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The Admissibility of Expert Testimony on Repressed Memories of Childhood Sexual Abuse in Logerquist v. McVey: Reliability Takes a Back Seat to Relevancy

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Notes

THE ADMISSIBILITY OF EXPERT TESTIMONY ON REPRESSED MEMORIES OF CHILDHOOD SEXUAL ABUSE IN *LOGERQUIST V. MCVEY*: RELIABILITY TAKES A BACKSEAT TO RELEVANCY

I. INTRODUCTION

Over the past twenty years, the number of reported incidents of childhood sexual abuse has increased in America.[1] Among the emerging victims are those adults who claim they suffered sexual abuse as a child but were unable to remember the abuse until years later.[2] A recent trend

1. *See* ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T HEALTH & HUMAN SERVS., THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3-6 to 3-7 (1996) (reporting statistics on child abuse and neglect); PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, NAT'L RESEARCH COUNCIL & INST. OF MED., UNDERSTANDING CHILD ABUSE AND NEGLECT 78 (1993) (same); *see also* Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1348-54 (1995) (describing prevalence of childhood sexual abuse). In 1980, 42,900 children reportedly suffered from sexual abuse, which accounted for an estimated 0.7 per 1000 children. *See* SEDLAK & BROADHURST, *supra*, at 3-3 (providing statistics on child abuse and neglect). By 1986, the number of occurrences of children experiencing sexual abuse increased to an estimated 1.9 per 1000 children, accounting for a total of 119,200 victims. *See id.* at 3-3, 3-7. This number continued to rise to 217,700 children (an estimated 3.2 per 1000 children) in 1993. *See id.* at 3-3, 3-7.

2. *See* Wendy J. Kisch, *From the Couch to the Bench: How Should the Legal System Respond to Recovered Memories of Childhood Sexual Abuse*, 5 AM. U. J. GENDER & L. 207, 208-09 (1996) (noting increase in women reporting repressed childhood sexual abuse); *see also* Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 486-87 (1997) (explaining that attention to childhood sexual abuse flourished beginning in late 1970s and current focus is parents wronged by suits based on false accusations). A large increase in the number of adults accusing parents of child sexual abuse emerged in the late 1980s to early 1990s. *See* Eleanor Goldstein, *False Memory Syndrome: Why Would They Believe Such Terrible Things if They Weren't True?*, 25 AM. J. FAM. THERAPY 307, 307-08 (1997) (acknowledging crescendo of accusations in late 1980s and early 1990s).

Eleanor Goldstein identifies three trends that may explain increased reporting of potentially false memories. *See id.* at 307-08 (explaining trends based on four years of research). First, public access to mind-altering techniques increased, including access to "hypnosis to retrieve so-called memories, use of visualization and imagery techniques, journaling, age regression exercises, body memory work, peer pressure, and careless use of drugs that are often hallucinatory." *Id.* at 307. Second, several movements emerged that stressed "intuition and feelings over science and evidence," including the recovery movement and feminist movement. *See id.* at 308 (discussing trends leading to increased reporting of repressed childhood sexual abuse). Third, the sexual revolution created sexual problems for adults that neither parents nor therapists could tackle, such as inability to commit to relationships and reduction in sexual pleasure due to dangers from sexually transmitted diseases. *See id.* (same).

among these "repressed" child victims of sexual abuse is their use of the legal system to seek redress for harm resulting from the abuse and their reliance upon experts to explain the repressed memory phenomenon.[3]

An initial barrier to legal claims involving repressed memories is the statute of limitations, which holds claims time-barred if not filed within a specified period.[4] Many states, however, now permit repressed child sex-

3. *See* Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 U. KAN. L. REV. 517, 519 (1996) (noting increase in repressed memory claims); Carol McHugh, *Suits Claiming Childhood Sex Abuse on Rise; Lawyers, Experts Question "Recovered Memories"*, CHI. DAILY L. BULL., Sept. 22, 1993, at 1 (same). Repression is the popularized term that explains how a child victim of sexual abuse places memories of the abuse into his or her unconscious and later recalls the abuse. *See* Bertram P. Karon & Anmarie J. Widener, *Repressed Memories: Just the Facts*, 29 PROF. PSCYHOL.: RES. & PRAC. 625, 625 (1998) ("*Repression* refers to the psychological process of keeping something out of awareness because of unpleasant affect connected with it."); *see also* KENNETH S. POPE & LAURA S. BROWN, RECOVERED MEMORIES OF ABUSE: ASSESSMENT, THERAPY, FORENSICS 46 (1996) ("The term *repression* has gained enormous popular currency as a mechanism used to describe how it is that people subjected to traumatic experiences in childhood might forget and then recall these events."). According to one scholar, three elements define the phenomenon:

> (1) repression is the selective forgetting of materials that cause the individual pain;
> (2) repression is not under voluntary control; and
> (3) repressed material is not lost but instead is stored in the unconscious and can be returned to consciousness if the anxiety that is associated with the memory is removed.

David S. Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research, in* CHILD SEXUAL ABUSE AND FALSE MEMORY SYNDROME 149, 150 (Robert A. Parker ed., 1998) (citation omitted).

Although the legal system prefers to use the term repression, clinicians have proffered other terms to describe the phenomenon, including dissociative amnesia and traumatic amnesia. *See* DANIEL BROWN ET AL., MEMORY, TRAUMA TREATMENT, AND THE LAW 578 (1998) (explaining different terms applicable to repressed memory phenomenon). Some proponents prefer to describe the unconscious removal of memories from conscious control as dissociative amnesia, especially given that the American Psychiatric Association ("APA") incorporates it within its diagnostic nomenclature. *See* Judith L. Alpert et al., *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PSYCHOL. PUB. POL'Y & L. 941, 962-65 (1998) [hereinafter *Symptomatic Clients*] (explaining that clinicians prefer term dissociation over repression and describing dissociation process). *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 478-81 (4th ed. 1994) (describing diagnostic features and criteria for dissociative amnesia); Bessel A. van der Kolk, *Traumatic Memories, in* TRAUMA AND MEMORY 243, 248-52 (Paul S. Appelbaum et al. eds., 1997) (discussing traumatic amnesia and dissociation). *But see* William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under* Daubert/Kumho *Analyses*, 5 PSYCHOL. PUB. POL'Y & L. 224, 236 (1999) (concluding that dissociative identity disorder is "one of the least generally accepted of all [psychiatric] diagnoses"). Because courts tend to use the term repression in their analyses, this Note uses the term repression to describe the phenomenon by which a child victim of sexual abuse is unable to recall the abuse until years later.

4. *See* Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extending Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone*

ual abuse cases to proceed to a verdict by applying the discovery rule, which stops the running of the statute of limitations until the plaintiff discovers or should have discovered all the facts essential to the claim.[5] Nevertheless, even if the law tolls the statute of limitations in these cases, it is essential to the victim's claim to use experts to explain the delay between the occurrence of the alleged abuse and the filing of the claim.[6]

The psychiatric and psychological community, however, is divided over whether any reliable scientific support exists to validate repressed memories.[7] The concerns raised by the scientific community are para-

Too Far?, 23 PEPP. L. REV. 1239, 1250-55 (1996) (explaining impact of statute of limitations and discovery rule exceptions on repressed child sexual abuse claims); Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 141 (1993) (describing statute of limitations as "major obstacle" for adult survivor).

5. *See* BROWN ET AL., *supra* note 3, at 591 (explaining status of state laws regarding delayed discovery rule in repressed memory cases); Lonnie Brian Richardson, Notes & Comments, *Missing Pieces of Memory: A Rejection of "Type" Classifications and a Demand for a More Subjective Approach Regarding Adult Survivors of Childhood Sexual Abuse*, 11 ST. THOMAS L. REV. 515, 528 (1999) (noting that twenty-eight states have applied discovery rule to child sexual abuse claims).

Some jurisdictions apply the discovery rule through judicial interpretation of case law. *See* Ernsdorff & Loftus, *supra* note 4, at 144-45 (noting increasing examples of judicial tolling of statute of limitations in repressed memory cases). Others rely on the legislature to enact statutes that will toll the statute of limitations in sexual abuse cases. *See* BROWN ET AL., *supra* note 3, at 591 (identifying states that have enacted legislation to apply discovery rule to repressed memory cases); Ernsdorff & Loftus, *supra* note 4, at 145-47 (identifying states that have enacted legislation to toll statute of limitations in repressed memory cases). Courts also differ as to when the rule applies. *See* Richardson, *supra*, at 528-29 (explaining delayed discovery rule and differing approaches to when rule applies in child sexual abuse cases). *See generally* Russell G. Donaldson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R.5TH 321 (1993) (collecting cases addressing when statute of limitations runs in child sexual abuse cases).

6. *See* Richmond, *supra* note 3, at 519 (explaining that "[c]ourts and litigants want scientific verification of repressed and recovered memories of childhood abuse").

