FROM THE COUCH TO THE BENCH: HOW SHOULD THE LEGAL SYSTEM RESPOND TO RECOVERED MEMORIES OF CHILDHOOD SEXUAL ABUSE?

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A woman in her thirties seeks therapy to overcome an eating disorder and trouble with relationships. The therapist recognizes the woman's complaints as signs of sexual abuse, despite the patient's denials. The therapist believes that the patient may be suppressing memories of sexual abuse and suggests that the patient think about it to see if any memories surface. The patient reports that she recalls her father abusing her, but is not sure whether her memories are real. The therapist recommends using hypnotic regression as a means of restoring the patient's memories. After the memories of abuse surface during hypnosis, the patient becomes certain that she was sexually abused by her father during her childhood.

The therapist discourages the patient from maintaining contact with any family member who does not believe her. As part of her treatment, the patient decides to sue her father for the crime that is now twenty years old.

Although her father is acquitted, the woman still refuses to see him. Her parents divorce and her father loses his job. The woman moves away from her home and her therapist. Eventually she concludes that she was wrong about the sexual abuse. The memories that she thought were real were not her true memories after all.

Realizing it was her therapist, not her father, who injured her, the woman decides to sue her therapist for the pain she and her family have suffered.[1]

Increasingly, society is becoming aware of the prevalence of child sexual abuse and the consequences for its victims, even as they be-

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1. This scenario is loosely based on the Maryland case of Donna Smith. *See* Eugene L. Meyer, *Poisoned Memories*, WASH. POST, May 27, 1994, at D1 (detailing the case and its aftermath).

come adults.[2] This awareness has led to greater assistance for victims and punishment for abusers.[3] In addition to such positive developments, however, the growing concern to stop child sexual abuse may also lead to negative consequences, such as an unfounded acceptance of the validity of recovered memories of sexual abuse.[4] Reliance on such "memories" can have devastating consequences, as this comment will explain. Consequently, society's desire to remedy childhood sexual abuse should not pressure the legal system to blindly accept unproven theories, such as recovery of repressed memories, both in the courtroom and the therapy session.

An increasing number of women[5] report recovering memories[6] of long-forgotten, childhood sexual abuse.[7] These women and their therapists believe that the memories were so painful that they were repressed, stored in the unconscious, and later recovered.[8] There is also a trend of women recanting their initial "memories" of sexual abuse.[9] There is no consensus within the mental health field as to whether memories can be repressed and later recovered. Experts agree, however, that even if recovered memories are sometimes true,

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2. *See infra* notes 25-28 and accompanying text (describing common injuries).

3. *See* Elizabeth F. Loftus, *The Reality of Repressed Memories*, AM. PSYCHOLOGIST, May 1993, at 518 (discussing changes in the legal system that favor victims in sexual abuse cases).

4. *See, e.g.*, Mark MacNamara, *The Rise and Fall of the Repressed-Memory Theory in the Courtroom*, 15 CAL. LAW 36, 38 (1995) (quoting a 1991-92 San Diego County grand jury report, which called the child protection system "out of control" and described the case of Jim Wade, who was falsely accused of raping his eight year old daughter. The daughter originally told investigators that a stranger climbed through her bedroom window. After speaking with therapists, however, she reported that her father had raped her. Two-and-one-half years later, Wade was cleared through use of DNA evidence.).

5. Some men report recovered memories of childhood sexual abuse, but since women are disproportionately affected, this paper will concentrate on the effects of recovered memories on women. Many of the effects are applicable to male victims as well. According to the False Memory Syndrome Foundation, a group comprised of families in which a child has accused an adult of sexual abuse and of professionals in related fields, of those who allegedly recover memories and accuse someone of abuse, 92% are female, 74% are between the ages of 31 and 50, 31% have post-college education, 60% report memories of abuse before the age of four and 64% report having repressed the memories for a period of between 20 and 39 years. *Frequently Asked Questions*, FALSE MEMORY SYNDROME, (draft, False Memory Syndrome Found., Phila., Pa.) Sept. 1995, at 9.

6. In this paper, recovered and recalled memories will be used interchangeably to refer to memories which were allegedly repressed and later remembered.

7. *Cf.* Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1193 n.22 (1992) (listing several celebrities who report recovering repressed memories including Roseanne Arnold, Oprah Winfrey, LaToya Jackson, and former Miss America Marilyn Van Derbur).

8. *But see infra* notes 43-54 and accompanying text (suggesting that many experts do not believe memories can be repressed and later recovered).

9. *See, e.g.*, Meyer, *supra* note 1, at D1 (recounting one family's experience with false memories).

there is no way for either the patient or the therapist to differentiate between true and false memories.[10] This dilemma has created a debate regarding the use of such memories in therapy and in the courtroom.

When examining the issues surrounding False Memory Syndrome,[11] the first step is to establish whether recovered memories are, in fact, true memories. Second, if the memories are not clearly reliable, should they still should be used as evidence of childhood sexual abuse? Finally, if recovered memories are used to prove instances of childhood sexual abuse, which, in fact, never took place, should patients, or the people they accuse, have legal recourse against the therapist who encouraged "recovering" these false memories?

Since the very field which researches recovered memories cannot agree on their validity, the best way to protect the public is to prohibit the use of questionable memories as evidence. The courtroom is not the place to determine the validity of scientific theories.[12] Instead, the scientific community should determine the validity of scientific theories and the jury and judge can then decide whether that theory applies to the facts of the given situation. There must be a balance between allowing scientific evidence to aid the court in determining the validity of a claim and protecting the parties from premature use of unverified scientific theories or techniques. In ad-

10. AMERICAN MEDICAL ASSOCIATION: REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, MEMORIES OF CHILDHOOD ABUSE (1994), *reprinted in* FMS FOUND. NEWSL. (False Memory Syndrome Found., Phila., Pa.) July 6, 1994, at 10 (citing the difficulty in determining the validity of repressed memories).

11. The term "False Memory Syndrome" was first coined by the False Memory Syndrome Foundation. The Foundation defines the syndrome as a condition where a person has such a strong belief in something that, although the belief is objectively false, the person's identity is based on the belief. *Frequently Asked Questions, supra* note 5, at 1. False Memory Syndrome is not recognized by the American Psychiatric Association (hence it is not listed in the Diagnostic and Statistical Manual IV (1994)). Since the term is widely used in literature on the topic, however, it will be used in this article as well.

12. When scientific theories or techniques are well established, they should be used in the courtroom to help the judge or jury reach a just outcome. When courts ignore scientific evidence, injustice results. For instance, evidence of the Battered Woman Syndrome should be used to help determine whether a woman should be considered culpable for murdering an abusive husband. *See generally* A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994); *see also* Bert Black, Francisco J. Ayala & Carol Saffran-Brinks, *Science and the Law in the Wake of* Daubert: *A New Search For Scientific Knowledge*, 72 TEX. L. REV. 715, 719 (1994) (citing Berry v. Chaplin, 169 P.2d 442, 451 (Cal. Dist. Ct. App. 1946)) (awarding child support in a paternity suit, even though blood typing proved Charlie Chaplin could not be the father) *and* Wells v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985), *aff'd in part*, 788 F.2d 741, 745 (11th Cir. 1986) (holding that a spermicide caused birth defects, despite overwhelming evidence to the contrary. When the 11th Circuit affirmed this judgment, the judge stated, "[s]cience doesn't matter, if there was sufficient evidence of causation in a legal sense.")).

dition, the public must be protected from negligent use of theories and techniques within psychotherapy sessions as these theories and techniques can significantly affect patients' mental health and the well-being of their families. Recovered memories can destroy families,[13] cause loss of employment,[14] and result in jail sentences.[15] In order to achieve just outcomes, courts should refrain from determining the validity of new, unverified scientific theories before the scientific field has done so.

This paper begins with a summary of the debate among scientists regarding recovered memories and False Memory Syndrome. It will examine the characteristics of individuals who report recovering memories of sexual abuse and discuss the scientific debate surrounding the validity of those memories.

Part II examines how the legal system facilitates claims based on unproven scientific evidence. First, it will review the discovery rule, which allows testimony of recovered memories to toll the statute of limitations. Next, admission of novel scientific evidence will be studied, focusing on the shift from the "general acceptance" standard established in *Frye v. United States*[16] to the reliance on the Federal Rules of Evidence used in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[17]

Part III demonstrates the necessity for the legal system to provide relief to those who are injured by a therapist's[18] negligent treatment of recovered memories.

Finally, Part IV concludes that public interest dictates that courts be wary of allowing new, unverified scientific evidence into the courtroom. At the same time, the courts should provide remedies when therapists injure patients through the use of unverified techniques and careless diagnoses of recovered memories.

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13. *See* Ramona v. Isabella, No. C61898 (Cal. Super. Ct. May 13, 1994) (involving a woman filing for divorce after her adult daughter 'recovered' a memory of her father sexually abusing her as a child); *"Incest" Father Sues Girl's Therapists,* THE OBSERVER, Apr. 17, 1984, at 18 (recounting details of the Ramona v. Isabella case).

14. Sandra G. Boodman, *Kathy O'Connor of Arlington Says She Remembered That Her Father Raped Her. She Sued Him And Lost. Are Delayed Memories Like Hers True Or False?,* WASH. POST, Apr. 12, 1994, at Health Insert (explaining that Kathy O'Connor's accusations of sexual abuse by her father caused both parents to lose their jobs).

15. *See* Sharon Begley & Martha Brant, *You Must Remember This,* NEWSWEEK, Sept. 26, 1994 at 69 (describing problems of recovered memories, including the possibilities of jail time for the accused).

16. 293 F. 1013 (D.C. Cir. 1923).

17. 509 U.S. 579 (1993).

18. In this paper, the term therapist will be used to refer to psychologists, psychiatrists, social workers, and others in the field of mental health therapy.

I. CAN MEMORIES BE REPRESSED AND SUBSEQUENTLY RECOVERED?

A. Who Reports Recovering Memories?

Reports of recovered memories are usually made by women,[19] often in the context of therapy[20] for problems such as anxiety, depression and sexual dysfunction.[21] This disproportionate effect on women may occur because recalled memories often involve childhood incest,[22] which claims more female victims than male.[23] Additionally, studies have found that more women than men seek therapy.[24] These two factors may result in women reporting recovered memories of sexual abuse more frequently than men since most memories are recovered in therapy.

Survivors of childhood incest often exhibit common problems in adulthood, including an inability to develop meaningful relationships,[25] abuse of drugs or alcohol,[26] attempted suicide,[27]

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19. *See* Keith Russell Ablow, *Recovered Memories: Fact or Fantasy? Controversy Over Delayed Recall of Sexual Abuse*, WASH. POST, June 22, 1995, at Z7; *see also Frequently Asked Questions*, *supra* note 5, at 9.

20. *See* Meyer, *supra* note 1, at D1 (describing memories recovered during therapy); *but see* Meiers-Post v. Schafer, 427 N.W.2d 606, 607-08 (Mich. Ct. App. 1988) (stating that the plaintiff's memories of sexual contact with her teacher were triggered by a documentary on television about sex between students and teachers).

21. *See* Loftus, *supra* note 3, at 523 (discussing the connection drawn between current problems and allegations of past sexual abuse).

22. *Cf.* Loftus, *supra* note 3, at 523 (stating that in addition to incest, recalled memories include torture by drugs, electric shock, rape, sodomy, forced oral sex, and ritualistic killing of babies born to, or aborted by the patients); Henry Chu, *Suit Claiming Satanic Abuse Nearing the Jury*, L.A. TIMES, April 11, 1991, at B7 (stating that two middle-aged sisters, both in therapy separately for multiple personality disorder, but with the same therapist, sued their mother after they allegedly recovered memories of their mother forcing them, since infancy, to participate in satanic rituals. The jury awarded nominal damages for negligent child rearing.); *see also* James S. Gordon, *The UFO Experience*, ATLANTIC MONTHLY, Aug. 1991, at 82-92 (stating that a woman recalled through hypnosis that she was abducted by aliens on an exotic spacecraft).

23. Maryann McCabe, *Dynamics of Childhood Sexual Abuse*, *in* SEXUAL ABUSE OF CHILDREN 5 (Ronald E. Cohen & Maryann McCabe eds., 1986) (stating that in a survey of 145 incest cases, 86% of the victims were female and 14% were male); *see also* JUDITH LEWIS HERMAN, FATHER-DAUGHTER INCEST 83 (1981) (estimating that in 80% of incest cases, the contact began before the daughter reached the age of 13, with the average age being nine).

24. Walter R. Grove & Jeannette F. Tudor, *Adult Sex Roles and Mental Illness*, 78 AM. J. SOCIOLOGY 812, 823 (1973); *but see* Denise LeBoeuf, Note, *Psychiatric Malpractice: Exploitation of Women Patients*, 11 HARV. WOMEN'S L.J. 83 (1988) (citing Mary Weisensee, *Women's Health Perceptions in a Male-Dominated Medical World*, *in* WOMEN IN HEALTH AND ILLNESS: LIFE EXPERIENCES AND CRISES 19, 22 (Diane Kjervik & Ida Marie Martinson eds., 1986)) (explaining that the Grove study did not include alcoholism, personality disorders, and acting-out behaviors, which are typically male patterns).

25. Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 358 (1991) (citing LEWIS HERMAN, *supra* note 23, at 83.

and prostitution.[28] The existence of these problems, however, is not necessarily indicative of childhood sexual abuse.[29] It is possible that a therapist's inappropriate linkage between sexual abuse and a common symptom thereof may produce "false" recovered memories.

