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COMMENT

The Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under *Daubert*?

If you genuinely think you were abused and your life shows the symptoms, there's a strong likelihood that you were If your memories of the abuse are still fuzzy, it is important to realize that you may be grilled for details Of course, such demands for proof are unreasonable. You are not responsible for proving that you were abused.

*The Courage to Heal: A Guide
for Women Survivors of Child
Sexual Abuse*¹

I. INTRODUCTION

Sexual abuse of children is a terrifying social problem in America.² According to the National Center on Child Abuse and Neglect, there were 130,000 confirmed cases of child sexual abuse in 1992.³ General population surveys indicate that between twelve and thirty-eight percent of women and between three and sixteen percent of men were subjected to some form of sexual abuse during their childhood.⁴ While it is imperative that society protect its children from sexual abuse, it must also consider the frightening prospect that a person may be falsely accused of sexually abusing a child.⁵

In recent years, many adult men and women have claimed to have recovered memories of childhood sexual abuse. These recollections have usually been recovered with the help of psychotherapy. While some juries have believed the allegations, scientists have challenged the validity of repressed memories. Scientists argue that "many of these recollections are false creations, born of patients' suggestibility and their therapists' leading statements."⁶ Even psychologists and

1. ELLEN BASS AND LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* 26, 148 (3d ed. 1994).

2. Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995).

3. Fred Taskar, *Repressed Memory Backlash Spreads*, BALTIMORE MORNING SUN, Apr. 18, 1995, at 6D.

4. Marks, *supra* note 2, at 207.

5. *Id.*

6. Christine Gorman, *Memory on Trial*, TIME, Apr. 17, 1995, at 54.

psychiatrists are bitterly divided over the premise that the memory of abuse can be completely erased and then recovered, virtually intact.⁷ According to the False Memory Syndrome Foundation,⁸ since the mid-1980's, approximately 800 criminal and civil cases have been filed in United States courts based on recovered memories of childhood sexual abuse.⁹ These cases present a dilemma for the justice system: if no one can say for sure, absent corroborating evidence, that a repressed memory is true, how then is a judge or jury to decide?¹⁰

This comment argues that repressed memories of childhood sexual abuse retrieved through therapy are not scientifically valid evidence under the test promulgated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹¹ Because the truth of retrieved repressed memories cannot be proven or disproven,¹² evidence of such memories should not be admitted unless there is outside corroboration.

Until recently, the primary issue in repressed memory cases was the statute of limitations. Some courts have invoked the discovery rule, thus tolling the applicable statute of limitations.¹³ Under the discovery rule, a statute of limitations will not begin to run until a plaintiff "discovers or, in the exercise of reasonable diligence, should have discovered both the fact of his injury and the cause thereof."¹⁴ Plaintiffs have benefitted from legislation which extends the civil statute of limitations for child sexual abuse on the basis of the delayed discovery

7. *Id.*

8. The False Memory Syndrome Foundation was established in 1992 as a support group for families involved in accusations of abuse based on repressed memories. According to the Foundation's mission statement, the purpose of the Foundation is "to seek the reasons for the spread of false memory syndrome; to work for the prevention of new cases of false memory syndrome; to aid the victims of false memory syndrome; and to bring their families into reconciliation." False memory syndrome has been defined by John F. Kihlstrom, Ph.D., as "a condition in which a person's identity and interpersonal relationships are centered around a memory of traumatic experience which is objectively false but in which the person strongly believes . . ." False Memory Syndrome Foundation Pamphlet, Vol. 95.4.

9. Mark MacNamara, *Fade Away: The Rise and Fall of the Repressed Memory Theory in the Courtroom*, 15 CAL. L. REV. 36 (1995).

10. Carol Ness, *Legal Challenge: Suits Over Incest*, SAN FRANCISCO EXAMINER, Apr. 7, 1993, at A1. The article quotes a judge, who presided over a criminal trial during which a lawyer was acquitted of charges brought by his adult daughter that she remembered abuse from age two to ten, as stating, "What I have to decide is if this is a real memory or a created memory." *Id.*

11. 113 S. Ct. 2786 (1993). See Part IV of this comment for a detailed discussion of the threshold standard governing the admissibility of expert testimony.

12. ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 163 (1994). See *infra* note 144 and accompanying text.

13. See *Vesecky v. Vesecky*, 880 S.W.2d 804 (Tex. Ct. App. 1994); *Hoult v. Hoult*, 792 F. Supp. 143 (D.C. Mass. 1992); *McCollum v. D'Arcy*, 638 A.2d 797 (N.H. 1994).

14. See *McCollum*, 638 A.2d at 798.

doctrine,¹⁵ and courts have tolled the statute of limitations under disability statutes.¹⁶

Courts have recently begun considering the scientific validity of the phenomenon of memory repression and the process of therapy used to recover those memories.¹⁷ This concern for scientific validity applies to both lay witness testimony¹⁸ and expert testimony.¹⁹ The requirement of scientific validation was made clear in *McCullum v. D'Arcy*²⁰ when the New Hampshire Supreme Court, while finding that the discovery rule applied in a civil action based on an assault that allegedly occurred over thirty-five years before, remanded the case with an admonition to the trial court. The court stated that the plaintiff would have to substantiate her allegations of abuse, and "if challenged, to validate the phenomenon of memory repression itself and the admissibility of evidence flowing therefrom."²¹

With the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²² the threshold for admission of expert testimony moved from whether the scientific technique had gained general acceptance within its particular field to the "validity and soundness of the scientific method used to generate the evidence."²³ Because there is no empirical evidence to support the theory that a person can lose a memory for many years and then accurately recover it,²⁴ plaintiffs may be unable to meet this burden.

Part II of this comment discusses the nature of memory, repression and retrieval. Part III examines repressed memory therapy and techniques used to retrieve the memories. Part III also reviews cases involving repressed memories and various psychotherapy techniques through which such memories were retrieved. Part IV analyzes the

15. These states include Alaska, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, Oregon, South Dakota, Vermont, Virginia, and Washington. Christina Bannon, Comment, *Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?* 26 ARIZ. ST. L.J. 835, 841 n.57 (1994).

16. See *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1988); *Leonard v. England*, 115 N.C. App. 103, 445 S.E.2d 50 (1994), cert. granted, 337 N.C. 801, 449 S.E.2d 571 (1994), and cert. vacated, 340 N.C. 113, 455 S.E.2d 663 (1995).

17. See *Isely v. Capuchin Province*, 877 F. Supp. 1055 (E.D. Mich. 1995); *New Hampshire v. Hungerford*, No. 94-S-045, 1995 WL 378571, at *1 (N.H. Super. May 23, 1995) (declaring that testimony of recovered memories was inadmissible in two aggravated felonious sexual assault cases).

18. See *Hungerford*, 1995 WL 378571 at *1.

19. See *Isely*, 877 F. Supp. at 1055.

20. 638 A.2d 797 (N.H. 1994).

21. *Id.* at 800.

22. 113 S. Ct. 2786 (1993).

23. *Isely*, 877 F. Supp. at 1061.

24. Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 52.

courts' dilemma, especially in light of *Daubert*, of determining whether the phenomenon of memory repression and recovery is scientifically valid.