7. *Compare Symptomatic Clients*, *supra* note 3, at 968-75 (describing results of studies that support conclusion that repression exists), *with* Peter A. Ornstein et al., *Comment on Alpert, Brown, and Courtois (1998): The Science of Memory and the Practice of Psychotherapy*, 4 PSYCHOL. PUB. POL'Y & L. 996, 999 (1998) [hereinafter *Science of Memory*] (criticizing studies relied upon by proponents and finding "little empirical support" for dissociation); *see also* Lynn Holdsworth, *Is It Repressed Memory with Delayed Recall or Is It False Memory Syndrome? The Controversy and Its Potential Legal Implications*, 22 L. & PSYCHOL. REV. 103, 108-16 (1998) (identifying views of proponents and opponents of repressed memory); Kisch, *supra* note 2, at 212-15 (same).

Proponents of repressed memory hypothesize that a child victim of sexual abuse places the trauma into his or her unconscious to alleviate the anxiety and other psychological effects that memories of the event invoke. *See* POPE & BROWN, *supra* note 3, at 46 (explaining repression); Jennifer Freyd, *Betrayal Trauma: Traumatic Amnesia as an Adaptive Response to Childhood Abuse*, 4 ETHICS & BEHAV. 307, 312 (1994) (finding that child abuse "by its very nature requires that information about the abuse be blocked from mental mechanisms"); Judith Lewis Herman, *Crime and*

mount to the legal decision to admit such testimony at trial, and courts

Memory, 23 BULL. AM. ACAD. PSYCHIATRY & L. 5, 7-9 (1995) (explaining that terror alters consciousness and leads to dissociative reactions). Proponents view trauma as correlated to repressed memories and embrace four implicit assumptions: (1) the mind can accurately record detailed memories; (2) traumatic memories often are repressed, particularly memories of sexual abuse; (3) traumatic experiences that are more severe are less likely to be remembered; and (4) repressed memories are accessible through different techniques, including psychotherapy. *See* Joel Paris, *A Critical Review of Recovered Memories in Psychotherapy: Part I — Trauma and Memory*, 41 CANADIAN J. PSYCHIATRY 201, 201 (1996) (reviewing evidence for assumptions underlying proponent perspective).

To support their position, proponents stress the large number of clinical cases of repressed memories and corroborated stories of repressed childhood sexual abuse. *See* Ross E. Cheit, *Consider This, Skeptics of Recovered Memory*, 8 ETHICS & BEHAV. 141, 142, 151-60 (1998) (explaining that opponent view overlooks corroborated stories of repressed childhood sexual abuse and providing list of thirty-five corroborated stories); Bertram P. Karon & Anmarie J. Widener, *Repressed Memories: The Real Story*, 29 PROF. PSYCHOL.: RES. & PRAC. 482, 483 (1998) (citing hundreds of cases of World War II veterans who repressed memories of battlefield trauma). *But see* Harrison G. Pope, Jr. et al., *Repressed Memories: Scientific Status of Research on Repressed Memories*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 13-2.1.2, at 154, 161-62 (David L. Faigman et al. eds., Supp. 2000) [hereinafter *Repressed Memories*] (explaining that false positive reports are inevitable in large numbers of reported observations of repression by clinicians); August Piper, Jr., *A Skeptic Considers, Then Responds to Cheit*, 9 ETHICS & BEHAV. 277, 278-90 (1999) (identifying seven flaws in corroborated studies identified by Cheit, including failure to provide relevant case facts that undermine conclusions).

Several studies on amnesia for childhood sexual abuse reveal that victims do report amnesia for the traumatic event or fail to recall the memory when asked about the event years later. *See* John Briere & Jon Conte, *Self-Reported Amnesia for Abuse in Adults Molested As Children*, 6 J. TRAUMATIC STRESS 21, 21-31 (1993) (finding that sixty percent of 420 women and 30 men in outpatient therapy setting experienced amnesia for childhood sexual abuse); Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167, 1167-74 (1994) (finding that participants failed to report or chose not to disclose childhood sexual abuse that occurred seventeen years earlier); *see also* Andrew D. Reisner, *Repressed Memories: True and False*, *in* CHILD SEXUAL ABUSE AND FALSE MEMORY SYNDROME, *supra* note 3, at 193, 200-05 (reviewing survey studies and case studies and concluding that empirical support exists for repression); Alan W. Scheflin & Daniel Brown, *Repressed Memory or Dissociative Amnesia: What the Science Says*, 24 J. PSYCHIATRY & L. 143, 146-79 (1996) (summarizing twenty-five studies and concluding that amnesia for childhood sexual abuse is "robust finding" because amnesia occurred in all studies); *Symptomatic Clients*, *supra* note 3, at 969-74 (describing results of studies that support conclusion that repression exists).

Opponents of repressed memory seriously question a person's ability to repress and recall memories, and they view repressed memories of abuse as more false than true. *See* Harrison G. Pope, Jr. et al., *Can Memories of Childhood Sexual Abuse Be Repressed?*, *in* CHILD SEXUAL ABUSE AND FALSE MEMORY SYNDROME, *supra* note 3, at 169, 172-76 (finding that four studies relied upon by proponents failed to demonstrate that participants suffered amnesia for abuse). A review of sixty-three studies on trauma survivors supports this position as "none of the more than 10,000 victims" participating in the studies reportedly repressed the traumatic memories. *Repressed Memories*, *supra*, § 13-2.1.1, at 155-57 (providing table of studies on trauma survivors and examining studies for repression); *see* Holmes, *supra* note 3, at 151-61 (reviewing studies over past sixty years and finding no support for repression); Paris, *supra*, at 204 (explaining that "recovered memories are more

now must address whether to admit expert testimony on repressed memories.[8] Courts differ, however, as to what evidentiary standard applies to

likely to be false memories"); *Science of Memory, supra*, at 999 (criticizing studies relied upon by proponents and finding "little empirical support" for dissociation).

Opponents rely upon the accepted view in the community that recall of memories is not free of infallibility. *See* Peter A. Ornstein et al., *Adult Recollections of Childhood Abuse: Cognitive and Developmental Perspectives*, 4 PSYCHOL. PUB. POL'Y & L. 1025, 1027-30 (1998) [hereinafter *Adult Recollections*] (identifying problems with memory); Paris, *supra*, at 202 (explaining inaccuracies of memory). Specifically, they emphasize that not all events get into memory because the brain is selective on what events a person attends to and processes. *Adult Recollections, supra*, at 1027 (discussing problems with memory); Paris, *supra*, at 202 (same). Additionally, even if the brain processes an event into long-term memory, several factors influence a person's ability to trace the event, including: "the amount of exposure to a particular event (both in terms of the length of exposure and the number of repetitions), the age of the individual, and the salience of the event (with highly salient experiences surviving longer [than] less salient ones)." *Adult Recollections, supra*, at 1027-28.

Opponents also emphasize that memory recovery techniques used in therapy may operate to implant false memories of abuse. *See* Ira E. Hyman, Jr. & Elizabeth F. Loftus, *Some People Recover Memories of Childhood Trauma That Never Really Happened, in* TRAUMA AND MEMORY, *supra* note 3, at 3, 10-14 (explaining how therapy can create false memories); *see also* Joel Paris, *A Critical Review of Recovered Memories in Psychotherapy: Part II – Trauma and Therapy*, 41 CANADIAN J. PSYCHIATRY 206, 208-09 (1996) (cautioning against use of recovery techniques until empirical support for techniques exist); J.T. Stocks, *Recovered Memory Therapy: A Dubious Practice Technique*, 43 SOC. WORK 423, 431 (1998) (reviewing empirical studies and finding clients "deteriorat[ed] . . . [a]fter entering recovered memory therapy"). Moreover, several methodological flaws undermine the studies relied upon by proponents, including: (1) failure to provide alternative explanations for findings; (2) reliance on correlational rather than multifactorial analyses; (3) small sample sizes; (4) lack of longitudinal and cross-validation designs; and (5) lack of outside corroboration to demonstrate accuracy. *See Symptomatic Clients, supra* note 3, at 961 (identifying methodological problems with studies relied upon by proponents); *see also* Holmes, *supra* note 3, at 151-61 (finding methodological flaws in and alternative interpretations for findings supporting proponent position); Henry L. Roediger, III & Erik T. Bergman, *The Controversy Over Recovered Memories*, 4 PSYCHOL. PUB. POL'Y & L. 1091, 1102 (1998) (finding that "methodological limitations" of studies relied upon by proponent "render most of [the proponent's] conclusions remarkably tentative and speculative, at best").

