St. John's Law Review

Volume 64
Number 2 *Volume 64, Winter 1990, Number 2*

Article 9

New York Court of Appeals Holds that Rape Trauma Syndrome Is Admissable to Explain the Victim's Behavior, but Not to Prove the Rape

William J. White

DEVELOPMENTS IN THE LAW

New York Court of Appeals holds that Rape Trauma Syndrome is admissible to explain the victim's behavior, but not to prove the rape

Rape is a violent crime[1] marked by underreporting[2] and low conviction rates.[3] Due to an increased public awareness of these problems, many states, including New York, have amended their rape statutes to provide additional protection for the victim.[4] In an

---

[1] *See* Note, *Checking The Allure Of Increased Conviction Rates: The Admissibility Of Expert Testimony On Rape Trauma Syndrome In Criminal Proceedings*, 70 VA. L. REV. 1657, 1657 (1984) [hereinafter Note, *Checking the Allure*] (rape is a "crime of violence and not of sex"). Numerous studies have demonstrated that "rape is an expression of power, aggression, conquest, degradation, anger, hatred and contempt." *See id.* at 1658 n.3; *see also* Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 403 (1985) (rapists are basically driven by violence and hatred of women, not by uncontrollable sexual desires).

Rape is defined as "[t]he unlawful carnal knowledge of a woman by a man forcibly and against her will." BLACK'S LAW DICTIONARY 1260 (6th ed. 1990). In New York, "[a] male is guilty of rape in the first degree when he engages in sexual intercourse with a female . . . [b]y forcible compulsion." N.Y. PENAL LAW § 130.35(1) (McKinney 1987) (emphasis added).

[2] *See In re* Pittsburgh Action Against Rape, 494 Pa. 15, 49, 428 A.2d 126, 143 (1981) (Larsen, J., dissenting). Statistics indicate that rape is the most underreported violent crime in America. *See id.* Conservative estimates of victimization survey data indicate that the occurrence rate of rape is two to three and one-half times higher than the number of rapes actually reported. *See* Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U.L. REV. 417, 417 n.1 (1984)(citing Kilpatrick, Resick & Veronen, *Effects of a Rape Experience: A Longitudinal Study*, 37 J. SOC. ISSUES, 105, 106 (1981)). Studies have also revealed that only a small percentage of rapes are actually reported and therefore the incidence of rape is much higher than the numbers reflect. *See* Note, *Checking the Allure*, *supra* note 1, at 1659 n.5. One of the reasons victims do not report rape is "the trauma associated with pursuing a complaint. . . [and] securing a conviction." *See* Estrich, *Rape*, 95 YALE L.J. 1087, 1162 (1986); *see also* People v. Liberta, 64 N.Y.2d 152, 166 n.8, 474 N.E.2d 567, 574 n.8, 485 N.Y.S.2d 207, 214 n.8 (1984) (rape is still grossly underreported), *cert. denied*, 471 U.S. 1020 (1985).

[3] *See* Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQ. 136, 136 (1977) (suggesting that institutionalized sexism, which includes male-dominated criminal justice system, is responsible). "Very few apprehended rapists are ever charged with and convicted of rape." *Id.* Furthermore, although the number of reported rapes has increased, few result in convictions. *See* Estrich, *supra* note 2, at 1170. Even with the passage of rape reform legislation, there has been no noticeable increase in conviction rates. *See* Rank, *State New Rape Laws Taking Hold*, Nat. L.J., Dec. 5, 1983, at 1, col. 1. "In 1971, 2,415 rapes . . . were reported to the police in New York City." *Id.* "In the first six months of that year only one person was convicted of felony rape." *Id.*; *see also* N.Y. Times, Feb. 25, 1990, § 6 (Magazine), at 20, 59 (interview with Chief of Sex Crimes Unit of Manhattan District Attorney's office).