When a patient goes to a therapist for treatment of symptoms associated with sexual abuse, the therapist may suspect a history of childhood incest.[30] The therapist may begin looking for other signs of sexual abuse, even in patients who do not remember any such instances.[31] This search may be dangerously suggestive to the patient and lead to the formation of false memories.[32]

B. Memories May Be Repressed and Later Recovered

Some modern therapists and researchers believe that incest is such a traumatic event that it may cause victims to repress memories of

26. DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 162 (1986) (estimating that 21% of all sexual abuse victims are addicted to drugs and 27% have a history of alcohol abuse); LEWIS HERMAN, *supra* note 23, at 162 (estimating that 20% of sexual abuse victims abuse drugs or alcohol).

27. LEWIS HERMAN, *supra* note 23, at 99 (estimating that 40% of all incest victims attempt suicide); FINKELHOR, *supra* note 26, at 154 (estimating that 16% of all incest victims attempt suicide).

28. Hagen, *supra* note 25, at 382 n.40; *see also* LEONARD KARP & CHERYL KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE 216 (1989) (stating that many factors influence problems faced by incest survivors, including the age of first sexual contact, "the frequency and duration of the abuse, the type of sexual conduct, and the violent or sadistic nature of the conduct").

29. *See* MacNamara, *supra* note 4, at 36 (suggesting that a diagnosis of repressed memory based on symptoms such as depression, sexual dysfunction and eating disorders is risky because patients and their accused abusers are filing lawsuits against therapists for negligent diagnoses).

30. *See* Loftus, *supra* note 3, at 526 (explaining the tendency among therapists to diagnose childhood abuse based on generalized symptoms).

31. *See* Begley & Brant, *supra* note 15, at 68-9 (stating that some therapists will tell a patient who has no memories of incest to imagine being sexually abused, in an attempt to find the "truth").

32. *See* Loftus, *supra* note 3, at 526 (describing some therapists' aggressive approaches in uncovering memories of suspected sexual abuse).

such abuse.[33] Factors that may trigger repression include child abusers' demands for secrecy[34] and the abuser's often authoritative position of father, uncle, or family friend.[35] When victims do report abuse they are often not believed,[36] or may later retract the statements in order to return the family unit to its previous state.[37] Some mental health professionals believe that the shock of the event forces the memory into an inaccessible area in the unconscious, which is only later accessible through therapy.[38] These therapists further believe that sex abuse victims sometimes experience Post-Traumatic Stress Disorder, another explanation for memory repression.[39]

Therapists who treat victims of childhood sexual abuse often recommend the book *The Courage to Heal*,[40] to patients. Sometimes referred to as the "bible of the incest survivors movement,"[41] *The Courage to Heal* is a self-help book for victims of childhood sexual abuse and has been blamed for encouraging women to recall childhood

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33. *See* Gary M. Ernsdorff and 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 (1993) (discussing the link between trauma and memory repression). The theory of recalling memories is often attributed to Sigmund Freud. Freud, however, later recanted his belief in recovered memories. *See also* E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN 81 (1990) (suggesting that half of all incest survivors do not remember the abuse); Victor Barall, *Book Review: Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1477-78 (1994); Judith Herman and Emily Schatio, *Recovery and Verification of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 2-5 (1987). *But see* Loftus, *supra* note 3, at 521-22 (stating that although 18% to 59% of patients who were sexually abused as children stated there was a point when they did not remember their abuse, these statistics should be treated with caution because affirmative answers do not necessarily mean that the memories were repressed; it could mean that the pain from the abuse was too great for the patient to think about it.).

34. SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 32-33 (1978); MacNamara, *supra* note 4, at 39.

35. KARP & KARP, *supra* note 28, at 154.

36. KARP & KARP, *supra* note 28, at 154 (stating that because children are often not believed, many cases go unreported).

37. Hagen, *supra* note 25, at n.46; Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 188 (1983).

38. Christine A. Courtois & Judith E. Sprei, *Retrospective Incest Therapy for* Women, *in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN 270, 276 (Leonore E. Auerbach Walker ed., 1988) (discussing how therapy combined with certain life events, such as the birth of a child, may trigger memories). *But see* McNamara, *supra* note 4, at 36 (describing the American Medical Association's conclusion that "recovered memories of childhood sexual abuse [are] ... of uncertain authenticity").

39. *See* Courtois & Sprei, *supra* note 38, at 281-82 (discussing how the recognition of Post Traumatic Stress Disorder facilitates healing).

40. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE 21 (1988) (stating that "if you are unable to remember any specific instances ... but still have a feeling that something abusive happened to you, it probably did").

41. 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, 838 (1994).

sexual abuse even when no such memories actually exist.[42]

C. *Recovered Memories May Be False Memories*

Not all experts agree that painful memories can be repressed and subsequently recovered.[43] Some claim that reports of recovered memories are actually false.[44] One commonly cited example of a false memory involved Jean Piaget. For years Piaget "remembered" that someone had tried to kidnap him and he was saved by his nurse.[45] Over a decade after the alleged incident, however, Piaget's nurse told him that she had lied about the event, and after Piaget's parents gave her a gold watch as a reward for saving him, she did not want to recant her story.[46] Piaget may have formed his "memory" from hearing the nurse talk about the alleged event.[47]

Many studies also suggest that it is possible to implant false memories.[48] For instance, a psychologist falsely told Paul Ingram, who was on trial for child abuse, that Ingram's children claimed that they were forced to have sex with each other, in front of Ingram.[49] Although Ingram at first did not recall such crimes, with the "help" of

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42. *See id.* (stating that even if a woman does not have memories of childhood sexual abuse, it probably happened); *see also* BLUME, *supra* note 33, at xiv, xvi (proposing a checklist for incest survivors and explaining that as many as half of all incest survivors may not remember that the abuse occurred).

43. *See* AMERICAN MEDICAL ASSOCIATION REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, MEMORIES OF CHILDHOOD ABUSE (1994), *reprinted in* FMS FOUND. NEWSL. (False Memory Syndrome Found., Phila., Pa.) July 6, 1994, at 10 (stating that while some therapists believe that memories cannot be repressed at all, others think some recovered memories are true, while some are false, and still others strongly feel that true memories can be recovered in therapy); Begley & Brant, *supra* note 15, at 69 (explaining that experiments suggest that sometimes events are not recorded in the brain and therefore cannot be remembered or hypnotically recovered later or that traumatic events are often distorted, but not entirely repressed).

44. *See* Loftus, *supra* note 3, at 519. Loftus tells a story of a woman who allegedly recalled memories of witnessing her father kill her best friend. Loftus believes that the woman's memories are questionable, however, because the events remembered had been in newspapers and the woman changed many 'memories' as she retold her story. For instance, after being reminded that the murdered girl was not missing until after lunch, the woman insisted that the murder took place late in the afternoon. Such inconsistencies suggest that some of the woman's memories may have been false.

45. Loftus, *supra* note 3, at 531.

46. Loftus, *supra* note 3, at 531.

47. Loftus, *supra* note 3, at 531. *But cf.* MacNamara, *supra* note 4, at 39 (describing the case of Brown University professor Ross Cheit, in which a recovered memory appears to have been real. Cheit allegedly recovered memories of a former camp administrator molesting him. Three witnesses supported Cheit's allegations and Cheit produced a confession signed by the accused administrator).

48. *See, e.g.*, Begley & Brant, *supra* note 15, at 68, 69 (citing Elizabeth Loftus' study in which people "remembered" being lost in the mall after the experience was suggested to them).

49. Loftus, *supra* note 3, at 532-33.

the psychologist, Ingram eventually "remembered" the fictitious event.[50] In another example, in 1993, a woman recalled being sexually abused by her father.[51] After ceasing therapy and her use of psychotropic drugs, however, the woman recanted her accusations.[52]

One explanation for the formation of false memories is the manner in which memories are stored. Different aspects of an experience are stored in different parts of the brain and when something is 'remembered,' these parts are brought together again.[53] In the process of recreating a memory, it is possible to attach segments of two different memories to one another, thus creating a false memory.[54] Some false memories may also be induced by therapists informing patients that certain symptoms indicate abuse and aggressively helping patients to "remember" such events.[55]

II. SHOULD UNVERIFIED PSYCHOLOGICAL THEORIES BE USED TO DETERMINE A PARTY'S FATE IN THE COURTROOM?

As a means of coming to terms with their abuse, victims often seek therapy, confront the abuser, or seek to bring the abuser to justice in a court of law.[56] Legal action can serve to empower the victim, compensate for the harm that was caused, deter future abuse, pay for

50. Loftus, *supra* note 3, at 533 (describing the Paul Ingram case. Ingram initially denied charges when arrested for child abuse but, after five months of interrogations and psychological sessions he began reporting memories of sexually abusing children and participating in a satan-worshipping cult which was alleged to have murdered 25 babies).

51. Meyer, *supra* note 1, at D1.

52. Meyer, *supra* note 1, at D1, D4.

53. *See* Begley & Brant, *supra* note 15, at 68 (explaining that the brain's limbic system pulls together bits of memory from different parts of the brain).

54. *See* Begley & Brant, *supra* note 15, at 68 (providing an example of how someone can recall running a stop sign and later connect that memory with other memories of stop signs); *see also* George K. Ganaway, *Historical Versus Narrative Truth: Clarifying the Role of Exogenous Trauma in the Etiology of MPD and its Variants*, 2 DISSOCIATION 205-20 (1989) (stating that internal sources of false memories include fantasizing about sexual abuse to protect oneself from more painful memories, while external sources include movies, books and therapists); MacNamara, *supra* note 4, at 38 (citing ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD ABUSE (1988)) (crediting the book, THE COURAGE TO HEAL, with encouraging women to come forward with stories of childhood abuse).

55. *See* Loftus, *supra* note 3, at 526-27 (providing examples of therapists who tell patients that it is likely that the patient was sexually abused, or involved in satanic rituals as a child). Loftus also cites case histories of patients who thought that it was possible they were abused, and were subsequently told by their therapist that if the patient thought it was a possibility, then it was probably true.

56. Begley & Brant, *supra* note 15, at 69 (citing the False Memory Syndrome Foundation's estimate that 700 civil and criminal cases have been filed based on recovered memories of childhood abuse).

therapy, and place blame on the abuser.[57] Controversy over the veracity of recovered memories, however, should cause courts to hesitate before relying solely on evidence of recovered memories.

A. The Rise of the Discovery Rule

Repressed memories create a unique problem when calculating statutes of limitations. In most sexual abuse cases, the statute of limitations is tolled until the age of majority, after which a victim has only one to three years in which to file a civil suit.[58] This rule prohibits recovery for victims who may not recall their abuse until years after reaching majority. Therefore, supporters of repressed memory theory have urged courts to apply the discovery rule to cases where victims allegedly recover memories of childhood sexual abuse.[59] By using the discovery rule, victims have the advantage of tolling the statute of limitations until they know, or through the exercise of reasonable diligence, should know, of the abuse and injuries resulting from the abuse.[60]

Once a court decides to apply the discovery rule, two factors influence how the rule is applied. First, the court examines the extent to which elements of the cause of action were repressed.[61] Second, a judge determines whether corroborating evidence is available. Most jurisdictions that accept the discovery rule limit its application to plaintiffs who have no recollection of past sexual abuse until shortly

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57. See Hagen, *supra* note 25, at 363 n.53, 56 (citing Margaret J. Allen, Comment, *Tort Remedies For Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609 (1983)) (describing the benefits a victim derives by suing her abuser); *see also* Elkington v. Foust, 618 P.2d 37, 41 (Utah 1980) (stating that punitive damages against a father for abuse of his daughter are meant to punish him and warn others not to engage in the same behavior). *But see* MacNamara, *supra* note 4, at 86 (quoting Bill Craig, a Los Angeles defense lawyer, who suggests that suing an alleged abuser can be harmful and break apart a family, regardless of the truth of the accusations. To avoid the strain of litigation, Craig suggests solving the problem through a mediator.).

58. Hagen, *supra* note 25, at 355 n.2 (citing examples of state statutes of limitations and noting that the statute of limitations period will depend upon the cause of action. For the most common causes of action, such as assault, battery, and intentional infliction of emotional distress, the statute of limitations is one to three years.).

59. *See* Hagen, *supra* note 25, at 356 (arguing that adults who were sexually abused as children should be able to use the discovery rule to toll the statute of limitations).

60. Hagen, supra note 25, at 355 n.3. The most prevalent use of this rule to toll the statute of limitations has been in latent disease cases arising from product liability actions. *See* Urie v. Thompson, 337 U.S. 163 (1949) (holding, for the first time, that the statute of limitations is tolled for a plaintiff until he or she is diagnosed with a disease, rather than running from the time the disease was contracted); Francis E. McGovern, *Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 424 (1981) (noting that some states begin tolling the statute of limitations on discovery of latent injury).

