An Analysis of Pennsylvania's Statutory Standard for the Admissibility of Expert Testimony on Rape Trauma Syndrome

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I. INTRODUCTION

On November 4, 2011, a grand jury from Centre County, Pennsylvania, issued a report that set in motion a series of events that would permanently alter the landscape of Pennsylvania’s evidence law.1 The report detailed the sexual abuse suffered by eight young boys at the hands of former Penn State University football coach Gerald “Jerry” Sandusky, who met all of his victims through his

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* J.D. Candidate, 2016, Duquesne University School of Law; B.A., 2013, summa cum laude, University of Pittsburgh. I would like to thank my father, Lieutenant Robert Weaver, Pennsylvania State Police (retired), whose unrelenting commitment to and compassion for victims of violent crime inspires me each and every day, and my mother, Sharon Weaver, whose love and encouragement has made all of my academic and professional pursuits, including this article, possible. I would also like to thank my faculty advisor, Professor Jane Campbell Moriarty, for her time, expertise, and invaluable insight throughout this process.

 charity for children. On November 5, 2011, Sandusky was arrested on 48 charges stemming from his systematic and repeated sexual abuse of the eight victims identified in the grand jury report.

At Sandusky’s trial in 2012, several victims testified to odd behaviors exhibited by Sandusky in attempts to gain their trust before he began sexually abusing them. According to the victims, Sandusky would often shower with them naked and initiate “soap battles” wherein he would “bear-hug” them. The victims testified that he also wrestled and “play-box[ed]” with them during these incidents. As substantiated by documents admitted into evidence at trial, Sandusky also wrote “love letters” to victims, detailing his affection for the young boys.

While the victims were key witnesses in the prosecution’s case against Sandusky, psychologist Dr. Elliot Atkins was a key witness for the defense. Dr. Atkins testified that Sandusky’s bizarre, inappropriate behaviors did not show that Sandusky was a predator; rather, Dr. Atkins testified that the behaviors showed that Sandusky suffered from Histrionic Personality Disorder. According to Dr. Atkins, Sandusky’s disorder is characterized by “excessively sexual or flirtatious behavior” in order to obtain attention from others. Dr. Atkins therefore opined that certain behaviors, such as the love letters, were merely a manifestation of Sandusky’s disorder rather than an indication that he had sexual or romantic feelings towards the victims.

2. Id.

In an investigation lasting more than seven months, [Freeh] found a legendary football coach bending his supposed bosses to his will, a university staff that was mostly unaware of its legal duties to report violence and sexual abuse, and a university president who hid problems from the board of trustees and was guided by a fear of bad publicity. Freeh’s report also criticized the university’s culture at large, noting that the failure of university officials to properly address Sandusky’s conduct “reveals numerous individual failings, but [] also reveals weaknesses of the university’s culture, governance, administration, compliance policies and procedures for protecting children.” Id.

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
The prosecution did not present a similar expert to testify as to the seemingly bizarre behaviors of Sandusky’s victims, who often stayed in touch with Sandusky, continued to spend nights at his residence, and even sent him Father’s Day cards after being repeatedly sexually abused. Without a proper understanding of the impact of sexual abuse on victims, the jury was left to surmise as to why the victims would act as such. The prosecution did not forgo introducing an expert witness by choice; Pennsylvania law expressly forbade it.

Until 2012, Pennsylvania was the only state in the country prohibiting the admission of expert testimony in criminal trials to explain the effects of sexual assault on victims. For decades, victim advocacy groups and sex crimes prosecutors have supported Pennsylvania’s decision to allow expert testimony in sex crimes cases because jurors often possess “preconceived notions about how victims behave after an assault”—notions based on longstanding, inaccurate “rape myths.” Proponents of the bill argue that allowing for expert testimony about victim behavior, namely the effects of Rape Trauma Syndrome (“RTS”), would provide a proper contextual framework within which the jury could determine credibility without reliance on erroneous and often harmful myths about victims.

Opponents of the admission of expert testimony cite three predominant concerns in their criticism of laws like Pennsylvania’s. First, they raise arguments that the admission of such testimony allows experts to make credibility determinations from the stand, essentially telling the jury that they should believe the victim.

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13. 42 PA. CON. STAT. § 5920(b) (2012).
Opponents therefore contend that the law permits improper “bolstering” of victim testimony, which occurs when a party offers evidence only for the purpose of enhancing a victim’s credibility. Second, opponents raise concerns that the law does not satisfy the standard for admission of expert testimony. Most critically, they believe that the testimony does not satisfy the “helpfulness” requirement because sexual assault and a victim’s response to sexual assault is within the ken of lay jurors. Lastly, opponents typically voice concerns regarding unfair prejudice. Many opponents, particularly defense attorneys, suggest that allowing an expert to testify on this subject matter invests an “aura of special reliability and trustworthiness” into the testimony, making jurors more likely to believe it and thus unfairly prejudicing the defendant.

This note explores how House Bill 1264 will level the playing field for Pennsylvania sexual assault victims, while avoiding the drawbacks cited by critics of statutes allowing such expert testimony. Section II explores the longstanding rape myths that have historically colored society’s understanding of rape and have created the need for updated legislation. It also explains RTS and its admissibility in criminal trials over the past several decades, and describes how Pennsylvania law and jurisprudence has failed to insulate criminal trials from the effects of harmful rape myths.

Section III analyzes whether the law implicates any of the concerns raised by opponents, or whether it serves its intended purpose—to “level the playing field” for victims of sexual assault. First, the section examines the admission of RTS expert testimony

19. “In a criminal case, improper bolstering of a witness’s testimony occurs when the jury could reasonably believe that the prosecutor is indicating a personal belief in the witness’s credibility.” 33A FED. PROC., L. ED. § 80:111 (2014).
21. Id. at 1394–95.
22. McCord, supra note 17, at 1204–06.
23. Id. at 1205. Some jurisdictions maintain that expert testimony concerning victim responses to rape are unfairly prejudicial. See, e.g., State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982). In Saldana, defendant was tried on charges stemming from his alleged sexual assault of a victim who did not report her rape immediately and was an acquaintance of the defendant. Id. at 229. At trial, a counselor for sexual assault victims testified to the typical “post-rape symptoms and behavior of rape victims.” Id. The court ultimately held that “[p]ermitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome the complainant was therefore raped, unfairly prejudices the [defendant-appellant] by creating an aura of special reliability and trustworthiness.” Id. at 230.
through the lens of the Pennsylvania Rules of Evidence and the Frye standard, particularly the helpfulness requirement. Second, the section discusses the two different approaches to RTS testimony, identifies the scheme adopted by Pennsylvania, and explores whether the scheme infringes upon the jury’s role as fact-finder. Finally, the section addresses whether RTS testimony admitted under Pennsylvania’s statutory scheme unfairly prejudices the defendant. This note concludes with a summary of analytical findings as to the future applicability and permissible scope of expert testimony under the law.

II. HISTORICAL BACKGROUND

A. Rape Myths

Society has “a long history of holding persistent and harmful myths about rape and those who are victimized by it.” These myths have shifted society’s focus away from the rapist to the victim, and rape trials often focus just as much, if not more so, on the behavior of the victim than on the behavior of the rapist. There are three general categories of rape myths, which have and continue to form the basis for laypersons’ misconceptions about victims’ responses to sexual assault.


25. See Pa. R. EVID. 702(b) (“the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue”).


27. Id.


29. Id. at 897.
often intimate partners, friends, or family members. The second type of rape myth concerns the victim. Rape victims are often depicted as women whose conduct, such as their dress, alcohol consumption, or prior sexual conduct, invites unwanted sexual contact. The final type of rape myth concerns the rape itself. Many people believe that if a woman did not physically resist her attacker during the course of a rape, she could not have been raped.

These rape myths form the basis for jurors’ expectations about how a victim should behave after a sexual assault, including, but not limited to the belief that the victim should be extremely emotional or hysterical after the incident. Most notably, jurors also often believe a “real victim”—one who is raped by a stranger, did not invite the conduct, and physically resisted the rape—would have immediately reported the assault to the police. When a victim does not behave in this way, jurors perceive a victim’s behavior

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30. Id. at 897–98. See Michelle J. Anderson, The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault, 52 (Villanova Univ. Sch. of L. Working Paper Series, Paper No. 20, 2004) (asserting: “When people think about rape, most imagine a stereotypical scenario. They picture a... stranger jumping out of the bushes, dragging an innocent... woman into a dark alley, beating her viciously, and raping her.”); Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013, 1023 (1991) (“the public strongly embraces the myth that rapists are ‘sick, emotionally disturbed’ men”).


32. Id. See Torrey, supra note 30, at 1015 (familiar rape myths include the belief that “women are ‘asking for it’ when they wear provocative clothes, go to bars alone, or simply walk down the street at night”).

33. Emrich, supra note 28, at 898.

34. Id. at 899 (explaining that “[m]any believe that a woman who was fully conscious, but did not resist, was not raped”).


36. NATIONAL DISTRICT ATTORNEY’S ASSOCIATION ET AL., INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (2007), available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf. The reality is, however, that “most victims never report the crime of rape.” See Torrey, supra note 30, at 1029 (explaining that an empirical study suggests that only 3% of victims ever report a rape to the police). Victims do not report rape for a variety of reasons, including, but not limited to, shame, fear, and the desire to avoid a lengthy trial process that could “provoke... responses in the victim similar to those caused by the actual rape.” Id. at 1029–50. Interestingly, Pennsylvania jury instructions aid in perpetuating the myth that victims immediately report their assaults. See Failure to Make a Prompt Complaint in Certain Sexual Offenses, PA. STANDARD JURY INSTRUCTIONS (CRIM) § 4.13A (2012). See Torrey, supra note 30, at 1041: [C]lose examination of the prompt complaint requirement reveals that it is based on rape myths... Because of the commonly held view that it was “natural” for a rape victim to complain as soon as possible after the assault, in the absence of such a report made to a third party the rape charge was assumed to be a fabrication created by a vindictive complainant.
as “counterintuitive,\textsuperscript{37} and therefore, compelling evidence of [his or her] lack of credibility.”\textsuperscript{38}

**B. Rape Trauma Syndrome and its Admissibility**

In reality, the belief that a sexual assault victim’s counterintuitive behaviors are indicative of a lack of credibility are far from accurate.\textsuperscript{39} RTS is a disorder characterized by a “variety of post-rape physical and emotional traits that many victims share”\textsuperscript{40} and is helpful in explaining the behaviors of victims immediately after the rape and the long-term impact of rape on victims.\textsuperscript{41} Researchers

Section 4.13A of the Standard Jury Instructions for Pennsylvania provide, in pertinent part:

The evidence of [name of victim]'s [failure to complain] [delay in making a complaint] does not necessarily make [his] [her] testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the [failure to complain] [delay in making a complaint] should be considered in evaluating [his] [her] testimony and in deciding whether the act occurred [at all] [with or without [his] [her] consent].

Failure to Make a Prompt Complaint in Certain Sexual Offenses, PA. STANDARD JURY INSTRUCTIONS (CRIM), § 4.13A (2012). This instruction is appropriate where “the evidence suggests that an alleged victim, otherwise competent and able to do so, did not promptly report a sexual offense.” Failure to Make a Prompt Complaint in Certain Sexual Offenses, PA. STANDARD JURY INSTRUCTIONS (CRIM), § 4.13A (2012), Advisory Committee Note.

“The empirical research . . . documents a reality in which women do not promptly report a rape.” Torrey, supra note 30, at 1042. However, persistent rape myths about the promptness of a complaint remain pervasive in both the prosecutor’s decision to bring charges and the ultimate outcome of the case. See id. at 1043 (explaining that “police investigators and prosecutors . . . actively seek evidence of a prompt complaint” and that “[a] national survey of prosecutors revealed that promptness of complaint was the third most important factor in the decision to make a criminal charge, following only proof of penetration and physical force”).