[4] *See* Note, *Checking the Allure*, *supra* note 1, at 1661-67. Concerns over the sexist assumptions underlying traditional rape legislation have led to a national trend of rape re-

effort to dispel the many commonly held misconceptions surrounding the crime of rape,[5] an increasing number of courts have admitted expert testimony[6] concerning a posttraumatic stress disorder known as "Rape Trauma Syndrome," or RTS.[7] Recently, in *People*

---

form. *Id.* at 1662-64. Also, as a result of the women's movement in the 1970's, a majority of states enacted rape reform statutes. *See* Comment, *supra* note 2, at 421. The purpose underlying this reform movement was to shift the focus of the trial from the victim's conduct to the defendant's conduct. *See id.* at 422. For example, in 1974, New York repealed section 130.15 of its Penal Law which placed a corroboration requirement on the testimony of a complaining witness in the prosecution of a forcible rape case. *See* N.Y. Times, Feb. 25, 1990, § 6 (Magazine), at 59 (corroboration requirement modified in 1972 and repealed in 1974); *see also* N.Y. PENAL LAW § 130.15 (McKinney 1987). New York also placed restrictions on defense attorneys in their cross examination of rape victims. *See* N.Y. CPL § 60.42 (McKinney 1987) (the "Rape Shield Law"). These changes were necessary since prior to 1975, when a defendant was charged with forcible rape, the victim's previous reputation for chastity was deemed relevant to the issue of whether or not she consented. *See* W. RICHARDSON, RICHARDSON ON EVIDENCE § 155, at 125-26 (J. Prince 10th ed. 1973) [hereinafter RICHARDSON]. Relevancy was based on the theory that an unchaste woman was more likely to consent than one of strict virtue. *See id.* However, in New York, with the passage of CPL section 60.42, the latitude given to a defense attorney in questioning a complaining witness about past sexual conduct was severely limited. *See* RICHARDSON, *supra*, § 155, at 62-64 (10th ed. Supp. 1985).

[5] *See* Massaro, *supra* note 1, at 402-03. Numerous studies have shown that judges, jurors, and the public-at-large know very little about rape, and usually what they claim to know is in fact fallacious. *See id.* at 402-04. One author commented:

> [J]uries are allies of male defendants and enemies of female complainants for reasons that run deeper than their poor grasp of the law or their predominantly male composition. They are composed of citizens who believe the many myths about rape, and they judge the female according to these cherished myths.

Id. at 405 (quoting S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 373 (1975).

[6] *See* RICHARDSON, *supra* note 4, § 367, at 340. Generally, there are two situations in which expert testimony is permitted. *See id.* The first is where it is required to enlighten a jury as to facts not within their common knowledge and from which they will be required to draw their own conclusions. *See id.* The second is where the conclusions to be drawn from the facts stated require professional or scientific skill not within the purview of the ordinary juror. *See* De Long v. County of Erie, 60 N.Y.2d 296, 307, 457 N.E.2d 717, 722, 469 N.Y.S.2d 611, 617 (1983) (expert testimony proper when it calls for professional or technical knowledge beyond typical juror's ken); Dougherty v. Mulliken, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900)(same).

[7] *See* Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 982 (1974). "Rape Trauma Syndrome (RTS) is the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." *Id.* "This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life-threatening situation." *Id.* Courts across the country have allowed prosecutors to introduce expert testimony on RTS. *See* Note, *Checking the Allure*, *supra* note 1, at 1659 n.8. Such testimony has been used to rebut the defense of consent as well as to dispel juror misperceptions surrounding the crime of rape. *See* State v. Marks, 231 Kan. 645, 647 P.2d 1292, 1299 (1982); McCord, *The Admissibility Of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C.L. REV. 1143, 1178 (1985).

v. Taylor,[8] the New York Court of Appeals, while reviewing two decisions,[9] concluded that evidence of RTS was admissible to explain the behavior of a rape victim where a jury might find certain conduct inconsistent with a claim of rape,[10] but was held inadmissible if offered solely to prove that the rape occurred.[11]

The first case reviewed in *People v. Taylor* ("*Taylor I*") involved the rape and sodomy of a nineteen-year-old female by the defendant John Taylor.[12] Following the attack, the complainant returned home and related to her mother the details of the rape, but did not discuss the identity of her attacker.[13] When the police arrived, the complainant stated that she was unaware of her attacker's identity.[14] Later, however, while alone with her mother at the police station,[15] the complainant revealed that the defendant, John Taylor, had attacked her.[16] The complainant then repeated this information to a detective.[17] Subsequently, the defendant was arrested and tried, but the jury was unable to reach a verdict.[18] At

---

[8] 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990).

[9] *Id.* at 282, 552 N.E.2d at 131-32, 552 N.Y.S.2d at 883-84.

[10] *Id.* at 293, 552 N.E.2d at 138, 552 N.Y.S.2d at 890.