61. *See infra* note 62 (citing cases in which all memories of past abuse were repressed); note 63 (citing cases in which the injury was not recognized).

before they file suit.[62] Some jurisdictions toll the statute of limitations only until the injury is discovered, whether or not the acts which caused the injury are known.[63] Often, courts will limit use of

62. Doe v. Roe, 1996 WL 445314 (Ariz. 1996) (holding that the plaintiff did not "discover she was abused until two years before filing suit, thereby bypassing the statute of limitations"); Peterson v. Huso, 1996 WL 411851 (N.D. 1996) (holding that the discovery rule tolls the statute of limitations until a sex-abuse victim discovers the abuse); Hagen, *supra* note 25, at 366; *see, e.g.* Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. Ct. App. 1989) *review granted and opinion superseded*, 788 P.2d 155 (Cal. 1990), *review dismissed, cause remanded*, 800 P.2d 858 (Cal. 1990) (allowing use of the discovery rule when there is no memory of sexual abuse until after the statute of limitations has run); Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988) (holding that the discovery rule is applicable where the plaintiff had no knowledge of the abuse until shortly before she filed suit and suggesting that it would not be applicable in cases where the plaintiff had remembered the abuse previously, even if all injuries stemming from the abuse were not known); Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994) (applying the discovery rule where a woman allegedly repressed memories of incest until the age of 28 and then filed suit within a year of discovering the abuse); *see also* Schwestka v. Hocevar, 1994 WL 224390 (N.D. Cal. May 18, 1994) (holding that the discovery rule was not appropriate and the suit time-barred when a 35 year-old plaintiff was consistently aware of sexual abuse that occurred between the ages of 6 and 16, and was aware of the wrongfulness of these acts from an early age); Marsha v. Gardner, 281 Cal. Rptr. 473 (Cal. Ct. App. 1991) (holding that the discovery rule could not be used to toll the statute of limitations when facts essential to the cause of action were discovered before the statute of limitations had run. Although the plaintiff was sexually abused between the ages of 8 and 17 and had not repressed these memories, she claimed that she was unaware of additional, psychological harm until after the statute of limitations had run. The court held that this additional harm only created uncertainty as to the amount of damages and was, therefore, not an element of the cause of action.); E.W. v. D.C.H., 754 P.2d 817 (Mo. 1988) (holding that the statute of limitations was not tolled by the discovery rule in a case where a child sued her step-uncle for prior sexual abuse because the plaintiff had continuous memories of the abuse); Bowser v. Guttendorf, 541 A.2d 377 (Pa. 1988) (holding that the discovery rule was not appropriate where the plaintiff should have known of the injury when it occurred); Raymond v. Ingram, 737 P.2d 314 (Wash. Ct. App. 1987), *review denied*, 108 Wash.2d 1031 (1987) (holding that the discovery rule could not apply when the plaintiff consistently remembered abuse from her grandfather between the ages of 4 and 17, even though she did not realize the extent of the psychological injuries until shortly before filing suit. The holding was superseded by WASH. REV. CODE ANN. § 4.16.340(2)) (West 1995).

63. *See, e.g.*, Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986) (extending the discovery rule to a case where the plaintiff engaged in a sexual relationship with her Indian Health Services counselor and was fully aware that the relationship had taken place, but did not connect her injuries to the relationship until after the statute of limitations had run); Hammer v. Hammer, 418 N.W.2d 23 (Wis. Ct. App. 1987), *review denied*, 428 N.W.2d 552 (Wis. 1988) (allowing use of the discovery rule when a plaintiff was aware of the abuse at the time it occurred, but the causal connection between the abuse and the plaintiff's injuries was not recognized). The court stated that the "injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions." *Id.* at 27 (quoting Hansen v. Pritt. Robins Co., 335 N.W.2d 578 (Wis. 1983)). *But cf.* Evans v. Eckelman, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990) (instructing the trial court on remand that the discovery rule can be used to toll the statute of limitations only where the plaintiff repressed memories of the abuse and not where she is simply unaware of the full extent of her injuries); DeRose v. Carswell, 242 Cal. Rptr. 368 (Cal. Ct. App. 1987) (holding, in the leading case in California, that the plaintiff could not use the discovery rule to toll the statute of limitations when she brought suit against her step-grandfather for sexually abusing her as a child. At the time of the abuse, the plaintiff was aware that it was causing her harm. She alleged, however, that she was not aware of the connection between her present injuries and the abuse until shortly before she filed suit. The court held that the discovery rule only applies when all of the facts essential to the cause of action are not discovered. This holding was superseded by CAL. CIV. PROC. CODE § 340 (West 1995).

the discovery rule to situations where corroborating evidence is available.[64] Other states toll the statute of limitations using a disability statute, which tolls the statue until a disability, such as a repressed memory, is discovered.[65] The recent trend is for courts to be more wary of recovered memories and to refuse to apply the discovery rule to these situations.[66]

The Supreme Court has stated that public policy often dictates strict application of statutes of limitation to insure fairness to defendants, to safeguard against stale claims, and to protect the rights of

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64. *See, e.g.*, Nicolette v. Carey, 751 F. Supp. 695, 699 (W.D. Mich. 1990) (requiring corroboration that a sexual assault occurred); Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. Ct. App. 1988) (holding that the statute of limitations could be tolled under the insanity clause until one year after the plaintiff recovered memories of sexual contact with her teacher, but only where there was also corroborative evidence); Petersen v. Bruen, 792 P.2d 18 (Nev. 1990) (allowing use of the discovery rule where there was clear and convincing evidence that abuse occurred); Osland v. Osland, 442 N.W.2d 907 (N.D. 1989) (applying the discovery rule when a 22 year old woman sued her father for assault and battery in the form of sexual abuse where evidence supported the claim of abuse); Olsen v. Hooley, 865 P.2d 1345 (Utah 1993) (holding that the plaintiff was required to show corroborating evidence to support her allegations of sexual abuse and extend the statute of limitations); *see also* AMERICAN MEDICAL ASSOCIATION, REPORT OF THE COUNCIL ON SCIENTIFIC AFFAIRS, MEMORIES OF CHILDHOOD ABUSE, *reprinted in*, FMS FOUND. NEWSL. (False Memory Found., Phila., Pa.) July 6, 1994, at 10 (suggesting that the AMA's policy should be changed to say that 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."); Tyson v. Tyson, 727 P.2d 226, 229 (Wash. 1986) (holding that the discovery rule should not be applied when a 27 year-old plaintiff alleged sexual abuse occurred between the ages of three and eleven because there was "no empirical, verifiable evidence ... of the occurrences and resulting harm which [the] plaintiff allege[d])." *Tyson* was superseded by the WASH. REV. CODE ANN. § 4.16.340(2) (West 1995). *But see* Johnson v. Johnson, 701 F. Supp. 1363, 1369 (N.D. Ill. 1988) (holding that the discovery rule should not depend on whether objective evidence is present because such evidence is only one factor).

65. *See, e.g., Meiers-Post*, 427 N.W.2d at 606; *cf.* Kelly v. Marcantonia, 1996 WL 389136 (R.I. 1996) (holding that whether a repressed memory constitutes an "unsound mind" to toll the statute of limitations is a question of law for the trial judge to decide); Jones v. Jones, 576 A.2d 316 (N.J. Super. Ct. 1990), *cert. denied*, 585 A.2d 412 (N.J. 1990) (stating that mental trauma resulting from sexual abuse by a relative may be regarded as an "insanity" disability so as to toll the statute of limitations). *But see* Peterson v. Huso, 1996 WL 411851 (N.D. 1996) (holding that repressed memories cannot be considered to be a disability because it is not listed as such in the appropriate statute); Ernstes v. Warner, 860 F. Supp. 1338 (S.D. Ind. 1994) (holding that repressed memories are not a disability that tolls the statute of limitations).

66. *See* Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780 (Wis. 1995); Lindabury v. Lindabury, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989), *cause dismissed*, 560 So. 2d 233 (Fla. 1990) (holding that the discovery rule did not toll the statute of limitations under Florida law where a daughter sued her parents for sexual battery); Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995) (holding that neither the discovery rule nor the grace period which tolls the statute of limitations for persons who are insane, tolls the statute of limitations for persons who repress memories); Doe v. Maskell, 1996 WL 426528 (Md. 1996) (holding, in a unanimous decision, that the mere presence of repressed memories is insufficient to trigger application of the discovery rule); Pearce v. Salvation Army, 674 A.2d 1123 (Pa. Super. Ct. 1996) (holding that the discovery rule does not toll the statute of limitations in cases of repressed memories); S.V. v. R.V., 39 Tex. Sup. Ct. J. 386 (Mar. 14, 1996) (holding that the discovery rule does not apply to cases of repressed memories).

diligent plaintiffs.[67] Some states are reluctant to extend the statute of limitations for litigants proceeding with claims based on repressed memories for the foregoing reasons and because these states believe therapy is an unreliable means of discovering past sexual abuse.[68]

Application of the discovery rule challenges a defendant to prove his innocence, years, and sometimes even decades, after the alleged events. However, time also works against the plaintiff's search for evidence,[69] especially since plaintiffs bear the burden of proving that the abuse occurred.[70] Hearsay and exclusionary rules prohibit evidence that is unreliable or may create a substantial danger of undue prejudice, from reaching the jury.[71] These evidentiary safeguards provide further protection to the defendant. From a policy standpoint, this protection of the abuser at the expense of the victim may be considered an "intolerable perversion of justice."[72] Thus, courts often use a balancing approach to determine when the statute of limitations should be tolled, weighing the dangers of allowing stale claims against barring a victim's recovery.[73]

State legislatures have also responded to concerns about childhood sexual abuse by passing legislation requiring that the discovery rule be applied to cases of childhood sexual abuse. In some states, the statute of limitations must be tolled until the plaintiff knew, or

67. United States v. Kubrick, 444 U.S. 111, 117 (1979); *see also* Denise Rose, Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 SANTA CLARA L. REV. 191, 216-217 (1985) (suggesting that the argument of giving defendants repose is not applicable in incest cases, but problems of stale evidence and faded memories are applicable); *cf.* Travis v. Ziter, 1996 WL 390629 (Ala. July 12, 1996) (holding that repressing memories is not the equivalent of being insane and it will not toll the statute of limitations).

68. *See* Tyson v. Tyson, 727 P.2d 226, 227-229 (Wash. 1986) (stating that the truth of recovered memories cannot be objectively ascertained, therefore, the discovery rule should not apply).

69. *Kubrick*, 444 U.S. at 117.

70. *See supra* note 64 (citing cases in which courts require plaintiffs to produce corroborating proof that abuse occurred).

71. Hagen, *supra* note 25, at 375.

72. Hammer v. Hammer, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987), *review denied* 428 N.W.2d 552 (Wis. 1988) (citing Comment, *Tort Remedies for Incestuous Abuse*, 13 GOLDEN GATE U. L. REV. 609, 631 (1983)).

73. Hagen, *supra* note 25, at 374; *see also* Johnson v. Johnson, 701 F. Supp. 1363, 1369 (N.D. Ill. 1988) (stating that the Illinois Supreme Court utilizes a case-by-case approach to applying the discovery rule, taking into account equitable considerations as strongly as it takes into account problems of proof).

should have known, that the injury was caused by the abuse.[74]

B. Should Novel Scientific Techniques and Theories Be Admitted as Evidence?

If a claim falls within the statute of limitations, the next issue is whether evidence of recovered memories will be allowed in the courtroom. Science should be used as much as possible to validate evidence. Judges, however, must use care when determining which evidence to admit as juries tend to overvalue scientific evidence when it is presented by an expert.[75] Juries may also face difficulty in accurately determining the validity of scientific evidence.[76]

In cases brought years after the acts in question took place, evidence is often difficult to obtain or substantiate.[77] Often the pri-

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74. ALASKA STAT. § 09.10.140 (1994) (allowing the plaintiff to bring a suit within three years after the plaintiff discovered or through reasonable diligence should have discovered that the act caused the injury); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1996) (allowing the plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the illness or injury occurring after the age of majority was caused by the sexual abuse); KAN. STAT. ANN. § 60-523 (1994) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse); MASS. GEN. LAWS ANN. ch. 260, § 4C (West Supp. 1996) (allowing a plaintiff to bring suit within three years after the victim discovered or reasonably should have discovered that an emotional or psychological injury was caused by the sexual abuse); MINN. STAT. ANN. § 541.073 (West Supp. 1996) (allowing a plaintiff to bring suit within six years after the plaintiff knew or had reason to know that the injury was caused by the sexual abuse); MO. ANN. STAT. § 537.046 (Vernon Supp. 1996) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse); MONT. CODE ANN. § 27-2-216 (1995) (allowing a plaintiff to bring suit within three years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse); NEV. REV. STAT. § 11.215 (1995) (allowing a plaintiff to bring suit within ten years after the plaintiff discovers or reasonably should have discovered that the injury was caused by sexual abuse); N.J. STAT. ANN. § 2A:61B-1 (West Supp. 1995) (allowing a plaintiff to bring suit within two years after the reasonable discovery of the injury and its causal relationship to the act of sexual abuse); OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1996) (allowing a plaintiff to bring suit within two years after the victim discovered or reasonably should have discovered that the injury was caused by the sexual abuse); R.I. GEN. LAWS § 9-1-51 (Michie Supp. 1995) (allowing a plaintiff to bring a suit within seven years after the victim discovered or reasonably should have discovered that the injury was caused by the sexual abuse); S.D. CODIFIED LAWS ANN. § 26-10-25 (1992) (allowing a plaintiff to bring suit within three years of the time the victim discovered or reasonably should have discovered that the injury was caused by sexual abuse); VT. STAT. ANN. tit. 12, § 522 (Supp. 1994) (allowing a plaintiff to bring suit within six years of the time the victim discovered that the injury was caused by the act); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1996) (allowing a plaintiff to bring suit within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act).

75. John E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449, 1462 (1993) (citing People v. Kelly, 549 P.2d 1240, 1245 (Cal. 1976)).