37. The term “counterintuitive” is not a psychological term used to define a victim’s behavior. NATIONAL DISTRICT ATTORNEY’S ASSOCIATION ET AL., supra note 36, at 11. Rather, it defines “the public’s perceptions of victim’s behavior and the failure of the public’s expectations to match actual victim behavior.” Id.

38. Id.

39. Tully, supra note 12. “Even though these myths are untrue and are overwhelmingly refuted by the data, they continue to play an important role in the way judges, jurors, and others perceive testimony in rape trials.” Torrey, supra note 30 at 1015. Moreover, even though victim credibility is often a central focus of rape trials, “very little empirical evidence suggests that victims frequently make false accusations.” Boeschen et al., supra note 26, at 414.

Empirical studies show that only 2–4% of victims falsely allege that a rape has occurred, which is the same estimated figure for false reporting of all other crimes. Id. at 415. Furthermore, studies also show that sexual assault trials are very “victim-centric.” Anderson, supra note 30, at 30–31. Jurors do not focus on the conduct of the defendant on trial but instead scrutinize the conduct of the victim. Id. Research has indicated that a verdict rendered in a sexual assault trial depends more on the jury’s assessment of the victim’s “guilt” than it has to do with its assessment of the defendant’s guilt. Id. at 31.

40. Hogan, supra note 16, at 590.

41. Id. at 531.
Ann Burgess and Lynda Holmstrom, who conducted a six-year longitudinal study of rape victims in the 1970s, first described the disorder. The results of the study showed that women who have been raped typically experience two phases of behavior—the acute phase and the reorganization phase—following their assault.

During the acute phase, which occurs in the hours immediately after the rape, victims exhibit either “emotional excitement” or “emotional flatness.” About half of victims demonstrate emotional excitement, which is characterized by crying, anxiety, and even inappropriate smiling. The other half of victims, however, demonstrate emotional flatness, which occurs when victims appear subdued, calm, and non-emotional. The reorganization phase is the long-term phase that occurs in the weeks, months, and even years after the rape, and is characterized by victims attempting to cope with the memory of the rape. During this phase, victims often experience fear, nightmares, and phobic reactions.

42. See id.; 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, 592-93 (2000). Burgess and Holmstrom conducted their study by interviewing 92 rape victims who had been admitted to the emergency room of Boston City Hospital between July 20, 1972 and July 19, 1973. Id. at 593. Burgess and Holmstrom interviewed the women upon their admission to the hospital and then followed up with them through phone calls and home visits over the next several years. Id. at 594. During the follow-up contacts, Burgess and Holmstrom asked questions regarding the victim’s thoughts, feelings, and behaviors. Id. Ninety percent of the ninety-two women originally interviewed at the hospital agreed to the follow-up contact. Id.

It is important to note that Burgess and Holmstrom’s research has been criticized. See Lauderdale, supra note 20, at 1371-72. Other researchers on the psychological impact of rape have criticized the methodology used by Burgess and Holmstrom, arguing that the study did not compare the reactions of victims to a control group of non-victims and that the sample was selected improperly. Id. at 1372. While Burgess and Holmstrom’s initial research may have been deficient in some respects, the “results of recent, methodologically sound, empirical research reinforce the findings of the early studies.” Id. at 1372-73 (citing four recent studies that comport with Burgess and Holmstrom’s initial findings).

43. Burgess and Holmstrom only studied female victims in developing the theory of RTS. Garrison, supra note 42, at 594. This is not to say that men cannot be victims of rape and sexual violence. Patricia Tjaden & Nancy Thoennes, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN, NATIONAL INSTITUTE OF JUSTICE (2000). A national study conducted by the United States Department of Justice revealed that 17.6% of women report being raped in their lifetime while 3.0% of men report being raped in their lifetime. Id. at 14. Accordingly, rapes are overwhelmingly perpetrated against women, and much of the scholarship on the issue focuses on rape through the lens of female victimization. See id. at 13-16.

44. Garrison, supra note 42, at 594-95.
45. Id.
46. Id.
47. Id.
49. Id. For purposes of this note, the second phase of RTS is less relevant due to the temporal proximity of the first phase. Rape trials often occur within one to two years of the assault, and therefore much of the focus is placed on the victim’s
Throughout the course of these two phases, particularly the acute phase immediately following a rape, victims often exhibit counterintuitive behaviors.\(^{50}\) One example is the “emotional flatness” reaction, where a victim appears non-emotional.\(^{51}\) This is counterintuitive to the common belief that someone who has experienced a rape would be crying and hysterical.\(^{52}\) The belief that all victims react hysterically to rape derives from the myths surrounding society’s idea of the stereotypical rape, wherein a stranger violently attacks a woman.\(^{53}\) The reality of most rapes, however, is that victims are assaulted by people they know in their own homes or in the home of a relative or friend.\(^{54}\) Moreover, most rape victims do not experience physical force or use of weapons throughout the course of the attack and are not seriously injured as a result of the attack.\(^{55}\)

behavior immediately after the assault rather than the long term effects of the assault. Garrison, supra note 42, at 598–601.

50. Hogan, supra note 16, at 532. In addition, Nina Gupta states: Rape-trauma syndrome includes many counterintuitive victim behaviors. For example, some expect a victim to be hysterical after a rape and may assume that a rape did not occur if a victim is calm and subdued after the incident. One might also expect a victim to report a rape immediately after it occurs. Studies indicate, however, that victims with rape-trauma syndrome will often refuse to acknowledge they have been raped. Similarly, although one might expect the victim of a traumatic experience to recall the event in vivid detail, victims may not have a clear memory of the rape. Thus, rape-trauma syndrome helps to explain a victim’s counterintuitive behavior that might otherwise lead a jury to believe that a victim was not raped. Nina Gupta, Disillusioning the Prosecution: The Unfulfilled Promise of Syndrome Evidence, 76 LAW AND CONTEMP. PROBS. 413, 416 (2014).

51. Hogan, supra note 16, at 532. Emotional flatness can also be referred to as a controlled response to rape. See id. at 531.

52. Id. at 532.

53. Anderson, supra note 30, at 52. For further explanation, see CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES PANEL ON MEASURING RAPE AND SEXUAL ASSAULT IN THE BUREAU OF JUSTICE STATISTICS HOUSEHOLD SURVEYS 6 (2012), asserting:
The myths about rape . . . perpetuate the idea that a “real rape” only happens when the rapist is a stranger who raped the victim in a vacant lot, the rape is perpetrated through the use of force or a weapon, and the victim suffered serious physical injuries in addition to the penetration, resisted the attack strenuously, and promptly complained to the authorities. Id.


55. Anderson, supra note 30, at 6–7. Only 13.8 percent of female victims and 15.1 percent of male victims report being raped by a stranger. Id. at 7. Only one third of victims report their rapist using physical force (e.g., hitting, kicking, and choking) during the course of an attack. Id. Similarly, only one third of victims report experiencing physical injury as a result of an attack, and in those cases, most injuries were minor. Id. Finally, many victims delay reporting, if they report at all. See id. at 8 (explaining that only 15% to 20% of rape victims report their attack to the police).
Therefore, studies show that it is not unusual for victims to demonstrate seemingly bizarre behaviors after a traumatic sexual assault and delay reporting the assault.\(^5\)\(^6\) For example, it is common for victims to fail to recall details of an assault, demonstrate an inability to tell police the name of the attacker, and show little emotion following the rape.\(^5\)\(^7\)

Without expert testimony explaining victim responses to sexual assault, defense attorneys are able to “capitalize on the public’s lack of knowledge and misconceptions about victim behavior” and argue to the jury that because the victim did not behave in accordance with the misconceptions, he or she is not a victim.\(^5\)\(^8\) Proponents of the admission of expert testimony argue that such testimony does not usurp the jury’s role as fact-finder but instead “provide[s] jurors with an accurate context within which to evaluate victim behavior so that jurors do not misjudge certain conduct as evidence of a victim’s dishonesty and incredibility.”\(^5\)\(^9\) Proponents argue that House Bill 1264 does not tip evidentiary considerations in favor of the prosecution but rather “level[s] the playing field” so that jurors need not rely on their preconceived, and often erroneous, notions about how victims should behave after an assault.\(^5\)\(^0\)

Over the past several decades, increased state judiciary and state legislature awareness of the pervasiveness of harmful rape myths in criminal proceedings prompted legislative and judicial action designed to insulate juries from bias based on preconceived notions.\(^5\)\(^1\) These updated standards permit the use of “social framework” testimony offered by expert witnesses in criminal proceedings.\(^5\)\(^2\) Social framework testimony is used to “construct a frame of reference or

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57. Id.
58. NATIONAL DISTRICT ATTORNEY’S ASSOCIATION ET AL., supra note 36. For example, in the Jeffrey Marsalis case, discussed supra, Marsalis’s defense attorney argued that Marsalis was “not a rapist . . . [but] just a playboy.” Enrich, supra note 28, at 896 (citing Dan P. Lee, He Said, They Said, PHILA. MAG., Oct. 2007, at 102, 200–01). Moreover, the fact that none of the women reported their rapes immediately and some remained in contact with Marsalis led the defense attorney to instruct the jury that, “a criminal courtroom is [not] the forum for a woman who regrets having sex with you.” Id.
60. Tully, supra note 12.
62. JOHN M. CONLEY & JANE CAMPBELL MORIARTY, SCIENTIFIC AND EXPERT EVIDENCE 237 (2d ed. 2011). Prior to allowing social framework testimony in regards to rape trials, courts already permitted social framework testimony in a variety of other contexts, including, but not limited to, eyewitness identification and behaviors of battered women. Id.
background context for deciding factual issues crucial to the resolution of a specific case."63 In the context of a rape trial, social framework testimony about RTS is used to “provide much-needed knowledge about these behaviors to the factfinder so that he or she is better informed to determine the credibility of the victim.”64

Shortly after RTS was first recognized in 1974, prosecutors began seeking to introduce RTS expert testimony in criminal trials.65 At first, courts were hesitant to admit such testimony and trial judges’ decisions to do so were often overturned on appeal.66 In the past two decades, however, the national trend has moved toward admitting the evidence.67 By 2006, the time at which Pennsylvania began considering the passage of a bill that would permit RTS expert testimony, Pennsylvania was the only state in the nation to forbid any type of RTS testimony.68

C. Pennsylvania Law and Jurisprudence

Pennsylvania’s delay in allowing admission of RTS expert testimony is not surprising given Pennsylvania’s long history of statutory and case law that, at best, has failed to insulate criminal proceedings from the harmful effects of rape myths and, at worst, has perpetuated them.69 As early as the Nineteenth Century, Pennsylvania jury instructions encapsulated many of the major rape myths, providing that a victim’s credibility may be determined by considering whether she physically resisted her attacker and promptly reported the rape to the authorities.70 Pennsylvania laws included similar myth-driven language.71 In 1887, the legislature amended

64. Hogan, supra note 16, at 533.
65. McCord, supra note 17, at 1156.
66. See, e.g., Saldana, 324 N.W.2d at 230 (Minnesota case reversing the conviction of a defendant when the trial court admitted the testimony of a sexual assault counselor, who testified about victims’ typical emotional response to rape); Allewalt v. State, 487 A.2d 664, 670 (Md. Ct. Spec. App. 1985), vacated, 517 A.2d 741 (Md. 1986) (Maryland case reversing on the same grounds); State v. Taylor, 663 S.W.2d 235, 240 (Mo. 1984) (en banc) (Missouri case reversing on the same grounds).
67. Emrich, supra note 28, at 893 (“Jurisdictions across the country have found a number of ways to admit such expert testimony without it being unduly prejudicial.”). There are several ways RTS testimony is admitted in rape trials. See generally Hogan, supra note 16, at 533–42. These approaches are discussed infra in an analysis of Pennsylvania’s current statutory scheme.
68. Emrich, supra note 28, at 893.
69. See generally id. at 899–908.
70. Id. at 904 (citing Stevick v. Commonwealth, 78 Pa. 460, 460 (Pa. 1875)) (factors relevant to a victim’s credibility include whether “she cried aloud, struggled and complained on the first opportunity, and prosecuted the offender without delay”).
71. Id.
Pennsylvania’s criminal code to include a provision that, “if the jury shall find that [the victim] was not of good repute and that the carnal knowledge was with her consent, the defendant shall be acquitted of felonious rape.” The statute itself provided that rape had to be perpetrated “forcibly and against [the victim’s] will.” These provisions allowed juries to decide cases on the basis of the rape myths that enforce the notion that rapes are perpetrated with physical violence and that a woman often invites a sexual assault through her own conduct.