II. THE MEMORY PROCESS

"Memory is not objective fact, but subjective, suggestible, and malleable."²⁵

Repression of a memory is more than "ordinary forgetting," which is the act of simply not thinking about an experience or event for some period of time and then having the memory come back to mind.²⁶ "Repression refers to the active banishment into the unconscious of a traumatic event or series of traumas."²⁷ The mind uses repression as a defense mechanism. When a person experiences a traumatic event and is then unable to function normally in life because the memories are too overwhelming, he or she may repress the memory in order to cope.²⁸ Repression of memories is often a coping mechanism for children who are sexually abused. Feelings of confusion and helplessness resulting from the inability to stop the abuse or to seek outside assistance lead many victims to internalize the pain, fear, confusion and guilt. This internalization then leads to a denial of the events and a repression of memories of the abuse incidents.²⁹ However, because of the traumatic nature of the events that lead to repression, researchers have been unable to design experiments that will enable them to study the repression and subsequent retrieval of the memory.³⁰ Studies conducted on the veracity of recovered memories of abuse have concluded that while memory repression does occur, some memories of abuse are almost certainly false.³¹

Traditional memory is divided into three stages: perception, retention, and retrieval.³² During the perception phase, a person experiences an event which is then committed to memory. The accuracy of the memory is affected by factors such as time of exposure, familiarity with the subject, and stressfulness of the event. If the person initially misperceives the event, an inaccurate memory results since an accurate memory was never recorded. Several factors may cause a person

25. *Id.* (quoting Elizabeth F. Loftus, a psychologist and leading expert on memory).

26. LOFTUS & KETCHAM, *supra* note 12, at 141.

27. *Id.*

28. Garry M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 133 (1993).

29. *Id.* at 136-37.

30. *Id.* at 133. The severe trauma necessary to induce repression could not ethically be reproduced in an experimental setting. *Id.* at 134.

31. *Biology Enters Repressed Memory Fray*, JAMA, Dec. 14, 1994, at 22.

32. Ernsdorff & Loftus, *supra* note 28, at 133.

to perceive qualities that do not occur. First, since the initial formation of memory is heavily influenced by context, important aspects of the event may not be included in the memory if they are not relevant to the context the person is using at the time of the event. Second, the person may either exaggerate or ignore certain aspects, depending on the person's expectancy of the event while it is occurring.³³

Once the perceived event is over, some information is stored in memory.³⁴ It is believed that memory of a single event is not stored just in one place in the brain. According to Elizabeth Loftus, a psychologist and leading expert on memory, "[w]hole memories - for example, the memory of your wedding day or your 10th birthday party - are not stored in one particular place but distributed throughout the brain."³⁵ During the ensuing period of time, the person may be exposed to new information which may influence his or her recollection of the past. A repressed memory is also affected by new inputs and it may be altered by additional information received. As time passes, memory becomes increasingly malleable and susceptible to new information. Because the alleged events comprising a repressed memory happened such a long time ago, the memory is especially vulnerable to new input. Also, a repressed memory is not consciously rehearsed; thus, unlike a favorable scene from childhood that people occasionally recall, the repressed memory does not have that opportunity to become stronger and more vivid. At the same time, the repressed memory also avoids modification of the memory which sometimes happens with reconstructive rehearsal.³⁶

The final stage in the memory process is the retrieval of the memory.³⁷ The retrieval of a memory can be influenced by the environment in which it is retrieved, expectations created in the person's mind, the persons present during the retrieval, and the techniques used to retrieve the memory.³⁸ When an event is recalled, the person must reconstruct the memory.³⁹ With each recollection, the memory can be changed or colored by succeeding events, other people's recollections or suggestions, or the context in which it is retrieved.⁴⁰

33. *Id.* at 156.

34. *Id.*

35. LOFTUS & KETCHAM, *supra* note 12, at 4. See also MARK PENDERGRAST, VICTIMS OF MEMORY 111-12 (1995) (quoting biological memory expert Larry Squire as saying, "Memory for whole events is stored widely, not in a single location . . . [R]ecollection of past events is a reconstruction from fragments, not a veridical playback of past events"). *Id.*

36. Ernsdorff & Loftus, *supra* note 28, at 157-58.

37. *Id.* at 158.

38. *Id.*

39. ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE 20 (1991).

40. *Id.*

Science writer Jeremy Campbell wrote the following about the retrieval process:

[O]ne's mind readily accepts imperfect information . . . filling in the missing parts from its large reserves of worldly knowledge In remembering, people not only distort and interpret information from the past so as to make it fit what they know or believe in the present; they seem to add new information. The more distant the event, the more material the mind adds.⁴¹

An experiment conducted by Loftus revealed that it is possible to inject into someone's mind a detailed memory of a childhood event that never happened.⁴² In the experiment, a colleague of Loftus told his younger brother, Chris, that he had been lost at age five in a shopping mall. Over the next several days, Chris recalled his feelings about being lost. A few weeks later, Chris was interviewed again about the false memory; he characterized his memory as reasonably clear and vivid, and even added details that had not been in his brother's original story. When told that his "getting lost" memory was made up, Chris was amazed. "Really! I thought I remembered getting lost."⁴³

Yet other research seems to indicate that extreme trauma can be repressed. In 1992, sociologist Linda Williams of the University of New Hampshire tracked down 129 women who, as children, had been taken to emergency rooms in the late 1970's for abuse-related injuries. Only thirty-eight percent, representing twenty women, said they could not remember their hospitalizations.⁴⁴ According to Williams, her findings "support clinicians' impressions that some people who have been abused present for treatment with no recollection of their history of child sexual abuse."⁴⁵ Loftus discounts Williams' findings, saying that "it is misleading to assume that simple failure to remember means repression has occurred."⁴⁶

41. PENDERGRAST, *supra* note 35, at 116, 118.

42. Elizabeth F. Loftus, *You Must Remember This . . . Or Do You? How Real are Repressed Memories?* WASH. POST, June 27, 1993, at C01 [hereinafter *You Must Remember This*].

43. *Id.* Chris' recollection is an example of a conflation, which is defined as an "illusory memory." See *infra* note 76 and accompanying text.

44. Gorman, *supra* note 6. See also Katy Butler, *Clashing Memories, Mixed Messages*, L.A. TIMES, June 26, 1994, at 12.

45. Linda M. Williams, *What Does it Mean to Forget Child Sexual Abuse?* J. OF CONSULTING AND CLINICAL PSYCHOL. 1185 (1994).

46. Elizabeth F. Loftus, *The Reality of Repressed Memories*, AM. PSYCHOLOGIST 522, May 1993.

III. REPRESSED MEMORY THERAPY

When a patient enters therapy, he or she is usually in a vulnerable, distressed frame of mind.⁴⁷ Because the patient is dependent on the therapist, the therapist has the opportunity to exert enormous influence.⁴⁸ New clients can be exceedingly vulnerable to influence, and are most susceptible to suggestion since they are normally unsure about what is wrong with them.⁴⁹ Therapists see problems, rather than strengths, because that is what they are trained to see.⁵⁰ In an effort to cure a patient's problem, many therapists concentrate on having the patient "mak[e] contact with the past."⁵¹ When patients relate stories of their childhood, therapists may try to provide insights into those past experiences. Because therapists bring into the therapeutic environment their own assumptions, biases, and expectations, they may suggest causes for the patient's behavior that do not exist.⁵² These suggestive methods are at the heart of the controversy regarding repressed memories. Techniques used by therapists to unearth buried memories include hypnosis, instructing the patient to read various books,⁵³ and barbiturates such as sodium amytal and sodium pentothal.⁵⁴

Hypnosis

The 1990 murder trial of George Franklin was the nation's first prosecution of a crime based on repressed memory.⁵⁵ In November 1990, Franklin was convicted of the first degree murder of Susan Nason, whose body was found in December 1969 near her home in San Mateo County, California.⁵⁶ In 1989, Eileen Franklin-Lipsker, Franklin's daughter and classmate of Nason, told authorities that after looking at her daughter one recent afternoon, she first remembered that she had witnessed the 1969 murder of Nason and that her father was the murderer.⁵⁷ Based on his daughter's trial testi-

47. PENDERGRAST, *supra* note 35, at 511.

48. *Id.*

49. Richard Ofse & Ethan Watters, *Making Monsters*, SOCIETY, Mar-Apr 1993, at 4.

50. PENDERGRAST, *supra* note 35, at 513.

51. LOFTUS & KETCHAM, *supra* note 12, at 266.

52. *Id.* at 267. One example of therapists' assumptions was evidenced in a survey conducted by psychologist Michael Yapko. Out of 900 San Diego therapists surveyed, forty-three percent said they would assume a client had a traumatic childhood if the client did not remember much about it. Glenn Kessler, *Repressed Memories—A Legal-Psychological Tangle*, NEWSDAY, Nov. 28, 1993, at 7.