76. Myers, *supra* note 75, at 1462.

77. *See Kubrick*, 444 U.S. at 117 (stating that with old claims, "the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

mary, if not the only evidence available in cases of repressed memories of childhood incest is the "recovered" memories of the patient.[78] This problem is sometimes further complicated by the use of techniques such as hypnosis[79] and sodium amytal therapy,[80] that are used to help the patient recall past events. The statements made by patients undergoing these therapeutic techniques is of questionable validity.[81]

1. Controversial Techniques Used to Revive Memories

a) Hypnosis

If testimony based on repressed memories is admissible, it is necessary to analyze the techniques used to help recover the memories. Hypnosis is sometimes used to refresh patients' memories,[82] but its use in psychotherapy is often debated.[83] Often, a hypnotized patient experiences an increase in both accurate and inaccurate recollec-

78. Jacqueline Hough, *Recovered Memories of Childhood Sexual Abuse: Applying the* Daubert *Standard in State Courts*, 69 S. CAL. L. REV. 855, 855 (1995) (stating that in many cases, recovered memories are the only evidence being brought to court).

79. Rola S. Vamini, Note, *Repressed and Recovered Memories of Child Sexual Abuse: The Accused as a "Direct Victim,"* 47 HASTINGS L.J. 551, 562 (1992) (explaining that many patients claim their therapists "planted" memories during hypnosis).

80. *Id.* (defining sodium amytal as a "truth serum" which is often used to induce memories that many patients later believe are false).

81. *See, e.g., Dad Wins Suit Against Daughter's Therapist*, PSYCHIATRIC NEWS, June 3, 1994, at 19 (describing a case in which Gary Ramona, a father who was accused of sexually abusing his daughter, sued his daughter's therapist claiming that sodium amytal was improperly used in implanting memories); Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L.REV. 1185 (1992) (discussing the use of hypnosis to recover memories).

82. *See* Kanovitz, *supra* note 81, at 1212 (stating that therapists specializing in childhood sexual abuse often use hypnosis to obtain results in less time and at less cost than traditional therapy) (citing Thruman Mott, Jr., *The Role of Hypnosis in Psychotherapy*, 24 AM. J. CLINICAL HYPNOSIS 241, 244-46 (1982) (citations omitted)).

83. *See* Kanovitz, *supra* note 81, at 1212 (asserting that although clinicians use hypnosis to improve memory, researchers generally do not believe that hypnosis can achieve such goals) (citing American Medical Ass'n Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 34 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 1, 1 (1986)). Kanovitz claims that this difference can be explained by the fact that clinical hypnotists work with patients who have repressed traumatic memories, while researchers work with 'normal' patients, who may not have strong, hidden memories. This, she claims explains why no memories are 'recovered' in normal individuals. Kanovitz, *supra* note 81, at 1213.

tions.[84] Scientists speculate that this phenomenon occurs because subjects become vulnerable to suggestion and try to please the hypnotist.[85] A hypnotized patient may fabricate memories or try to fill in gaps between known memories.[86] Furthermore, "memory hardening" may occur with hypnosis,[87] causing a patient to become confident in the "truth" of both true and false memories.[88] Sorting accurate from inaccurate memories becomes impossible for both professionals trained in hypnosis and the patients themselves.[89]

Hypnosis is used for two distinct purposes. Therapeutically, it can help patients come to terms with their past and thus help relieve present problems. Forensically,[90] it can provide evidence for civil or criminal trials.[91] In therapeutic sessions, the purpose of hypnosis is not to discover the truth of past events, but rather to discover the patient's perceptions of past events to determine how past events influence present life.[92] Hypnosis is also used to strengthen the relation-

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84. Borawick v. Shay, 842 F. Supp. 1501, 1503-04 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995), *cert. denied*, 1165 S. Ct. 1869 (1996) (quoting Rock v. Arkansas, 483 U.S. 44, 58-60 (1987)); *see also* Martin T. Orne, Wayne G. Whitehouse, David F. Dinges, and Emily Carota Orne, *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications*, *in* HYPNOSIS AND MEMORY 21, 34-44 (Helen M. Pettinati ed., 1988) (summarizing studies which found that subjects of hypnosis recall more correct and incorrect information and that subjects are more confident in the accuracy of memories recalled during hypnosis than during a waking state); Kanovitz, *supra* note 81, at 1229-34 (stating that during a traumatic event such as a car crash, recovered memories may be less reliable because the images may never have been fully formed. Sexual abuse, however, especially by a friend or relative, is likely to produce a clear memory and be recovered correctly.).

85. *See* Kanovitz, *supra* note 81, at 1230-31 and n.191 (stating that patients sometimes add details in response to a hypnotist's suggestion and listing sources that question the reliability of hypnotically revived memories).

86. *See* Kanovitz, *supra* note 81, at 1231 (asserting that patients frequently substitute a hypnotist's suggestions for their own recollection or add the suggested details to their own memories).

87. *See Rock*, 483 U.S. at 60 (explaining that memory hardening occurs when a subject has confidence in both true and false memories).

88. *Borawick*, 842 F. Supp. at 1504 (*citing Rock*, 483 U.S. at 58-60); *see also* United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984), *cert. denied*, 502 U.S. 1101 (1992) (describing how a witness becomes convinced that statements made under hypnosis are true).

89. *Valdez*, 722 F.2d at 1202. *But see Rock*, 483 U.S. at 61 (stating that the jury can be educated to the limitations of hypnosis); Kanovitz, *supra* note 81, at 127 n.137 (explaining that a patient's desire to please her therapist may make her susceptible to suggestion in regular therapy sessions, just as in hypnosis sessions).

90. *Cf.* BLACK'S LAW DICTIONARY 649 (6th ed. 1990) (defining forensic psychiatry as, "[t]hat branch of medicine dealing with disorders of the mind in relation to legal principles and cases").

91. Kanovitz, *supra* note 81, at 1218.

92. Kanovitz, *supra* note 81, at 1218 n.140 (citing DONALD P. SPENCE, NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS 21-33, 175-214 (1982)).

ship between the therapist and patient.[93] Although a strong therapist/patient relationship is generally beneficial, it may run the risk of eliciting false information if the patient tries to please the therapist.[94] For instance, if a patient believes that a therapist is searching for childhood sexual abuse, then pleasing the therapist could lead to the creation of false memories.[95]

Unlike therapeutic hypnosis, the primary goal of forensic hypnosis is to discover the truth.[96] Certain procedures can be followed which increase the likelihood that statements made while under hypnosis may be admitted as evidence.[97] For instance, accuracy of statements made during hypnosis can be increased by refraining from use of leading questions and not allowing the patient to know the therapist's expectations.[98]

The American Medical Association recommends guidelines for refreshing memories through hypnosis.[99] Legally, hypnosis is suggested only when performed forensically and conducted by a trained psychiatrist or psychologist aware of the legal implications of the procedure.[100] A taped or written record of the patient's knowledge of the case prior to hypnosis is also suggested.[101] Additionally, the entire hypnotic therapy session, including the pre-hypnosis interview, the hypnosis itself and the post-hypnosis interview should be videotaped.[102]

Courts deal with hypnotic evidence in three ways. Some state courts consider a witness who has undergone hypnosis to be incom-

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93. Kanovitz, *supra* note 81, at 1212.

94. Kanovitz, *supra* note 81, at 1218 (stating that the intensity of the bond between clinician and patient runs a risk of "overstepping the bounds of interview neutrality").

95. *See* Kanovitz, *supra* note 81, at 1219 (stating that leading questions are often asked during therapeutic hypnosis).

96. Kanovitz, *supra* note 81, at 1217-18.

97. *See, e.g.*, State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (listing six procedural requirements for admissibility of scientific evidence); *Borawick*, 842 F. Supp. at 1504-05 (listing factors which render more likely the successful introduction of hypnotically induced testimony into evidence).

98. Kanovitz, *supra* note 81, at 1219.

99. American Medical Ass'n, Report of the Council on Scientific Affairs, CSA Report 5-A-94, June 16, 1994, Subject: Memories of Childhood Abuse [hereinafter AMA Report] (*cited in* Yank D. Coble, Jr., Note, 3 (7) FALSE MEMORY SYNDROME FOUNDATION NEWSLETTER 10-12 (1994)).

100. *Id.*; *see also Hurd*, 432 A.2d at 97 (stating that requiring a professional psychologist or psychiatrist to conduct a hypnotic session may safeguard against misuse of hypnosis).

101. Yank D. Coble, Jr., Note, 3 (7) FALSE MEMORY SYNDROME FOUNDATION NEWSLETTER 10-12 (1994).

102. *Id.*

petent *per se* to testify to any subject discussed while under hypnosis.[103] Other courts, including some federal courts, leave the question of competence or credibility for the trier of fact to resolve.[104] A third set of state and federal courts consider a hypnotized witness competent to testify only if the witness suffered a memory loss potentially remedied by hypnosis and if safeguards are employed to guard against suggestion and confabulation.[105]

The court in *Borawick* held that safeguards are necessary when dealing with witnesses who have undergone hypnosis.[106] To insure a just trial, the court required that the hypnotist be properly qualified and avoid adding to the subject's descriptions.[107] In addition, the court asked for permanent records and other corroborating evidence.[108] The court in *Borawick* believed that without such safeguards, recovered memories should not be used as evidence.[109]

b) Sodium Amytal

Sodium amytal, a sedative and hypnotic agent,[110] has been used to determine whether recovered memories of sexual abuse are true

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103. *See* Rock, 483 U.S. at 57-58 n.14 (citing cases from multiple states, including, Alaska, Arizona, Florida and Delaware which hold that a *per se* rule of excluding a criminal defendant's hypnotically induced testimony was unconstitutional under the Fifth, Sixth and Fourteenth Amendments); Sprynczynatyk v. General Motors, 771 F.2d 1112, 1120 n.10 (8th Cir. 1985) (referring to cases in which a court found that hypnotically induced testimony was found to be inadmissible *per se*); *Borawick*, 842 F.Supp. at 1504 (referring to cases in which a witness who has undergone hypnosis is *per* se incompetent as to any subject explored while under hypnosis); Contraras v. Alaska, 718 P.2d 129, 134 (Ala. 1986) (stating that the use of hypnosis fails the *Frye* test, and also fails FED. R. EVID. § 403 because hypnotically adduced testimony is more prejudicial than probative).

104. *See, e.g.*. *Sprynczynatyk*, 771 F.2d at 1120 n.9 (listing cases in which courts have admitted testimony acquired under hypnosis and left credibility assessments to juries); Kline v. Ford Motor Co., Inc., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (holding that a refreshment of memory through hypnosis goes to credibility of testimony and not to competence as a witness, and, as such, is an issue for the trier of fact to assess); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-510 (9th Cir. 1974) (rejecting defendant's arguments that undergoing hypnosis to improve his limited recollection of events as inherently untrustworthy and concluding that a cautionary instruction to the jury regarding hypnosis is appropriate).

105. *See Rock*, 483 U.S. at 59 n.16 (listing cases in which hypnosis affects credibility and not just admissibility of testimony and advising courts to conduct individual inquiries in each case); *Borawick*, 842 F. Supp. at 1504-05 (listing safeguards required by *Hurd*); *Hurd*, 432 A.2d at 86 (holding that a witness' testimony may be credible when safeguards such as use of an experienced psychologist or psychiatrist or recording a witness' pre-hypnosis memories are used); *see also* State v. Fertig, 668 A.2d 1076 (N.J. 1996) (reaffirming the use of the *Hurd* factors and rejecting the idea that testimony is inadmissible *per se* if it was illicited through hypnosis).

106. *Borawick*, 842 F. Supp. at 1501.

107. *Id.* at 1505.

108. *Id.*

109. *Id.*

110. AMA DRUG EVALUATION 153 (4th ed. 1980).

memories.[111] Despite its reputation as a truth serum, there is no medical or scientific basis for this use;[112] sodium amytal, only relaxes people.[113] In its 1994 review of sodium amytal, the AMA concluded that this drug has no legitimate use in recovered-memory cases.[114] Scientists theorize that because patients are told that sodium amytal acts as a truth serum, some patients may form strong beliefs in the truth of any statements revealed during therapy.[115] This process is similar to memory hardening during hypnosis.[116] Therefore, memories developed after sodium amytal therapy should be treated with caution.

2. Should Recovered Memories be Used as Evidence?

As a result of the controversy surrounding recovered memories, the law must carefully examine the weight it gives to this type of evidence. The issue usually involves whether to allow expert testimony based on techniques or theories that are not generally accepted by the scientific community.

a) From Frye to Daubert

The traditional authority in determining whether expert testimony based on scientific evidence should be admitted is *Frye v. United States*.[117] That court held that expert opinions based on scientific techniques are only admissible if the technique has "gained general acceptance in the particular field in which it belongs."[118] Although in

111. *See* Ramona v. Isabella, No. C61898 (Cal. Super. Ct. May 13, 1994) (Deposition of the marriage, family and child counselor, 54) (recounting an instance in which the victim's psychiatrist advised the victim that it was impossible to lie while under the influence of sodium amytal and therefore the victim's recovered memories of abuse were true).

112. *Id.* at 452-56 (analyzing studies of the clinical use of truth serum and its ability to stimulate behavior or verbal commentary of past events).

113. August Piper, Jr. *"Truth Serum" and "Recovered Memories" of Sexual Abuse: A Review of the Evidence*, J. OF PSYCHIATRY & LAW 447, 449 (Winter 1993).

114. AMA Report, *supra* note 99.

115. *See, e.g.*, Elizabeth F. Loftus, *The Reality of Repressed Memories* 48(5) AM. PSYCHOLOGIST 518, 526 (1993) [hereinafter *The Reality of Repressed Memories*]; Kanovitz, *supra* note 81, at 1230-31 n.188-90.

116. *The Reality of Repressed Memories, supra* note 115, at 528.

117. 293 F. 1013, 1014 (D.C. Cir. 1923).