In the 1960s and 1970s, Pennsylvania’s legislators became more receptive to the true nature of rape cases. Notably, in 1972, the Pennsylvania legislature amended its sexual assault laws to include a series of lesser-included related offenses that covered unlawful conduct outside the scope of forcible rape. Even with the expanded scope of punishable offenses, the law remained deficient in several crucial respects. Particularly, Pennsylvania law expressly provided that spousal rape was not punishable, permitted defendants to introduce evidence of victims’ promiscuity and prior sexual behavior, and, perhaps most harmful to victims, required that victims make a “prompt complaint.”

In 2000, Pennsylvania underwent a significant overhaul of its sexual assault laws. Significant amendments to the criminal code included rape shield laws, repeal of the spousal rape provision, and repeal of the prompt complaint requirement. Despite these positive reforms, Pennsylvania still lacked safeguards to protect criminal trials from harmful rape myths because the legislature had not yet passed a law, as many other states had, that permitted prosecutors to present expert testimony about victims’ responses to rape, particularly within the context of RTS. In fact, without any statutory authority to guide Pennsylvania courts as to the admission of expert testimony in sexual assault cases, Pennsylvania developed a long line of well-established case law serving to render constraints

73. Emrich, supra note 28, at 904.
74. TRACY ET AL., supra note 53, at 6; see also Emrich, supra note 28, at 899.
75. Emrich, supra note 28, at 905.
76. 18 PA. CONS. STAT. § 3122.1 (statutory sexual assault); 18 PA. CONS. STAT. § 3123 (involuntary deviate sexual intercourse); 18 PA. CONS. STAT. § 3126 (indecent assault).
77. Emrich, supra note 28, at 906.
78. 18 PA. CONS. STAT. § 3105.
79. Emrich, supra note 28, at 908.
80. Id.
81. Id. at 909.
on the admission of expert testimony in sexual assault cases—the most restrictive in the country.\footnote{Id. at 913–16. See Commonwealth v. Dunkle, 602 A.2d 830, 836–38 (Pa. 1992) (holding that expert testimony concerning victim’s delay in reporting abuse, omission of details of the abuse, and inability to recall certain aspects of the abuse was inadmissible because the content of the testimony was within the jury’s “range of common experience” and “infringed upon the jury’s right to determine credibility”); Commonwealth v. Gallagher, 547 A.2d 355, 358 (Pa. 1988) (holding that expert testimony regarding Rape Trauma Syndrome’s effect on a victim’s ability to identify an attacker was introduced solely to “enhance the credibility of the victim” and therefore inadmissible); Commonwealth v. Seece, 517 A.2d 920, 922 (Pa. 1986). But cf. Gallagher, 547 A.2d at 359–61 (Larsen, J., dissenting) (disagreeing with the majority’s holding on the grounds that the “average juror does not know about the psychology and behavioral impact of rape on a rape victim” because “many jurors bring to the courtroom the myths about rape about which had long influenced our courts . . .”).}

The most recent Supreme Court of Pennsylvania case to reiterate Pennsylvania’s extremely restrictive posture on expert testimony in sexual assault cases was \textit{Commonwealth v. Balodis}.\footnote{747 A.2d 341, 345 (Pa. 2000).} In \textit{Balodis}, defendant Peter Balodis, the owner of a Montgomery County hotel, was convicted of involuntary deviate sexual intercourse, statutory rape, and corruption of a minor stemming from allegations that he sexually abused a ten-year-old boy staying at his hotel in 1988 and 1989.\footnote{Id. at 342–43.} At trial, the Commonwealth presented the expert testimony of a clinical social worker who had interviewed the victim in 1989, shortly after the abuse ended.\footnote{Id. at 343.} The social worker testified “to the general characteristics of child sexual abuse victims as those traits relate to the failure to promptly report abuse, and after the abuse is reported, to reveal the details of the abuse in stages.”\footnote{Id.} On appeal, the Supreme Court of Pennsylvania agreed with defendant that the “sole purpose of [the social worker’s] testimony was to enhance the credibility of [the victim]” and the trial court consequently “invited the jury to abdicate its responsibility to determine [the victim’s] credibility.”\footnote{Id. at 345.}

From 2000 on, Pennsylvania courts interpreted the \textit{Balodis} decision as an absolute ban on expert testimony in sexual assault cases, finding such testimony constitutes an improper bolstering of victim
credibility and usurps the function of the jury.\textsuperscript{88} Finding this restriction unjust to victims of sexual assault, Pennsylvania State Representative Cherelle L. Parker began drafting a bill in 2006 that would allow for the admission of expert testimony concerning victim behaviors in sexual assault cases.\textsuperscript{89} Representative Parker ultimately sponsored House Bill 1264, which “permit[s] an expert to provide testimony on the counterintuitive behavior indicative of a rape victim, as well as any recognized form of post-traumatic stress disorder in sexual assault cases as well as other common psychological reactions to trauma.”\textsuperscript{90} House Bill 1264 was slow to gain widespread support in the Pennsylvania General Assembly; it took the bill nearly six years to pass and become effective as law.\textsuperscript{91}

In the wake of the high-profile indictment, arrest, and prosecution of former Penn State University assistant football coach Jerry Sandusky; however, House Bill 1264 quickly gained momentum and accelerated through the legislative process.\textsuperscript{92} While in the national spotlight, the Sandusky trial demonstrated to lawmakers that Pennsylvania was “missing [an] element” in sex abuse cases as

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\item \textsuperscript{88} See, e.g., Commonwealth v. Alicia, 92 A.3d 753, 761 (Pa. 2014) (citing the Balodis decision for the premise that responses to sexual abuse are “well within the range of common experience, knowledge, and understanding of a jury, and expert testimony on the matter . . . improperly infringe[s] upon the jury’s ability and responsibility to assess the credibility of [victims]”).
\item \textsuperscript{89} Tara Murtha, \textit{Reality Check: Pennsylvania’s Rape Laws Perpetuate the Myths}, PHILA. WKLY. (June 22, 2011), http://www.philadelphiaweekly.com/news-and-opinion/cover-story/Reality-Check-Pennsylvanias-Rape-Laws-Perpetuate-the-Myths.html. The trial of Jeffrey Marsalis highlighted Representative Parker’s concerns with Pennsylvania’s evidentiary scheme. \textit{Id.} Marsalis, known as the “Match.com Rapist,” was charged with raping twenty-one women whom he had met online. Emrich, supra note 28, at 891–92. At trial, some of the victims testified that, after the rapes, they met with Marsalis again, failed to report the assault to the police, and a few had even continued pursuing a romantic relationship with Marsalis. \textit{Id.} at 892. In closing arguments, Marsalis’s attorney explained that these behaviors simply showed that the women “regrett[ed] having sex with [defendant]” and resorted to the criminal courts for redress. \textit{Id.} at 896. Defendant was acquitted of all charges except for two counts of sexual assault. Murtha, supra. Philadelphia prosecutor Deborah Harley maintains that Marsalis was acquitted because “they felt the victims’ behavior after the assault was counterintuitive.” \textit{Id.}
\item \textsuperscript{90} Culler, supra note 12.
\item \textsuperscript{91} Tully, supra note 12.
\item \textsuperscript{92} Id.; Mangino, supra note 18. In one of the highest profile sex abuse trials in recent history, former Penn State University defensive coordinator Jerry Sandusky was indicted and subsequently arrested on charges stemming from allegations that he sexually abused ten young boys for a period of over fifteen years. Viera, supra note 1, at A1. Jerry Sandusky met all of his victims through his charity, The Second Mile organization, which was established to assist underprivileged children. \textit{Id.} Following a jury trial, Sandusky was convicted of 45 of the 48 counts related to the allegations of sexual assault. Drape, supra note 3, at A1. He is currently serving a 30 to 60 year sentence in the Pennsylvania Department of Corrections. Candace Smith et al., \textit{Jerry Sandusky Gets 30 to 60 Years for Sex Abuse After Tearful Victim Statements}, ABC NEWS (Oct. 9, 2012), http://abcnews.go.com/US/jerry-sandusky-sentenced-30-60-years-prison/story?id=17427204.
compared to the rest of the country. For example, many of Sandusky’s victims testified that they remained in touch with Sandusky and continued to visit his home after he began sexually abusing them, and one victim even sent Sandusky a Father’s Day card while Sandusky was abusing him. Noticeably absent from Sandusky’s trial was the use of expert testimony to explain these seemingly bizarre, counterintuitive behaviors. Instead, in accordance with the Balodis decision and the Pennsylvania Jury Instructions, the jurors were left to rely on their own “common sense” and “practical knowledge of life as [they had] experienced it” to interpret these behaviors in determining Sandusky’s guilt.

The Sandusky investigation, indictment, and trial were crucial in bringing attention to the deficiencies in Pennsylvania’s evidentiary law. On June 29, 2012, less than a week after Sandusky’s conviction, Governor Corbett signed HB 1264 into law. In its final form, the law provides, in pertinent part:

(1) In a criminal proceeding subject to this section, a witness may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness’s experience with, or special-

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93. Tully, supra note 12.
94. Culler, supra note 12; Tully, supra note 12.
95. Tully, supra note 12.
96. Balodis, 747 A.2d at 345; see also Role of Jury—Deliberations; Verdict Must be Unanimous:

An expert witness is a person who has special knowledge or skill in some science, art, profession, occupation, or subject that the witness acquired by training, education, or experience. Because an expert has “special”—that is, “out of the ordinary”—knowledge or skill, he or she may be able to supply jurors with specialized information, explanations, and opinions that will help them decide a case.

PA. SUGGESTED STANDARD JURY INSTRUCTIONS (CRIM), §7.05 (2012); Expert Testimony—Basic Instruction, PA. STANDARD SUGGESTED JURY INSTRUCTIONS (CRIM), §4.10A (2008).

Relying on their common sense and practical knowledge, the Sandusky jury seemed to have little trouble reconciling the victims’ counterintuitive behavior in light of the overwhelming evidence against Sandusky, including but not limited to the testimony of a multitude of victims, an eyewitness account of the abuse, and inculpatory “love” letters written to a victim. Viera, supra note 1; Michael Isikoff, Prosecutors have ‘bizarre’ letters Sandusky wrote to victim, source tells NBC, NBC NEWS (June 5, 2012), http://usnews.nbcnews.com/_news/2012/06/05/12073856-prosecutors-have-bizarre-letters-sandusky-wrote-to-victim-source-tells-nbc.

The Sandusky case is the exception, however, not the norm. See, e.g., Anderson, supra note 30, at 8 (“Studies reveal that most victims of rape do not promptly complain to the police or other authorities, most rapes do not produce corroborating evidence, and most jurors are already cautioned by an underlying societal bias against those who claim rape.”).

97. Tully, supra note 12.
ized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence, that will assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.

(2) If qualified as an expert, the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.

(3) The witness’s opinion regarding the credibility of any other witness, including the victim, shall not be admissible.

(4) A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony. 99

III. DISCUSSION

A. Compliance with Pa.R.Evid. 702 and Frye

Pennsylvania’s law admitting expert testimony on RTS complies with Pennsylvania Rule of Evidence 702 and the Frye 100 standard for admissibility because the testimony is (1) based on scientific, technical, or other specialized knowledge beyond the realm of the average layperson’s understanding; (2) helps the jury to understand the evidence or determine a fact in issue, but restricts the expert from opining as to the fact in issue; and (3) is reliable and generally accepted in the field of psychology.