53. Bannon, *supra* note 15, at 837.

54. PENDERGRAST, *supra* note 35, at 149. See notes 103-09 and accompanying text for a discussion of *Joyce-Couch v. DeSilva*, 602 N.E.2d 286 (Ohio App. 1991).

55. 'Recovered-Memory' Murder Reversal, NAT'L L.J., Apr. 17, 1995, at A8.

56. *Franklin v. Duncan*, 884 F. Supp. 1435 (N.D. Cal. 1995).

57. *Id.* at 1440.

mony, Franklin was convicted and sentenced to life imprisonment.⁵⁸ On April 5, 1995, a federal judge overturned the conviction by granting Franklin's writ of habeas corpus.⁵⁹

During the trial, the defense raised the possibility that Franklin-Lipsker's testimony was based on a false memory that was triggered during hypnosis.⁶⁰ Her brother testified that she told him in August 1989 that a memory of her father committing a murder had surfaced under hypnosis.⁶¹ However, after being told by an attorney in November 1989 that she would be an "invalid witness" if she had undergone hypnosis,⁶² she retracted her statement and told her brother not to mention hypnosis during his testimony.⁶³

Two eminent experts in the field of psychiatry testified during Franklin's trial on the veracity of a recovered memory, and their testimony was directly contradictory.⁶⁴ Dr. Lenore Terr, a psychiatry professor and specialist in the field of childhood trauma and the type of memory created by such trauma, testified for the prosecution. According to Terr, a true recovered memory could be differentiated from a false one by three factors: the subject's symptoms, the level of detail of the memory, and the level of emotion accompanying the subject's reporting of the memory. Terr concluded that Franklin-Lipsker fit the profile of a memory repressor, and that her memory had returned in the manner of a true memory.⁶⁵ In contrast, Dr. David Spiegel, a professor of psychiatry at Stanford Medical School, testified for the defense that it was extremely difficult to tell a false memory from a true one. "The older the memory . . . the more likely it [is] to combine fact and fantasy: when events are kept out of awareness and kept unconscious, there's certainly opportunity for transformation of the events to occur."⁶⁶ Dr. Spiegel further testified that memories could be influenced by suggestion and that people who had suffered traumas were more suggestible than people who had not. Dr. Spiegel concluded that a person such as Franklin-Lipsker, who had suffered repeated traumatic experiences, might be more likely to have false memories.⁶⁷

58. *Id.* at 1438.

59. *Id.* at 1437.

60. *Id.* at 1442.

61. *Id.*

62. *Id.* at 1442, n.4.

63. *Id.* at 1442.

64. Victor Barall, *Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1490-92 (1994) (book review).

65. *Id.* at 1491.

66. *Id.* at 1492.

67. *Id.* Franklin-Lipsker testified to being sexually abused by her father on two occasions, once when she was five years old, and again when she was seven. These memories were not repressed. *Id.* at 1488.

In its decision reversing Franklin's conviction, the court stated that establishing whether an asserted memory is true or not is a function of the trial process.⁶⁸ The court cautioned that "asserted memories of events long past must be subject to rigorous scrutiny," and "a memory which does not even exist for a long passage of time and then is 'recovered' must be at least subject to that same rigorous scrutiny."⁶⁹

In March 1995, the State of Nevada filed a motion to dismiss charges of sexual and/or ritual abuse in a case where the victim recovered memories of the abuse while hypnotized.⁷⁰ In an earlier evidentiary hearing, the court had barred evidence of memories retrieved through hypnosis and expert testimony regarding the retrieval of repressed memories through hypnosis. Citing the American Medical Association's 1994 report questioning the authenticity of recovered memories⁷¹ and in anticipation of defense counsel's expected analysis on the accuracy and reliability of repressed memories, the State moved for dismissal of the charges.⁷² The motion was granted.⁷³

Experts agree that memories retrieved under hypnosis are often mixtures of fantasy and truth.⁷⁴ According to the *Comprehensive Textbook of Psychiatry*, "the hypnotized individual has a pronounced tendency to confabulate in those areas where there is little or no recollection . . . and . . . there is a high likelihood that the beliefs of the hypnotist will somehow be communicated to the patient in hypnosis"⁷⁵ The American Medical Association has issued words of caution about the use of hypnosis in memory recovery, stating that "new information is often reported under hypnosis, and . . . while that information may be accurate, it may also include confabulations and pseudomemories."⁷⁶ In its *Statement on Memories of Sexual Abuse*, the American Psychiatric Association warned that "special knowledge and experience are necessary to properly evaluate and/or treat patients who report the emergence of memories during the use of specialized interview techniques (e.g., the use of hypnosis or amytal)"⁷⁷

68. *Franklin*, 884 F. Supp. at 1438.

69. *Id.*

70. *Nevada v. Dorsey*, No. 31163 (Douglas County, Nev., Mar. 8, 1995).

71. *See infra* text accompanying note 76.

72. *See supra* note 70.

73. *Nevada v. Dorsey*, No. 31163 (Douglas County, Nev., Mar. 10, 1995).

74. PENDERGRAST, *supra* note 35, at 126.

75. *Id.* at 126 (quoting COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1516 (Harold I. Kaplan ed., 5th ed. 1989)).

76. Am. Medical Ass'n, *Report of the Council on Scientific Affairs, CSA Report 5-A-94*, at 2 [hereinafter AMA Report]. "Confabulations" have been defined as "illusory memories." PENDERGRAST, *supra* note 35, at 126.

77. Am. Psychiatric Ass'n, *Statement on Memories of Sexual Abuse*, Dec. 12, 1993, at 4.

The Supreme Court had occasion to address the reliability of hypnosis in *Rock v. Arkansas*.⁷⁸ In a five-to-four decision, the Court ruled that Arkansas' per se rule excluding all posthypnosis testimony impermissibly infringed on the defendant's right to testify in her own defense.⁷⁹ The defendant, charged with manslaughter in the shooting of her husband, twice underwent hypnosis by a trained neuropsychologist to refresh her memory as to the precise details of the shooting.⁸⁰ While acknowledging that hypnosis may produce inaccurate testimony, the majority found two factors present that indicated that the defendant's hypnotically refreshed testimony may be reliable enough to have warranted its admissibility at trial. First, her proffered testimony concerning the defective condition of the gun was corroborated by a gun expert. After hypnosis, the defendant recalled that her finger had not been on the trigger and that the gun had discharged when her husband grabbed her arm during the scuffle. The gun expert testified at trial that the gun was prone to fire when hit or dropped, without the trigger being pulled.⁸¹ The second factor the Court relied on was the absence of leading questions by the neuropsychologist during the taped hypnosis sessions.⁸²

In the *Rock* opinion, the Court described hypnosis as "involv[ing] the focusing of attention; increased responsiveness to suggestions; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily."⁸³ Voicing concerns similar to those expressed by critics of repressed memory hypnotic therapy, the Court noted three characteristics of hypnosis that may lead to the production of false memories: (1) the subject becomes suggestible and may try to please the hypnotist with answers the subject believes will be met with approval; (2) the subject may confabulate — fill in details from his or her imagination to make an answer more coherent and complete; and (3) the subject experiences "memory hardening" which instills great confidence in both true and false memories, making effective cross-examination more dif-

78. 483 U.S. 44 (1987).

79. *Id.* at 62. The majority based its ruling on constitutional grounds, finding that limiting the defendant's testimony violated her Fifth, Sixth and Fourteenth Amendment rights. *Id.* at 51-52.