[11] *Id.* ("evidence of [RTS] is inadmissible when it inescapably bears solely on proving that a rape occurred").

[12] *Id.* at 282, 552 N.E.2d at 132, 552 N.Y.S.2d at 884.

[13] *Id.* "While waiting for the police . . . the victim . . . was hysterical and sobbing . . . [h]er hair was matted, her sweater on inside out and she appeared very upset." People v. Taylor, 142 App. Div. 2d 410, 413, 536 N.Y.S.2d 825, 827 (2d Dep't 1988), *aff'd*, 75 N.Y.2d 277 (1990).

[14] *See Taylor*, 75 N.Y.2d at 282, 552 N.E.2d at 132, 552 N.Y.S.2d at 884. Speaking very rapidly and jumping up and down, the complainant gave a description of her attacker to the police. *Taylor*, 142 App. Div. 2d at 413, 536 N.Y.S.2d at 827.

[15] *Taylor*, 75 N.Y.2d at 282, 552 N.E.2d at 132, 552 N.Y.S.2d at 884. At the police station, the complainant was asked to remove her clothing so that it could be examined for forensic evidence. *Id.* at 282-83, 552 N.E.2d at 132, 552 N.Y.S.2d at 884. Before going to a private room to do so, she was re-interviewed concerning the events leading up to the attack. *Id.* However, again the complainant "repeated that she did not know who her attacker was." *Id.*

[16] *Id.* at 282-83, 552 N.E.2d at 132, 552 N.Y.S.2d at 884. While the complainant and her mother were alone in a private room, "her mother told her, that anything further that she could tell the police might be of help." *Taylor*, 142 App. Div. 2d at 413, 536 N.Y.S.2d at 827. The complainant then stated, "John Taylor [the defendant] raped me." *Id.*

[17] *Taylor*, 75 N.Y.2d at 283, 552 N.E.2d at 132, 552 N.Y.S.2d at 884. The complainant stated she had known the defendant for years and had just seen him the previous night at a local convenience store. *Id.* She further asserted that she had no doubt it was the defendant since there was ample time during the attack to see his face. *Id.* The complainant made a positive identification of the defendant in two separate line-ups and he was subsequently indicted by a grand jury on one count of rape in the first degree, two counts of sodomy in the first degree, and one count of sexual abuse in the first degree. *Id.*

[18] *Id.*

a second trial, the prosecutor was allowed to present expert testimony concerning RTS.[19] This testimony was offered to explain the reasons the complainant might have been unwilling to name the defendant as her attacker in the first few hours following the attack, and to rebut the inference that, because she appeared calm following the attack, she had not been raped.[20] The second trial secured the conviction of the defendant on two counts of sodomy and one of attempted rape.[21]

In the second case in *Taylor* ("*Taylor II*"), the complainant, an eleven-year-old female, claimed that she was sexually assaulted by the defendant, Ronnie Banks.[22] On the morning after the alleged attack, the complainant described the incident to her grandmother, who then contacted the police and had the defendant arrested.[23] At trial, both the complainant and her grandmother were permitted to testify as to various emotional problems that had haunted the complainant since the attack.[24] In addition, the prosecutor was allowed to offer expert testimony describing the symptoms of RTS to show that the victim was suffering from it.[25] At the close of trial, the defendant was convicted of four statutory counts, including rape and sodomy.[26]

The Appellate Division, Second Department, affirmed the conviction in *Taylor I* and the Fourth Department affirmed the conviction in *Taylor II*.[27] Both defendants appealed, asserting that the admission of expert testimony concerning RTS was improper.[28]

On appeal, the New York Court of Appeals affirmed the order

---

[19] *Id.*

[20] *Id.* The expert testimony on RTS explained why a victim, who knows her attacker, might be unwilling to identify him in the first few hours after the attack. *Id.* The expert further testified that it was quite common for a rape victim to appear quiet and calm after an attack. *Id.*

[21] *Id.* at 283, 552 N.E.2d at 132-33, 552 N.Y.S.2d at 884-85.