Pennsylvania Rule of Evidence 702, which governs the admissibility of testimony by expert witnesses, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand

99. 42 PA. CONS. STAT. § 5920(b). Section (a) of the statute provides that the statute applies to sexual offenses under Chapter 31 of the crimes code. 42 PA. CONS. STAT. § 5920(a).

100. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
the evidence or to determine a fact in issue; and (c) the expert’s methodology is generally accepted in the relevant field.101

Subsection (c) reflects Pennsylvania’s adoption of the Frye standard.102 In 1923, the United States Court of Appeals for the District of Columbia decided *Frye v. United States*.103 In Frye, the defendant’s attorney offered expert testimony104 regarding the defendant’s veracity based on his responses to the “systolic blood pressure deception test.”105 The trial court, however, excluded the evidence, and Frye was ultimately convicted of murder.106 On appeal, the United States Court of Appeals for the District of Columbia held:

While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.107

In holding that a scientific deduction requires general acceptance in order to be admissible, the court held that the expert’s use of the “systolic blood pressure deception test” to determine veracity had not yet gained general acceptance as a device for detecting deception, and the results of the defendant’s test were therefore inadmissible.108 In 1977, Pennsylvania adopted the Frye standard in *Commonwealth v. Topa*.109 Since then, Pennsylvania courts interpret

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101. PA. R. EVID. 702.
102. PA. R. EVID. 702 (comment).
103. Frye, 293 F. at 1014.
104. The expert offered by the defense at Mr. Frye’s trial was William Marston, the psychologist who had created the “systolic blood pressure deception test”—an early form of the polygraph. Heather G. Hamilton, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS 201, 203 (Winter 1998).
105. *Id.*
106. *Id.*
109. 369 A.2d 1277 (Pa. 1977). It is important to note that many legal scholars have heavily criticized Frye. See Hamilton, *supra* note 104, at 204 (“Despite its popularity with the courts . . . the Frye standard was the object of sharp criticism among scholars.”); Borders, *supra* note 107, at 859 (“the [Frye] test . . . has been vigorously criticized, changed, and sometimes rejected”). There are five major criticisms of Frye. *Id.* at 860. First, “courts have been inconsistent in characterizing proof as scientific evidence that must meet the Frye test.” *Id.* Second, courts have struggled to identify the relevant scientific field for evidence. *Id.* Third, the “general acceptance” standard renders the test “ambiguous” and “vague.” *Id.* at 860–61.
the *Frye* standard as follows: “[N]ovel scientific evidence is admissible . . . [when the evidence] ha[s] gained general acceptance in the relevant scientific community.”110 As recently as 2003, the Supreme Court of Pennsylvania has reaffirmed its adoption of the *Frye* standard.111

1. Scientific, Technical, or Specialized Knowledge

Expert testimony regarding victim responses to sexual assault satisfies Pennsylvania Rule of Evidence 702(a) because “the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson . . . .”112 Empirical studies demonstrate that the typical juror lacks adequate knowledge of rape.113 When comparing results on a questionnaire about sexual assault, laypersons scored significantly lower than experts.114 Notably, researchers found that “the scores of the laypeople were al-

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Fourth, the test results in a “deprivation of reliable and often outcome-determinative evidence.” *Id.* at 861. *See id.* (explaining that the deprivation of reliable and outcome-determinative evidence is the “most compelling” criticism of the *Frye* test). Finally, the test’s focus on general acceptance “obscures critical problems in the use of a particular technique.” *Id.* at 861–62.

Because of these criticisms, federal and state courts began to ignore, modify, or reject the *Frye* test. Borders, *supra* note 107, at 862. By 1990, nearly seventy years after the *Frye* decision, *Frye* “remained viable in only a shrinking minority of the states.” Hamilton, *supra* note 104, at 206. In 1993, the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See also* Hamilton, *supra* note 104, at 208 (“The cracks in the foundation of the *Frye* standard widened when the Supreme Court decided *Daubert*”). In *Daubert*, the Court “escalate[d] the role of Rule 702 in the process of determining the admissibility of scientific evidence.” Hamilton, *supra* note 104, at 207. The *Daubert* court held that “the admissibility of scientific expert testimony did not turn on whether the expert community in question agreed among themselves that they were in possession of dependable knowledge, but on whether the putative knowledge could be demonstrated to be valid.” Michael J. Saks, *The Aftermath of Daubert: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS 229, 229 (2000).

110. See, e.g., Commonwealth v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998). In *Blasioli*, the Supreme Court of Pennsylvania considered whether the trial court properly admitted an expert’s testimony that DNA testing showed that the DNA profile of the defendant’s blood sample matched that of the semen sample obtained from the victim shortly after she was raped. *Id.* at 1118–19. The Court ultimately held that the evidence was properly admitted because the “product rule” of DNA, which states that the probability of a genetic profile occurring randomly is the product of probabilities of each individual allele’s occurrence in general population, has gained general acceptance across disciplines of “population genetics, human genetics and population demographics.” *Id.* at 1125–27. Notably, the Court considered that there is often a lack of unanimity among scientists on certain subjects. *Id.* at 1127. The Court was therefore careful to note that “unanimity is not required for general acceptance.” *Id.*


112. PA. R. EVID. 702(a).


114. *Id.*
most no better than chance, as if they had provided completely random guesses to the questionnaire.”

115 These results “suggest that it would be helpful to [jurors] to receive more information on reactions to rape.”

116 Moreover, the harmful myths about rape on which jurors typically rely underscore the notion that rape is outside the common knowledge of lay jurors. 117 Pervasive rape myths often result in jurors expecting sexual assault cases to fit their stereotype of a “real rape,” where a woman is attacked by a stranger and suffers injuries. 118 Lacking an adequate understanding of rape victims’ behavior, jurors are left to rely on myths about how victims should respond rather than on accurate, science-based information on how victims typically do respond. 119

For example, defense attorneys for Jeffrey Marsalis, the Philadelphia man accused of raping twenty-one women whom he had met online and subsequently dated, argued that the jurors should consider the fact that many women met with the defendant after the rapes, failed to report the assaults to the police immediately, and even continued pursuing a romantic relationship with the defendant after the rapes. 120 According to Deborah Harley, the chief of the Family Violence and Sexual Assault Unit of the Philadelphia District Attorney’s Office, the defendant’s acquittals on all but two of his fifty charges can be attributed to the fact that the jury was “not educated on victim behavior,” calling it a “huge obstacle” to the prosecution of Marsalis. 121 Accordingly, expert testimony acts as “a vehicle for jury education” because victim behaviors are outside the realm of jurors’ common knowledge, especially in light of pervasive myths about rape that have long colored how society views victims. 122

115. Lonsway, supra note 35.
116. Boeschen et al., supra note 26, at 425. In a dissenting opinion in Commonwealth v. Gallagher, Pennsylvania Supreme Court Justice Larsen acknowledged the fact that responses to sexual assault are typically not within jurors’ common knowledge. 547 A.2d 355, 358 (Pa. 1988) (Larsen, J., dissenting). Justice Larsen explained that “[t]he average juror does not know about the psychological and behavior impact of rape on a rape victim.” Id. at 360.
117. Boeschen et al., supra note 26, at 414.
118. Lonsway, supra note 35.
119. Murtha, supra note 89. See also National District Attorney’s Association et al., supra note 36, at 8 (“Common victim behaviors are often incomprehensible to laypeople. Laypeople, therefore, often rely on myths or substitute their own wrong judgments.”).
120. Emrich, supra note 28, at 892.
121. Murtha, supra note 89.
122. See Tully, supra note 12.
2. Helpful to the Jury

Expert testimony concerning victim response to sexual assault also satisfies subsection (b) of Pennsylvania Rule of Evidence 702 because “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . .”. Many opponents voice concerns that this law allows experts to opine to the ultimate fact in issue, i.e., whether a rape has occurred, rather than providing testimony that is helpful to the jury in deciding the ultimate fact in issue.

The language of Pennsylvania’s statute, however, expressly provides that “the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors [but may not render] opinion[s] regarding the credibility of any other witness, including the victim.”

By restricting expert testimony to behaviors of victims generally, the legislature ensured that the Commonwealth does not offer expert testimony to show that a particular victim was truthful. Rather, the testimony “represent[s] a compilation of the experiences of other victims [that are] extremely helpful to a jury in understand the behavior of the particular [victim] they are called to judge.” Accordingly, pursuant to Pennsylvania Rule of Evidence 702(b), expert testimony concerning victim response to sexual assault does not usurp the jury’s ability to determine the ultimate fact in issue; rather, it provides jurors with a proper and accurate context in which to evaluate victims’ credibility.

3. General Acceptance

Lastly, expert testimony concerning victim response to sexual assault also satisfies subsection (c) of Pennsylvania Rule of Evidence 702, which is the Frye standard for admissibility, because “the expert’s methodology is generally accepted in the relevant field.” The two policies underlying the Frye standard are assuring the reliability of evidence and assuring that the opponent will have a fair

123. PA. R. EVID. 702(b).
125. 42 PA. CONS. STAT. § 5960(3)-(4).
126. See Murphy, supra note 124, at 306.
127. Id.
129. PA. R. EVID. 702(c).
opportunity to expose weaknesses in such evidence.\textsuperscript{130} For evidence to be reliable under \textit{Frye}, it must be “(1) reliable in the sense of being valid; (2) it must be reliable in the sense of being consistent; and (3) its validity and consistency must be generally accepted by the proper scientific community.”\textsuperscript{131}

As required by the first prong of the \textit{Frye} standard, evidence on victim response to sexual assault is reliable in the sense that it is valid.\textsuperscript{132} Studies concerning victim response to sexual assault are based on researchers’ extensive discussions with individuals who had sought treatment as a result of rape.\textsuperscript{133} Because it is highly unlikely that someone would seek treatment for a rape that did not occur, researchers can make valid conclusions that the symptoms resulted from rape.\textsuperscript{134} Moreover, the fact that similar responses do not result from consensual sex underscores the validity of such conclusions.\textsuperscript{135}

Furthermore, as required by the second prong of \textit{Frye}, RTS evidence is reliable in the sense that it is consistent.\textsuperscript{136} Researchers began to extensively study victims’ responses to rape in the early 1970s.\textsuperscript{137} Since then, many trauma researchers have “conduct[ed] controlled empirical studies on the psychological reactions to rape using control groups, larger sample sizes, long-term assessments, and objective assessment measures,” which confirmed early findings regarding victim responses to sexual assault.\textsuperscript{138} These researchers have come to the conclusion that rape causes certain specific behaviors in victims, which renders evidence concerning victim behaviors consistent for purposes of \textit{Frye}.\textsuperscript{139}

Finally, as required by the third prong of \textit{Frye}, RTS evidence demonstrates validity and consistency accepted by the proper scientific community.\textsuperscript{140} In the context of victim response to sexual assault, the proper community in which to analyze its acceptance is the psychological community.\textsuperscript{141} One of the hallmarks of acceptance

\begin{footnotesize}
\begin{enumerate}
\item McCord, \textit{supra} note 17, at 1190.
\item Id. at 1191.
\item Id. \textit{“V}alidity depends upon whether the symptoms can be accurately perceived, and upon whether the existence of the symptoms accurately diagnose rape as the cause of the symptoms.” Id.
\item See id. \textit{See also} Boeschen et al., \textit{supra} note 26, at 416.
\item McCord, \textit{supra} note 17, at 1191.
\item Id.
\item Id.
\item Boeschen et al., \textit{supra} note 26, at 416.
\item Id. at 417.
\item McCord, \textit{supra} note 17, at 1191.
\item Id. at 1191.
\item Id.
\end{enumerate}
\end{footnotesize}
by the scientific community is the creation of an established treatment plan.\textsuperscript{142} Behavioral psychologists have long implemented an established method of treatment based on the results of extensive studies.\textsuperscript{143} Even more compelling, typical victim responses to sexual assault are discussed in DSM-IV (Diagnostic and Statistical Manual of Mental Disorders) as a subset of Post-Traumatic Stress Syndrome.\textsuperscript{144} Inclusion in the DSM-IV, which serves as the definitive resource on mental disorders used by mental health professionals, demonstrates an “unequivocal acceptance” by the scientific community.\textsuperscript{145} Accordingly, expert testimony concerning victim response to sexual assault satisfies Pennsylvania Rule of Evidence 702 and the "Frye" standard for admissibility.