80. *Id.* at 44.

81. *Id.* at 47.

82. *Id.* at 62.

83. *Id.* at 59, n.17 (quoting Council on Scientific Affairs, Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 JAMA 1918, 1919 (1985)).

ficult.⁸⁴ "The most common response to hypnosis . . . appears to be an increase in both correct and incorrect recollections."⁸⁵

Certain procedural safeguards, according to the Court, can reduce the inaccuracies hypnosis produces. Hypnosis should be performed only by a psychiatrist or psychologist who is trained in its use and who is independent of the investigation.⁸⁶ Also, interrogations before, during and after hypnosis should be recorded by tape or video to reveal whether leading questions were asked.⁸⁷ Finally, corroborating evidence of the hypnotically refreshed testimony will verify the accuracy of the information recalled as a result of hypnosis.⁸⁸

Over twenty-five states exclude hypnotically refreshed testimony. These courts have found that such testimony is "either inherently unreliable or at least that its reliability has little support from the relevant scientific community."⁸⁹ In North Carolina, hypnotically refreshed testimony is inadmissible in judicial proceedings because it "is simply too unreliable to be used as evidence in a judicial setting."⁹⁰

Reading Lists

Many therapists who believe their patients are victims of childhood sexual abuse recommend one of a growing number of self-help books which contain symptom lists.⁹¹ These lists are designed to help survivors recognize both the extent of the damage caused by the abuse and its continuing impact on their lives.⁹² E. Sue Blume defended her "Incest Survivors Aftereffects Checklist" by saying the list "can serve as a diagnosis device for suggesting sexual victimization when none is remembered."⁹³ Among the list of characteristics that are diagnostic of an incest survivor are the fear of being alone in the dark, nightmares, poor body image, headaches, arthritis, adult nervousness, fear of losing control, guilt, shame, low self-esteem, feeling crazy, feeling different, and "denial, no awareness at all."⁹⁴

84. *Id.* at 59-60.

85. *Id.* at 59. According to the JAMA Council Report, there is no data to support the premise that hypnosis increases remembering only accurate information. *Id.* at 60, n.18.

86. *Id.* at 60. The Court also recommended that only the hypnotist and the subject be present during the session. *Id.*

87. *Id.* "Such guidelines do not guarantee the accuracy of the testimony . . . but they do provide a means of controlling overt suggestions." *Id.*

88. *Id.* at 61.

89. ERNSDORFF & LOFTUS, *supra* note 28, at 162, n.169.

90. *State v. Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984).

91. LOFTUS & KETCHAM, *supra* note 12, at 154.

92. *Id.* at 154.

93. *Id.* at 155. The list is included in Blume's book *SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN* (1991). *Id.* at 21-22.

94. *Id.* at 22.

The symptoms list from *The Courage to Heal* contains similar characteristics which, if satisfied, are meant to suggest the patient was abused: powerlessness, feeling different, inability to express feelings, depression, substance abuse, eating disorders (overweight or anorexic), and loneliness.⁹⁵ Critics argue that these lists are so general they can cover the entire human race. In reviewing the list from *The Courage to Heal*, psychologist Carol Tavris commented, "[t]he same list could be used to identify oneself as someone who loves too much, someone who suffers from self-defeating personality disorder, or a mere human being in the late 20th century. The list is general enough to include everybody at least sometimes. Nobody doesn't fit it."⁹⁶

The suggestive power of techniques such as the symptoms list has been addressed by the American Psychiatric Association. It warns that "memories . . . can be significantly influenced by a trusted person (eg, therapist . . .) who suggests abuse as an explanation for symptoms/problems, despite initial lack of memory of such abuse."⁹⁷

Sodium Pentothal and Sodium Amytal

Among the barbiturates administered during memory recovery therapy are sodium pentothal and sodium amytal.⁹⁸ Some critics view interviews which involve amytal or pentothal as more likely to produce confabulations than simple hypnosis.⁹⁹ Without corroborating evidence, "even the most skilled clinician cannot evaluate the truth of drug-induced statements."¹⁰⁰ Like hypnosis, these drugs render the patient more relaxed and suggestible. According to psychiatrist August Piper, Jr., amytal produces a state similar to alcohol intoxication: "slurred speech, drowsiness, a feeling of warmth, distorted memory, and an altered time-sense."¹⁰¹ The American Medical Association has cautioned that "amytal . . . has no legitimate use in recovered-memory cases."¹⁰²

95. PENDERGRAST, *supra* note 35, at 63.

96. LOFTUS & KETCHAM, *supra* note 12, at 154-55.

97. Am. Psychiatric Ass'n, *supra* note 77.

98. Both drugs are commonly referred to as "truth serum." Bannon, *supra* note 15, at n.109. See also *Leonard v. England*, 115 N.C. App. 103, 445 S.E.2d 50 (1994). According to the plaintiff's treating physician who performed the sodium amytal interview during which the plaintiff recovered memories of sexual, physical, and emotional abuse, the drug is "used for therapeutic interviews and is recognized as an effective treatment for disorders involving repression." *Id.* at 105, 445 S.E.2d at 51.

99. PENDERGRAST, *supra* note 35, at 149.

100. Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, 79-Nov. A.B.A. J. 70, 73 (1993).

101. PENDERGRAST, *supra* note 35, at 149.

102. AMA Report, *supra* note 76.

Joyce-Couch v. DeSilva,¹⁰³ the first case where a malpractice judgment was awarded to a patient in recovered memory therapy, illustrates the potential harm of drug-induced therapy. In 1980, Joyce-Couch went to DeSilva, a psychiatrist, because of recurrent dizziness for which her physician could find no physical cause. After advising Joyce-Couch that her problems were caused by information that she had been repressing in her subconscious, DeSilva conducted between 141 and 171 sodium pentothal interviews over a four-year period.¹⁰⁴ Expert witnesses for Joyce-Couch testified that while the use of sodium pentothal interviews is an accepted form of treatment to discover repressed traumatic events, no more than six to twelve such interviews should be given to any one patient. Also, the experts testified that once the repressed information is discovered, the therapist should reveal the trauma to the patient and begin to help the patient cope with the trauma.¹⁰⁵ Testimony indicated that although DeSilva learned through the interviews conducted during 1980 that, as a child, Joyce-Couch was sexually abused by her mother, he told her he did not yet know what was wrong. A year later, he told her she had been molested as a child, but that she would need to continue the interviews to discover who had molested her.¹⁰⁶

Joyce-Couch's reliance on DeSilva was heightened by his telling her that he was the only one who could help her. In spite of his warning, Joyce-Couch sought treatment from a psychologist in 1984 who testified that she had become addicted to the sodium pentothal and suffered from post-traumatic stress disorder as a result of DeSilva's treatment.¹⁰⁷ The jury awarded Joyce-Couch \$125,000 in compensatory damages.¹⁰⁸ During her four years of treatment by DeSilva, Joyce-Couch went from a functioning person with some dizziness and unresolved anger from her childhood to a non-functioning person on psychiatric disability, who was "unable to work, unable to sleep and [who] did little but stay at her home."¹⁰⁹

103. 602 N.E.2d 286 (Ohio Ct. App. 1991).

104. *Id.* at 289.

105. *Id.* at 288-89.

106. *Id.* at 289.

107. *Id.*

108. *Id.* at 288. Because of Joyce-Couch's use of marijuana while she was being treated by DeSilva, the jury found that she was forty percent negligent, and judgment was entered for \$75,000. *Id.* at 289. However, the court of appeals determined that a jury instruction on comparative negligence was improper since there had been no evidence that her marijuana use was the proximate cause of her distress. *Id.* at 295. Additionally, the court of appeals reversed the directed verdict entered in DeSilva's favor on the issue of punitive damages, finding that the evidence supported the inference that "DeSilva exercised a conscious disregard for appellant's rights and safety and that his conduct had a great probability of causing substantial harm." *Id.* at 293.