118. *Frye*, 293 F. at 1014 (holding that since a systolic blood pressure deception test, which was purported to distinguish between truth and lies, was not generally accepted in the psychological and physiological fields, expert testimony based on these tests could not be used to determine the innocence of a man accused of murder).

use for over seventy years, the *Frye* test has many critics.[119] One weakness of the "general acceptance" standard is that it may be overly conservative.[120] It requires that the legal system wait until scientists accept certain theories or methods, during which time the public does not have use of this new information.[121] Peter Huber sums up the critics' views of the conservative nature of *Frye* by quoting Judge Sterne, explaining that if standards like *Frye* had been applied in other fields, "Christopher Columbus could never have been qualified as an expert to render an opinion on circumnavigation and the Wright Brothers would never have been able to testify as experts and give opinions relating to flight, because their views never gained 'general acceptance in the scientific community.'"[122]

Another weakness of the *Frye* test is that it is difficult to determine general acceptance of a scientific theory or technique and to define the scientific field in which it belongs. How a court defines "general acceptance" will often determine whether the scientific theory or method in question will meet the general acceptance standard.[123] While it may be useful to allow scientists to decide general acceptance of particular techniques, critics argue that scientific decisions usurp the role of judges.[124]

The Federal Rules of Evidence, enacted in 1975,[125] contain several

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119. *See, e.g.*, CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 363-64 (1954); Paul C. Gianelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1233-34 (1980) (stating that conflicting court decisions interpreting McCormick's requirement of general scientific acceptance as a precondition for admission of evidence have created confusion).

120. Brief of Amici Curie American Law Professors at 25, Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (No. 92-102).

121. *See* Giannelli, *supra* note 119, at 1223 n.202 (citing Coppolino v. State, 223 So. 2d 68, 75 (Fla. Dist. Ct. App. 1968) (stating that "[s]ociety need not tolerate homicide until there develops a body of medical literature about some particular lethal agent")); United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974) (stating that although the *Frye* standard slows the admission of new scientific discoveries, it is worth the cost because it assures that the validity of new discoveries is determined by those best able to do so).

122. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 20 (1991) (*quoting* Rubanick v. Witco Chem. Corp., 576 A.2d 4, 15 (N.J. 1990) (Stern, J., concurring)) (analyzing Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship* 42 AM. U. L. REV. 1637 (1993).

123. *See* People v. Barney, 10 Cal. Rptr. 2d 731, 744 (Cal. Super. Ct. 1992) (holding that there was no general acceptance of DNA testing because a debate was published on the issue in the December, 1991 issue of the journal SCIENCE); Amicus Brief, American Law Professors, *supra* note 120, at 26 (suggesting that tea leaf reading is generally acceptable if the relevant field is tea leaf readers).

124. Edward J. Imwinkelried, *The Evolution of the American Test for the Admissibility of Scientific Evidence*, 30 MED. SCI. & LAW 60, 61 (1990).

125. Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595 § 1, 88 Stat. 1926 (Jan. 2, 1975).

provisions which may change the standard for admitting scientific evidence.[125] For example, Rule 702, which governs expert testimony, does not indicate that "general acceptance" is necessary for scientific evidence to be admitted.[127] Rule 702 states that, "[i]f 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."[128] Rule 403 checks the admissibility of scientific evidence by excluding scientific evidence which, although valid, would cause prejudice or waste time.[129]

Whether the Federal Rules of Evidence superseded the court's ruling in *Frye* was unclear for many years. Both courts and scholars argued over whether *Frye* or the new Federal Rules of Evidence should be followed in court proceedings.[130]

In 1993, the Supreme Court tried to end this controversy in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[131] by holding that the Federal Rules of Evidence, not *Frye*, provides the standard for admitting expert scientific testimony in a federal trial.[132] The Court rejected *Frye* because the "general acceptance" standard was not included in the Rule's language, nor was any mention of *Frye* present in the draft-

126. § 1, 88 Stat. at 1930-31 (*e.g.*, Rules 104(a) & (b), 105, 401, 402) (codified as amended at 28 U.S.C. §§ 63).

127. FED. R. EVID. 702.

128. *Id.*

129. FED. R. EVID. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

130. *See, e.g.*, United States v. Williams, 583 F.2d 1194 (2d Cir. 1978) (holding that the Federal Rules of Evidence supersede *Frye*. The court stated that the first two requirements of the Federal Rules of Evidence 403, probativeness and materiality, are generally not in dispute. The real test is a balancing between the third requirement, reliability of the evidence, and its potential negative impact on the jury.); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE Sec. 702[03] at 702, 743-51 (1989) (arguing that the drafters of the Federal Rules of Evidence did not mention *Frye* because they no longer meant to follow the "general acceptance" standard); Veronica I. Larvie, *Evidence —Admissibility of Scientific Evidence in Federal Courts—The Supreme Court Decides* Frye *is Dead, and the Federal Rules of Evidence Provide the Standard, But Is There a Skeleton in the Closet?* Daubert v. Merrill Dow Pharmaceuticals, 113 S. Ct. 2786 (1993), 29 LAND & WATER L. REV. 275, 281 (1994) (stating that three federal circuits ruled *Frye* no longer applies, while six apply the *Frye* standards); *but see* Edward J. Imminkelreid, EVIDENTIARY FOUNDATIONS, 90-91 (3d ed. 1995) (suggesting that the *Frye* standard survived the Federal Rules of Evidence and remains the majority view among state courts).

131. 113 S. Ct. 2786 (1993).

132. *Daubert*, 113 S. Ct. at 2794 (stating that the *Frye* standard is "absent from and incompatible with the Federal Rules of Evidence, [and] should not be applied in federal trials").

ing history.[133] Since *Frye*'s general acceptance test was the prevailing standard at the time, the fact that it was not mentioned suggests Congress did not intend for it to survive the enactment of the Federal Rules of Evidence.[134] Congress's intent to abandon *Frye* is also evidenced by the fact that a "rigid 'general acceptance' requirement would have been at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'"[135]

Although not espousing a "general acceptance" standard, the Federal Rules of Evidence still limit admissible evidence.[136] Likewise, *Daubert* establishes boundaries of admissibility, allowing only evidence which is both reliable[137] and relevant.[138] The relevancy test under both *Daubert* and the Federal Rules of Evidence requires that testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[139]

The Court in *Daubert* states that reliability is established when an expert's testimony is based on scientific knowledge.[140] The use of the adjective "scientific" in Rule 702 "implies a grounding in the methods and procedures of science."[141] The word "knowledge" is interpreted by the Court as "connot[ing] more than subjective belief or unsupported speculation."[142] Instead, knowledge "appl[ies] to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."[143] The Court concedes that scientific testimony does not need to be "known" to a certainty, since

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133. *Id.*

134. *Id.*

135. *Id.*

136. *But c.f.* Larvie, *supra* note 130, at 287 (stating that *Daubert* will give federal judges more responsibility in evaluating scientific evidence and allow more admissible scientific evidence. This will force attorneys to handle questionable, yet admissible, evidence by vigorous cross-examination, presentation of contrary evidence, careful instruction on the burden of proof and increased use of directed judgments).

137. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993); *see also* Gier v. Educational Service Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994) (holding that a psychiatrist's testimony that the plaintiffs were sexually abused was not reliable, and therefore, inadmissible).

138. Larvie, *supra* note 130, at 283 (stating that the Court in *Daubert* determined that relevant evidence is admissible evidence).

139. *Daubert*, 113 S. Ct. at 2790; *see* Gianelli, *supra* note 119, at 32 (stating that evidence must assist the trier of fact to establish a relevancy test, and courts often evaluate scientific validity when determining relevancy).

140. *Daubert* 113 S. Ct. at 2795.

141. *Id.*

142. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786, 2795 (1993).

143. *Id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1252 (1986)).

arguably, there are no certainties in science.[144] However, the Court requires "an inference or assertion be derived by the scientific method" to be considered "scientific knowledge."[145] The Court continues to require that this knowledge be reliable and insists that "evidentiary reliability will be based upon scientific validity."[146]

The Supreme Court in *Daubert* has listed several factors to consider when determining whether a theory or technique is scientific knowledge and thus reliable.[147] These factors include scientific testing, peer review and publication, the known or potential rate of error, and the presence of "general acceptance" within the relevant scientific community.[148] No single factor was considered by the Court to be dispositive, rather each was considered a relevant factor which could help determine whether to admit certain testimony.[149] Since general acceptance within the relevant scientific community is a factor, the *Frye* standard continues to be considered.[150]

b) Evidence of Repressed Memories

The use of sodium amytal as a truth serum has not been generally accepted within the scientific community,[151] and thus, does not pass the *Frye* standard. Although it might be considered relevant, it is not reliable[152] and also does not meet the requirements of *Daubert*.[153] Based on these conclusions, evidence of recovered memories obtained during sodium amytal therapy should not be admitted in court.

Under *Daubert's* interpretation of Rule 702, scientific evidence must be "ground[ed] in the methods and procedures of science" and "connote more than [a] subjective belief or unsupported specu-

144. *Id.*

145. *Id.*

146. *Id.* at n.9 (noting that scientists distinguish between validity, meaning that the principle behind the knowledge shows what the knowledge purports to show, and reliability, meaning that the results are consistent since the principle is applied).

147. Daubert v. Merrell Dow Pharmaceuticals, 113 S.Ct. 2786, 2796-97 (1993).

148. *Id.*

149. *See* Larvie, *supra* note 130 and accompanying text.

150. Larvie, *supra* note 130, at 292 (warning that the inclusion of "general acceptance" as a factor allows *Frye* back into the analysis, and allows judges to possibly ignore *Daubert*).

151. *See* Larvie *supra* note 130 and accompanying text.

152. *See supra* notes 113-114 and accompanying text (explaining that sodium amytal therapy studies and evaluations within the scientific community have not established the drug as a reliable tool in "recovering memories").

153. Larvie, *supra* note 130.

lation."[154] By interpreting the rule in such a manner, the Court in *Daubert* sought to provide a standard for lower courts to determine the validity and reliability of scientific evidence.[155] Thus, testimony involving an inference or assertion of scientific knowledge must be supported by "'good grounds' based on what is known."[156] *Daubert* dictates that before admitting scientific evidence, judges must consider the ease of producing false results,[157] the outcome of peer review, [158] and the known or potential rate of error.[159] Although researchers have theorized as to why memories may be repressed, there are no studies that fulfill the *Daubert* standard of utilizing 'methods and procedures of science' to prove or disprove that repressed memories actually exist.[160] Thus, in the eyes of the court, repressed memories do not meet the *Daubert* standard of reliability[161] because there is no way to establish that the recalled memories are true and research has shown that recalled memories can be falsified.[162]

The possibilities of both truely repressed and falsely recalled memories have been examined scientifically, but the outcome of such research remains inconclusive. Researchers are unable to determine how often repressed memories are falsely recalled, leaving a significant potential for error. Preliminary studies suggest that it is possible for a person to falsely recall an event which never took place. Additionally, people who recover memories of childhood

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154. Daubert v. Merrell Dow Pharceuticals, 113 S.Ct. 2786, 2795 (1993).

155. *Id.*

156. *Id.*

157. *Id.* at 2796.

158. *Id.* at 2797.

159. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2797 (1993).

160. Brenda C. Coleman, *Recovered Memories of Childhood Sexual Abuse Unreliable AMA Says*, ASSOC. PRESS, June 15, 1994 (citing the AMA council who reported that "[i]t is not yet known how to distinguish true memories from ingrained events" in cases of childhood sexual abuse).

161. *Daubert*, 113 S. Ct. at 2795; *see also* MacNamara, *supra* note 4, at 86 (quoting David Faigman, professor at Hastings College of Law, as stating that *Daubert's* requirement of scientific data to support entry of scientific evidence, will make it very difficult to enter repressed memories into evidence).

162. *See* AMA Report, *supra* note 99 (citing a Statement of the American Psychiatric Assoc. Board of Trustees, adopted Dec. 12, 1993, which reads:

> "there is no completely accurate way of determining the validity of reports in the absence of corroborating information.... . [F]ew cases in which adults make accusations of childhood sexual abuse based on recovered memories can be proved or disproved and it is not yet known how to distinguish true memories from imagined events in these cases");

APA Issues Statement on Memories of Sexual Abuse, PSYCHIATRIC TIMES, 26 (Feb. 1994) (stating that no one knows how to accurately determine whether recovered memories are true memories).

sexual abuse have later recanted their allegations.[163] The significant controversy surrounding these memories,[164] the high risk of error, and researchers' inconclusive results forestalls repressed memory testimony from fulfilling the evidentiary requirements established in *Daubert*.[165] Also, the controversy surrounding the use of testimony derived from repressed memories detracts from the idea of "general acceptance" that the Court in *Daubert* felt should have some bearing on admissibility of recovered memory testimony.[166]

The exploration of repressed memories may be therapeutically helpful.[167] The Court, however, recognizes a difference between the quest for truth in the courtroom and in the laboratory.[168] Scientific conclusions are often subject to "perpetual revision" while law has serious, immediate implications and must "resolve disputes finally and quickly."[169] Therapeutic treatment of recovered memories as a science is similar to the quest for truth in the laboratory. In a laboratory, it is necessary to test new techniques, as it may be in therapy, when traditional methods are not successful. Novel science, while at times appropriate in a laboratory or clinical setting, is not always appropriate in a legal setting where a judge or jury facing a complex scientific issue might show a science expert undue deference.[170] In the case of repressed memories, courts must be wary of allocating undue deference to a scientific theory that remains highly controversial.

The Court in *Daubert* also quoted Judge Weinstein as explaining, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge, in weighing possible prejudice against probative force under Federal Rule of Evidence 403, exercises more control over experts than over

163. *See, e.g.*, Meyer, *supra* note 1 (explaining how a woman whose father was convicted of sexually abusing her as a child later recanted her allegations that her father abused her after she stopped seeing her therapist, upon whom she heavily relied).