\textbf{B. Impact on the Jury’s Role as Fact-finder}

A critical and heavily debated issue surrounding the admission of any social framework testimony is the concern that the admission of such testimony can usurp the jury’s role as the sole fact-finder.\textsuperscript{146} This concern was the basis for the Pennsylvania Supreme Court’s decision in Balodis,\textsuperscript{147} where the Court found expert testimony on sexual abuse impermissible because it only served to “enhance the credibility of [the victim].”\textsuperscript{147} The Balodis decision is unsurprising, given that at the time it was decided in 2000, Pennsylvania was the only state lacking a statutory framework for the admission of such testimony.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{142} Id. at 1192.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000).
  \item \textsuperscript{145} American Psychiatric Association, DSM (2014), http://www.psychiatry.org/practice/dsm; McCord, supra note 17, at 1192.
  \item \textsuperscript{146} Tully, supra note 12. See also Conley & Moriarty, supra note 62, at 238 (“Despite its widespread admission, behavioral science testimony poses difficult questions: whether the testimony is based on scientifically sound principles; what are sufficient qualifications for a testifying expert; what is the appropriate scope of the testimony; and whether the testimony impermissibly interferes with the jury’s role in determining credibility.”).
  \item \textsuperscript{147} Commonwealth v. Balodis, 747 A.2d 341, 345 (Pa. 2000). In Balodis, as discussed supra, a social worker testified to the general characteristics of sexual abuse victims. Id. The Supreme Court of Pennsylvania held that that the “sole purpose of [the social worker’s] testimony was to enhance the credibility of [victims]” and the trial court consequently “invited the jury to abdicate its responsibility to determine [victim’s] credibility.” Id.
  \item \textsuperscript{148} Emrich, supra note 28, at 893.
\end{itemize}
There are two general frameworks available for admitting expert testimony of RTS testimony in rape trials: offensive and defensive. Within these two general frameworks, there are several avenues for admission of RTS testimony. All avenues implicate varying degrees of encroachment on the jury’s role as the sole factfinder in criminal proceedings. Without any Pennsylvania Supreme Court decisions determining whether Pennsylvania’s statute for admissibility usurps the jury’s role as fact-finder, it must first be determined the type of framework for which the statute provides. Second, as a corollary, the specific language used in the statute must be examined to assess the constraints expressly provided in the statute.

1. **Offensive vs. Defensive Dichotomy**

In broad terms, RTS testimony is admissible through either an offensive or a defensive framework. The offensive framework, which is liberal and expansive, permits the introduction of expert RTS testimony to prove that a rape occurred or, if presented by the defense, that it did not occur. Within the offensive category for

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149. See generally Gupta, supra note 50, at 413–31 (the two general frameworks for admissibility typically apply to various types of behavioral testimony).
150. See id.; Boeschen et al., supra note 26, at 424–28 (describing five “levels” of admissibility: (1) testimony on specific behaviors of rape survivors that are described as “unusual” by the defense, (2) testimony on the common reactions to rape and the general diagnostic criteria of RTS or PTSD, (3) expert gives an opinion about the consistency of a victim’s behavior or symptoms with RTS or PTSD, (4) testimony stating that the victim suffers from RTS or PTSD, and (5) expert opinion that goes beyond a diagnosis). See also Lonsway, supra note 35, (enumerating the same five levels).
151. See generally Hogan, supra note 16, at 529–57. See also PA. STANDARD JURY INSTRUCTIONS (CRIM), § 2.01 (2005) (“You, the jurors, are the sole judges of the facts. It will be your responsibility, at the end of the trial when you deliberate, to evaluate the evidence, and from the evidence find what the facts are.”).
153. Hogan, supra note 16, at 533. "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." Id. For illustrative purposes, Hogan uses State v. Marks, 647 P.2d 1292, 1294 (Kan. 1982) as an example of offensive use of RTS testimony. Hogan, supra note 16, at 534. In Marks, the Kansas Supreme Court upheld a defendant’s conviction for rape where the trial court permitted a forensic psychiatrist to testify that the victim had been attacked and was therefore suffering from RTS. 647 P.2d at 1298–99. In justifying its holding, the Court explained that RTS should be treated as any other type of evidence, stating that it is subject to cross-examination and can be weighed as the jury sees fit. Id. at 1290.

Hogan also notes that two years later, the Kansas Supreme Court restricted the applicability of Marks, explaining that “Marks does not . . . authorize a medical expert to testify that in his opinion the complaining witness in a particular case was raped . . . [RTS testimony] is restricted to the victim’s state of mind and the existence of [RTS].” Id. supra note 16, at 534 (quoting State v. Bressman, 689 P.2d 901, 908 (Kan. 1984)). Although Bressman was intended to clarify Marks, the Marks court did indeed permit exactly what Bressman claims is impermissible: the use of RTS testimony to show that a rape occurred. See
admissibility, there are two avenues through which RTS testimony can reach the factfinder: (1) diagnostic testimony and (2) offensive use by the defense. Diagnostic testimony is used to establish that a sexual assault occurred. Most courts do not allow this type of testimony because it infringes on the jury’s role in determining the ultimate fact in issue, i.e., whether the victim was raped.

In *State v. McCoy*, the West Virginia Supreme Court explained the adverse consequences of permitting an RTS expert to offer diagnostic testimony. In *McCoy*, the defendant was accused of raping the victim, a friend of defendant’s wife. On the second day of defendant’s trial, the prosecutor called Lauren McKeown, a rape crisis counselor. The trial court granted the prosecution’s motion

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*Marks*, 647 P.2d at 1299 (the forensic psychiatrist testified that the victim had suffered a “frightening attack”).


155. *Id.* at 426. “Thus, offensive use generally occurs in the prosecution’s case in chief.” *Id.* See also Hogan, *supra* note 16, at 533.


158. *Id.* at 737.

159. *Id.* at 732.

160. *Id.* at 733. At the time of trial, McKeown was the assistant director of a women’s shelter and co-founder and coordinator of a rape crisis counseling team. *Id.* She held a bachelor’s degree in sociology and a master’s degree in community agency counseling, had received training in rape crisis counseling, and had dealt with over one hundred rape cases. *Id.* On appeal, the defendant first argued that the lower court erred in finding that McKeown was qualified as expert to testify about the behavior of rape victims. *Id.* See W. VA. R. EVID. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise”).

The West Virginia Supreme Court found that McKeown “had sufficient knowledge, training, and experience to qualify under Rule 702 as an expert in the rape counseling area and that the trial court did not err in so ruling.” *McCoy*, 366 S.E.2d at 735. Although McKeown was not a licensed psychiatrist or psychologist, as were the experts in cases discussed *supra*, courts have found that there are several professions qualified to render RTS opinion testimony. See generally Lonsway, *supra* note 35. Medical professionals and mental health professionals, such as physicians, Sexual Assault Nurse Examiners (“SANE”), psychologists, and psychiatrists are most commonly called to offer testimony on RTS. See *id.* Victims’ advocates, law enforcement professionals, counselors, researchers, and even professors, however, have also been introduced as expert witnesses so long as they demonstrated “expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization.” *Id.*

An analysis of who should be permitted to offer RTS testimony is beyond the scope of this note. It is important to note, however, that constraints in this regard are necessary. The requirement of “scientific, technical, or specialized knowledge” should conceivably limit who is qualified to testify on RTS, as discussed in *McCoy*. Appellate review of cases decided under § 5920(b) should provide parameters for Pennsylvania’s restrictions on who is permitted to testify.
to qualify McKeown as an expert to given an opinion “as to the victim’s reactions subsequent to the alleged assault.”\textsuperscript{161} McKeown testified that the victim’s behaviors, namely her delay in reporting the rape and the fact that she took several showers after the rape, were “in conformity with someone who had been sexually assaulted.”\textsuperscript{162} McKeown further added that the victim was “still traumatized by this experience.”\textsuperscript{163}

On appeal, the West Virginia Supreme Court explained that when McKeown took the stand as an expert, “she did not limit her testimony to the behavior of sexual assault victims generally. Nor did she limit her testimony to an opinion that [the victim’s] behavior was in conformity with the behavior of others she had treated as victims of sexual assault.”\textsuperscript{164} Instead, by making the remark that the victim was “traumatized by this experience,” McKeown’s testimony was “tantamount to an opinion that [the victim] had, in fact, been raped by the defendant.”\textsuperscript{165} The court therefore held that McKeown’s testimony that the victim had been raped “encroach[ed] too far upon the exclusive province of the jury to weigh the credibility of the witnesses and determine the truthfulness of their testimony.”\textsuperscript{166} The reasoning of the McCoy court has been adopted by nearly every state and rests on sound policy.\textsuperscript{167} Allowing an expert to opine as to whether a victim was raped would eviscerate the need

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\textsuperscript{161} McCoy, 366 S.E.2d at 733.
\textsuperscript{162} Id. at 737.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 737. See also Lonsway, supra note 35. The types of testimony that the court described as having been exceeded by McKeown’s opinion, i.e., testimony describing victim behaviors generally and testimony describing whether the victim’s behavior was in conformity with the behavior of other victims, constitutes defensive testimony, which will be discussed infra.
\textsuperscript{165} McCoy, 366 S.E.2d at 737. “[McKeown’s] testimony amounted to a statement that she believed the alleged victim, and by virtue of her expert status she was in a position to help the jury determine the credibility of the most important witness in a rape prosecution.” Id.
\textsuperscript{166} Id. at 737 (citing State v. McQuillen, 689 P.2d 822, 834 (Kan. 1984) (Schroeder, C.J., dissenting)). The McCoy court ultimately held:

[Experts] may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped. In this case, the expert’s conclusion that [the victim] was “still traumatized by this experience” was an implicit conclusion that she had been raped. We, therefore, find that admission of her testimony was reversible error.

\textsuperscript{167} See Lonsway, supra note 35 (testimony that the victim is “telling the truth . . . was raped, or both” is inadmissible in “almost all states”). Lonsway notes that there are some limited exceptions. Id. One such example would be State v. Marks, 647 P.2d at 1299. It is important to note, however, that Marks has been further clarified and limited in subsequent case law, which indicates that states are moving towards an absolute restriction on the admission of offensive RTS testimony. See, e.g., State v. Bressman, 689 P.2d 901, 908 (Kan. 1984).
\end{flushleft}
for the jury to determine the ultimate fact in issue, i.e., whether the rape occurred, and would upset notions of fundamental fairness to defendants who are indisputably presumed innocent throughout the course of a criminal trial.  

The second avenue for admissibility of offensive RTS testimony is the offensive use by the defendant, where the defense seeks to introduce RTS testimony as substantive proof that a rape did not occur. In this context, the defense presents experts who testify that the absence of RTS symptoms demonstrates that the victim was not raped. Few courts have addressed this issue, as offensive evidence is most likely to be introduced through the prosecution during its case-in-chief to show that a rape did, in fact, occur. In any event, it seems that offensive RTS testimony introduced by the defense would be subject to the same restrictions as offensive testimony introduced by the prosecutor, as the testimony would speak to the ultimate fact in issue, i.e., whether a rape occurred. Accordingly, because courts have drastically restricted, and in most cases, have banned offensive use of RTS testimony, it is unlikely that courts will find offensive testimony offered by the prosecutor or a defendant admissible.

The second framework for admissibility of RTS expert testimony, the defensive framework, is much more likely to be deemed admissible by the courts. The three avenues for admissibility of defensive RTS expert testimony are as follows: (1) rehabilitation of the

168. See generally Lonsway, supra note 35. See also State v. Taylor, where the court held that an expert:

[W]ent too far in expressing his opinion that the victim suffered rape trauma syndrome as a consequence of the incident with the defendant and that conclusion vouches too much for the victim’s credibility and supplies verisimilitude for her on the critical issue of whether defendant did rape her.