109. *Id.* at 289.

In the first malpractice case brought by the target of a civil claim based on repressed memories, Gary Ramona sued his daughter's therapists after his daughter said she had recovered memories of him sexually abusing her.¹¹⁰ On May 13, 1994, the jury awarded Ramona \$475,000. In a ten-to-two decision, the jury determined that Holly Ramona's memories were probably false and that although the therapists had not implanted the memories of abuse in his daughter, they had reinforced them.¹¹¹

Holly Ramona first sought treatment in 1989 for bulimia nervosa (an eating disorder involving bingeing and self-induced vomiting). Although she had never considered herself to be a sexual abuse victim, her therapist told her mother that seventy to eighty percent of bulimics have been sexually abused.¹¹² After attending group therapy sessions at which sexual victimization was discussed, Holly began having flashbacks of being abused, as a child, by her father. A psychiatrist, at the request of the therapist, conducted several sodium amytal interviews. According to the therapist, the interviews revealed that Gary Ramona had repeatedly raped Holly from the time she was five until she was seven. When Holly expressed doubts about such abuse, both the therapist and the psychiatrist assured her it was impossible, without training, to lie while under the influence of sodium amytal.¹¹³

According to trial testimony, Holly also testified that she recovered memories of her father saying that her grandmother had been raped by her brothers (her grandmother denied this) and to her father forcing her to orally copulate the family dog.¹¹⁴ Like the jury in the Franklin case, this jury heard conflicting testimony from the experts. Terr, who testified for the psychiatrist, said that children who survive repeated and secret abuse put themselves in trances during the incidents. Since they do not tell anyone, including themselves, about the abuse, some of their memories may never get transferred to the part of the brain where stories are kept. Terr interviewed Holly for three hours, read the depositions, therapy notes and other psychological exams. She concluded that Holly showed signs of sexual abuse because Holly, among other things, was terrified of men, slept with her knees tight against her chest, was terrified of gynecological exams, had a sense of doom about her future, and was convinced she would never marry.¹¹⁵

110. LOFTUS & ROSENWALD, *supra* note 100, at 71. See also MacNamara, *supra* note 9, at 36.

111. Butler, *supra* note 44.

112. LOFTUS & ROSENWALD, *supra* note 100, at 71.

113. *Id.* at 71-72.

114. Butler, *supra* note 44.

115. *Id.*

On the other side of the case was Loftus, who testified that Holly had been subjected to "an outrageous degree of suggestion."¹¹⁶ In rebuttal to Terr's testimony, the defense introduced evidence that Holly's memories were a false but coherent story spliced together from true events: "remembrances of childhood enemas, normal fatherly good-nights, a traumatic childhood urethral exam, and the disturbing sexual play of a neighborhood child."¹¹⁷

The precedential value of the Ramona jury verdict remains an unanswered question unless the decision is appealed and upheld. However, it does evidence society's willingness to hold psychotherapists in recovered memory cases accountable to both the patient and the accused. There is no clear cut rule about the duty psychotherapists have in treating patients with repressed memory.¹¹⁸ Some critics believe that during the 1970's and 1980's, when the horrifying extent of sexual abuse and incest began to surface, well-meaning clinicians began advocating a "leap of faith" approach.¹¹⁹ Therapists began presuming the accuracy of a recovered memory of sexual abuse in order to foster the important therapeutic atmosphere of trust.¹²⁰

Many therapists take the position that if patients are cured, it does not matter whether they have worked through traumatic realities or traumatic fantasies. These therapists believe that even if a memory is objectively false, if it is real to the patient, then who can say that it is not, in some basic and critical sense, real?¹²¹ On the other hand, unless the therapist addresses the historical accuracy of any memory involving accusations of abuse, could they harm the patients by treating them for conditions that may not exist?¹²² Dr. Paul McHugh, a psychiatrist at Johns Hopkins Medical School, believes that therapists who do not feel it is their job to judge their patients' credibility are making a mistake. "By not making an attempt to find additional confirmation for what the patient is telling you, you are ultimately saying that you believe the patient simply because the patient's feelings are so intense Yet, feelings can mislead."¹²³

The American Psychiatric Association has issued guidelines clarifying the psychiatrist's role in repressed memory cases. Among the directives are to "maintain an empathetic, non-judgmental, neutral stance towards reported memories of sexual abuse," and to "avoid

116. *Id.*

117. *Id.*

118. LOFTUS & ROSENWALD, *supra* note 100, at 72.

119. *Id.* at 56.

120. *Id.*

121. *Id.*

122. *Id.* at 135.

123. Gorman, *supra* note 6.

prejudging the cause of the patient's difficulties or the veracity of the patient's reports."¹²⁴ Clinicians are urged not to "exert pressure on patients to believe in events that may not have occurred, or to prematurely disrupt important relationships or make other important decisions based on these speculations."¹²⁵

IV. SCIENTIFIC VALIDITY

In repressed memory lawsuits, juries must decide whether the recovered memories of childhood sexual abuse are true.¹²⁶ Many juries tend to believe that such memories are credible.¹²⁷ Cases usually come down to the accuser's vividly detailed, highly emotional tale of unspeakable acts versus the accused's simple statement that it did not happen. Lack of evidence is seen as consistent with molestation, which by its very nature is secret, unspoken and leaves few physical scars.¹²⁸ A 1991-92 report by a San Diego grand jury concluded that, "[b]ecause (molestation) can rarely be proven, the system seems determined to err on the side of assuming guilt — that which cannot be proven to be false must be true."¹²⁹ Because sexual abuse is by nature a hidden, private act, determining guilt or innocence is usually a matter of emotion, character and conviction.¹³⁰

Defendants in repressed memory cases are now raising scientific arguments to exclude both lay witness testimony and expert testimony. For expert testimony to be admitted at trial, the specialized knowledge to be imparted by the expert must be such as would assist the trier of fact.¹³¹ The credibility and reliability of witnesses have traditionally been considered exclusively within the province of the jurors.¹³² Consequently, courts have usually barred expert testimony that impinges on those jury prerogatives. Average citizens, using their common sense and real life experiences, are deemed able to determine not only whether a witness is being honest, but also whether an honest person's perceptions are accurate reflections of external reality.¹³³ While expert testimony on "normal" memory processes may

124. Am. Psychiatric Ass'n, *supra* note 77.

125. *Id.*

126. Bannon, *supra* note 15, at 854.

127. Kessler, *supra* note 52, at 7. Jennifer Hoult was awarded \$500,000 in damages in a civil suit after recovering memories during therapy that her father raped her as many as 3,000 times between the ages of six and sixteen. *Id.* Her father unsuccessfully appealed the verdict. Hoult v. Hoult, 57 F.3d 1 (1st Cir. 1995).

128. Ness, *supra* note 10, at A1.

129. *Id.*

130. PENDERGRAST, *supra* note 35, at 86.

131. See, e.g., FED. R. EVID. 702; Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993).

132. Barall, *supra* note 64, at 1481.

133. *Id.* at 1481-82.

justifiably be rejected as within the realm of common knowledge of an average juror, recovered memory is not a phenomenon with which the average juror can be expected to be familiar.¹³⁴ "The idea that a person could suddenly remember, years later, a vivid occurrence that theretofore had never entered his or her consciousness may well strike the lay juror as completely preposterous, or indicative of pure insanity."¹³⁵ Accordingly, expert testimony would probably be necessary to help the jury evaluate the validity of the witness' once repressed but now retrieved memory. However, since such cases will usually hinge on the credibility of the accusing and the accused witnesses, juries might have to choose sides in a battle of the experts.¹³⁶

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹³⁷ the Supreme Court articulated the definitive threshold standard governing the admissibility of expert testimony. Prior to this ruling, expert opinion based on a scientific technique was inadmissible unless the technique was "generally accepted" in the relevant scientific community.¹³⁸ In *Daubert*, the Supreme Court ruled that the *Frye* "general acceptance" test was superseded by the adoption of the Federal Rules of Evidence, and specifically Rule 702.¹³⁹ Rule 702 provides: "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."¹⁴⁰

The *Daubert* Court set forth a two-part test which must be met for expert testimony to be properly admitted under Rule 702: (1) the testimony must consist of scientific knowledge that is supported by appropriate validation, and (2) the evidence or testimony must "assist the trier of fact to understand [the evidence] or [to] determine a fact in issue."¹⁴¹ To satisfy the first prong of the test, trial courts may consider several factors: (1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the degree of acceptance within the relevant scientific community.¹⁴²

134. *Id.* at 1483.

