compelling reason, and subject to the trial court’s discretion.²⁰⁰ Despite finding that a compelling reason existed, the Supreme Court overruled prior case law and held that a trial court may not order an examination of the victim in a sex offense case.²⁰¹ The Court reasoned that the case law was applied in the civil context, whereas in the criminal context, victims are not parties to an action and are not under the State’s control.²⁰² Additionally, prior case law was based on the court’s authority to order a sex victim to undergo a psychological examination, which is no longer good law pursuant to an Illinois statute stating that the courts have no such authority.²⁰³ The Court highlighted that this change was in large part due to the fact that rape victims are no longer subjected to a higher level of scrutiny relative to other victims, and a desire to avoid the potential intimidation and embarrassment of sex victims by defense counsel.²⁰⁴ The Court further held that the State may not present evidence from experts who conducted a physical or mental exam unless the victim submits to an exam by the defense. The State may introduce evidence from non-examining experts without triggering a defense exam.²⁰⁵

This case presents two concerns regarding prosecutors’ introduction of diagnostic testimony under the guise of formally defensive testimony. First, the *Lopez* ruling may lead to poor science in the courtroom on both sides. The logical extension of the Illinois ruling is that if the victim submits to an expert examination, then the State can introduce more diagnostic testimony. Of course, allowing the defense to submit diagnostic testimony gathered from an examination of the victim would “balance the scales,” but, as discussed above, RTS testimony should not be used by the defense or prosecution to diagnose victims.

¹⁹⁶ *Id.* at 1214.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1215.

²⁰⁰ *Lopez*, 800 N.E. 2d at 1216.

²⁰¹ *Id.* at 1216-17.

²⁰² *Id.* at 1217.

²⁰³ *Id.* at 1218.

²⁰⁴ *Id.* at 1219-20.

²⁰⁵ *Lopez*, 800 N.E. 2d at 1221.

Second, such a rule creates the possibility that courts will establish an indirect requirement that sexual assault victims undergo a psychological or physical exam to balance the State's use of diagnostic testimony. As the concurring opinion in *Lopez* highlights, this rule places undue pressure on the victim: "the majority needlessly hampers the State in its prosecution of such crimes and unwittingly places the victims of sex offenses in situations where they will feel compelled to comply with the very requests for physical examinations the majority seeks to deny."²⁰⁶ The concurrence argues that the court should have adhered to the original test that allowed courts to order victim examinations in limited circumstances. This original test was difficult to meet, and hence better protected all parties involved in the case:

This court need only invoke the test, provide guidance to the lower courts by adopting the factors noted above, and rest confident in the trial courts' proper exercise of discretion. A physical examination should not be granted lightly. The majority chooses a different path, preferring to deny the trial courts jurisdiction to order an independent physical examination by a defense expert. While well intentioned, the majority's holding is misguided. The accused, the victim, and the prosecution are the losers.²⁰⁷

Thus, even if the courts do not begin to directly require a victim to undergo a psychiatric or physical exam, indirect requirements, such as that in *Lopez*, affect victims and the criminal justice system. Under this dangerous analysis, the decision about victim examination is not rooted in the defendant's constitutional rights, the victim's right to privacy, or the concerns as to expert testimony admissibility. Instead, it is a "tit for tat" decision, allowing one side to do as the other, while placing undue pressure on victims.

VI. CONCLUSION: THE NEED FOR A FUNCTIONAL DICHOTOMY

The formal dichotomy between offensive and defensive uses of RTS has failed. The admission of diagnostic hypotheticals allows inadmissible RTS testimony to continue to sneak into trials. These abuses quite clearly impinge on the jury's or the judge's role as the ultimate factfinder, and in turn, impact the defendant's right to a fair trial. The current courtroom use of RTS harms victims as well. The defense may ask offensive hypotheticals in order to show that the victim does not suffer from RTS, and hence, was not raped, despite the fact that experts can neither diagnose nor "un-diagnose" a victim with RTS under courtroom admissibility standards. Additionally, as prosecutors continue to push upon the upper limits of RTS testimony, they are giving defense attorneys more ammunition to argue that the courts should require the defense to conduct psychological examinations of the victim. The current understanding of RTS within the court system is not optimal for the factfinder, the defendant, or the rape victim.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1227.

The courts' purpose is rather clear—to disallow offensive testimony that vouches for the credibility of the victim via diagnosis, and that infringes on the factfinder's role, *but* to allow defensive, rehabilitative testimony to explain counterintuitive behaviors, and to aid the factfinder in the decision-making process. This purpose became subverted when the courts implemented a formal dichotomy to define what is admissible and inadmissible. As a result, testimony in the form of hypotheticals that mirror the specific facts of the case is treated as formally defensive and rehabilitative, even though its effect is offensive and diagnostic.