663 S.W.2d 235, 240 (Mo. 1984).

169. Gupta, supra note 50, at 428.


Though predominantly employed against the accused, the probative value of RTS is theoretically available to any party. RTS testimony becomes relevant to the accused when the alleged victim is asymptomatic or her behavior is inconsistent with the post-rape behavior of other victims of rape who suffer from RTS or rape-related PTSD.

171. Id. at 1530; see Hogan, supra note 16, at 533. Courts that have addressed this issue have noted that allowing the defense to introduce RTS testimony presents unique challenges, such as whether a defendant can compel a victim to undergo a psychological evaluation in regard to RTS symptoms. See, e.g., State v. Allewalt, 517 A.2d 741, 751 (Md. 1986).

172. Gupta, supra note 50, at 429.

173. Id.

174. See generally Lonsway, supra note 35; see also Gupta, supra note 50, at 420 (“Syndrome evidence is more frequently admitted defensively than offensively in [rape cases]”).
victim, (2) explanation of counterintuitive behaviors, and (3) rebuttal to a defense of consent.\textsuperscript{175} The first avenue, rehabilitation of the victim, only occurs when the defense has first attacked the credibility of the victim.\textsuperscript{176} Unlike offensive RTS expert testimony, however, defensive testimony cannot be used to "specifically diagnose the particular victim in the case as suffering from RTS."\textsuperscript{177} An example of defensive use of RTS expert testimony to rehabilitate the victim is \textit{State v. Robinson}.\textsuperscript{178}

In \textit{Robinson}, the defendant was accused of attacking the victim as she was walking from her apartment building to her vehicle.\textsuperscript{179} According to the victim, defendant grabbed her from behind, threatened her with a knife, and pushed her into the apartment building’s basement, where he raped her.\textsuperscript{180} At trial, the defendant attempted to “rebut the complainant’s testimony [that she was raped] by noting that she was not crying after the assault and that she was so composed that she was able to write out her own statement at the police station.”\textsuperscript{181} To rebut this contention, the prosecutor called a rape crisis counselor who had dealt with approximately seventy to eighty victims throughout her six years at the center.\textsuperscript{182} The counselor testified that she “observed that many victims of sexual assault were emotionally flat immediately after the assault and that she commonly saw an apparent shift in emotions from relative calmness to agitation in the hours, days, or weeks following the assault.”\textsuperscript{183}

The \textit{Robinson} court held that the expert testimony was admissible and, additionally, was helpful to the jury because of the defendant’s attempt “to capitalize on the misconception that all sexual assault victims are emotional following the assault.”\textsuperscript{184} Accordingly,

\begin{itemize}
\item \textsuperscript{175} Gupta, suprana note 50, at 420.
\item \textsuperscript{176} Id. at 420–21.
\item \textsuperscript{177} Hogan, suprana note 16, at 535.
\item \textsuperscript{178} 431 N.W.2d 165 (Wis. 1988).
\item \textsuperscript{179} Id. at 166.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id. at 172.
\item \textsuperscript{182} Id. at 171
\item \textsuperscript{183} Id. \textit{See also} Gupta, suprana note 50, at 422 (the expert in \textit{Robinson} “testified only as to her observations of the victim's behavior and symptoms and her observations of other sexual-assault victims”).
\item \textsuperscript{184} \textit{Robinson}, 431 N.W.2d at 172–73:
\end{itemize}

We hold that the circuit court did not abuse its discretion by admitting the testimony at issue into evidence because where a defendant has suggested to the jury that some conduct of the victim after the incident is inconsistent with her claim of having been sexually assaulted, the use of expert testimony in relating observations of the way other sexual assault victims actually behave serves a particularly useful role by disabusing the jury of some widely held misconceptions about sexual assault victims.
courts have generally held that the defensive use of RTS expert testimony is permissible so long as the witness does not include an opinion from the expert as to whether the victim was raped or, in other words, is believable.185 Rendering an opinion as to whether a victim has been raped enters the realm of offensive RTS testimony, which, as discussed, is impermissible in nearly every jurisdiction.186 Accordingly, courts must be careful to require experts to be selective in their choice of words and restrict their testimony to only the characteristics of rape victims generally when rebutting the defense’s attack on a victim’s credibility.187

The second avenue for admissibility of defensive RTS expert testimony is testimony that explains the victim’s counterintuitive behaviors.188 This category is the most restrictive on expert witnesses and is therefore most favored by the courts.189 The purpose of testimony to explain victims’ counterintuitive behaviors is to rebut misconceptions about rape such that factfinders are “better informed to determine the credibility of the victim.”190 An example of

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185. Gupta, supra note 50, at 423 (“Rehabilitation can occur through expert testimony that merely describes generally the characteristics and symptoms of the victim’s behavior and observations of other victims of sexual assault.”).

186. Lonsway, supra note 35; see also Hogan, supra note 16, at 542. Hogan provides a nuanced analysis of the offensive/defensive dichotomy by noting that defensive testimony has often entered into the realm of offensive testimony when prosecutors use hypotheticals. Id. Hogan provides the following example of a prosecutor’s hypothetical, taken from State v. Freeney, 637 A.2d 1088, 1095 (Conn. 1994):

Assume that a [woman] has taken a walk with and had drinks with a casual male acquaintance who turns suddenly violent against that woman . . . . Assume that the acquaintance is physically much larger than the woman, assume that the acquaintance hits and threatens her and issues her orders telling her that she belongs to him . . . . 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?

Hogan, supra note 16, at 543 (citing Freeney, 637 A.2d at 1095). According to Hogan, these types of hypothetical questions are outside the scope of defensive, rehabilitative RTS testimony. Id. at 544 (“the expert’s testimony was defensive only in form, and actually diagnostic in function”). By including facts unique to the case at bar, the prosecutor “inevitably [made] one think that the hypothetical victim is the victim in the case.” Id. at 543–44. By doing so, 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.” Id. at 544. Accordingly, Hogan argues that the “admission of diagnostic hypotheticals allows inadmissible RTS testimony to continue to sneak into trials.” Id. at 554.


188. Gupta, supra note 50, at 423.

189. Emrich, supra note 28, at 917. See Gupta, supra note 50, at 423 (“Courts generally allow evidence of [RTS] if it explains how a victim’s behavior that seems inconsistent with a claim of rape is actually consistent with the claim”).

190. Hogan, supra note 16, at 533 (explaining that counterintuitive behaviors can be “interpreted as strong evidence that the victim is lying” and can therefore “devastate a victim’s credibility”).
defensive RTS testimony to explain counterintuitive victim behaviors is *Lessard v. State*.¹⁹¹

In *Lessard*, a defendant, who was a former friend of the victim, was accused of breaking into the victim’s home and raping her.¹⁹² Victim admitted that after defendant assaulted her, she “ask[ed] him not to tell anyone that they had sex.”¹⁹³ At trial, a rape crisis counselor testified that it is common for a victim to ask her attacker not to say anything about what happened during the assault.¹⁹⁴ Defendant appealed on the grounds that the rape crisis counselor “vouched for the truthfulness of the victim which is an invasion of the province of the jury.”¹⁹⁵ The *Lessard* court held that the explanation given by the expert did not constitute testimony as to the victim’s credibility because the expert did not, at any point in her testimony, state that she believed the victim’s version of events or believed that a rape had occurred.¹⁹⁶ Accordingly, the defensive use of expert testimony to describe counterintuitive behaviors has been widely held admissible so long as the expert discusses victim response to rape generally and refrains from opining as to whether a particular victim has been raped.¹⁹⁷

The third and final avenue for admitting defensive RTS testimony is rebutting a defense of consent.¹⁹⁸ Courts adopting this approach allow expert witnesses to testify about RTS to assist the jury in determining if the victim consented to sex with the defendant.¹⁹⁹ An illustrative case in this regard is *State v. Huey*.²⁰⁰ In *Huey*, the defendant, a member of a motorcycle gang, was accused of kidnapping the victim and raping her repeatedly over the course of approximately one week.²⁰¹ Defendant claimed that the victim consented to sexual intercourse with him.²⁰² The prosecution introduced expert testimony that the victim was suffering an “adjustment reaction” to a “psycho-social stressor.”²⁰³ The expert did not use the term RTS at any point during his testimony, but instead provided “general observations of stress.”²⁰⁴ The court held that the expert

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¹⁹². Id. at 229.
¹⁹³. Id.
¹⁹⁴. Id. at 233.
¹⁹⁵. Id.
¹⁹⁶. Id. at 234.
¹⁹⁷. Gupta, supra note 50, at 424.
¹⁹⁸. Id.
¹⁹⁹. Emrich, supra note 28, at 918.
²⁰¹. Id. at 1291–92.
²⁰². Id. at 1293.
²⁰³. Id.
²⁰⁴. Id. at 1293–94.
testimony was admissible and further explained that evidence referring to RTS directly would be permitted as well because the case involved an issue of consent.205 Similar to the constraints on other types of defensive testimony, RTS testimony used to rebut the defense's consent argument may not include testimony about whether or not the victim was raped.206

Accordingly, the two broad general frameworks and the five subsets of those frameworks have been met with differing levels of acceptance by the courts.207 Courts are much more likely to admit RTS testimony for a defensive use, i.e., rehabilitation of the victim, explanation of counterintuitive behaviors, and rebuttal to a defense of consent, than for offensive use, i.e., diagnostic testimony used by both the prosecution and defense.208

2. Pennsylvania's Statutory Scheme

The Pennsylvania Supreme Court has not yet analyzed the categorical framework Pennsylvania has adopted through its enactment of 18 Pa. Con. Stat. § 5920(b), although its 2015 Commonwealth v. Olivo209 decision has suggested a future analysis the Court may employ should defendants challenge their convictions on the grounds that § 5920 constitutes an improper encroachment on the jury's role as factfinder.210 In Olivo, defendant Jose Luis Olivo was charged with, inter alia, two counts of rape and two counts of involuntary deviate sexual intercourse, stemming from allegations that he sexually abused his girlfriend’s seven-year-old daughter.211

205. Id. at 1294.
206. Emrich, supra note 28, at 918.
207. Gupta, supra note 50, at 414 (“Courts differ greatly in their approaches to the admissibility of syndrome evidence”).
208. See id. (“Admissibility varies with the purpose for which the evidence is offered; defensive use of syndrome evidence is more widely accepted than offensive use, which is rare”).
210. Id. at 769. The Superior Court has, however, addressed the issue of whether § 5920 permits improper bolstering of victims' testimony. See, e.g., Commonwealth v. Terantino, 2015 WL 7300127, at *1 (Pa. Super. Ct. Apr. 14, 2015). In Terantino, defendant was accused of sexually assaulting his fourteen-year-old step daughter. Id. At trial, the prosecution called witness Carol Haupt, who specialized in treating perpetrators and victims of sexual assault. Id. Haupt testified that “[m]ost victims don’t report for a very long time if ever” because of “shame, fear, embarrassment, thinking they may get in trouble themselves, not knowing who to tell, being afraid that they won’t be believed . . . .” Id. Haupt had never met the victim and did not testify about the victim specifically. Id. On appeal, defendant argued that Haupt's testimony improperly bolstered the credibility of the victim. Id. In its analysis, the Superior Court cited the language of § 5920 that expressly forbids discussing the credibility of the victim and summarily held that, based on the facts of the case at issue, Haupt did not do so. Id. at *2. The Superior Court declined to establish or recommend parameters to be applied in future cases. See id.
Prior to his trial, defendant filed a motion in limine to prevent the Commonwealth from introducing expert testimony under § 5920 regarding the victim’s response to the sexual abuse.  

The defendant did not argue that the statute usurped the jury’s role as factfinder, but instead argued that the statute unconstitutionally infringed on the Pennsylvania Supreme Court’s exclusive authority over procedural rulemaking under Article V, Section 10(c) of the Pennsylvania Constitution. Alternatively, defendant argued that, even if the legislature could enact evidentiary rules, § 5920 was improper because it was in direct contravention with the Pennsylvania Supreme Court’s decision in Commonwealth v. Dunkle, where the Court held inadmissible “expert testimony concerning typical behavior patterns exhibited by sexually abused children.” In so holding, the Dunkle Court explained that victims’ responses to sexual abuse were “easily understood by lay people and did not require expert analysis.”