135. *Id.*

136. *Id.* at 1487.

137. 113 S. Ct. 2786 (1993) (ruling that the district court erred in excluding certain expert testimony regarding whether the drug Bendectin causes birth defects on the grounds that the expert testimony was not sufficiently based on epidemiological evidence to establish causation).

138. *Frye v. United States*, 293 F. 1013 (App. D.C. 1923).

139. *Daubert*, 113 S. Ct. at 2793-94.

140. FED. R. EVID. 702.

141. *Daubert*, 113 S. Ct. at 2795.

142. *Id.* at 2796-97.

A. *Scientific Knowledge*

In connection with a theory's testability and rate of error (the first and third factors under *Daubert's* first prong), the Court noted that "[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified," and "[t]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability."¹⁴³ It is this lack of falsifiability of the repressed memory theory that concerns its critics. As Loftus explains the premise of falsifiability,

Scientists can't just pronounce that the earth is round or the force of gravity keeps our feet on the ground without offering evidence in support of their theories A scientific theory has to be falsifiable, which means that, in principle at least, some other scientist can come along and create an experiment designed to prove that the earth isn't round or that gravity doesn't keep us grounded.¹⁴⁴

Loftus notes the impossibility of proving or disproving an unconscious and unknowable process of the human mind.¹⁴⁵ According to psychologist Martin Seligman, a theory must be shown that it can be disproved in order to achieve scientific credibility. Yet, the truth of a retrieved repressed memory cannot, without outside corroboration, be proved or disproved.¹⁴⁶ Although the extent of the error rate is unknown, false memories do occur. Some cases have included allegations based on recovered memories in which it was impossible that the remembered event occurred. These cases include memories of alien abductions.¹⁴⁷ A further indication of the potential for false memories is the recantation of a growing number of those who once claimed recovered memories.¹⁴⁸ During group memory recovery therapy, Lynn Gondolf discovered memories of her father raping her. After she stopped therapy, she realized "her therapist had coerced her and other members of her group into imagining memories of abuse."¹⁴⁹ In 1994, Steven Cook retracted his accusations of being molested seventeen years earlier by a cardinal of the Catholic church. Cook's accusations stemmed from memories recovered under hypnosis. He began to doubt the accuracy of those memories after obtaining a second

143. *Id.* at 2797 (citations omitted).

144. LOFTUS & KETCHAM, *supra* note 12, at 64.

145. *Id.*

146. *Id.* at 163-64. *See also* Isely v. Capuchin Province, 877 F. Supp. 1055, 1065 (E.D. Mich. 1995) (testimony by plaintiff's psychological expert that repressed memory cannot be tested empirically).

147. LOFTUS & KETCHAM, *supra* note 12, at 165.

148. Bannon, *supra* note 15, at 844.

149. *Id.*

opinion from a clinical psychologist, and subsequently dropped his ten million dollar civil lawsuit.¹⁵⁰

Critics of repressed memory claim that no empirical scientific evidence supports the theory that a person can lose a memory for many years and then accurately recover it.¹⁵¹ According to research psychologist David Holmes of the University of Kansas, who reviewed sixty years of research on memory repression, there are no controlled studies showing that an event can be accurately reproduced in memory after a long period of repression.¹⁵² By its very nature, repressed memory does not lend itself to empirical assessment.¹⁵³ The traumatic event supposedly being remembered usually will have occurred in private, with no witnesses other than the accuser and the alleged perpetrator. Since the alleged perpetrator will have every reason to deny the incident occurred, the accuser will be the sole source of information available to someone studying the phenomenon.¹⁵⁴

As to the second factor a court may consider to determine whether the proffered evidence is scientific knowledge, the *Daubert* Court stated that publication, or lack thereof, in a peer-reviewed journal was a relevant, but not dispositive, consideration.¹⁵⁵ While publication does not necessarily correlate with reliability, submission of a novel technique to the scrutiny of the scientific community is a component of "good science" because it increases the likelihood that substantial flaws in the methodology will be detected.¹⁵⁶ While there has been a plethora of articles published and studies conducted on the repressed memory theory, there has been little agreement that the theory can be rationally and scientifically exhibited. Further, critics point out that through publication of their studies, the substantial flaws in the methodology indicate that the repressed memory theory is not "good science."¹⁵⁷

The final factor a court may consider in determining scientific validity relates to the "general acceptance" of the theory or technique.¹⁵⁸ Within the field of psychotherapy, not only is there a lack of consen-

150. *Id.* at 844-45. See also Paul S. Milich, *Controversial Science in the Courtroom: Daubert and the Law's Hubris*, 43 EMORY L.J. 913 (1994).

151. Bannon, *supra* note 15, at 845.

152. Loftus, *You Must Remember This*, *supra* note 42, at CO1.

153. Barall, *supra* note 64, at 1484.

154. *Id.*

155. *Daubert*, 113 S. Ct. at 2797.

156. *Id.*

157. See MacNamara, *supra* note 9, at 43.

158. *Daubert*, 113 S. Ct. at 2797.

sus on the accuracy of recalled repressed memories, there is vehement disagreement.¹⁵⁹

Several scientific societies have published reports of their official position on repressed memories. Unlike the lack of consensus among practitioners in the psychotherapy field, these positions uniformly reflect concerns that both the methodology used to retrieve repressed memories and the accuracy of such memories are questionable. The American Medical Association stated its position in the 1994 Report of the Council on Scientific Affairs: "The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication."¹⁶⁰

In 1993, the American Psychiatric Association issued its *Statement on Memories of Sexual Abuse* acknowledging that "it is not known how to distinguish, with complete accuracy, memories based on true events from those derived from other sources."¹⁶¹ It further noted that "there is no completely accurate way of determining the validity of reports [of adults who report memories of sexual abuse] in the absence of corroborating information."¹⁶² In an ambiguously worded statement issued in 1993, the American Psychological Association noted that while long forgotten memories of abuse can be remembered, it is possible to construct pseudomemories for events that never occurred.¹⁶³ The Association explained that the mechanisms that produce delayed recall and pseudomemories are "not currently well understood," and the report concluded that "[t]here are gaps in our knowledge about the processes that lead to accurate and inaccurate recollections of childhood abuse."¹⁶⁴

Even before the formation of the *Daubert* test, courts were faced with the lack of objective, verifiable evidence in repressed memory cases. These concerns were first addressed in the 1986 decision in *Tyson v. Tyson*.¹⁶⁵ In *Tyson*, the plaintiff alleged that her father committed multiple acts of sexual assault upon her from the time she was three until she was eleven. She alleged that the sexual assaults caused her to repress all memory of the acts until she entered psychotherapy at age twenty-six. The Washington Supreme Court declined to apply the discovery rule because there was no empirical evidence to verify

159. See *Isely v. Capuchin*, 877 F. Supp. 1055 (E.D. Mich. 1995); *Ault v. Jasko*, 637 N.E.2d 870, 875 (Ohio 1994) (Wright, J., dissenting); Milich, *supra* note 150.