164. *See* AMA Report, *supra* note 99 (recognizing that "[c]onsiderable controversy has arisen within the therapeutic community over the issue, and experts from varied professional backgrounds can be found on all sides of the issue").

165. Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786, 2796-97 (1993).

166. *Id.* at 2797.

167. *Id.* at 2798.

168. *Id.*

169. *Id.*

170. *See* Richard D. Friedman, *The Death and Transfiguration of Frye*, 34 JURIMETRICS J. 133, 146 (1994) (indicating that deference may be appropriate "the broader and more recurrent the scientific issue is").

lay witnesses."[171] For this reason, caution must be exercised before allowing experts from either side to testify about the merits of recovered memories.

If the medical community continues to be sharply divided about the validity of recovered memories as proof of childhood sexual abuse, then the legal system should not accept such memories as evidence in a case against the abuser. Relying on unsubstantiated theories about repressed memories of sexual abuse may result in devastating consequences for both victims and their families.[172]

III. SHOULD THE LEGAL SYSTEM PROVIDE RELIEF TO INDIVIDUALS HARMED BY THERAPISTS WHO ENCOURAGED RECOVERING MEMORIES?

The previous section discussed whether recovered memories should be allowed in the courtroom as evidence of sexual abuse, in light of disagreement among health care professionals about the validity of these memories. This section analyzes whether the legal system should, in effect, regulate psychotherapy by allowing patients and their families who are injured by falsely recovered memories, to bring claims against therapists who encouraged recovery of the memories.

A. Why Allow Legal Recourse?

Increasingly, society regards doctors as capable of mistakes and thus, holds them liable for such in malpractice actions.[173] Although civil remedies do not eliminate the original harm, monetary awards provide compensation for those injured,[174] and, more importantly,

171. *Daubert*, 113 S. Ct. at 2798 (quoting Weinstein, 138 F.R.D., at 632).

172. *See generally* Vincent J. Candelora, *Facilitated Communication: A Scientific Theory Or A Mode Of Communication? Should People With Autism Have A Voice In Court?*, 99 DICKINSON L. REV. 753 (1995) (explaining how courts accept testimony of sexual abuse through facilitated communications by autistic children). Facilitated communication is a controversial method that was developed in the late 1970s where a "facilitator" lightly holds an autistic child's hands on a keyboard, enabling the child to communicate through typing. *Id.* at 753. During some of these communication sessions, allegations of sexual abuse began appearing. Controversy developed, however, as to whether the communications were coming from the children or the facilitator. In controlled settings where the facilitator was unaware of the questions being asked of the autistic students, the students had a difficult time correctly answering the questions. *Id.* at 759 n.53. As with testimony using recovered memories, there is no scientific consensus on the validity of facilitated communication. *Id.* at 759 n.53. Courts remain divided over whether facilitated communication is based on scientific technique or is merely a form of communication. *Id.* at 760-1; *see also* Meyer, *supra* note 1.

173. 1 DAVID W. LOUISELL & HAROLD WILLIAMS, MEDICAL MALPRACTICE 1-10 (1992) (noting that the tort suit is the system that society has seemingly chosen for helping people injured by doctor's mistakes).

174. *Id.* (stating that although the tort lawsuit and monetary compensation for physical or mental injury is often inadequate, it is currently the only system available).

discourages professionals from repeating negligent acts.[175] In the context of recovered memories, allowing malpractice[176] suits against negligent therapists would provide redress for those injured by the creation of false memories and alert therapists to use care when eliciting memories of past events from patients.

Patients typically seek therapy to understand, or sometimes solve, problems dealing with troubling aspects of their lives. In the course of patient treatment, therapists sometimes hypothesize that repressed memories of sexual abuse are the root of a patient's problems.[177] The patient, like her therapist, is anxious to find a "solution" to her problem and places a tremendous amount of trust in her therapist, often revealing her innermost secrets.[178] Depressed patients may also be vulnerable and desperate for a cure. By identifying past sexual abuse as the cause of a patient's problems, a therapist increases the patient's level of dependence on the therapist. This occurs because of the therapist's position as an authority figure and the patient's desire for treatment.[179] Thus, the patient's vulnerable position in this relationship should cause the therapist to exercise extra care to safeguard against implanting memories.

Increasingly patients who have recovered memories of childhood sexual abuse later allege that their recollections were, in fact, false memories.[180] The patient then believes that she has been victimized

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175. *See* David W. Feeder, II, Comment, *When Your Doctor Says, "You Have Nothing to Worry About," Don't Be So Sure: The Effect of* Fabio v. Bellomo *on Medical Malpractice Actions in Minnesota*, 78 MINN. L. REV. 943, 946 n.19 (1994) (stating that the failure of sound malpractice claims can foster the continuation of malpractice and that malpractice law provides a "vital check on physicians' broad power and discretion").

176. *See* BLACK'S LAW DICTIONARY 959 (6th ed. 1990) (defining malpractice as "[p]rofessional misconduct or unreasonable lack of skill").

177. Glenn Kessler, *Repressed Memories—A Legal-Psychological Tangle of Hidden Horrors*, N.Y. NEWSDAY, Nov. 28, 1993 at 7 (discussing the rise in cases of repressed memories as the source of problems like bulimia and depression).

178. *See* Steven R. Smith, *Mental Health Malpractice in the 1990's*, 28 HOUS. L. REV. 209, 216 (noting that the trust patients imbue in their therapists also serves as a limiting factor in the number of malpractice claims filed against therapists); *see also* Feeder, *supra* note 175, at 946 n.20.

179. *See* Daniel Goleman, *Plausible Explanation for False Memory Reported*, June 8, 1994 at E4 (noting that the "lay expectation is that whatever we remember should be true, but memory does not work like a video camera"); Kessler, *supra* note 177 (quoting a member of the American Psychological Association Ethics Committee, "[p]eople are very desperate and will latch onto a reason for their depression. The diagnosis [of childhood sexual abuse] makes them highly dependent on the therapist.").

180. *See, e.g.*, Meyer, *supra* note 1 (describing the legal furor over a woman's recantation of charges of sexual abuse against her father following his acquittal); Kessler, *supra* note 177 (describing cases where therapists have been sued by patients and patient's alleged abusers on grounds of negligently assisting a patient recover memories of childhood sexual abuse).

not by the alleged abuser, but instead, by her therapist.[181] When this occurs, the patient should have the opportunity to seek compensation through a malpractice claim, just like patients of other health care professionals. Such suits would not only allow recovery to an injured party, but they could also help to establish a standard of care[182] for therapists to rely upon when treating future patients.

Malpractice suits against therapists are usually more complicated than suits against medical doctors because there are less defined standards of care in therapy and the injuries incurred are less easily identifiable.[183] Such mental injuries, however, can be just as serious as their physical counterparts. The result is a more difficult standard of proof.

Since the validity of recovered memories is controversial,[184] regulation of therapists may be necessary to prevent unnecessary harm. Mistakes are made in all fields, and therapists should not be penalized for making honest, reasonable mistakes. False allegations of sexual abuse, however, can harm both the patient and the patient's family.[185] Therefore, legal protection for parties within the sphere of injury may be necessary.

B. Problems With Allowing Suits Against Therapists

When therapists can be sued for use of certain treatments, the legal system is, in effect, mandating how mental health professionals should practice.[186] Taking therapeutic discretion away from therapists could be very harmful to patients, therefore, therapists should

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181. *Cf.* Steven Horowitz, *The Doctrine of Informed Consent Applied to Psychotherapy*, 72 GEO. L.J. 1637, 1646 (1984) (*quoting* THE HARVARD GUIDE TO MODERN PSYCHIATRY 358 (A. Nicholi ed. 1978) as stating that psychotherapy is "a serious undertaking with enormous potential for harm as well as for healing").

182. *See* Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, 17 J. PSYCHIATRY & LAW 163, 173 (1989) (stating that courts can create standards of care by outlining duties in malpractice cases and by adopting professional standards in their determination of a duty).

183. *See* BARBARA A. WEINER & ROBERT M. WETTSTEIN, LEGAL ISSUES IN MENTAL HEALTH CARE, at 152, 156, 164 (1993) (explaining that as a result of use of different schools of therapy and a patient's oftentimes pre-existing condition, attaching a particular causal event to a resultant symptom can sometimes be difficult).

184. *See supra* notes 33-55, and accompanying text (describing disagreement among therapists about the validity of recovered memories).

185. *But cf.* Bird v. W.C.W., 868 S.W.2d 767, 770 (Tex. 1994) (holding that a psychologist has no professional duty to a third party not to misdiagnose child abuse).

186. *See* WEINER & WETTSTEIN, *supra* note 183, at 149 (indicating that for better or worse, fear of liability affects how a therapist cares for her patient); *cf.* Mark A. Small, *Legal Psychology and Therapeutic Jurisprudence*, 37 ST. LOUIS U. L.J. 675, 678 (1993) (stating that a primary form of regulation for mental health professionals is state licensing laws).

be given wide latitude in deciding what is best for a patient.[187] Still, the legal system needs to oversee therapy methods, hopefully with the help of therapists, to ensure that patients get at least a minimum standard of care.[188]

Another problem with subjecting mental health professionals to tort liability is that it may cause therapists to be more careful during therapy, which may decrease trust between the therapist and patient.[189] This trust is thought to be an important component of successful therapy,[190] thus the patient may suffer from policies which make malpractice suits against therapists more likely.

C. Do Not Forget The Patient

When deciding whether the mental health field should be regulated by allowing lawsuits against therapists, the well-being of the patients must be considered. Therapeutic jurisprudence is a fairly new area of mental health law,[191] which argues that the legal system should consider therapeutic ramifications of policies and laws.[192] This does not mean that the best therapeutic outcome should always be the primary factor in setting policy, but it should at least be con-

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187. *See* Schopp & Wexler, *supra* note 182, at 172 (*citing* Rogers v. Okin, 634 F.2d 650, 657 (1st. Cir. 1980)) (holding that a physician should be given discretion to balance harm to the patient against the need to prevent violence when determining whether to force medications on patients). Schopp and Wexler believe that this approach provides little guidance for courts' review of the actions of physicians in negligent care cases. Schopp and Wexler, *supra* note 182, at 172.

188. *See* Schopp & Wexler, *supra* note 182, at 172 (recommending that courts utilize guidelines from professional organizations in conjunction with an individual doctor's professional judgment in defining standards of due care); *Cf.* Feeder, *supra* note 175, at 945-46 (stating that there must be a balance between a physician's liability concerns and checks on the physician's power and discretion).

189. Schopp & Wexler, *supra* note 182, at 183-84 (explaining that the therapist-patient relationship is based on mutual trust and the patient's belief that the therapist has the patient's well-being as her primary interest. Cautious therapy in the interest of avoiding liability can cause the patient to lose trust in the therapist because a patient believes the therapist no longer has her well-being as her primary interest.).

190. Schopp & Wexler, *supra* note 182.

191. *See* Ingo Keilitz, *Justice and Mental Health Systems Interactions; An Overview and Introduction to the Special Issue*, 16 LAW & HUM. BEHAVIOR 1 (1992) (arguing that mental health law originally concentrated on patient rights, but since those issues have largely been addressed, mental health law must now concentrate on the processes and systems of the laws themselves); Ingo Keilitz and Ronald Roesch, *Improving Justice and Mental Health Systems Interactions: In Search of a New Paradigm*, 16 LAW & HUM. BEHAVIOR 5, 13 (1992) (advocating that the "interactions and the interorganizational relations" of the justice and mental health systems need to be more closely studied).

192. *See* David B. Wexler, *Putting Mental Health Back in to Mental Health Law*, 16 LAW & HUMAN BEHAVIOR 27, 32 (1992) (explaining that "therapeutic jurisprudence" approaches the law as a "social force" that in the process of creating substantive rules or legal procedures "may produce therapeutic or antitherapeutic consequences").

sidered.[193]

For example, creating specific standards of care may aid therapists and courts alike in determining what is acceptable therapy for most patients.[194] A set standard of care, however, may limit the therapeutic options available for the patient.[195] Although a particular standard might be fine for most patients, it may not be the optimal treatment for every patient.[196] A conflict arises from the fact that a strict standard cannot accommodate all situations or an individual patient's specific needs, but without a standard, there is no clear basis from which to judge whether a doctor was acting reasonably. Therapists may also feel uncomfortable disregarding a standard if it makes malpractice liability more likely.[197] Thus, they might opt for a potentially less beneficial type of therapy.[198] Therapeutic jurisprudence calls for the therapeutic effect on the individual patient to be considered when standards of care are set[199] and argues against strict standards of care that would unduly restrict the options of both the therapist and the patient.[200]

When deciding whether to allow suits against therapists for encouraging recovered memories, the effect on the patient must be considered. If the goal of deterrence through attaching liability to the encouragement of false memories is realized, therapists may become less likely to encourage recovered memories.[201] If all recovered memories are false memories, this is a desirable result.[202] If some memories, however, are true memories, then therapists should be

193. *Id.* (noting that the goal of therapeutic jurisprudence is to clarify "the therapeutic consequences of legal arrangements" not to "trump other considerations").

194. *But cf.* Steven Horowitz, Note, *The Doctrine of Informed Consent Applied to Psychotherapy*, 72 GEO. L.J. 1637, 1639 (1984) (stating that standards of care are difficult to determine in psychotherapy because few psychological therapies are universally accepted).

195. *See* Schopp & Wexler, *supra* note 182, at 175 (explaining that although a set standard of care encourages doctors to act in a manner that protects patients in general, a set standard can also diverge from the interests of a specific patient, thus forcing the doctor to act in a manner that conflicts with the patient's best interests).