The trial court agreed with the defendant and granted his motion in limine to exclude the expert testimony. Interestingly, the trial court observed that the expert testimony would have been relegated to victim behaviors generally and would have been helpful to the jury, but nonetheless found that rules governing the proper admission of evidence are solely “in the province of the Pennsylvania Su-

212. Id. at 771.
213. Id. Article V, Section 10(c) of the Pennsylvania Constitution states that the Pennsylvania Supreme Court has “exclusive power to enact procedural rules, and a law inconsistent with such a rule is suspended.” Commonwealth v. McMullen, 961 A.2d 842, 848 (Pa. 2008). Subsection (c) of Section 10 provides the following:

   The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.

PA. CONST. art. V, § 10.
214. 602 A.2d at 830.
215. Olich, 127 A.3d at 771 (citing Dunkle, 602 A.2d at 831).
216. Id. (citing Dunkle, 602 A.2d at 896).
217. Id. at 772.
The Supreme Court under Article V, Section 10 of the Pennsylvania Constitution.”

The Commonwealth appealed the trial court’s decision, arguing that although the Pennsylvania Supreme Court has exclusive power to implement procedural rules, evidentiary rules are a well-recognized exception to the general rule. Therefore, the central issue before the Court was whether § 5920 constituted an “impermissible procedural rule” or a “proper exercise of legislative authority to enact a rule of evidence.” To determine whether § 5920 was an impermissible procedural rule in violation of Article V, Section 10, the Court explained that the “threshold inquiry . . . is whether the statute is procedural or substantive in nature.”

Analogizing to Commonwealth v. Newman, which addressed a statute involving martial privilege, the Court held that “Section 5920 is clearly a rule of evidence, which we have acknowledged can be governed by statute.” Further, the Court explained that § 5920 was “substantive rather than procedural as it permits both parties to present experts to testify to facts and opinions regarding specific types victim responses and victim behaviors . . . . It does not dictate how the evidence is presented . . . .” As such, the Court ultimately concluded that the enactment of § 5920 was well within the province of the General Assembly and did not constitute a violation of Article V, Section 10 of the Pennsylvania Constitution.

In addressing defendant’s argument that § 5920 ran in direct contravention to the Court’s holding in Dunkle, the Court explained that the Dunkle decision “hinged on the Court’s consideration of the research supporting the admission of evidence.” It further noted that the decision was based on admissibility considerations, such as whether the evidence was within the knowledge of a lay juror, not on constitutional considerations regarding the General Assembly’s authority to pass a statute governing such testimony. Accordingly, in addressing defendant’s alternative argument, the Court determined that § 5920 did not violate its decision in Dunkle.

In a dissenting opinion, however, Justice Eakin addressed the statute within the context of its encroachment on the jury’s role as...
factfinder, asserting that the statute improperly “permits expert witnesses to influence a jury’s determination of victim’s credibility under the guise of educating jurors on the varying reactions to sexual violence . . .” Justice Eakin posited that, although § 5920 facially precludes comments regarding credibility, the expert testimony will nevertheless “weigh directly on a victim’s credibility, fundamentally altering the exclusive function of the jury.” The dissent acknowledged that the testimony allowed under § 5920 is helpful to the jury in understanding victims’ response to sexual assault, but noted that it had “no bearing on the underlying facts of an assault [and does not] establish whether an accused actually committed a crime.” Rather, the dissent explains, the testimony directly and improperly either bolsters or attack’s a victim’s credibility and has no other purpose in the sexual assault trials.

The Olivo dissent suggests that Pennsylvania has adopted an impermissible framework governing the admissibility of expert testimony in sexual assault cases. The majority declined to address § 5920 within the context of whether it usurped the jury’s role as factfinder and instead limited its analysis to the central issue raised by the defendant—whether § 5920 was made pursuant to proper rule-making procedures under the Pennsylvania Constitution. The dissent, however, provides insight into possible rationale the Court may adopt or, at the least, entertain should a defendant challenge § 5920 on the grounds that it encroaches on the jury’s responsibility to determine the ultimate fact in issue of the case. To analyze Pennsylvania’s framework and determine whether it is an improper means of bolstering victims’ credibility, the statutory language provides the basis of the analysis.

Subsection (1) reflects the familiar requirement of Pennsylvania Rule of Evidence 702 subsections (a) and (b). Rule 702(a) provides that an expert witness rendering an opinion is to base his or her opinion on “scientific, technical or other specialized knowledge . . . beyond that possessed by the average layperson.” Using nearly analogous language, § 5920(b)(1) provides that the a witness

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230. Id.
231. Id.
232. Id.
233. See id. at 782–83.
234. Id. at 777.
235. See Olivo, 127 A.3d at 782–83.
236. See 42 PA. CONS. STAT. § 5920(b).
237. PA. R. EVID. 702(a)–(b).
238. PA. R. EVID. 702(a).
“may be qualified by the court as an expert if the witness has specialized knowledge beyond that possessed by the average layperson based on the witness’s experience with, or specialized training or education in, criminal justice, behavioral sciences or victim services issues, related to sexual violence.”

Unlike most statutory authority and case law, § 5920 expounds upon which professional fields are appropriate for introducing RTS testimony, noting witnesses with experience in the fields of “criminal justice, behavioral sciences or victim services issues, related to sexual violence” may be qualified to render such testimony.

Rule 702(b) provides that an expert witness’s opinion testimony must “help the trier of fact to understand the evidence or to determine a fact in issue . . . .” Again, using language nearly analogous to Rule 702(b), § 5920(b)(1) reflects the familiar “helpfulness” requirement of Rule 702(b) by providing that an RTS expert’s testimony must “assist the trier of fact in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted.” It is important to note that the Pennsylvania Legislature was careful to include the specific facts in issue to which the testimony may be helpful—the dynamics of sexual violence, victim responses to sexual violence, and the impact of sexual violence on victims during and after being assaulted.

Therefore, subsection (1) of § 5920(b) avoids the problems associated with offensive RTS testimony as discussed in McCoy, where the court held that the expert’s testimony that the victim had been

239. 42 PA. CONS. STAT. § 5920(b)(1).
240. See, e.g., McCoy, 366 S.E.2d at 733 (explaining that a rape crisis counselor “had sufficient knowledge, training, and experience to qualify under Rule 702 as an expert in the rape counseling area and that the trial court did not err in so ruling,” but neglecting to expound upon other professional fields that would be appropriate for admission of expert testimony on RTS).
241. 42 PA. CONS. STAT. § 5920(b)(1). See generally Lonsway, supra note 35. Medical professionals, mental health professionals, victims’ advocates, law enforcement professionals, counselors, researchers, and even professors, have been introduced as expert witnesses so long as they demonstrated “expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization.” Id. As discussed supra, appellate review of cases wherein the trial court admitted testimony under § 5920 will better define the parameters of who is qualified to testify, but Pennsylvania’s law provides guidance as to the general professional fields best suited to render such testimony. 42 PA. CONS. STAT. § 5920(b)(1).
242. PA. R. EVID. 702(a)-(b).
243. 42 PA. CONS. STAT. § 5920(b)(1).
244. Id.
raped usurped the jury's role as the sole factfinder in the defendant's criminal rape trial.\textsuperscript{245} By limiting the scope of testimony to that which would be helpful to the jury in understanding the dynamics of sexual violence and victim response to sexual assault generally, subsection (1) of § 5920 supports the conclusion that Pennsylvania has adopted a restrictive, type-2 defensive framework which permits expert RTS testimony to explain counterintuitive behaviors.\textsuperscript{246}

Pennsylvania’s standard for admissibility is most analogous to the framework discussed in \textit{Lessard}, where the court upheld the admission of testimony by a rape crisis counselor who explained that, generally, it is common for a victim to ask her attacker not to say anything about what happened during the assault.\textsuperscript{247} At no point did the counselor state that she believed the victim’s version of events or believed that a rape had occurred.\textsuperscript{248} Similarly, § 5920(b)(1) only permits the admission of testimony concerning the dynamics of sexual violence and victim response to sexual assault generally, rather than in the specific context of the victim’s response in the case at issue.\textsuperscript{249} Accordingly, subsection (1) of § 5920(b) supports the conclusion that Pennsylvania has adopted the “most restrictive” and “most favored” framework for admission of RTS testimony.\textsuperscript{250}

Subsection (2) of § 5920 also appears to support the conclusion that Pennsylvania has adopted a type-2 defensive framework with regards to the admissibility of RTS testimony, although the language may require some judicial clarification.\textsuperscript{251} Subsection (2) provides further parameters for the scope of RTS expert testimony by providing that “the witness may testify to facts and opinions regarding specific types of victim responses and victim behaviors.”\textsuperscript{252} Because the offensive/defensive dichotomy turns on whether or not the evidence is being offered to describe victims generally or particularly, the word “specific” could be the source of confusion at the trial level.\textsuperscript{253} It appears, however, that the term “specific” is intended to qualify “behaviors,” rather than “victims.”\textsuperscript{254} Accordingly, on its

\textsuperscript{245} McCoy, 366 S.E.2d at 737 (citing McQuillen, 689 P.2d at 834 (Schroeder, C.J., dissenting)).

\textsuperscript{246} Gupta, supra note 50, at 420.


\textsuperscript{248} Id. at 234.

\textsuperscript{249} 42 PA. CONS. STAT. § 5920(b)(1).

\textsuperscript{250} Emrich, supra note 28, at 917.

\textsuperscript{251} 42 PA. CONS. STAT. § 5920(b)(2).

\textsuperscript{252} Id.

\textsuperscript{253} Id. See generally Gupta, supra note 50, at 420–29.

\textsuperscript{254} See 42 PA. CONS. STAT. § 5920(b)(2).
face, subsection (2) provides that the witness may testify to specific victim behaviors; e.g., delays in reporting, a lack of crying or hysteria, or failure to recall details of an assault. Courts, however, may interpret subsection (2) as permitting the witness to testify to victims’ specific behaviors. Such a reading would interpret the statute as providing for offensive, diagnostic testimony, which would present serious, and possibly reversible, errors for consideration of the appellate courts.

Subsection (3) of § 5920(b) may provide guidance as to the interpretation of subsection (2). Subsection (3) provides a specific constraint on the scope of RTS opinion testimony by explaining that “[t]he witness’s opinion regarding the credibility of any other witness, including the victim, shall not be admissible.” This subsection protects the statute from permitting experts to render credibility determinations from the stand, which the vast majority of courts have expressly prohibited in the context of RTS expert testimony. Although the statute expressly forbids credibility testimony, the ambiguity remains as to whether the expert may specifically discuss the victim. Courts, however, have held that allowing an expert to discuss whether the victim in the case at issue has demonstrated behaviors consistent with sexual assault, even without rendering an opinion as to whether the victim suffered a sexual assault, have essentially permitted the expert to make a credibility determination. Because of existing case law from other states, it

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

Gupta, supra note 50, at 413–31.

256. See 42 PA. CONS. STAT. § 5920(b)(2).

257. See Gupta, supra note 50, at 427; see, e.g., State v. McCoy, 366 S.E.2d 731, 737 (W. Va. 1988) (finding reversible error where the court permitted a rape crisis counselor to explain that a specific victim was “traumatized by this experience,” thereby rendering her opinion testimony “tantamount to an opinion that [the victim] had, in fact, been raped by the defendant”).

258. See 42 PA. CONS. STAT. § 5920(b)(2)–(3).

259. 42 PA. CONS. STAT. § 5920(b)(3).