8. *See* Kisch, *supra* note 2, at 225 (asserting that "law must carefully examine weight it gives" repressed memory evidence because of scientific controversy); *see also* Cynthia V. McAlister, Comment, *The Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under* Daubert, 22 N.C. CENT. L.J. 56, 71-72 (explaining that repressed memory phenomenon lies outside knowledge of jury). Although most jurisdictions find lay and expert testimony on behavioral characteristics of child victims of sexual abuse relevant to sexual abuse claims, some reject the testimony as inconsequential because the jury is familiar with the behaviors at issue. *See* Newkirk v. Commonwealth, 937 S.W.2d 690, 695 (Ky. 1996) (rejecting testimony regarding propensity of child victims of sexual abuse to recant honest accusations of abuse because theory failed reliability analysis, lacked relevance and implied guilt or innocence in particular case); Commonwealth v. Dunkle, 602 A.2d 830, 836-38 (Pa. 1992) (rejecting testimony explaining why child victims of sexual abuse delay or omit reporting for lack of relevance because explanation was within knowledge of jury); *see also* Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child*

such testimony.[9] Some jurisdictions apply a heightened evidentiary standard by requiring the trial court to assess the reliability of the expert testimony; others merely require that the testimony pass on general relevance grounds—an admittedly low-level evidentiary standard.[10] In a recent decision, *Logerquist v. McVey*,[11] the Supreme Court of Arizona joined an intermediate court in California to become the only courts that admit expert testimony on repressed memories on relevancy grounds.[12]

This Note discusses the Supreme Court of Arizona's holding in light of other federal and state court decisions on the admissibility of expert testimony about repressed memories. Part II overviews the evidentiary standards applied to expert testimony generally and repressed memories specifically.[13] Part III describes the facts giving rise to the decision in *Logerquist*.[14] Part IV outlines the *Logerquist* court's approach in permitting expert testimony on repressed memories.[15] Part V examines the court's conclusions regarding the admissibility of repressed memory testimony.[16] Part VI analyzes the likely impact of the Supreme Court of Arizona's deci-

Sexual Abuse Prosecutions, 48 DUKE L.J. 933, 961-68 (1999) (analyzing case law in jurisdictions that permit and deny expert testimony on behavioral characteristics of child victims of sexual abuse).

9. *See* David L. Faigman et al., *Repressed Memories: The Legal Relevance of Research on Repressed Memories*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, *supra* note 7, § 13-1.3, at 528, 532-34 (1997), 148, 151-52 (Supp. 2000) (giving overview of evidentiary issues facing courts addressing admissibility of repressed memory testimony); *cf.* Steele, *supra* note 8, at 961-72 (explaining state paradigms in applying evidentiary standard to behavioral evidence in child sexual abuse prosecutions).

10. *Compare* Shahzade v. Gregory, 923 F. Supp. 286, 287-90 (D. Mass. 1996) (applying reliability standard), Isely v. Capuchin Province, 877 F. Supp. 1055, 1064-66 (E.D. Mich. 1995) (same), State v. Walters, 698 A.2d 1244, 1246-48 (N.H. 1997) (same), State v. Hungerford, 697 A.2d 916, 925-34 (N.H. 1997) (same), State v. Quattrocchi, No. P92-3759, 1999 WL 284882, at *9-16 (R.I. Super. Apr. 26, 1999) (applying reliability and general acceptance standard), *and* Franklin v. Stevenson, 987 P.2d 22, 27-28 (Utah 1999) (applying reliability standard), *with* Wilson v. Phillips, 73 Cal. App. 4th 250, 255 (1999) (applying relevancy standard), *cert denied*, No.S081229, 1999 Cal. LEXIS 7143, at *1 (Oct. 6, 1999).

11. 1 P.3d 113 (Ariz. 2000) (en banc).

12. *See id.* at 123, 134 (holding that relevancy standard applies to expert opinion testimony on repressed memories).

13. For a further discussion of the development of evidentiary standards related to expert testimony, see *infra* notes 18-36 and accompanying text. For a further discussion of the approach by federal and state courts in analyzing the admissibility of expert testimony on repressed memories, see *infra* notes 37-64 and accompanying text. For a further discussion of Arizona case law addressing the admissibility of expert testimony generally and expert testimony on repressed memories, see *infra* notes 65-77 and accompanying text.

14. For a further discussion of the facts giving rise to the Supreme Court of Arizona's holding in *Logerquist*, see *infra* notes 78-98 and accompanying text.

15. For a further discussion of the Supreme Court of Arizona's approach in analyzing the admissibility of expert testimony on repressed memories in *Logerquist*, see *infra* notes 99-162 and accompanying text.

16. For a further discussion of the criticisms of the Supreme Court of Arizona's analysis in *Logerquist*, see *infra* notes 163-87 and accompanying text.

sion regarding the admissibility of repressed memory testimony in childhood sexual abuse cases.[17]

II. BACKGROUND

A. *Evidentiary Standards Applicable to Expert Testimony*

1. *General Acceptance Standard*

The United States Court of Appeals for the District of Columbia Circuit adopted the first standard for admitting expert testimony in *Frye v. United States*.[18] In *Frye*, the court explained that novel scientific testimony is admissible only when the scientific principles underlying the evidence are generally accepted in the particular field.[19] In reaching this conclusion, the court adopted the general acceptance standard as an absolute prerequisite to the admissibility of scientific evidence.[20] The court, however, failed to cite any authority for its ruling or to provide any specific guidance on how to apply this narrowly proscribed standard.[21] Nevertheless, federal and state courts applied *Frye* to unfamiliar scientific and pseudoscientific evidence with little or no reasoning or criticism.[22] This

17. For a further discussion of the potential effects resulting from the Supreme Court of Arizona's decision in *Logerquist*, see *infra* notes 188-98 and accompanying text.

18. 293 F. 1013, 1014 (D.C. 1923) (setting forth evidentiary standard).

19. *See id.* at 1014 (setting forth evidentiary standard). The defendant sought to introduce at trial expert testimony on the results of a systolic blood pressure test administered to the defendant and testimony on the theory that a rise in systolic blood pressure indicates deception. *See id.* at 1013-14. The trial court excluded the testimony and denied defense counsel's request to have the expert administer the test in open court. *See id.* at 1014.

20. *See* David L. Faigman et al., *The Legal Standards for the Admissibility of Scientific Evidence*, *in* 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, *supra* note 7, § 1-2.2, at 1, 7-10 (1997) (recognizing creation of standard but criticizing its lack of clarity regarding when evidence reaches general acceptance and leaving admissibility solely in hands of scientific community).

21. *See Frye*, 293 F. at 1014 (providing no authority for conclusions). The court cited no authority in the opinion, implying that the court was unaware of the widespread implications from the decision. *See* Alma Kelley McLeod, Comment, *Is* Frye *Dying or Is* Daubert *Doomed? Determining the Standard of Admissibility of Scientific Evidence in Alabama Courts*, 51 ALA. L. REV. 883, 884 (2000) (discussing holding and impact of *Frye* opinion). Moreover, the court refrained from defining what constitutes novel scientific evidence, thereby leaving unanswered the vital question of what evidence triggers the standard. *See id.* at 885. The court merely held that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye, 293 F. at 1014.

22. *See* Faigman et al., *supra* note 20, § 1.2.3, at 5-7 (1997) (stating that no resistance to *Frye* appeared in scholarly works or judicial discourse until 1970s); *see*

unquestioned application of the standard began crumbling fifty years later when Congress adopted a general evidentiary framework binding on federal courts.[23]

2. *Relevance Standard*

In 1975, Congress adopted the Federal Rules of Evidence to govern the admissibility of evidence.[24] The basis for admitting exert testimony is set forth in Federal Rule of Evidence 702 ("FRE 702"), which requires the trial judge to ascertain whether the witness qualifies as an expert and whether the witness will testify to matters that are related to the issue in question and that are outside the ken of the average jury.[25] Because FRE 702 makes no reference to the general acceptance standard, either in the text of the rule or its commentary, confusion arose regarding the continued application of *Frye*.[26]

3. *Reliability Standard*

In *Daubert v. Merrell Dow Pharmaceuticals*,[27] the United States Supreme Court settled whether the general acceptance standard or FRE 702 governs the admissibility of expert testimony.[28] In *Daubert*, the Court held that FRE 702 superseded the general acceptance standard as the absolute evidentiary test for admissibility.[29] The Court emphasized, however, that

also Joseph G. Feehan, *Life After* Daubert *and* Kumho Tire: *An Update on Admissibility of Expert Testimony*, 88 ILL. B.J. 134, 134 (2000) (explaining long-time applicability of general acceptance standard in federal and state courts); Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. 485, 495-96 (1997) (same).

23. *See* Faigman et al., *supra* note 20, § 1-2.4, at 7-10 (examining scholarly and judicial criticisms of *Frye*).

24. *See id.* § 1-3.0, at 10-11 (discussing development of Federal Rules of Evidence).