160. AMA Report, *supra* note 76.

161. Am. Psychiatric Ass'n, *supra* note 77.

162. *Id.*

163. Am. Psychological Ass'n, *Working Group on Investigation of Memories of Childhood Abuse*, INTERIM REPORT (1994).

164. *Id.*

165. 727 P.2d 226 (Wash. 1986).

the existence of the alleged acts.¹⁶⁶ In rejecting the availability of testimony from expert psychological and psychiatric witnesses, the majority explained that "[u]nlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence."¹⁶⁷ The court noted that studies had questioned the assumption that an analyst has any special ability to help a patient determine the historical truth.

The *Tyson* court also questioned the psychoanalytic process, pointing out the possibility that the analyst could influence the patient's memories and alter the patient's statements about his or her memories based on the analyst's own "predisposition, expectations, and intention to use them to explain the subject's problems."¹⁶⁸ While conceding that psychoanalysis helps treat one's emotional problems, the court cautioned that "the trier of fact in legal proceedings cannot assume that [psychoanalysis] will produce an accurate account of events in the individual's past."¹⁶⁹

In 1994, in a case of first impression for the Ohio Supreme Court, the court addressed the scientific validity of the repressed memory theory. In *Ault v. Jasko*,¹⁷⁰ the twenty-nine-year-old plaintiff alleged that during therapy, she recovered memories of being sexually abused by her father beginning when she was twelve years old.¹⁷¹ Although the court applied the discovery rule to toll the statute of limitations, the concurring and dissenting opinions reflected the justices' concerns about the reliability of memory retrieval. In a concurring opinion, Justice Resnick wrote that since the court was considering only the trial court's granting of the defendant's Rule 12(b)(6) motion, it was not ruling on the merits of the plaintiff's allegations. However, Justice Resnick acknowledged being "troubled by the potential unreliability of recovered memories."¹⁷²

166. *Id.* at 229. Following this decision, Washington became the first state to enact legislation specifically addressing the statute of limitations in childhood sexual abuse cases. Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1269 (1991).

167. *Tyson*, 727 P.2d at 229. See also *Louisiana v. Foret*, 628 So.2d 1116, 1125 (La. 1993) ("[P]sychodynamic theories on the explanation of human behavior is, at best, a science that is difficult to impossible to test for accuracy Thus, the key question of testability in determining whether a technique is valid enough for admissibility cannot be conclusively answered.") *Id.* at 1125.

168. *Tyson*, 727 P.2d at 229.

169. *Id.*

170. 637 N.E.2d 870 (Ohio 1994).

171. *Id.* at 871. "The plaintiff sought professional help for depression and anxiety. Her treatment included therapy and medication from a social worker, a psychologist and a psychiatrist." *Id.* at 877 (Wright, J., dissenting).

172. *Id.* at 873 (Resnick, J., concurring).

Both dissenting opinions discussed the lack of reliable information on repressed memory. Chief Justice Moyer proposed that the proper forum for determining whether statutes of limitations should be tolled in such cases was the General Assembly, where "all views, all relevant information, all scientific data, and all empirical studies can be presented, reviewed and debated . . ."¹⁷³ Chief Justice Moyer further cautioned that the day had not yet arrived when courts could be given "reliable, competent information on the issue of repressed memory."¹⁷⁴

Justice Wright's dissent offered a discourse on the controversy, concluding that "the methods used by psychologists and psychoanalysts to retrieve repressed memories are unreliable and are not sufficiently established to have gained a general acceptance in the fields of either forensic or clinical psychology . . ."¹⁷⁵ Justice Wright expressed concern about therapists' techniques and about the possibility that their suggestions, unwittingly or otherwise, could implant in their patients' minds repressed memories of sexual abuse.¹⁷⁶

In noting the similarities between the practice of retrieving repressed memories and the science of polygraphy, Justice Wright noted that both procedures place "unusual responsibility on the examiner" and are "fraught with unreliability."¹⁷⁷ As to the "general acceptance" in the psychotherapeutic community of the practice of memory retrieval, Justice Wright noted that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community' . . . may properly be viewed with skepticism."¹⁷⁸

Even some courts that have indicated a willingness to apply the delayed discovery rule in repressed memory cases have recognized that the lack of scientific evidence regarding the authenticity and reliability of recovered memories will be an issue for the trial court.¹⁷⁹ In *Olsen v. Hooley*,¹⁸⁰ the court noted that "the inherent reliability and admissibility of expert testimony regarding memory repression and revival may be an issue that will have to be reached at trial."¹⁸¹ In holding that the discovery rule applied in the case, the court specified that

173. *Id.* at 874 (Moyer, C.J., dissenting).

174. *Id.*

175. *Id.* at 875 (Wright, J., dissenting).

176. *Id.* at 876.

177. *Id.* at 877.

178. *Id.* (quoting *Daubert*, 113 S. Ct. at 2795, 2797 (1993)).

179. *See, e.g., Olsen v. Hooley*, 865 P.2d 1345 (Utah 1993) (requiring the plaintiff to produce corroborating evidence of the abuse in order to toll the statute of limitations).

180. *Id.*

181. *Id.* at 1350.

the plaintiff's burden at trial would be to prove that "she did in fact repress a memory of actual facts."¹⁸²

A Michigan federal district court recently took a lenient approach to the *Daubert* standard of admissibility of expert testimony on this controversial theory. In *Isely v. Capuchin Province*,¹⁸³ the court denied the defendants' motions in limine to preclude in toto the plaintiff's psychologist expert's testimony on repressed memory.¹⁸⁴ Dr. Carol Hartman, the plaintiff's treating therapist and a professor of psychiatric nursing at Boston College, testified during an evidentiary hearing that although there was no way to empirically test repressed memory, there had been a number of studies conducted that validated the theory. She also testified that she had written articles and book chapters discussing the brain functions before and after a trauma with a focus on the memory of adolescents.¹⁸⁵ She acknowledged that although there was not universal acceptance of the theory in the field, there was a fair degree of acceptance.¹⁸⁶

In determining that the testimony was admissible, the court found that the studies and writings constituted a sufficient scientific basis of support for the theory.¹⁸⁷ By its ruling, the court seemed to ignore, or at the very least, downplay the importance of several factors that, according to the *Daubert* test, would indicate that the theory was not "scientific knowledge": (1) the theory cannot be empirically tested, and (2) there is substantial disagreement within the field as to the theory itself and the techniques used to retrieve the memories. As a result of this ruling, the *Isely* jury will be subjected to a courtroom scientific debate over the reliability of complex evidence which will neither assist the jury nor lead to a rational determination of the facts at issue.¹⁸⁸

The court concluded that Dr. Hartman could testify as to her theories and opinions concerning repressed memory and whether the plaintiff's behavior was consistent with someone suffering from repressed memory.¹⁸⁹ The court, however, did limit the scope of her testimony by barring her from stating whether she believes the plain-

182. *Id.*

183. 877 F. Supp. 1055 (E.D. Mich. 1995).

184. *Id.* at 1067. The plaintiff alleged that he had been sexually abused by several priests while he was a student at seminary. *Id.*

185. *Id.* at 1067.

186. *Id.* at 1065. Dr. Hartman testified that studies done by Elizabeth Loftus, one of the major detractors, had been countered by others in the field. *Id.*

187. *Id.* at 1066.

188. In *Daubert*, the court stated that assisting the trier of fact to understand the evidence or to determine a fact in issue "goes primarily to relevance," i.e., whether the expert's testimony relates to any issue in the case. *Daubert*, 113 S. Ct. at 2795. See also Milich, *supra* note 150, at 923.