261. See 42 PA. CONS. STAT. § 5920(b)(2)–(3).

262. See, e.g., People v. Wells, 12 Cal. Rptr. 3d 762, 763 (Cal. App. 4th 2004). In Wells, defendant was convicted of sexually assaulting two minor, female relatives. Id. at 769–65. At trial, the prosecutor called Dr. Anthony Urquiza, who was qualified as an expert in child
appears that the subsection (3) bar on credibility testimony likely also bars testimony as to particular victims’ behaviors.\textsuperscript{263} Accordingly, subsections (2) and (3) support the conclusion that Pennsylvania has adopted a type-2 defensive framework, restricting expert testimony to victim behaviors in general for the limited purpose of dispelling rape myths that may negatively influence jurors.\textsuperscript{264}

Although subsection (4) does not provide support for an analysis of the framework in which Pennsylvania has adopted, it is nonetheless a critical point of inquiry.\textsuperscript{265} Subsection (4) explains who may introduce RTS expert witnesses, stating: “A witness qualified by the court as an expert under this section may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony.”\textsuperscript{266} As discussed in the previous section, there are concerns that allowing the defense to introduce RTS testimony presents unique challenges, such as whether a defendant may compel a vic-

\textit{sexual abuse.} \textit{Id.} at 767. Dr. Urquiza testified as to common responses to sexual abuse, such as child victims’ frequent failure to disclose abuse immediately exhibited by child victims generally. \textit{Id.} Dr. Urquiza also explained that when children do disclose, they typically do so over extended periods of time during which children progressively reveal more about the abuse, and, as children grow more comfortable with discussing the abuse, their stories often vary with each time they retell them. \textit{Id.} Dr. Urquiza did not testify in regard to the behavior of the two child victims involved in the case at issue. \textit{Id.}

After Dr. Urquiza’s testimony, the defendant presented the testimony of Dr. Dianne Sullivan Eversteine, who had reviewed videotapes of one of the victims. \textit{Id.} at 768. Dr. Eversteine stated that she intended to testify that one of the child victims was not “exhibit[ing] the emotional reaction one would expect from a petite girl who had been raped by a large man.” \textit{Id.} Ultimately, Dr. Eversteine explained to the court that she would testify that the victim’s demeanor was “inconsistent with having suffered trauma.” \textit{Id.}

The trial court refused to admit such testimony, and the defendant appealed on the grounds that the refusal constituted reversible error. \textit{Id.} Relying on prior decisions in the California state courts, the appellate court in \textit{Wells} held that the expert testimony was only admissible for the limited purpose of “disabusing a jury of misconceptions it might hold about how a child reacts to molestation.” \textit{Id.} at 769. Accordingly, the court found that Dr. Eversteine’s proposed testimony was outside the permissible scope of expert testimony concerning victim response to sexual abuse. \textit{Id.} at 770.

In its analysis, the court drew critical distinctions between the types of testimony offered by Dr. Urquiza and Dr. Eversteine. \textit{Id.} at 770–71. According to the Court, Dr. Urquiza’s testimony was permissible because he merely explained the typical responses to sexual abuse without “tying his testimony to either of the complaining witnesses.” \textit{Id.} at 770. Conversely, Dr. Eversteine’s proposed testimony would have permitted her to “render an opinion as to whether [the victims were] truly molested.” \textit{Id.} at 770–71. Accordingly, the Court asserted that, “[b]ecause the jury would likely have understood Dr. Eversteine’s proposed testimony about ‘usual’ reactions from a trauma victim as a veiled opinion that [the victim], who did not exhibit such ‘usual’ behaviors, was not truly molested, the trial court properly excluded this testimony . . . .” \textit{Id.}

\textsuperscript{263} 42 PA. CONS. STAT. § 5920(b)(3).
\textsuperscript{264} See Gupta, supra note 50, at 422.
\textsuperscript{265} 42 PA. CONS. STAT. § 5920(b)(4).
\textsuperscript{266} 42 PA. CONS. STAT. § 5920(b).
tim to undergo a psychological evaluation in regard to RTS symptoms.\textsuperscript{267} There are also negative implications, however, when courts refuse to afford the defense an equal opportunity to present RTS expert testimony.\textsuperscript{268}

Because Pennsylvania’s statutory scheme likely provides for a type-2 defensive framework, these concerns are not implicated.\textsuperscript{269} First, Pennsylvania’s framework will allow for an expert to render his or her opinion without examining the victim because the framework only permits the admission of testimony concerning victim behaviors generally, rather than that of the victim in the case at issue.\textsuperscript{270} Prosecutors and defense attorneys alike will be limited to inquiring as to how victims, in general, respond to rape.\textsuperscript{271} Accordingly, neither prosecutorial nor defensive use of RTS testimony will necessitate interviewing the victim; if confined to the proper scope of type-2 defensive testimony, the expert can render a permissible opinion based on their observation of victims generally throughout the course of their training and experience.\textsuperscript{272}

Second, concerns about the defendant being deprived of a fair opportunity to present its own experts are undoubtedly not present due to the plain language of § 5920(b)(4).\textsuperscript{273} Subsection (4) expressly provides that an RTS expert “may be called by the attorney for the Commonwealth or the defendant to provide the expert testimony,” negating any concern in regard to the equal opportunity to admit RTS testimony.\textsuperscript{274}

\textsuperscript{267} See, e.g., State v. Allewalt, 517 A.2d 741, 751 (Md. 1986) (“[W]e can foresee cases where the defendant will seek to counter the State’s PTSD evidence with his own expert testimony [which] can, in turn, lead to issues concerning compulsory psychiatric examination of the complainant by an expert for the defense”).

\textsuperscript{268} See, e.g., Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989). In Henson, the defendant called a psychiatrist, Dr. David Glover, to testify about victim behaviors after rape. \textit{Id.} at 1191. During Dr. Glover’s testimony, the defense asked the following question:

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

\textit{Id.} The prosecution objected, and the trial court sustained the objection on the grounds that the testimony was not relevant and a proper foundation had not been laid. \textit{Id.} Defendant was convicted of rape and appealed on the grounds that the trial court erred by not allowing Dr. Glover’s testimony. \textit{Id.} at 1190–91. The Supreme Court of Indiana agreed, holding that “to bar the defendant from presenting such evidence exceeds the discretion of the trial court; and, in this case, the trial court’s ruling impinged upon the substantial rights of appellant to present a defense and was reversible error.” \textit{Id.} at 1194.

\textsuperscript{269} 42 PA. CONS. STAT. § 5920(b)(1)–(3).


\textsuperscript{271} See Henson v. State, 535 N.E.2d 1189, 1194 (Ind. 1989).

\textsuperscript{272} See Lessard, 719 P.2d at 234.

\textsuperscript{273} See Henson, 535 N.E.2d at 1194.

\textsuperscript{274} 42 PA. CONS. STAT. § 5920(b)(1)–(3).
Accordingly, the express language of § 5920(b) and existing case law addressing similar constraints on RTS testimony indicates that Pennsylvania has adopted a type-2 defensive framework.\textsuperscript{275} This framework is the most restrictive, and therefore the most favored by the courts.\textsuperscript{276} By allowing experts to discuss victim responses generally while prohibiting the experts from discussing the victim in the case at issue specifically, Pennsylvania has taken steps to protect the rights of the accused while also insulating criminal trials from harmful rape myths.\textsuperscript{277} Section 5920 therefore permits the admission of testimony that is helpful in providing the jury with the proper framework to determine credibility without permitting experts to render credibility determinations from the stand.\textsuperscript{278}

\textbf{C. Potential for Unfair Prejudice}

The final and most common concern with the admission of RTS testimony is the belief that admission of such testimony is unfairly prejudicial to the defendant.\textsuperscript{279} Pennsylvania Rule of Evidence 403 permits a court to exclude relevant evidence if “its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”\textsuperscript{280} Unfair prejudice is a “tendency to suggest decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.”\textsuperscript{281} Many opponents of the admission of RTS testimony believe that jurors give RTS expert testimony special weight because such testimony “creates an aura of special reliability and trustworthiness.”\textsuperscript{282}

Empirical studies, however, demonstrate that the effects of expert testimony on jury decisions are minimal.\textsuperscript{283} In a 1985 study, two groups of mock juries listened to a taped reenactment of an actual rape trial and deliberated to a unanimous verdict.\textsuperscript{284} One group was a non-expert control group.\textsuperscript{285} The study predicted that

\begin{flushleft}
275. \textit{Id.}
278. \textit{Id.}
280. PA. R. EVID. 702.
281. PA. R. EVID. 702 (comment).
282. Frazier & Borgida, \textit{supra} note 279, at 302 (citing State v. Saldana, 324 N.W.2d 227 (Minn. 1982)).
283. \textit{Id.}
284. \textit{Id.}
285. \textit{Id.}
\end{flushleft}
if jurors gave undue weight to expert testimony, they would be more likely to render a guilty verdict. The study ultimately revealed that the effects of expert testimony on juror decisions were “quite small.” Further, there were no significant differences in juror ability to recall case facts. Finally, mock jury deliberations revealed that jurors did not always perceive expert testimony in a positive light.

A 1988 study resulted in similar findings, showing that the expert testimony did not affect the “favorability of discussions of the defendant’s credibility.” The testimony did, however, lead jurors to rate the complainant as more credible than jurors who had not heard expert testimony. The scientists conducting the study interpreted these findings as demonstrating that “rather than being prejudicial to the defendant, the expert testimony seemed to counteract the otherwise pervasive effects of rape myths on juror judgments.” Taken together, the two students suggest that although the expert testimony does influence juror decision making to an extent, it does not appear that jurors give the testimony undue weight such that it is unfairly prejudicial to the defendant.

IV. CONCLUSION

The importance the 2012 enactment of 18 Pa.C.S. § 5920 cannot be overstated. For years, Pennsylvania lagged behind its sister states in adopting a law or deciding a case permitting the admission of expert testimony to explain victim behaviors in sexual assault cases. As such, victims in the Pennsylvania criminal justice system were subjected to defenses that frequently exploited their counter-intuitive behaviors, submitting to jurors that the fact that victims did not resist their attacker, cry out for help, or immediately report their attack to authorities meant they were not worthy of belief. Prior to the passage of § 5920, Pennsylvania allowed for victims and their behaviors to be put on trial, rather than defendants.

286. Id.
287. Id.
288. Frazier & Borgida, supra note 279 at 302.
289. Id.
290. Id. at 303.
291. Id.
292. Id.
293. Id. See also Hogan, supra note 16, at 540 ("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").
Although the positive aspects of § 5920 are evident, concerns remain. The advantage that § 5920 provides to victims must be balanced with the rights of the accused. It appears that Pennsylvania has carefully balanced these interests through the adoption of a type-2 defensive framework for admission of RTS testimony. Without any guidance from Pennsylvania appellate courts, it appears that RTS experts in Pennsylvania will be limited to testifying about victim response in general as gleaned from training and experience. This restriction allows experts to provide the jury with a proper framework for analysis of victim credibility, while refraining from rendering an opinion as to a particular victim’s credibility.

In the coming years, Pennsylvania courts will undoubtedly define the exact parameters of the scope of expert testimony. Pennsylvania courts must decide, just as courts in other states have been deciding for decades, how far experts may go in touching upon the case at issue, particularly through the use of hypotheticals. Given Pennsylvania’s extremely restrictive history on social framework testimony, it would not be surprising if Pennsylvania continued the trend by restricting experts to discussing behaviors generally, without any reference to a hypothetical situation similar to that present in the case at issue. Reference to hypotheticals similar to the case at issue can enter the realm of offensive RTS testimony, which the vast majority of courts reject as inadmissible.

At its essence, § 5920 will be crucial in leveling the playing field for victims of sexual assault, regardless of where Pennsylvania draws its parameters. Although it took Pennsylvania decades to pass a law similar to those widely accepted nationwide, the old adage, “better late than never” is fitting. While Pennsylvania has failed victims of sexual assault in the past by refusing to insulate their attackers’ trial from harmful rape myths, Pennsylvania can now look toward the future. With the passage of § 5920, Pennsylvania courtrooms will no longer be places where victims must undergo scrutiny for the things they did, but places where victims can seek redress for the things that others have done to them.