25. *See* FED. R. EVID. 702 (setting forth rule regarding expert testimony). FRE 702 states that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

26. *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-10, at 65-70 (3d ed. 1999) (noting division between courts treating Federal Rules of Evidence as superseding *Frye* and those which continue to follow *Frye* because nothing in Rules or legislative history overruled *Frye*). Some courts interpreted FRE 702 as incorporating *Frye* while other courts focused on the omitted reference to *Frye* as indication that the strict requirement of general acceptance no longer controlled. *Compare* Christophersen v. Allied Signal Corp., 939 F.2d 1106, 1110-11 (5th Cir. 1991) (applying *Frye*), *with* United States v. Williams, 583 F.2d 1194, 1197-98 (2d Cir. 1978) (rejecting *Frye* as sole determinative factor in assessing reliability), *and* State v. Hall, 297 N.W.2d 80, 84-85 (Iowa 1980) (en banc) (rejecting *Frye* in light of expert testimony rule).

27. 509 U.S. 579 (1993).

28. *See id.* at 587 (holding that Federal Rules of Evidence supersede *Frye*).

29. *See id.* The *Daubert* Court based its conclusion that FRE 702 superseded *Frye* on two factors illuminated through the plain language and context of the rule. *See id.* at 588-89 (examining plain language and context of FRE 702). First, Con-

its decision did not completely loosen the restraints on admitting expert testimony, nor did it relax the duties of the trial judge to screen the proffered evidence.[30] The trial judge must assess whether the expert testimony is relevant to the issue in question and, moreover, is reliable (meaning that the proffered evidence must be grounded in scientific reasoning or methodology).[31] To assist the trial judge in his or her gatekeeping role of evaluating the reliability of scientific evidence, the Court outlined four non-binding factors that trial courts may consider: (1) whether the theory or technique evinced by the expert is testable; (2) whether the theory or technique has been subject to peer review; (3) whether the theory or technique has reported or known error rates; and (4) whether the theory or technique is generally accepted in the scientific community.[32]

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gress omitted any reference to the general acceptance standard, implying that the legislature did not intend the standard to have an effect on the enacted rules. *See id.* (same). Second, the legislative purpose in adopting the federal rules of evidence–namely, the creation of rules with a "liberal thrust" in order to "relax[ ] the traditional barriers to 'opinion' testimony"–directly contradicted the conservative approach of *Frye* to apply the general acceptance standard as the sole determinative factor of admissibility. *Id.* at 588-89 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

Although the *Daubert* decision only binds the federal courts, the decision has found its way into state jurisprudence with at least thirty states adopting *Daubert* or employing their own version of reliability within the state evidentiary scheme. *See* Faigman et al., *supra* note 20, § 1-3.0, at 11-12 n.7 (1997), 3 n.4 (Supp. 2000) (identifying states adopting reliability analysis or retaining general acceptance); 1 GIANNELLI & IMWINKELRIED, *supra* note 26, §§ 1-13 to 15, at 80-87 (identifying states adopting reliability analysis or retaining general acceptance); *see also* Bert Black, *Expert Evidence in the Wake of the* Daubert-Jones-Kumho Tire *Trilogy*, 1999 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 125, 171-75 (identifying states applying *Daubert* or retaining *Frye*).

30. *See Daubert*, 509 U.S. at 589 (explaining impact of ruling on trial court's duty to assess admissibility of evidence).

31. *See id.* at 589-92 (explaining relevancy and reliability requirements). The *Daubert* decision fleshed out three prerequisites of an FRE 702 analysis. First, the court must determine if the witness is qualified "by knowledge, skill, experience, training or education." FED. R. EVID. 702; *see also* State v. Alberico, 861 P.2d 192, 202 (N.M. 1993) (identifying elements under Rule 702 analysis); Faigman et al., *supra* note 20, § 1-3.2, at 15 (explaining qualification prong). Second, under the helpfulness or relevancy prong, the court must assess whether the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702; *see also Alberico*, 861 P.2d at 202 (identifying elements under Rule 702 analysis); Faigman et al., *supra* note 20, § 1-3.1, at 13-14 (explaining relevancy prong). Third, the court must assess the validity and reliability of the proffered evidence, both terms that are "interrelated, with the concept of validity encompassing the concept of reliability." *Alberico*, 861 P.2d at 203 (identifying elements under Rule 702 analysis). The Supreme Court of New Mexico also explained that "[v]alidity is the measure of determining whether the testimony is grounded in or a function of established scientific methods or principles, that is, scientific knowledge. Reliability is akin to relevancy in considering whether the expert opinion will assist the trier of fact." *Id.*

32. *Daubert*, 509 U.S. at 593-94 (explaining four factor analysis of expert scientific evidence). In applying these factors, judges need not approach the testimony

Much confusion arose over the application of the *Daubert* decision to technical and specialized knowledge because *Daubert* involved only scientific testimony.[33] The Court settled this confusion in *Kumho Tire Co. v. Carmichael*,[34] when it extended the reliability component to all expert testimony.[35] The Court emphasized, however, that application of the evidentiary standard is flexible, meaning that the court can rely upon the four factors outlined in *Daubert* as well as any other factors deemed appropriate in the particular circumstances.[36]

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with the goal of establishing "a categorical view of the science. Judges are expected to use the *Daubert* factors (and others) to determine if it is more likely than not that the methods and reasoning validly support the proffered scientific expert testimony." Faigman et al., *supra* note 20, § 1-3.3, at 19 (explaining validity prong).

33. *See* Faigman et al., *supra* note 20, § 1-3.4, at 30 (explaining confusion arising after *Daubert* decision); Paul Giannelli & Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in* Kumho Tires, 14 CRIM. JUST. 12, 14-15 (2000) (explaining different approaches by courts to technical knowledge following *Daubert*).

The United States Supreme Court also never addressed the standard of review applicable to evidentiary rulings based on a *Daubert* analysis. *See* Faigman et al., *supra* note 20, § 1-3.5, at 37-38 (explaining confusion regarding standard of review). Some courts accorded greater deference to the trial court by applying an abuse of discretion standard; other courts limited discretion by applying a de novo standard of review to evidentiary rulings. *Compare* Duffee v. Murray Ohio Mfg. Co., 91 F.3d 1410, 1411 (10th Cir. 1996) (applying abuse of discretion to evidentiary rulings on expert testimony), *with* Joiner v. Gen. Elec. Co., 78 F.3d 524, 529 (11th Cir. 1996) (applying plenary review to evidentiary rulings on expert testimony), *rev'd*, 522 U.S. 136, 143 (1997). The Court concluded that an abuse of discretion applies to reviews of *Daubert* decisions. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997) (holding that appellate courts hearing challenges to *Daubert* rulings must "give the trial court the deference that is the hallmark of abuse-of-discretion review").

34. 526 U.S. 137 (1999).

35. *See id.* at 149 (holding that reliability and relevancy standard applies to all expert testimony). In reaching this conclusion, the Court stated that the federal rules grant "all experts, not just . . . 'scientific ones,'" greater "latitude" to testify regarding their opinions compared to laypersons. *See id.* at 148 (explaining why distinction between types of expert testimony is inappropriate). Additionally, the Court said no clear distinction between scientific, technical or specialized knowledge exists or is necessary given that all three exact the same "foreign experience" upon the jury. *See id.* at 149 (same).

36. *See id.* at 149-53 (explaining discretion granted to trial judge in assessing reliability and relevance of expert testimony). The proposed amendment to FRE 702 codifies the holdings in *Daubert* and *Kumho* by emphasizing the judge's gatekeeping role, clarifying the standards for assessing reliability and explaining that the rule applies to all types of evidence. *See* H.R. DOC. NO. 106-225, at 40-41 (2000) (explaining rationale for amending FRE 702); *see also* Giannelli & Imwinkelried, *supra* note 33, at 13 (noting that proposed amendment to FRE 702 applies to all evidence and takes effect as of December 1, 2000, unless Congress intervenes). The amendment alters FRE 702 by including the following language at the end of the existing rule: "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." H.R. DOC. NO. 106-225, at 40.

B. *Admissibility of Expert Testimony on Repressed Memories in Child Sexual Abuse Cases*

As a result of the growing trend to extend the discovery rule to repressed child sexual abuse cases and increased reliance by adult victims of child abuse on expert testimony on the repressed memory phenomenon, many courts are facing evidentiary challenges to the use of such testimony.[37] Although the scientific community remains divided on the reliability of repressed memories, and the empirical data supporting and disconfirming the phenomenon remains the same, courts addressing the evidentiary admissibility of repressed memory testimony have reached contradictory outcomes.[38]

1. *Successful Challenges to Expert Testimony on Repressed Memories*

In *State v. Hungerford*,[39] the Supreme Court of New Hampshire deemed expert testimony on repressed memories inadmissible on reliability grounds.[40] In *Hungerford*, the court reasoned that a reliability standard applied to expert testimony on repressed memories because repressed memories evoked from therapeutic techniques are inseparable from the process triggering the recall.[41] In a detailed analysis employed by New Hampshire's court of last resort, the expert testimony failed to pass reliability scrutiny because of the "divisive state of the scientific debate" concerning the accuracy of memories recovered "either spontaneously or by some method seeking to recover the memory."[42]

37. *See* Faigman et al., *supra* note 9, § 13-1.1, at 528-29 (discussing when in legal process expert testimony on repressed memories is relevant); *see also* Richardson, *supra* note 5, at 529 (explaining that *Daubert* is second "hurdle" child abuse plaintiff must overcome). This Note will focus solely on cases involving repressed memories recovered spontaneously or through the aid of therapeutic techniques. For a discussion of hypnotically refreshed memories and the evidentiary approaches that states undertake with such testimony, see generally Matthew J. Eisenberg, Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 TEMPLE L. REV. 249 (1995) and Emily E. Smith-Lee, Note, *Recovered Memories of Childhood Abuse: Should Long-Buried Memories Be Admissible Testimony*, 37 B.C. L. REV. 591 (1996).