196. Schopp & Wexler, *supra* note 182, at 175.

197. Schopp & Wexler, *supra* note 182, at 178.

198. Schopp & Wexler, *supra* note 182, at 178.

199. Wexler, *supra* note 192, at 32.

200. *See* Wexler, *supra* note 192, at 32 (arguing that therapeutic jurisprudence aims for a "weighing of other potentially relevant normative values" including patient "autonomy" and "liberty" in setting legal standards and practices).

201. *See* Schopp & Wexler, *supra* note 182, at 174 (noting that one of the "general purposes" of tort law is to encourage specific behavior that protects the interests of others).

202. *But see* Kessler, *supra* note 177, at 7 (stating that even if memories are false, working through their underlying causes may still be therapeutically helpful to the patient).

free to explore the possibilities with each patient.[203] While we may not want these unreliable memories to be used in the courtroom, it may still be beneficial for them to be explored in therapy.[204]

Therapists should not necessarily be held to the same standard when treating patients as should evidence which is to be admitted in court. This is because it is important for new techniques to be tried, potentially allowing psychotherapy to advance in its understanding and implementation of appropriate therapy. Theories, however, such as recovered memories, or techniques such as hypnosis, which are not accepted by a significant segment of the mental health field,[205] should be used with caution if patients may be injured in the process.

D. Theories on Which to Sue

When injury results, a patient can sue a therapist for malpractice based on a cause of action of negligence.[206] To prove negligence, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, that this duty was breached, that injury resulted, and that the injury was caused by the therapist's breach of duty.[207]

A duty between a therapist and a patient can be demonstrated through the theory of a contract between the therapist and patient[208] or by establishing that providing care creates a professional relationship and with it, a duty.[209] Establishing the breach of duty is more

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203. *Id.*

204. *See* Bruce Bower, *Child Sexual Abuse: Sensory Recall and Treating Survivors*, SCIENCE NEWS, June 4, 1994 at 365 (noting that the trauma of childhood sexual abuse may "interfere with the brain's conscious recall system" and that therapy based either on the past trauma or present problems of the patient helped to reduce depression).

205. *See* Kanovitz, *supra* note 81 (citing an American Medical Association Report that states that therapists disagree about whether memories can be repressed and later recovered); *cf. supra* notes 92-98 and accompanying text (explaining that the use of hypnosis has different uses therapeutically and forensically).

206. *See* Steven R. Smith, *Mental Health Malpractice in the 1990s*, 28 HOUS. L. REV. 209, 218 (1991) (stating that "negligence is the most common form of malpractice liability," but that other forms include battery, intentional infliction of mental distress, and false imprisonment); *see also* Ira H. Leesfield, *Negligence of Mental Health Professionals: What Conduct Breaches Standards of Care*, 23 TRIAL 57, 57-58 (1987) (listing therapy practices which are often found to be negligent, including sexual misconduct, using inappropriate drug therapy, failing to prevent a suicide, breaching the duty to warn third parties of violent acts of a patient, and breaching the duty of confidentiality).

207. PROSSER & KEETON ON TORTS 164-65 (5th ed. 1984).

208. WEINER & WETTSTEIN, *supra* note 183, at 151 (noting that a contract is established when in return for a fee, the therapist provides the patient with services).

209. WEINER & WETTSTEIN, *supra* note 183, at 151 (explaining that a duty arises when the patient seeks care and the therapist provides it).

challenging.[210] First, it is difficult to prove that an injury was caused by the therapist. Additionally, a lack of community standards of care makes it difficult to determine what therapy should be used to satisfy the duty.[211]

To support a malpractice claim, a plaintiff must show that there is a recognized standard in the medical community and the physician in question negligently departed from the standard when treating the patient.[212] This is a difficult burden to meet for a patient who has recovered memories.[213] There are currently no standards for therapeutic use of recovered memories on which to base a claim.[214] Still, the number of suits filed against therapists are increasing[215] and the awards have been as high as 5.15 million dollars.[216]

There are some cases where it is clear that a therapist has breached a standard of care. For instance, a therapist was found liable for negligence and intentional infliction of emotional distress when he injected a patient with sodium pentothal between 141 and 171 times to

210. WEINER & WETTSTEIN, *supra* note 183, at 151 (noting that without obvious negligence an expert witness must be used to attempt to establish a standard of care that the provider fell below).

211. Leesfield, *supra* note 206, at 57 (stating that professionals often do not agree on a diagnosis or treatment and liability can only be established if it is shown that the therapist clearly acted contrary to the correct treatment recognized within the profession (*citing* Bourgeois v. Dade County, 99 So.2d 575, 577 (Fla. 1956)); *see also* WEINER & WETTSTEIN, *supra* note 183, at 163-64 (suggesting that psychotherapy is the least likely area where a malpractice suit will be successful because there are no universally accepted guidelines as to what type of psychotherapy should be used and when).

212. *See* LeBoeuf, *supra* note 24, at 97 (*citing* Davis v. Virginian Ry. Co., 361 U.S. 354, 357 (1960)).

213. *Cf.* John W. Strong, McCormick on Evidence § 203 (4th ed. 1992) (stating that probative value should be shown more strongly when the evidence in question is esoteric in order to prevent a jury from giving undue significance to that evidence).

214. *Cf.* J. Albert, L. Brown, S. Ceci, Christine Courtois, Elizabeth Loftus, & P. Omstein, WORKING GROUP ON INVESTIGATION OF CHILDHOOD ABUSE FINAL REPORT, American Psychological Ass'n (1996) (failing to establish clear guidelines for treatment of recovered memories but explaining the issues involved and the viewpoints of various experts in the field).

215. *See* Kessler, *supra* note 177, at 7 (noting that in 1989, five civil and criminal cases were filed in the United States and in 1992, 50 cases were filed).

216. *See* Kessler, *supra* note 177, at 7 (citing the 1992 jury award for a 33 year-old woman from Akron, Ohio, who after recovering memories of incest, accused her uncle of sexually abusing her as a child).

determine whether the patient was sexually abused by her mother.[217] Some therapists may use nothing more than "talking therapy," but may illicit such unbelievable "memories" of sexual abuse that therapeutic negligence seems obvious.[218] Other cases, however, are more subtle. A therapist may simply suggest that the patient may have been sexually abused, so maybe she should think about it, and see if any memories resurface.[219]

E. Parents suing therapists

Not only do patients suffer when false memories are recovered, but, the patient's family often suffers as well, especially when a relative is accused of abuse. Family members may lose their jobs, endure avoidance by the patient, or become maligned in their community.[220] For these reasons, a patient's family members may wish to sue a therapist who has assisted in recovering memories. It is more difficult to prevail when a claim is made by a patient's relative against a therapist, rather than by the patient herself.[221] To prove negligence on the part of a therapist, a family member[222] must first show that the therapist owes him or her a duty of care.[223] This duty is more difficult

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217. Joyce-Couch v. DeSilva, 602 N.E.2d 286, 289 (Ohio App. 1991) (noting that the patient indicated early on in the therapy through the use of sodium pentothal that she had been sexually abused by her mother yet the therapist continued injecting the patient with sodium pentothal for four years despite increasing signs of distress, including addiction to sodium pentothal). The court in this case noted that sodium pentothal is an "accepted form of treatment to discover repressed traumatic events hidden in a patient's subconscious." *Id.* at 288. However, there was "no medical justification" for the large number of treatment sessions conducted. *Id.* at 293. The court also found malice in the therapist's conduct from evidence presented indicating that the therapist told the patient to masturbate and rub her breasts during the sodium pentothal therapy to try to help her remember the abuse. *Id.*

218. *See* Kessler, *supra* note 177, at 7 (citing the case of Laura Pasley who settled her case for a six-figure sum after suing her therapist for implanting false memories of being sexually abused by her mother, brother, grandfather and others; Laura Pasley eventually decided that her memories stemmed from horror movies she saw as a child). *Id.*

219. *See* Kessler, *supra* note 177, at 7 (quoting Mitch Bobrow, a therapist who says he can sense when a patient has been sexually abused, even if the patient has no such memories. He says that he uses psychological "forceps" to help trigger memories. Bobrow has "helped" 25% of his patients recover memories of sexual abuse.).

220. *See* Bert Black, Francisco J. Ayala & Carol Saffran-Brinks, *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 718-20 (1994) (citing examples of problems which may occur as a result of incorrect nonscientific conclusions in trials).

221. Brian D. Gallagher, *Damages, Durress, and the Discovery Rules: The Statutory Right of Recovery for Victims of Childhood Sexual Abuse*, 17 SETON HALL LEGIS. J. 505, 533 (1993).

222. *See* note 23 and accompanying text (stating that suits by fathers are most likely since recovered memories generally involve incest).

223. *See* Leesfield, *supra* note 206, at 57-58 (listing therapy practices which are often found to be negligent, including having sex with a patient, using inappropriate drug therapy, failing to prevent a suicide, breaching the duty to warn third parties, and breaching the duty of confidentiality).

to prove than in most negligence cases, as the family member is a third party in the therapist-patient relationship. It is clear that a therapist owes a duty of care to the patient, but it is less clear whether this duty extends to family members.[224]

The general rule is that a duty of care can extend to a third party when it is foreseeable that actions, or inactions, will affect a third party.[225] Duty can also be established by determining that the defendant's conduct is directed, at least in part, at the plaintiff,[226] or when there is a relationship between the actor and the third party, such as a therapist and parent.[227] Several factors may be considered to help determine whether a duty exists to a third party. These factors include "the foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor."[228] In *Montoya v. Bebensee*,[229] the court held that there is social utility for therapists to report possible child abuse, but there is also a risk of substantial injury if one is falsely accused.[230]

Another cause of action available to family members injured by

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224. *See* Vineyard v. Kraft, 828 S.W.2d 248, 252 (Tex. Ct. App. 1992) *and* Dominguez v. Kelly, 786 S.W.2d 749, 751 (Tex. Ct. App. 1990) (holding that a therapist does not owe a duty of care to a patient's parents); *Bird*, 868 S.W.2d at 769 (holding that a psychologist has no professional duty to the father of a patient where the psychologist falsely accused the father of sexually abusing his child. The court stated that the public good of diagnosing sexual abuse outweighs the risk of misdiagnosis.).

225. *See* Slaughter v. Legal Process and Courier Serv., 162 Cal. App.3d 1236, 1249 (1984) (stating that whether a duty is owed "depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability"); Dillon v. Legg, 68 Cal.2d 728, 740 (1968) (stating that the primary factor in determining duty is whether it is reasonably foreseeable that the plaintiff will suffer emotional distress); Montoya v. Bebensee, 761 P.2d 288, 288 (Colo. Ct. App. 1988) (stating that a "mental health provider owes a duty to refrain from taking actions of her own that may foreseeably result in injury to another").

226. *See* Molien v. Kaiser Foundation Hospitals, 616 P.2d 813, 817 (Cal. 1980) (holding that a doctor owed the plaintiff a duty because it was foreseeable that the plaintiff would suffer emotional distress); *see also* Britton v. Soltes, 563 N.E.2d 910, 912 (Ill. App. Ct. 1990) (holding that a doctor's failure to diagnose tuberculosis in a patient, who subsequently infected his family, did not extend a duty to the patient's family, since injury to the family was not foreseeable); Sullivan v. Cheshier, 846 F. Supp. 654, 660 (N.D. Ill. 1994) (holding that parents may not sue their daughter's psychologist when the psychologist helped their daughter "remember" sexual abuse by an older sibling. The court held that parents can only sue if the psychologist's actions were directed against the parents, and, if a false memory was imposed.).

227. *See* Smith v. Pust, 23 Cal. Rptr. 2d 364, 368 (Cal. Ct. App. 1993) (stating that a claim may be made where there is a professional relationship between the plaintiff and defendant and a meaningful connection between the wrongful act and the relationship).

228. Smith v. Denver, 726 P.2d 1125, 1127 (Colo. 1986).

229. 761 P.2d 288 (Colo. Ct. App. 1988).

230. *See Id.* (holding a therapist liable for suggesting limited visitation rights for a father accused of sexually abusing his child).

false accusations of sexual abuse is loss of consortium.[231] Some courts allow malpractice claims for negligent and intentional interference of the parent-child relationship.[232] Other courts, however, restrict loss of consortium claims to spousal relationships.[233] Loss of consortium damage should be permitted, however, when a therapist encourages a patient to end relations with her parents, as this interferes with the parent-child relationship.[234] Damages would most likely increase if this harm was intentional.[235] Finally, several states have statutory provisions that allow a parent to collect damages for the loss of the parent-child relationship.[236]

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231. Consortium is defined as "conjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation." Loss of consortium consists of other intangibles such as companionship and sexual relations. BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

232. *See* Kunz v. Deitch, 660 F. Supp. 679, 683 (N.D. Ill. 1987) (holding that a father could sue his parents for trying to separate him from his son); Person v. Behnke, 611 N.E.2d 1350, 1353-55 (Ill. App. Ct. 1993) (stating that a father could have a valid claim for loss of custody and visitation rights); Dymek v. Nyquist, 469 N.E.2d 659, 665-66 (Ill. 1984) (holding that a father was allowed to sue his ex-wife and her psychiatrist for destroying his relationship with his son); Bullard v. Barnes, 468 N.E.2d 1228, 1232 (Ill. 1984) (holding that when malpractice causes the death of a child, parents may sue for a loss of the parent-child relationship); Sanchez v. Schindler, 651 S.W.2d 249, 252-53 (Tex. 1983) (stating that 35 states allow parents to recover for the loss of companionship and society of their children in a wrongful death action); Shockley v. Prier, 225 N.W.2d 495, 500 (Wis. 1975) (allowing for recovery of damages for loss of companionship, comfort, aid and society of a child). *But see* Baxter v. Superior Court, 563 P.2d 871, 874 (Cal. 1977) (holding that while a parent may not sue for loss of consortium, the parent is not barred from a suit for interference with the parent-child relationship); Curtis v. Cook, 440 N.E.2d 942, 947-48 (Ill. App. Ct. 1982) (holding that a parent may not sue for loss of the parent-child relationship).