[22] *Id.* at 283-84, 552 N.E.2d at 133, 552 N.Y.S.2d at 885. Banks allegedly pulled the complainant by the arm into a neighborhood garage and sexually assaulted her. *Id.*

[23] *Id.* at 284, 552 N.E.2d at 133, 552 N.Y.S.2d at 885. Banks was charged with rape, sodomy, sexual abuse and endangering the welfare of a child. *Id.*

[24] *Id.* The complainant had been experiencing nightmares, had trouble sleeping through the night, was afraid of going to school and began running and staying away from home. *Id.*

[25] *Id.* at 284-85, 552 N.E.2d at 133, 552 N.Y.S.2d at 885. Dr. David Gandell was permitted to testify for the prosecution. *See id.* Dr. Gandell is an obstetrician-gynecologist with special training in treating sexual assault victims. *See id.*

[26] *Id.* at 285, 552 N.E.2d at 133, 552 N.Y.S.2d at 885.

[27] *Id.* at 282, 552 N.E.2d at 132, 552 N.Y.S.2d at 884.

[28] *Id.*

in *Taylor I*, but reversed in *Taylor II*.[29] Writing for a unanimous court, Chief Judge Wachtler found that RTS was generally accepted within the relevant scientific community and that such evidence could be helpful to rape trial jurors in dispelling some common misperceptions about rape.[30] The court added that "the reason why the testimony is offered will determine its helpfulness, its relevance and its potential for prejudice."[31] In affirming the *Taylor I* conviction, the court reasoned that a defendant is not unduly prejudiced when RTS evidence is used to explain a victim's behavior where such behavior might appear inconsistent with a claim of rape, or when it is used to dispel misconceptions about rape.[32]

With respect to the defendant in *Taylor II*, however, the admissibility of RTS evidence was rejected because the court found that its sole purpose was to prove that the rape had in fact occurred.[33] While the court conceded that "rape produces identifiable symptoms in rape victims," it noted that the presence or absence of RTS symptoms are not dispositive of whether the victim was actually raped.[34] The court concluded that because expert testimony on RTS "might create such an inference in the minds of lay jurors," its admission into evidence for this purpose alone would be unacceptably prejudicial to a defendant.[35]

It is submitted that the New York Court of Appeals, in *Taylor*, remained consistent with prior New York law by allowing RTS evidence to be admitted to explain a victim's illogical post-attack behavior, but that the court then wrongfully limited the use of such evidence in not allowing it to be used to prove that the crime

---

[29] *Id.*

[30] *Id.* at 287-91, 293, 552 N.E.2d at 135-36, 138, 552 N.Y.S.2d at 887-88, 890.

[31] *Id.* at 292, 552 N.E.2d at 138, 552 N.Y.S.2d at 890.

[32] *Id.* at 293, 552 N.E.2d at 138, 552 N.Y.S.2d at 890. The court held that expert testimony was admissible to show that a rape victim who is familiar with her attacker is more fearful of identifying him to authorities and is less likely to report the crime at all. *See id.* at 292-93, 552 N.E.2d at 138, 552 N.Y.S.2d at 890. Expert testimony explaining the victim's behavior is relevant because such understanding is beyond the knowledge of the average juror and, when admitted for this purpose, is not unduly prejudicial to the defendant. *See id.*

[33] *See id.* at 293, 552 N.E.2d at 138-39, 552 N.Y.S.2d at 890. The court opined that unlike *Taylor*, the evidence in *Banks* was not offered to explain behavior that might appear inconsistent with the claim of rape. *See id.*

[34] *Id.*

[35] *Id.* at 293, 552 N.E.2d at 138-39, 552 N.Y.S.2d at 890-91. The court felt that the imprimatur of an expert could create a false sense of reliability in the minds of the jury. *See id.*

occurred. It is further asserted that the *Taylor* court has left unanswered the question of whether RTS evidence is admissible where the defense of consent has been raised.

It appears that the Court of Appeals' stance on RTS evidence in *Taylor I* is in line with a growing number of decisions in New York that have allowed expert testimony on various psychological phenomena to explain a witness's seemingly inconsistent behavior.[36] For example, New York trial courts have permitted expert testimony on "child sexual abuse syndrome" to aid the jury's understanding of "the psychological aftermath occasioned by [this] trauma, [and explain] such [behavior] as false recantations, . . . feelings of guilt and apprehension about the trial."[37] Furthermore,