38. *See* Robert Timothy Reagan, *Scientific Consensus on Memory Repression and Recovery*, 51 RUTGERS L. REV. 275, 277-81 (1999) (giving overview of cases dealing with evidentiary admissibility of repressed memory testimony).

39. 697 A.2d 916 (N.H. 1997).

40. *See id.* at 930 (applying *Daubert*-plus analysis and holding that "phenomenon of recovery of repressed memories has not yet reached the point where [the court] may perceive these particular recovered memories as reliable"). In *Hungerford*, the court consolidated two criminal cases in which the defendants were accused of sexually abusing victims, who were minors at the time of the alleged events, but had repressed the memories and years later recalled the alleged events in therapy. *See id.* at 917-19.

41. *See id.* at 921 (affirming trial court's conclusion that recollection of repressed memories during therapy is inseparable from therapeutic process utilized to retrieve memories).

42. *Id.* at 921. In reaching its decision, the *Hungerford* court stated that the party proffering the expert testimony must demonstrate "a reasonable likelihood

The Supreme Court of New Hampshire faced another case involving expert testimony on repressed memories in *State v. Walters*.[43] In *Walters*, the court relied on its holding in *Hungerford* to find that the repressed memory phenomenon failed a *Daubert* analysis.[44] Similarly, in *State v. Quattrocchi*,[45] the Superior Court of Rhode Island excluded expert testimony on repressed memories after applying the *Daubert* factors.[46] Because

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that the recovered memory is as accurate as ordinary human memory" to satisfy the reliability showing. *Id.* at 924. To assess the admissibility of the proffered evidence, the court employed a multi-factor analysis that incorporated the first four factors outlined in *Daubert*. *See id.* at 925 (outlining eight factor test). Additionally, the court was cognizant of the impact of suggestibility techniques on recovered memories and, therefore, incorporated four factors to assess the corroborative nature of the memories: (1) the age of the victim-witness at the time of the alleged abuse; (2) length of delay between alleged abuse and recovery of memories; (3) "objective, verifiable corroborative evidence" that the alleged abuse occurred; and (4) circumstances giving rise to the recovery, including use of therapeutic or other recovery techniques. *See id.* (outlining eight-factor test).

Based on a review of the empirical literature, the court concluded that, despite the growing discourse and research on repressed memories in peer-reviewed publications, the recovered memory phenomenon lacked general acceptance because of the divisive split in the scientific community. *See id.* at 927-28. The court then recognized that, although testing of repressed memories is difficult, some studies indicate that testing is nonetheless possible. *See id.* at 928. No false positive rates are plausible, however, because no effective method to trace false memories exists. *See id.* (noting particular problem with testing). Moreover, the age of the victims at the time of the abuse (early twenties and thirteen years of age) and the short time delay between the alleged abuse and recovery of the memories (one and a half years and four years) favored the reliability of the recovered memories. *See id.* at 928-29 (applying last four factors in reliability test). Nevertheless, the court noted that no "indicia of reliability [was] present in the particular memories" presented by the plaintiffs because no corroborative evidence existed and the memories were recovered during therapy. *See id.* at 930 (holding that reliability of recovered memories could not outweigh lack of general acceptance for repressed memories).

43. 698 A.2d 1244 (N.H. 1997). In *Walters*, the defendant allegedly sexually assaulted his stepdaughter when she was nine or ten years old. *See id.* at 1245. The stepdaughter allegedly repressed the memories until she was fifteen when she started to have nightmares that included flashbacks of the abuse. *See id.* at 1245. The trial court permitted expert testimony only to explain "the phenomena of traumatic amnesia and memory repression, and to opine on the reliability of ordinary memory and recovered memory . . . ." *Id.* at 1246.

44. *See id.* at 1247-48 (applying four factors to assess indicia of reliability of particular memories at issue). In holding that no sufficient indicia of reliability existed for the complainant's recovered memories, the court emphasized the complainant's young age at the time of the alleged abuse, the time delay of eight years before the complainant recalled the abuse, and the lack of corroborative evidence. *See id.* at 1247-48 (applying *Hungerford* indicia of reliability factors to case and excluding testimony). Additionally, the court held that the party proffering the expert testimony bears the burden to establish the validity of the repressed memories. *See id.* at 1246 (holding that trial court erroneously shifted burden to defending party to prove unreliability of repressed memories).

45. No. P92-3759, 1999 WL 284882, at *1 (R.I. Apr. 26, 1999).

46. *See id.* at *6, *16 (explaining standard to apply to evidence and deciding to exclude evidence). The lower court admitted expert testimony on repressed memories without holding a preliminary hearing to assess the reliability of the

Rhode Island still retained *Frye*, the court focused closely on the general acceptance factor.[47] In reaching its decision to exclude the testimony, the court adopted the reasoning of the *Hungerford* court, which emphasized the lack of consensus in the scientific field regarding the validity of repressed memories.[48]

Finally, in *Franklin v. Stevenson*,[49] the Supreme Court of Utah also excluded expert testimony on repressed memories under a reliability analysis.[50] In holding that the trial court failed its gatekeeping role by admitting the testimony, the court emphasized that the plaintiff's experts conceded that no scientific validity existed for the recovery techniques used to elicit the plaintiff's memories.[51] Furthermore, the court conducted its own independent research that revealed no scientific support validating the theory of repression.[52]

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testimony. *See* State v. Quattrocchi, 681 A.2d 879, 881 (R.I. 1996) (explaining procedural history of case). The Supreme Court of New Hampshire vacated the defendant's conviction and remanded the case for the lower court to conduct a preliminary hearing to assess the reliability of the evidence under a *Daubert* analysis. *See id.* at 884 (concluding that Rhode Island justices must exercise "gatekeeping function . . . prior to allowing scientific evidence that supports repressed recollections or flashbacks to be submitted to the jury, if such evidence is challenged by an appropriate objection or motion to suppress").

47. *See Hungerford*, 1999 WL 284882, at *6-9 (explaining importance of general acceptance standard to case). The court concluded that scientific evidence must satisfy both the *Daubert* factors and the general acceptance standard because the Supreme Court of Rhode Island decided in an earlier case that the state rules of evidence failed to supercede the *Frye* rule. *See id.* (noting Rhode Island's continued adherence to *Frye*). The court went on to state, however, that *Frye* and the general acceptance factor in *Daubert* require an equivalent analysis. *See id.* at *11 (explaining similarity of standards).

48. *See id.* at *13-14 (noting reason why repressed recollection is unreliable). The court found the expert testimony unreliable and therefore inadmissible because of the lack of consensus on the "accuracy and authenticity of repressed recollection." *Id.* at *14. The court also rejected an argument by the State to relax the test as applied to "soft sciences" because ethical concerns make testing in this area difficult, if not impossible. *See id.* The court emphasized that, even in cases that make a "soft science" argument, reliability remains an essential requirement. *See id.* (citing *United States v. Hall*, 974 F. Supp. 1198, 1202 (C.D. Ill. 1997)).

49. 987 P.2d 22 (Utah 1999).

50. *See id.* at 28 (rendering holding of case). The plaintiff had recovered memories of abuse through the aid of therapeutic techniques, including relaxation techniques. *See id.* at 23. The defendant challenged the admissibility of testimony on the theory of repression and the therapeutic techniques on reliability grounds. *See id.* In reaching its decision to exclude the testimony, the court explained that Utah case law required the party proffering the evidence to demonstrate the reliability of the underlying principles or techniques. *See id.* at 26-27. To guide the analysis, the court highlighted *Daubert*-like factors as essential factors. *See id.* at 27 (holding that *Daubert*-like factors are "instructive in trial court-level inquiries into the reliability of scientific evidence").

51. *See id.* at 27-28 (reproducing portion of experts' testimony from which court concluded that "[n]either expert could assure the trial court that the therapeutic methods at issue had *any* degree of scientific validity or reliability").