189. *Isely*, 877 F. Supp. at 1067.

tiff or whether she believes that the incidents he alleges occurred. "Such testimony would invade the province of the jury . . . and . . . be unhelpful to the jury since everything she knows about the alleged events is hearsay" ¹⁹⁰ A similar warning was issued in *New Hampshire v. Cressey* when the court stated that "[e]xpert psychological evidence can only be admissible . . . if it is at least partly based on factors in addition to and independent of the victim's account." ¹⁹¹

In May 1995, a Maryland court was faced with its first test of recovered memory in a sexual abuse case when Circuit Judge Kaplan dismissed a civil suit filed by two former students against a Catholic priest who allegedly molested them twenty-five years ago. ¹⁹² In ruling that the plaintiffs' memories did not qualify for an exception to the state's statute of limitations, the judge noted that their recollections "did not meet the test of scientific reliability" and that since there are no empirical studies to verify the existence of the phenomenon, there was no way to validate the memories. ¹⁹³

B. Helpfulness

The second requirement, according to *Daubert*, for expert testimony to be properly admitted under Rule 702 is that such testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." ¹⁹⁴ This prong was referred to as the "helpfulness test" of Rule 702 in *United States v. Downing*. ¹⁹⁵ The issue presented to the *Downing* court was whether expert testimony on the reliability of eyewitness identification should have been admitted in the trial of a defendant convicted solely on the basis of eyewitness testimony. ¹⁹⁶ The court remanded the case for the trial court to determine the admissibility of the evidence based on a balancing test of two components: (1) whether the scientific principles upon which the expert testimony rested were sufficiently reliable to enable the testimony to aid the jury in reaching an accurate resolution of the disputed issue, and (2) whether the testimony could overwhelm or mislead the jury. ¹⁹⁷

190. *Id.*

191. 628 A.2d 696, 700 (1993) (holding that it was reversible error for the State's psychological expert to conclude that the child victims in a criminal trial had been sexually abused).

192. Robert A. Erlandson, *Recovered Memory Claim Denied in Sex Abuse Case*, BALTIMORE MORNING SUN, May 6, 1995, at 1A.

193. *Id.*

194. *Daubert*, 113 S. Ct. at 2795. See also *supra* note 141 and accompanying text.

195. 753 F.2d 1224, 1231 (3d Cir. 1985).

196. *Id.* at 1243. The court overturned the defendant's conviction on charges of mail fraud, wire fraud and interstate transportation of stolen property. Because the crucial evidence against the defendant consisted solely of eyewitness identification, the court found that excluding the proffered expert testimony was not harmless error. *Id.*

197. *Id.* at 1226.

The court noted that if a jury must accept the expert's own assertions as to the accuracy of his or her conclusions instead of being presented with the data on which the expert relies, the jury may be misled.¹⁹⁸ In repressed memory cases, the only information on which the expert can rely is the alleged victim's recollections; thus, a juror would have no independent basis on which to evaluate the accuracy of the expert's testimony. The *Downing* court also noted that techniques that rely on the expert's subjective judgment to draw conclusions from the data on which the testimony is based would raise the possibility of confusing or misleading a jury.¹⁹⁹ Finally, the court noted that novel scientific evidence carries with it concerns over trustworthiness and reliability, and that "[w]hen there is a serious question of reliability of evidence, it is appropriate for the court to exercise . . . an evidentiary screening function."²⁰⁰

On the state court level, trial judges appear willing to exhibit a more rigorous "gatekeeping" role in determining whether to admit repressed memory testimony. In a May 1995 ruling in New Hampshire, a superior court judge barred testimony from victims in two criminal sexual assault cases who allegedly recovered memories through therapy.²⁰¹ The court determined that the concept of repressed memory and its recovery through therapy were clearly scientific processes and that before a jury could decide the credibility of the witnesses, the jury would need to understand the method by which the testimony was developed. This requirement necessitated the application of the *Daubert* directive that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."²⁰² Thus, the court reasoned that it had a duty to ascertain, prior to the admission of the victims' testimony, the scientific validity of the phenomenon of repressed memory and the process by which it was recovered.²⁰³

As to the repressed memory theory itself, the court determined that due to the inappropriate application of many of the studies to the phenomenon and the substantial flaws in the methodology used in those studies,²⁰⁴ the "testability may be seriously challenged and refutability

198. *Id.* at 1239.

199. *Id.*

200. *Id.* at 1240.

201. *State v. Hungerford*, 1995 WL 37857, at *1 (N.H. Super. 1995).

202. *Id.* at *2 (quoting *Daubert*, 113 S. Ct. at 2795).

203. *Id.* at *3.

204. *Id.* at *8. Judge Gross noted several deficiencies in the survey studies cited in support of the existence of the repressed memory theory: (1) the failure to account for the recognized inability of children to form narrative memories before the age of five, (2) the failure to confirm or corroborate the occurrence of the alleged trauma, and (3) the ambiguity of the survey ques-

may be seriously advanced.”²⁰⁵ In connection with the falsifiability of the phenomenon, Judge Groff wrote, “there is absolutely no ability, absent independent corroboration or confirmation, to determine whether a particular ‘repressed memory’ is false or true.”²⁰⁶ He then cited the potential for false memories and the inability to identify them.²⁰⁷

The court found that expert testimony would be required in a repressed memory case, since the concept of a repressed memory “transcends human experience.”²⁰⁸ But it went on to explain that, even if the experts could distinguish a true memory from a false memory, their testimony would usurp the jury’s function of determining witness credibility since they would be advising the jurors as to the truth or existence of the facts themselves.²⁰⁹ While noting that therapy is inherently suggestive, the court determined that the reliability of the victims’ memories were diminished by several factors: the techniques used by the therapists, the rapid confirmation by the therapists of the events as recalled by the plaintiffs, and the therapists’ failure to verify or attempt to corroborate the abuse.²¹⁰

V. CONCLUSION

The *Daubert* decision puts trial judges in the position of having to evaluate the scientific principles or methodologies underlying the proposed testimony to determine whether those methodologies are scientifically valid. The majority felt confident that federal judges would be able to undertake such a review.²¹¹ The repressed memory phenomenon may be the ultimate test of that capability. Within the psychological sciences, much of the data is subjective and many of the theories are difficult, if not possible, to empirically test.²¹² Yet the *Daubert* Court regarded the testability of a theory or technique as a “key question” in determining if it is scientific knowledge.²¹³ Critics of the repressed memory theory claim that its lack of falsifiability precludes it from being a valid scientific theory.²¹⁴ When faced with arguments by the experts on the falsifiability of repressed memory, trial judges may

tions such that it was impossible to ascertain whether the failure to remember was in fact memory repression, or merely normal forgetting or reluctance to disclose the experience. *Id.*

205. *Id.* at *11.

206. *Id.*

207. *Id.* See *supra* text accompanying notes 143-46.

208. *Id.*

209. *Id.*

210. *Id.* at *14.

211. *Daubert*, 113 S. Ct. at 2796.

212. Milich, *supra* note 150, at 917.

213. *Daubert*, 113 S. Ct. at 2796.

214. See *supra* text accompanying notes 144-150.

find themselves in the same dilemma as Chief Justice Rehnquist when he wrote, "I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability.'"²¹⁵

The excerpts from *The Courage to Heal* at the beginning of this Comment illustrate the dichotomy of the repressed memory phenomenon. In one camp, there are those who believe that every recovered memory of abuse is true, regardless of the method by which the memory was retrieved or whether there is any corroboration. For this group, the most important "truth" is whether the patient believes the abuse occurred. In the opposing camp, there are those who believe that the only relevant truth is that which can be proved in a court of law. Every therapy patient needs to have a relationship of trust with his or her therapist. Yet uncritical acceptance of every single claim of a recovered memory of sexual abuse, no matter how bizarre, is not good for anyone. Its effect will be that society will begin to doubt the true cases of abuse.

Incest and sexual abuse are horrible crimes, and those who commit them should be punished. Yet the court must treat evidence of recalled repressed memory in the same manner as any other novel scientific theory. It must determine whether the theory is scientifically valid. The test under *Daubert* is not unreasonable.

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215. *Daubert*, 113 S. Ct. at 2800 (Rehnquist, C.J., concurring/dissenting).