---

[36] *See* People v. Fisher, 53 N.Y.2d 907, 909, 423 N.E.2d 53, 54, 440 N.Y.S.2d 630, 631 (1981). In *Fisher*, the Court of Appeals allowed a psychiatrist to testify that the chief prosecution witness in a murder trial was exhibiting symptoms consistent with the psychological phenomenon of "repression" or "blockage," which accounted for her delayed identification of the defendant. *Id.* at 907-09, 423 N.E.2d at 53-54, 440 N.Y.S.2d at 630-31. The defendant tried to exploit the witness's initial failure to inform the police who the murderer was by suggesting that the witness's later identification was the product of police suggestion and hypnotic and psychiatric influence. *Id.* at 908. In its rebuttal, the prosecution called a psychiatrist "to explain with, reasonable medical certainty, that it was possible for an individual to initially . . . block out certain facts or feelings . . . which follow . . . a traumatic event, but to recall them at a later time." *Id.* at 909, 423 N.E.2d at 54, 440 N.Y.S.2d at 631. Similarly, the Appellate Division, Fourth Department, allowed a psychiatrist to testify that because the defendant was suffering from "battered wife syndrome," she reasonably believed that her life was in danger and was therefore entitled to the defense of justification. *See* People v. Emick, 103 App. Div. 2d 643, 654-55, 481 N.Y.S.2d 552, 559 (4th Dep't 1984); *see also* N.Y. PENAL LAW § 35.15(2)(a) (McKinney 1987) ("person may not use deadly physical force upon another person unless . . . [h]e reasonably believes that such other person is using or about to use deadly physical force"). In *Emick*, the defendant's expert testified that the defendant manifested the classic signs of battered wife syndrome. *See Emick*, 103 App. Div. 2d at 654, 481 N.Y.S.2d at 559. She stated that victims of this syndrome believe that they cannot escape from their tormentor. *Id.* Dr. Rice opined that the defendant saw killing her husband as her only means of escape. *Id.* at 655, 481 N.Y.S.2d at 559. A similar situation existed in People v. Cruickshank, 105 App. Div. 2d 325, 331, 484 N.Y.S.2d 328, 335 (3d Dep't 1985), *aff'd*, 67 N.Y.2d 625, 499 N.Y.S.2d 663, 490 N.E.2d 530 (1986), where the defendant in a murder case raised the defense of justification, asserting that her conduct was necessary to prevent rape. *Id.*

[37] *See* People v. Grady, 133 Misc. 2d 211, 213, 506 N.Y.S.2d 922, 924 (Sup. Ct. Bronx County 1986) (expert testimony on child abuse syndrome used to explain inconsistent statements and behavior of young children) (relying on People v. Reid, 123 Misc. 2d 1084, 1085, 475 N.Y.S.2d 741 (Sup. Ct. Kings County 1984)), *aff'd*, 125 App. Div. 2d 1011 (1st Dep't 1986).

In People v. Benjamin, 103 App. Div. 2d 663, 481 N.Y.S.2d 827 (4th Dep't 1984), the defense counsel repeatedly questioned a fourteen-year-old victim as to why she did not reveal the sexual abuse at an earlier time. *Id.* at 669, 481 N.Y.S.2d at 832. The prosecutor in rebuttal was permitted to introduce expert testimony that child victims of abuse are often reluctant to reveal the crime. *Id.*; *cf. In re* Nicole V., 71 N.Y.2d 112, 122, 518 N.E.2d 914,

the position adopted by the Court of Appeals on RTS is supported by a majority of state courts throughout the country.[38]

By limiting the use of RTS evidence[39] in *Taylor II*, it appears that the Court of Appeals has foregone the clarity of prior New York decisions dealing with psychological phenomena by creating ambiguity as to whether RTS will be admissible to rebut the defense of consent. In marked contrast to *Taylor II*, the Court of Appeals has approved of the use of "battered child syndrome" evidence when offered to show whether a crime has occurred.[40] However, in *Taylor II*, when RTS evidence was introduced for this same purpose, the court held it inadmissible on the grounds that its probative value was outweighed by the possibility of unfair prejudice.[41] As both RTS and battered child syndrome have been recognized by the Court of Appeals as being generally accepted by their relevant scientific communities,[42] it seems entirely inconsis-

---

918, 524 N.Y.S.2d 19, 23 (1987) (expert testimony allowed in child protection proceeding to satisfy corroboration requirement).