52. *See id.* at 28 n.3 (explaining results of independent research on repression). The court concluded that, because the techniques employed lacked reliabil-

2. *Unsuccessful Challenges to Expert Testimony on Repressed Memories*

In *Isely v. Capuchin Province*,[53] the United States District Court for the Eastern District of Michigan admitted repressed memory testimony under a *Daubert*-like analysis.[54] In *Isely*, the court held that expert testimony on repressed memories and post traumatic stress disorder ("PTSD") was admissible because "sufficient scientific basis of support for the theory [exists] in [the psychology expert's] field of expertise."[55] The United States District Court for the District of Massachusetts relied on *Isely* in *Shahzade v. Gregory*[56] and admitted expert testimony on repressed memories after finding that the expert proffered sufficient scientific evidence to satisfy the four-factor *Daubert* analysis.[57]

Prior to the *Logerquist* decision by the Arizona Supreme Court, only one state court rendered expert testimony on repressed memories admissible.[58] In *Wilson v. Phillips*,[59] the California Court of Appeals admitted the testimony after holding that the lower court erroneously applied the general acceptance standard.[60] In reaching its conclusion that expert testimony on repressed memories was subject to a relevancy standard, the *Wilson* court analogized the conclusions of the expert to a medical ex-

ity, "any expert testimony based upon [these] techniques is also unreliable and inadmissible." *Id.* at 28.

53. 877 F. Supp. 1055 (E.D. Mich. 1995).

54. *See id.* at 1064-67 (applying *Daubert*-like factors to proffered testimony).

55. *Id.* at 1066. The expert testified that several studies on repressed memories appeared in the literature and focused heavily on two survey studies. *See id.* at 1065 (explaining expert's testimony and reliance on studies). Additionally, the expert opined that a majority of clinicians recognized the concept of repression, producing a fair degree of acceptance among this group. *See id.* The expert noted, however, that scientific acceptance was not universal as no consensus exists on the accuracy of elicited memories. *See id.*

56. 923 F. Supp. 286 (D. Mass. 1996).

57. *See id.* at 288-90 (applying *Daubert* and holding testimony admissible). The expert testified that several published studies supported the theory of repression and that most clinicians recognize the theory. *See id.* at 288. In addition to the expert testimony presented at the evidentiary hearing, the court also relied on the APA's inclusion of dissociative amnesia within its diagnostic nomenclature. *See id.* at 289.

58. *See* Wilson v. Phillips, 73 Cal. App. 4th 250, 256 (1999) (affirming admissibility of repressed memory evidence).

59. 73 Cal. App. 4th 250 (1999).

60. *See id.* at 255-56 (concluding that general acceptance standard was inapplicable to particular expert testimony in this case). In *Wilson*, the plaintiffs, the daughter and stepdaughter of the defendant, filed a civil suit against the defendant for molesting them when they were younger. *See id.* at 252. Both victims repressed memories of the abuse for over thirteen years. *See id.* at 252-53. The plaintiffs offered into evidence expert testimony on repressed memories and expert testimony that they exhibited symptoms consistent with individuals who had repressed memories of abuse. *See id.* The expert also testified that studies demonstrated that children will repress memories of abuse, thereby triggering dissociative amnesia. *See id.* at 253 n.2. The children later recalled the memories due to a triggering event or circumstance. *See id.* The expert further opined that repressed memories are "as accurate as" unrepressed memories. *See id.*

pert.[61] The court found no difference between a psychological evaluation of a child sexual abuse victim to assess mental condition and a medical evaluation of a person for physical ailments.[62] The court concluded that the expert testimony proffered in *Wilson* "amounted to little more than run-of-the-mill expert medical opinion," which California law categorically exempts from a *Frye* analysis.[63] Consequently, not only is *Wilson* the only state case that admits repressed memory testimony, it is also the only case that applies a low-level evidentiary standard.[64]

61. *See id.* at 255 (comparing psychological expert testimony on repressed memories to medical expert testimony).

62. *See id.* (finding comparability between psychological expert testimony on repressed memories and medical expert testimony).

63. *Id.* at 255. When *Frye* is inapplicable, California courts analyze admissibility under the state evidence code. *See id.* at 257 (Crosby, J., concurring) (stating that case involved "an evidentiary issue for the judge and jury to deal with under existing rules"). Included within the code is an expert testimony rule that incorporates language similar to FRE 702. *See* CAL. EVID. CODE § 801 (West 2000) (requiring that expert and other opinion testimony be "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact").

Similar to California, Florida retains *Frye* as the evidentiary standard for admitting expert testimony, although it also adopted an expert testimony rule modeled on FRE 702. *See* Hadden v. State, 690 So. 2d 573, 577-78 (Fla. 1997) (explaining Florida's adherence to *Frye* despite adoption of state rules of evidence); *see also* Holdsworth, *supra* note 7, at 124 (examining Florida's approach to expert testimony); Steele, *supra* note 8, at 968-69 (same). Florida also permits expert testimony under a relevancy standard by making a distinction between "expertise that is based solely upon the experience of the expert and expertise that is based upon experience as well as knowledge of clinical studies performed by third parties." Steele, *supra* note 8, at 968. For instance, in *Flanagan v. State*, the Supreme Court of Florida rendered profile testimony inadmissible under *Frye* because Florida law finds "profile and syndrome evidence" unreliable. *See* 625 So. 2d 827, 828 (Fla. 1993) (applying *Frye* to exclude sex offender testimony). Opinions based solely on experience and training, however, need only satisfy relevancy analysis. *See id.* at 828 (explaining distinction between pure opinion testimony and scientific-expert testimony). In *Hadden*, the court applied this distinction to expert testimony on behavioral characteristics of a child victim of sexual abuse. *See Hadden*, 690 So. 2d at 581 (applying distinction to proffered testimony). The court concluded that the proffered testimony must pass *Frye* analysis because the expert based his opinions on diagnostic criteria. *See id.* at 580-81 (holding that testimony was inadmissible because it constituted profile evidence and thereby lacked reliability). The court noted that such testimony "is not made admissible by combining [it] with pure opinion testimony because such a combination is not pure opinion evidence based solely upon the expert's clinical experience." *Id.* at 580.

64. *But see* Commonwealth v. Crawford, 718 A.2d 768, 773 (Pa. 1998) (refusing to permit repressed memory testimony in criminal case unrelated to childhood sexual abuse). In *Crawford*, the Supreme Court of Pennsylvania held that expert testimony on repressed memories was inadmissible because the testimony would address the issue of credibility, which falls within the ken of the jury. *See id.* (explaining reasoning for excluding expert testimony in criminal case not involving childhood sexual abuse). The court emphasized, however, that the scientific validity of repressed memories was not at issue in this case because the government had not introduced evidence to support the credibility of the witness' assertion that he had repressed the memory. *See id.* Therefore, unlike *Wilson*, this case bears no weight on which evidentiary standard applies to repressed memory testimony. *See*

C. *Evidentiary Challenges to Expert Testimony in Arizona*

1. *Application of Evidentiary Standards in Arizona*

Since 1962, Arizona has applied *Frye* as its evidentiary standard, thereby requiring that expert scientific testimony meet the general acceptance standard.[65] In 1997, Arizona enacted its own rules of evidence, modeled extensively on the Federal Rules of Evidence.[66] Included within the state rules is Arizona Rule of Evidence 702 ("ARE 702"), an expert testimony rule that mirrors the language of FRE 702.[67] Nevertheless, Arizona courts continued to apply *Frye* to expert testimony after adopting the Arizona Rules of Evidence.[68] The Supreme Court of Arizona made an exception to this rule in criminal cases in which experts proffered testimony based on their experiences, observations, training and education.[69] Additionally, the Supreme Court of Arizona permitted testimony on general behavioral characteristics of child victims of sexual abuse and rape victims, while simultaneously excluding on *Frye* grounds expert testimony on child sexual abuse accommodation syndrome ("CSAAS") and rape trauma syndrome ("RTS").[70] In none of these cases did the court address the impact of *Daubert* on ARE 702, and, in fact, the court refrained from doing so in cases where the issue was placed squarely before it.[71]

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id. at 773 n.2 (stating that decision does not address whether repressed memory testimony is admissible under *Frye*).

65. *See* State v. Valdez, 371 P.2d 894, 898 (Ariz. 1962) (en banc) (refusing to admit testimony on lie detector test because of lack of general acceptance for test); *see also* Paul F. Eckstein & Samuel A. Thumma, *Novel Scientific Expert Evidence in Arizona State Courts*, ARIZ. ATT'Y, June 1998, at 18 (explaining evolution of general acceptance standard in Arizona).

66. *See* Logerquist v. McVey, 1 P.3d 113, 125 (Ariz. 2000) (en banc) (explaining that Arizona adopted its own version of Federal Rules of Evidence in 1977).

67. *See* ARIZ. R. EVID. 702 (providing comparable rule to FRE 702 for admitting expert testimony).

68. *See* State v. Bible, 858 P.2d 1152, 1183 (Ariz. 1993) (en banc) (emphasizing reliance on *Frye* in DNA evidence context); State v. Velasco, 799 P.2d 821, 827 (Ariz. 1990) (en banc) (applying *Frye* to silica gel tests); State *ex rel.* Collins v. Seidel, 691 P.2d 678, 681 (Ariz. 1984) (en banc) (explaining that ARE 702 requires showing of general acceptance).