233. *See* Alber v. Illinois Dep't of Mental Health & Developmental Disabilities, 786 F. Supp. 1340, 1364-65 (N.D. Ill. 1992) (holding that even intentional interference between a parent and child relationship was not actionable); Dralle v. Ruder, 529 N.E.2d 209, 214-215 (Ill. 1988) (holding that suit for loss of consortium of a child is prohibited where the injury to the parent is simply the "derivative consequence of an injury to the child"); Siciliano v. Capitol City Shows, Inc., 475 A.2d 19, 22 (N.H. 1984) (holding, in a case where two children were killed when an amusement ride malfunctioned, public policy precluded the creation of a new cause of action for negligently injured or killed children. The reasons the court listed included: the insufficiency of money to replace a lost child, the emotional nature of the situation, and an increase in insurance premiums.).

234. *See* Surina v. Lucey, 214 Cal. Rptr. 509, 512 (Cal. Ct. App. 1985) (holding that a third party may not interfere with a parent's rights to custody, even if the interference is motivated by kindness to the child); RESTATEMENT (SECOND) OF TORTS § 700 (1987); PROSSER ON TORTS § 124 (1984) (stating that loss of services is not essential for interference with the relation).

235. Plante v. Engel, 469 A.2d 1299, 1301 (N.H. 1983) (holding that a claim of loss of consortium of a child is acceptable where there was intentional interference with parental custody); PROSSER, LAW OF TORT §7 (5th ed. 1971).

236. *See, e.g.*, IDAHO CODE § 5-310 (1979) (*interpreted in* Hayward v. Yost, 242 P.2d 971 (Idaho 1952) to include the loss of protection, comfort, society and companionship); IOWA R. CIV. P. 8 (1983) (stating that parent may sue "for actual loss of services, companionship, and society" and reflecting the holding of Wardlow v. City of Keokuk, 190 N.W.2d 439 (Iowa 1971)); WASH. REV. CODE ANN. 4.24.010 (West 1983) (stating an action for damages for loss of services, support, love and companionship, and injury to or destruction of the child-parent relationship and reflecting the holding in Lockhart v. Bisel, 426 P.2d 605 (Wash. 1967)). *But see* ALA. CODE § 6-5-

There are several reasons why negligent interference and intentional interference tort claims are rejected in recovered memory cases. First, a tort remedy is still available to the directly injured party.[237] Second, if claims could be brought by both the family members of patients and the patient herself, there would be a multiplication of claims against the therapist.[238] Finally, the difficulty in determining damages is too great.[239]

A more difficult, but sometimes more successful cause of action for parents is infliction of emotional distress. This claim is generally only allowed if the plaintiff was in the zone of danger, an area determined by the proximity of the third party to the commission of the tort in terms of time, location, and relationship.[240]

F. Jury Orders Therapist To Pay Father Five Hundred Thousand Dollars

Recently, a California court set precedent by awarding a father accused of sexually molesting his daughter, $500,000.00 in damages from the daughter's therapist.[241] The daughter, Ramona, was diagnosed with bulimia nervosa.[242] A marriage, family and child counselor (MFCC), told the daughter's mother that eighty percent of all people who suffer from eating disorders were sexually abused as children.[243] When the MFCC told the daughter that eating disorders strongly correlate with sexual abuse, the daughter did not know whether or not she was abused.[244] Through therapy, she began having mental flashbacks of abuse, but did not know whether they were real events.[245] To determine whether these flashbacks were real, the

390 (1975) (stating that there is no recovery for the loss of a child's society).

237. *Dralle*, 529 N.E.2d at 213 (stating that a monetary amount may be used to remedy the devalued parent-child relationship and the difficulty in assigning such an amount).

238. *Dralle*, 529 N.E.2d at 213.

239. *Dralle*, 529 N.E.2d at 213.

240. *See* Corso v. Merrill, 406 A.2d 300, 307-08 (N.H. 1979) (stating that if the zone of danger is well defined, then allowing third parties to use this cause of action will not lead to unlimited liability).

241. Ramona v. Isabella (Cal. Sup. Crt. C61898, 1994).

242. Ramona v. Isabella (Cal. Sup. Crt. C61898, 1994) (Mother's Deposition 13/18-16/7).

243. Ramona v. Isabella (Cal. Sup. Ct. C61898, 1994) (Mother's deposition 65/9-67/24). This statistic is contradicted by Dr. Harrison G. Pope Jr. of Harvard Medical School who found that the rate of childhood sexual abuse in bulimics is no different than the general population. Dr. Harrison G. Pope Jr., *Childhood Sexual Abuse and Bulimia Nervosa: A Comparison of American, Austrian, and Brazilian Women*, 151 AM. J. PSYCHIATRY 732, 735 (1994) (stating that 24% to 36% of bulimic women from 3 countries reported childhood sexual abuse and these percentages are not greater than those found in the general population).

244. Pope, *supra* note 244.

245. Pope, *supra* note 244.

counselor brought the daughter to a psychiatrist to be tested with sodium amytal.[246] The psychiatrist told the counselor and the daughter that one cannot lie under sodium amytal, unless trained to do so.[247] During the sodium amytal testing, the daughter believed that her father had raped her; afterwards however, she could not recall whether her statements were true.[248] When she questioned the validity of her memories, the psychiatrist told Ramona that her memories must be true.[249] Since these events, Ramona has had an unshakable belief that her father raped her and has filed a civil action against him.[250] Consequently, Ramona's mother filed for divorce, her father lost his job, and his reputation has been ruined.[251]

Following the discovery of Ramona's repressed memories, Ramona's father sued the psychiatrist for negligent infliction of emotional distress. As stated above, a duty is owed to a third party when it is foreseeable that the third party will be injured and when actions are directed, at least in part, at the third party.[252] Since sodium amytal was used to determine if Ramona's father raped her, Ramona's father was the object of the procedure, and thus the therapist owed a duty of care to him.[253] The court determined that the psychiatrist's behavior of telling the counselor and Ramona that Ramona could not lie under sodium amytal therapy was outrageous and extreme, and, therefore, there was a triable issue of material fact.[254] The jury determined that since Ramona's father suffered grave injury, he was entitled to an award of $500,000.00.[255]

G. Preventing Injury To Both Patients and Parents Through Informed Consent

In addition to allowing suits for malpractice or negligence, therapists can protect patients and their families by obtaining a patient's informed consent before performing memory recovery procedures.

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246. Pope, *supra* note 244.

247. Ramona v. Isabella (Cal. Sup. Ct. C61898, 1994) (Marriage, family and child counselor's deposition 54/4-20). Dr. Martin T. Orne states that sodium amytal is not useful in obtaining the truth, instead it makes the patient believe in the truth of a statement.

248. *Id.*

249. *Id.*

250. Ramona v. Isabella (Cal. Sup. Crt. C61898, 1994).

251. *Id.*

252. *See* Molien v. Kaiser Foundation Hospitals, 616 P.2d 813, 817 (Cal. 1980).

253. Ramona v. Isabella, (Cal. Sup. Crt. C61898, 1994).

254. *Id.*

255. *Id.*

Informed consent serves three purposes: it enables patients to avoid harm and to retain control over their therapy, it encourages therapists to consider the pros and cons of a particular therapy, and it increases a patient's chances of recovery if harmed by an unscrupulous therapist.[256]

The concept of informed consent originated with the landmark case of *Mohr v. Williams*.[257] Initially, this doctrine required doctors to obtain consent for treatment, but eventually expanded to require doctors to give patients enough information about therapies so that patients can make educated decisions as to whether to accept that form of treatment.[258]

Informed consent generally requires a patient to be informed of the potential benefits and risks of the contemplated therapy, the expected prognosis with and without treatment, and any possible alternative treatments.[259] Suits based on lack of informed consent can be based on lack of competence to consent to treatment, lack of voluntariness or lack of sufficient information.[260]

There are two standards which are used to determine whether the patient has received enough information. The first is a professional standard, which determines whether the information received was the information another professional in the particular jurisdiction would have given.[261] The second standard is the reasonable patient standard, which requires the professional to give as much information as a reasonable patient would desire.[262] To win a suit based on a failure to obtain informed consent, the patient must show that the risks involved with a therapy should have been disclosed; the risks

256. Horowitz, *supra* note 181, at 1637, 1640.

257. 104 N.W. 12 (Minn. 1905) (holding a doctor guilty of battery if he does not receive consent from a patient prior to giving treatment); *see also* WEINER & WETTSTEIN, *supra* 183, at 115 (stating that the judicial doctrine of informed consent began as early as 1914, with the recognition that patients have the right to refuse needed medical treatment).

258. WEINER & WETTSTEIN, *supra* note 183, at 115 (explaining that the therapist has the burden of giving the patient necessary information).

259. WEINER & WETTSTEIN, *supra* note 183, at 118; *see also* Hunter L. Prillaman, *A Physician's Duty to Inform of Newly Developed Therapy*, 6 J. CONTEMP. HEALTH L. & POL'Y 43, 45 (1990) (stating that informed consent requirements include informing patients of potential complications or possible problems with a certain therapy and any possible alternative treatments. A physician must provide as much information as a reasonable medical practitioner would provide and as much as a reasonable patient would want to know.).

260. WEINER & WETTSTEIN, *supra* note 183, at 216; *see also* Horowitz, *supra* note 181, at 1642 (stating that a patient who did not give consent, or was not competent to give consent, could sue for battery and that a patient who was not given sufficient information may have a cause of action in negligence).

261. WEINER & WETTSTEIN, *supra* note 183, at 218.

262. WEINER & WETTSTEIN, *supra* note 183, at 218.

were not, in fact, disclosed; the risks materialized; the patient would not have accepted the therapy if she knew of the risks involved; and that the materialized risks resulted in injury.[263]

In recovered memory cases, the patient could be warned that the methods used are experimental, or not accepted by others in the profession, so that the patient does not base major life decisions solely on novel techniques.[264] The Committee on Privacy and Confidentiality of the California State Psychological Association recommends that therapists give patients three documents before beginning psychotherapy—a client's rights statement, an initial contract form and an informed consent form, that disclose some of the risks of psychotherapy.[265] Horowitz argues that use of these documents would ensure that therapists inform patients, establish a profession standard of care and help reduce problems of proof during litigation.[266]

Informing a patient that recovered memories are not universally accepted can help patients control therapy outcomes. Although recovering past memories may help patients understand current psychological problems, these memories may be devastating to both the patient and the patient's family. Worse yet, if these memories prove to be false, the family will have suffered unnecessary and irreparable harm. Thus, informed consent is as important in therapy as in all other health professions.[267]

IV. CONCLUSION

Sexual abuse is a heinous crime and the legal system must do everything possible to punish abusers and protect victims. This must not, however, include accepting unverified theories to establish the existence of sexual abuse. Protection is not only needed for those

263. Horowitz, *supra* note 194, at 1658.

264. For example, the American Psychiatric Association Board Statement on Memories of Sexual Abuse states that "it may be important to caution the patient against making major life decisions during the acute phase of treatment." Am. Psychiatric Ass'n, Statement on Memories of Sexual Abuse, Dec. 12, 1993 at 4. This advice contradicts therapists' frequent suggestion that patients break off relations with family members who do not believe that their recalled memories of sexual abuse actually occurred. *But see* Horowitz, *supra* note 194, at 1652 (stating that disclosing possible negative effects of a particular treatment might harm the subsequent therapy).

265. Horowitz, *supra* note 194, at 1662-63.

266. Horowitz, *supra* note 194.

267. Consent does not foreclose the ability for a patient to sue for injuries. *Cf.* LeBoeuf, *supra* note 24, at 97 (explaining that in cases where therapists have sexual relations with patients, consent is irrelevant because the sex would not have taken place but for the therapeutic relationship, therefore, the injury occurred due to therapy).

abused, but also for those falsely accused of sexual abuse, and for those falsely led to believe that they were victims of sexual abuse.

Courts in the United States have developed a trend to accept evidence of abuse as recovered memories, elicited through therapy. Public pressure to eradicate sexual abuse, however, must not lead to the premature acceptance of recovered memories of sexual abuse. That does not help the patient, nor anyone else involved.

The legal system must provide a legal recourse to individuals who are injured by therapists negligently encouraging patients to recover memories. The injuries incurred by a patient falsely believing her father raped her can be extremely serious. Therefore, therapists must use caution before they damage someone's life by utilizing a theory that is not widely accepted as valid by the mental health community. If a therapist truly believes the recovered memories are real, one way to minimize potential harm is to inform the patient that not all therapists agree that recovered memories are true memories. This way, a therapist may still continue therapy in the way she thinks best and a patient is not left believing that she *must* have been abused.

The legal system must protect innocent citizens. It must not embark on a crusade to eradicate childhood sexual abuse by admitting evidence of recovered memories when the very existence of recovered memories is questioned within the mental health field. If the mental health field determines that recovered memories are true memories, then the legal system should take that knowledge and use it in the courts. Until that time, however, those accused of sexual abuse by unreliable memories must be protected so that they do not become the real victims of recovered memories.