[38] *See, e.g.*, People v. Bledsoe, 36 Cal. 3d 236, 247, 681 P.2d 291, 298, 203 Cal. Rptr. 450, 457 (1984) (RTS may play role in dispelling jurors' misconceptions about rape); People v. Hampton, 746 P.2d 947, 951 (Colo. 1987) (expert testimony that rape victim assaulted by acquaintance is generally more reluctant to alert police was allowed to explain delay in reporting); *see also* McCord, *supra* note 7, at 1178 (unanimous agreement among courts that RTS admissible to explain unusual complainant behavior). *But see* Commissioner v. Gallagher, 519 Pa. 291, 293-94, 547 A.2d 355, 358 (1978) (expert testimony on RTS held inadmissible to explain victim's failure to identify defendant two weeks after rape).

[39] *See Taylor*, 75 N.Y.2d at 292-93, 552 N.E.2d at 138-39, 552 N.Y.S.2d at 890-91 (evidence of RTS not allowed to prove crime took place); *see also Reid*, 123 Misc. 2d at 1087, 475 N.Y.S.2d at 743 ("expert . . . will be permitted only to explain rape trauma syndrome to the jury and express her opinion that the victim suffers from that syndrome").

[40] *See* People v. Henson, 33 N.Y.2d 63, 74, 304 N.E.2d 358, 363, 349 N.Y.S.2d 657, 665 (1973). Expert medical testimony that a child is suffering from "battered child syndrome" is evidence that the child did not receive those injuries by accidental means. *Id.* The court was careful to point out that the opinion of the doctor did not indicate *who* caused the injuries, only that someone did. *Id.* (emphasis added). *See In re* Lou R., 131 Misc. 2d 138, 143, 499 N.Y.S.2d 846, 850 (Family Ct. Onondaga County 1986) (evidence of battered child syndrome admissible to show neglect).

[41] *See supra* notes 31-35 and accompanying text.

[42] *See Taylor*, 75 N.Y.2d at 287-88, 552 N.E.2d at 135, 552 N.Y.S.2d at 887; *Henson*, 33 N.Y.2d at 73, 304 N.E.2d at 364, 349 N.Y.S.2d at 665.

The New York Court of Appeals has acknowledged that rape is a highly traumatic event that will initiate in most women the onset of certain identifiable symptoms. *See Taylor*, 75 N.Y.2d at 286, 552 N.E.2d at 134, 552 N.Y.S.2d at 886. One such symptom is a fear of men. *See id.* at 287, 552 N.E.2d at 135, 552 N.Y.S.2d at 886.

Likewise, the New York Court of Appeals has recognized certain symptoms to be present in a "battered child syndrome," including findings "of subdural hematoma, multiple fractures in various stages of healing, soft tissue swellings or skin bruising." *Henson*, 33 N.Y.2d at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 665.

tent to deem RTS evidence more prejudicial to a defendant than evidence of battered child syndrome.[43]

The admissibility of RTS evidence to rebut the defense of consent is an issue which has been debated by courts[44] and commentators alike.[45] Given the broad holding in *Taylor*, it is submitted that the admissibility of RTS evidence to rebut the defense of consent has been left an open question. However, the language of the court's opinion[46] seems to indicate that the Court of Appeals would probably reject the use of RTS evidence when consent is raised as a defense. This becomes apparent when it is considered that the victim's lack of consent is the element of the crime which determines whether or not a rape was committed.[47] Thus, when a

---

[43] *See* Massaro, *supra* note 1, at 460.

> One explanation for the incongruity between what courts say and what they do with regard to RTS evidence is that judges intuitively may not trust the assessment by mental health professionals that the professionals' theories and methods are reliable. Some people insist that psychology and psychiatry are, at best, mere speculation about the enormously complex and elusive subject. Judicial distrust of this speculation may be greatest when it is offered against a criminal defendant on the "ultimate issue" of whether a crime has occurred and thus might have prompted the courts to exclude RTS evidence even though a consensus of the relevant scientific community considers it reliable.

Id.

[44] *See, e.g.*, State v. Huey, 145 Ariz. 59, 63-64, 699 P.2d 1290, 1294-95 (1985) (RTS evidence allowed to rebut consent when there is evidence coitus occurred); State v. Marks, 231 Kan. 645, 654-55, 647 P.2d 1292, 1299 (1982) (RTS allowed to rebut defense of consent); State v. Liddell, 211 Mont. 180, 189, 685 P.2d 918, 923 (1984) (any relevant evidence which lends support to existence or nonexistence of fact can only aid jury). *But see, e.g.*, People v. Bledsoe, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (expert testimony on RTS is unfairly prejudicial to defendant when used to show rape occurred); State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (same).