69. *See* State v. Hummert, 933 P.2d 1187, 1193 (Ariz. 1997) (en banc) (permitting opinion testimony based on experience and observations with DNA testing); State v. Lindsey, 720 P.2d 73, 74-75 (Ariz. 1986) (en banc) (permitting opinion testimony based on experience and observations with child incest victims); State v. Roscoe, 700 P.2d 1312, 1319-20 (Ariz. 1984) (en banc) (permitting opinion testimony based on experience and observations with dog scent tracking).

70. *See* State v. Huey, 699 P.2d 1290, 1293-94 (Ariz. 1985) (en banc) (permitting expert testimony in rape case); State v. Varela, 873 P.2d 657, 664 (Ariz. Ct. App. 1993) (permitting expert testimony in child sexual abuse case). For an overview of RTS, see Krista L. Duncan, Note, *"Lies, Damned Lies, and Statistics?" Psychological Syndrome Evidence in the Courtroom After* Daubert, 71 IND. L.J. 753, 761 (1996). For an overview of CSAAS, see Steele, *supra* note 8, at 943-44.

71. *See Bible*, 858 P.2d at 1183 (emphasizing reliance on *Frye* and declining to adopt *Daubert* in this case); *see also* Eckstein & Thumma, *supra* note 65, at 19 (explaining that Arizona has not adopted *Daubert*). In *Bible*, the court addressed

2. *Evidentiary Challenges to Repressed Memory Testimony in Arizona*

Prior to *Logerquist*, the Supreme Court of Arizona reviewed only one case, *Doe v. Roe*,[72] in which repressed memory was central to the claim.[73] In *Doe*, the court removed the initial barrier to repressed child sexual abuse cases and allowed victims to file claims after reaching the age of majority.[74] In reaching this decision, the court analyzed at some length the current scientific status of the repressed memory phenomenon and determined that "repressed memories of childhood abuse can exist and can be triggered and recovered."[75] The court noted that the accuracy of these recollections is nonetheless suspect because suggestible therapeutic techniques or inadequately skilled therapists may falsely implant the memories.[76] The court emphasized that its analysis did not reach so far as to decide the admissibility of expert testimony on repressed memory.[77] Consequently, the Supreme Court of Arizona left unanswered how Arizona law would approach expert testimony on repressed memories, and thereby set the stage to assess this issue in *Logerquist*.

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whether expert testimony on DNA testing is admissible if the experts based their opinions on statistical calculations that lack general acceptance. *See Bible*, 858 P.2d at 1187 (disfavoring government's arguments on admissibility of testimony). The court held that such statistical calculations were subject to *Frye* analysis and could not pass muster. *See id.* at 1188-89 (explaining that DNA statistics at issue lacked general acceptance in scientific community and could not satisfy *Frye* requirement). The court also refused to analyze the effect of *Daubert* on the general acceptance standard in the context of DNA testing. *See id.* at 1183. Specifically, the court recognized that:

> [DNA testing] makes line-drawing in this case particularly difficult. Not only are we in a complex scientific field, but the technology is still evolving. Furthermore, this is not an area in which the jury can easily penetrate the aura of infallibility, nor one in which the principles are easily demonstrable in the courtroom.

Id. at 1183.

Additionally, the court noted that DNA testing has generated substantial controversy and falls within a complex field that is still evolving. *See id.* The court also refrained from addressing the effect of *Daubert* on ARE 702 because the parties did not extensively brief the issue. *See id.*

72. 955 P.2d 951 (Ariz. 1998) (en banc).

73. *See id.* at 954-56.

74. *See id.* at 969 (extending discovery rule and Arizona statute tolling statute of limitations for unsound mind to repressed memory cases). The Supreme Court of Arizona disagreed with the lower court's decision to weigh the facts and ascertain whether the specific case fell within the parameters of the discovery rule and the statutory analysis for unsound mind. *See id.* at 969. Instead, the court held that the jury shoulders this responsibility. *See id.* at 969.

75. *Id.* at 959.

76. *See id.* (rendering conclusion that memories can be inaccurate or implanted based on review of debate surrounding repressed memory).

77. *See id.* at 956 (noting that evidentiary question of application of *Frye* is not at issue).

III. FACTS: *LOGERQUIST V. MCVEY*

At the age of thirty, Kim E. Logerquist claimed that her pediatrician, John T. Danforth, sexually molested her during four visits between 1971 and 1973.[78] At the time of the alleged offense, Logerquist was eight to ten years old.[79] From 1973 to 1991, Logerquist claimed that she unconsciously repressed memories of the sexual molestation to maintain emotional stability.[80] Her memory loss ended in September 1991, when she began having flashbacks of the abuse.[81] Logerquist claimed that her recall of the sexual molestation returned spontaneously after viewing a commercial featuring a pediatrician.[82]

In September 1992, Logerquist filed suit against Danforth asserting several claims, including intentional torts, medical malpractice and breach of fiduciary duty.[83] Danforth filed a motion for summary judgment asserting that Logerquist filed her claims after the statute of limitations period.[84] The trial judge granted Danforth's motion, holding that

78. *See* Logerquist v. McVey, 1 P.3d 113, 115 (Ariz. 2000) (en banc) (giving facts of case); *see also* Logerquist v. Danforth, 932 P.2d 281, 282 (Ariz. Ct. App. 1996) (explaining facts of case on appeal from trial court's ruling that plaintiff's claims were time-barred).

79. *See Logerquist*, 1 P.3d at 115.

80. *See Logerquist*, 932 P.2d at 282.

81. *See id.* Logerquist's flashbacks unveiled three memories. *See id.* at 282-83. In the first memory, Logerquist recalled "Danforth touching her inappropriately between the legs and inserting something cold into her vagina." *Id.* at 283. In the second memory, Logerquist remembered Danforth inserting an object into her vagina and rectum and "threatening to give her a big shot if she [did] not stop fussing." *Id.* In the third memory, Logerquist recalled "moving backwards on the table, feeling something inserted in her rectum and vagina, and being pulled down onto the table." *Id.*

82. *See id.* at 282. Some discrepancy existed regarding what triggered Logerquist's memories. *See id.* According to Logerquist's deposition, an old movie triggered her flashbacks. *See id.* Yet, she informed two friends that a television commercial for children's medicine and featuring a pediatrician triggered her memories. *See id.*

83. *See id.* at 283. It is unclear from the facts of the case whether Logerquist's memories were enhanced or refreshed through therapy during the one-year delay between her recall of the abuse and her subsequent filing of the claim. *See id.* at 282-83 (omitting any reference to plaintiff's actions between September 1991 and September 1992). Logerquist was seeing a physician and psychologist for "emotional problems" at the time the Supreme Court of Arizona ruled on the admissibility of her proffered expert testimony on repressed memories. *See Logerquist*, 1 P.3d at 116 (noting that defendant argued that plaintiff's memories "had been distorted, implanted, or suggested by improper techniques" used by professionals plaintiff sought for treatment). The nature of the professional contact was unknown from the facts. *See id.* at 115-116 (explaining facts and procedural history of case with no reference to nature of professional treatment sought by plaintiff).

84. *See Logerquist*, 932 P.2d at 283. In addition to arguing that summary judgment was proper because Logerquist's claims were time-barred, the defendant also claimed that repressed memory testimony was inadmissible under *Frye*. *See id.* at 288 (noting plaintiff's contention regarding expert testimony on repressed memories).

Logerquist's claims were time-barred.[85] Logerquist successfully appealed the Arizona trial court's decision to the Arizona Court of Appeals.[86]

Logerquist then sought to introduce expert testimony on the phenomenon of repressed memories of childhood sexual abuse.[87] Danforth filed a motion objecting to this testimony and requesting the trial court hold a *Frye* hearing to assess the admissibility of testimony on repressed memories.[88] Over Logerquist's objection, the trial court granted Danforth's motion for a hearing.[89] At the hearing two experts testified: a clinical psychiatrist for the plaintiff and a research psychologist for the defendant.[90] Plaintiff's expert explained that at trial he would testify that, based on his experience, observation of patients and the repressed memory literature, he believed the phenomenon exists for some persons.[91] Specifically, the plaintiff's expert would testify that "severe childhood trauma, including sexual abuse, can cause a repression of memory, and that in later years this memory can be recalled with accuracy."[92] Defendant's expert explained that at trial he would testify regarding the methodological flaws in the published studies on repressed memories.[93]

85. *See id.* at 283 (discussing holding of trial court).

86. *See id.* at 285-86 (explaining that common law delays statute of limitations in repressed child sexual abuse cases and remanding case for trial).

87. *See Logerquist*, 1 P.3d at 116 (giving procedural history of case).