Courts find testimony to be defensive simply because an expert does not testify explicitly that “X victim suffers from RTS,” even if that expert's testimony clearly implicates a diagnosis. Instead of relying on this formal dichotomy between what is admissible and what is not, the courts should analyze RTS testimony using a functional dichotomy: whether the expert's testimony vouches for the victim's credibility or whether it corroborates the victim's story. The determination will involve examining the functional effect of the expert's testimony, not whether it fits into formal definitions regardless of effect. Essentially, courts should “call it what it is.”

In order to consider RTS on a functional level, courts should analyze an expert's testimony on three axes: (1) offensive/defensive; (2) diagnostic/rehabilitative; and (3) specific/general. The courts already utilize the first two axes in their analysis; however, these two axes do not adequately distinguish between credibility and corroborating testimony. This inadequacy stems from the fact that courts consider the two axes in the formal sense and frequently refer to them interchangeably, as one can glean from the aforementioned cases and analysis. Courts should treat the two axes distinctly and functionally, as only one part of the total analysis.

A. Offensive/Defensive

A formal analysis of the first axis will consider the point at which the testimony occurred at trial, such as whether it was in the prosecution's case-in-chief or rebuttal, and whether the defense had attacked the victim's credibility. Note that this formal distinction is not transferable when the defense introduces RTS testimony. A functional consideration of the first axis alleviates these formalities. Courts simply determine whether the testimony defends against a misperception about the rape victim, regardless of the point or posture of the trial and regardless of who introduces the testimony. RTS should be admissible to defend against commonly-held misperceptions, notwithstanding whether the victim's credibility had been explicitly attacked. Although some may argue that elements of RTS are now common knowledge, misconceptions about victims remain prevalent.²⁰⁸ Courts have begun to admit RTS to counteract these misperceptions so that formal distinctions, such as who introduced the testimony and when it was introduced,

²⁰⁸ *People v. Alvarez*, No. H024709, 2004 Cal. App. Unpub. LEXIS 2741 (6th Dist. Mar. 25, 2004).

have become irrelevant. A functional axis adheres to the courts' intent to allow RTS testimony in order to better inform jurors about common behaviors of rape victims.

B. Diagnostic/Rehabilitative

The second axis—diagnostic/rehabilitative—is actually distinct from the first, even though courts currently categorize diagnostic testimony as offensive, and non-diagnostic, rehabilitative testimony as defensive. However, a party may introduce non-diagnostic testimony without any attack by the other party, and likewise, diagnostic testimony may be introduced to defend against credibility attacks on the victim. Thus, the courts have erroneously interpreted these two axes and the formal division between them as interchangeable.

Under the court's current practice, the analysis becomes an evaluation of "buzzwords." Courts look at whether the experts said something along the lines of "X victim is suffering from RTS" or "I diagnosed X victim with RTS." Yet, as demonstrated above, hypotheticals serve as a key means to avoid these buzzwords and effectively provide a diagnosis. Under a functional approach, courts analyze an expert's testimony by determining whether the testimony has the effect of (a) diagnosing the victim with RTS; or (b) rehabilitating the victim from societal misconceptions, or from attacks by the defense, by explaining counterintuitive behaviors. As noted in the discussion of the *Svihl* case, buzzwords can be a helpful way for an expert to emphasize that he or she is not making a diagnosis. However, the specific language used by the expert should only be one factor in the consideration, and should not serve as a formal, determinative line.

C. Specific/General

In contrast to the axes that courts have explicitly utilized, the specific/general axis remains only an undercurrent in the courts' analysis as to whether testimony refers to the victim specifically or to victims in general. *Robinette*, for example, discussed specific testimony regarding why victim X displays RTS symptoms a, b, and c, as opposed to general testimony that would have explained the symptoms of RTS. Courts prefer general testimony because the more specific the testimony, the more it becomes credibility testimony. Because such testimony is a functional guide, it should serve as part of the courts' analyses.

The use of these three axes in a functional manner enables a court to evaluate what it means to evaluate. In fact, considering these three axes is not a drastic change for the courts. Moreover, such analyses alleviate the concerns raised in this article about the current treatment of RTS. First, evaluating hypotheticals functionally minimizes the risk of a diagnosis sneaking into trial. Second, since RTS testimony will remain defensive, rehabilitative, and general, the pressure on courts to allow defense experts to examine the victim lessens substantially.

RTS testimony is incredibly valuable in rape cases because of its explanation of counterintuitive behaviors that unfairly discredit the victim. Yet the formalistic dichotomy undermines RTS's usefulness by admitting improper RTS testimony, which renders RTS extremely vulnerable to arguments that the testimony should be completely disregarded. There is no reason to continue evaluating RTS under the formal dichotomy, as it does not offer the results that courts originally intended. Courts must reform the current treatment of RTS before its usefulness is further diminished and becomes more harmful than helpful. A functional analysis using the proposed three axes will be a better utilization of RTS for factfinders, defendants, and victims.