[45] *See* Massaro, *supra* note 1, at 436-53 (RTS should be admissible to rebut defense of consent); McCord, *supra* note 7, at 1202-04 (same). *But see* Note, *Checking the Allure*, *supra* note 1, at 1689-91 (RTS should not be admissible when consent is defense); Comment, *Criminal Law—Evidence—Expert Testimony That Rape Victim Suffered Post Traumatic Stress Disorder Is Admissible To Rebut A Defense of Consent*: State v. Allewalt, *308 Md. 89, 517 A.2d 741 (1986)*, 16 U. BALT. L. REV. 141 *passim* (same).

While presently there are no reported New York decisions which allow the use of RTS to rebut the defense of consent, there is dicta in *Taylor* which suggests that it has been permitted previously for this purpose. *See* People v. Taylor, 142 App. Div. 2d 410, 412, 536 N.Y.S.2d 825, 826 (2d Dep't 1988), *aff'd*, 75 N.Y.2d 277, 552 N.E.2d 1131, 552 N.Y.S.2d 883 (1990). "[T]estimony with respect to . . . rape trauma syndrome . . . is admissible in a rape case *even where* the victim is not a minor and the *defense is not one of consent.*" *Id.* (emphasis added). Based on this language, it can be inferred that RTS has been admitted previously where the victim was a minor or the defense was consent.

[46] *See Taylor*, 75 N.Y.2d at 293-94, 552 N.E.2d at 138-39, 552 N.Y.S.2d at 890-91; *see also supra* notes 32-35 and accompanying text.

[47] *See* N.Y. PENAL LAW § 130.05(1) (McKinney 1987) ("[w]hether or not specifically

defendant admits to sexual intercourse with the complainant, it is the presence or absence of consent which ultimately determines whether the act was a crime.[48] Therefore, to allow the admission of RTS evidence to show that sexual intercourse was nonconsensual would also tend to prove that the crime of rape took place. If faced with the admissibility of RTS evidence and the defense of consent, it is submitted that the Court of Appeals, in accordance with *Taylor*, would hold that "the helpfulness . . . [of such evidence would be] outweighed by the possibility of undue prejudice."[49] This would be an unfortunate outcome, and, it is further submitted, render ineffective New York's attempt to assist its victims of rape.

William J. White

New York Court of Appeals holds prosecutor may, without court approval, ask grand jury to vacate indictment before it is filed in order to present additional evidence

At common law there was no limit on a prosecuting attorney's power to repeatedly submit a charge to successive grand juries until one voted an indictment.[1] This broad power left open to a pros-

stated, it is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim").

[48] *See* Massaro, *supra* note 1, at 410-23 (discussing what constitutes consent).

[49] *See Taylor*, 75 N.Y.2d at 293, 552 N.E.2d at 139, 552 N.Y.S.2d at 891; *see also* People v. Bledsoe, 36 Cal. 3d 236, 249, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1980) (expert testimony that complainant suffers from RTS unfairly prejudices defendant by creating aura of special reliability); State v. Saldana, 324 N.W.2d 227, 229 (Minn. 1982) (expert testimony on RTS produces extreme danger of unfair prejudice when admitted on issue of consent); State v. Taylor, 663 S.W.2d 235, 241 (Mo. 1984) (same). *But see* State v. Whitman, 16 Ohio App. 3d 246, 247, 475 N.E.2d 486, 488 (1984) (probative value of RTS evidence on issue of consent outweighs prejudicial impact).

[1] *See* People v. Wilkins, 68 N.Y.2d 269, 273, 501 N.E.2d 542, 543, 508 N.Y.S.2d 893, 894 (1986); People *ex rel.* Flinn v. Barr, 259 N.Y. 104, 107-08, 181 N.E. 64, 65 (1932). "The only protection then available to an individual was the constitutional prohibition against being twice placed in jeopardy for the same crime, and that protection could not be invoked until the time of trial." *In re* Special Grand Jury, 129 Misc. 2d 770, 774, 494 N.Y.S.2d 263, 267 (Nassau County Ct. 1985) (citing People v. Rosenthal, 197 N.Y. 394, 401, 90 N.E. 991, 994 (1910), *aff'd*, 226 U.S. 260 (1912)).

The influence a prosecutor can have over a grand jury has led critics to characterize the grand jury as a "rubber stamp" of the prosecutor. *See* Note, *The Exercise of Supervisory*