88. *See id.* (explaining procedural history of case). Both parties engaged in intensive motion practice after filing motions supporting and disfavoring a *Frye* hearing. *See id.* at 117 (stating that "veritable blizzard of paper" proceeded initial filings supporting and disfavoring *Frye* hearing). In separate filings, Danforth sought to limit the testimony of plaintiff's expert regarding animal studies, his testimony based on his clinical experience and his testimony concerning the reports documenting the occurrence of repressed memory. *See id.* (noting scope of defendant's motion practice). Additionally, Danforth filed a separate motion requesting the court to perform three acts: (1) preclude Logerquist's treating physician and therapist from testifying; (2) permit Danforth to provide additional information to assist the court in assessing the proffered testimony by plaintiff's expert; and (3) "strike an affidavit filed in opposition to [Danforth's] motion for summary judgment because it contained expert opinion." *Id.*

89. *See id.* at 115.

90. *See id.* (noting qualifications of experts). Plaintiff's expert witness, Dr. Bessel A. van der Kolk, specialized in dissociative disorder, treated patients suffering from repressed memory, and conducted research on memory and trauma. *See id.* at 115, 117 (explaining background of plaintiff's expert). Defendant's expert witness, Dr. Richard Kihlstrom, lacked any clinical experience with persons claiming to suffer from repressed memory and conducted no studies regarding memory and trauma. *See id.* at 115 (giving background of defendant's expert).

91. *See id.* at 115 (discussing testimony of plaintiff's expert). Dr. van der Kolk also submitted a letter to plaintiff's counsel accepting plaintiff's request for his testimony. *See id.* at 117 (reproducing portion of letter). In that letter, Dr. van der Kolk explained that he would rely on published studies documenting repressed memory, the presence of dissociative amnesia within APA's diagnostic nomenclature and the "official statement of the [APA] on Memories of Childhood Sexual Abuse." *Id.*

92. *Id.* at 115 (quoting *Logerquist v. Danforth*, No. CV 92-16309 (Ariz. Super. Ct. June 11, 1998) (order excluding expert testimony on repressed memories)).

93. *See id.* at 115 (explaining testimony of defendant's expert).

Additionally, the witness cited several studies demonstrating that trauma improves memory, rather than represses it.[94] The trial judge concluded that the testimony of plaintiff's witness was not based on generally accepted theories and, therefore, was inadmissible under *Frye*.[95]

Logerquist sought review of the trial court's interlocutory order by the court of appeals, but was unsuccessful.[96] Following the court of appeals' refusal to grant jurisdiction, Logerquist then sought review by the Supreme Court of Arizona.[97] The Supreme Court of Arizona accepted review and concluded that the testimony of plaintiff's expert was not subject to a *Frye* analysis and ARE 702 did not incorporate the reliability standard promulgated in *Daubert*.[98]

IV. NARRATIVE ANALYSIS

In determining that *Frye* was inapplicable to expert testimony on repressed memories, the Supreme Court of Arizona relied heavily upon Arizona criminal case law applying *Frye* and the decisions of other jurisdictions.[99] Because the court concluded that expert testimony on re-

94. *See id.* (explaining testimony of defendant's expert).

95. *See id.* at 118 (giving trial court's rationale for excluding testimony proffered by plaintiff's expert) (quoting *Logerquist v. Danforth*, No. CV 92-16309 (Ariz. Super. Ct. June 11, 1998) (order excluding expert testimony on repressed memories)). In reaching its conclusion that the "theories advanced by Plaintiff's experts are not generally accepted in the relevant scientific community of trauma memory researchers," the Superior Court focused on the "infancy" of studies regarding the effects of trauma on memory and the "methodological flaws" in published studies on this issue. *Id.* (quoting *Logerquist v. Danforth*, No. CV 92-16309 (Ariz. Super. Ct. June 11, 1998) (order excluding expert testimony on repressed memories)). The court further identified methodological flaws in the studies relied upon by Dr. van der Kolk: "These methodological flaws include, but are not limited to, inadequate sample sizes, gender bias, [lack of] consideration of other reasons for loss of memory (i.e. infantile amnesia), and perhaps most importantly, [lack of] independent corroboration that the event alleged to have been forgotten, actually occurred." *Id.* (quoting *Logerquist v. Danforth*, No. CV 92-16309 (Ariz. Super. Ct. June 11, 1998) (order excluding expert testimony on repressed memories)).

96. *See id.* at 115 (explaining procedural history of case). Decisions rendered at evidentiary hearings constitute interlocutory orders that Arizona law renders appealable at the discretion of the appellate court. *See* ARIZ. R. PRO. SPECIAL ACTION 1 (allowing discretionary review of interlocutory orders).

97. *See Logerquist*, 1 P.3d at 115 (describing procedural history of case).

98. *See id.* (explaining holding in case).

99. *See id.* at 119-23 (giving rationale for rejecting *Frye* and applying ARE 702 to repressed memory). Prior to addressing the applicability of the general acceptance standard, the court first outlined the contentions of the parties. *See id.* at 115. Specifically, the plaintiff argued that the *Frye* test was inapplicable to the expert's testimony, or, if *Frye* applied, that the court should replace *Frye* with *Daubert*. *See id.* In contrast, the defendant asserted that the trial judge accurately applied *Frye* to the expert's testimony and deduced that repressed memory has not gained acceptance in the relevant scientific community. *See id.* The defendant also proffered an alternative argument that if the court refused to apply or discarded the *Frye* standard, then *Daubert* applied and supported the trial court's exclusion of the testimony. *See id.*

pressed memories is subject to the relevancy standard outlined in ARE 702, the court next determined whether to adopt the interpretation of FRE 702 rendered by the United States Supreme Court in *Daubert* and *Kumho*.[100] The court refused to read reliability into ARE 702 based on the text of the rule, cases decided after the adoption of ARE 702, and general adverse impressions of the *Daubert/Kumho* analysis.[101]

A. *The* Logerquist *Court Rejects the General Acceptance Standard and Applies ARE 702*

Justice Feldman, writing for the majority, first emphasized that the language of *Frye* limits its use to "novel scientific theories or processes."[102] Because Logerquist did not argue that a "scientific principle or process can be used to produce memories that are always or often accurate," the expert testimony never triggered the general acceptance requirement.[103] Rather, ARE 702 would permit the plaintiff to present expert testimony to "explain her behavior following the [alleged offense] and to help the jury determine" the credibility and accuracy of the plaintiff's memories.[104]

To support its conclusion that ARE 702 applied to the expert testimony, the court first relied on Arizona criminal case law involving expert testimony on behavioral characteristics of child incest victims, dog tracking evidence and DNA testing.[105] Next, the court found persuasive its decisions to allow expert testimony on syndrome evidence.[106] Finally, the

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Next, the court reviewed how the question of admissibility arose in the lower court, as well as the reasoning behind the court's decision to preclude. *See id.* The court concluded that the trial court order effectively eliminated plaintiff's ability to bring forth repressed memory testimony from the expert, as well as her physician and therapist. *See id.* at 118. Specifically, the court found that the order rendered it difficult, if not impossible, for the plaintiff to prove to the jury that she had suffered from dissociative amnesia and that her recall could have been accurate. *See id.* (finding that trial court order excluding testimony was too broad). The court then presumed that, because the order applied only to the plaintiff's witness, the defendant would be permitted to call expert witnesses to testify that the plaintiff's recall lacked credibility. *See id.*

100. *See id.* at 123-25 (stating that trial court erroneously applied *Frye* instead of ARE 702 and that court must address effect of *Daubert* on ARE 702).

101. *See id.* at 128-32 (listing reasons for refusing to interpret a reliability component into ARE 702).

102. *Id.* at 118. *Logerquist* is an en banc decision with four separate opinions: (1) a majority opinion written by Justice Stanley G. Feldman; (2) a concurring opinion written by Vice Chief Justice Charles E. Jones and joined by Chief Justice Thomas A. Zlaket; (3) a dissenting opinion written by Justice Frederick J. Martone; and (4) a dissenting opinion written by Justice Ruth V. McGregor. *See id.* at 113-114, 134, 136, 140.

103. *Id.* at 118.

104. *Id.* at 119.

105. *See id.* at 119-21 (providing overview of case law deemed applicable to analysis).

106. *See id.* at 121-22 (same).

court looked to other jurisdictions for cases analogous to the present case.[107]

1. *The Court Relies on Three Arizona Criminal Cases Involving Expert Opinion Testimony*

The court first applied its holding in *State v. Lindsey*,[108] a case involving child incest.[109] In *Lindsey*, the Supreme Court of Arizona upheld the court of appeals' decision to permit testimony that child incest victims often recant accusations of abuse under ARE 702.[110] The *Logerquist* court concluded that the testimony of Logerquist's expert, like the expert testimony in *Lindsey*, "is similarly based on principles of social and behavioral science recognized by clinicians."[111]

The court then highlighted its decision in *State v. Roscoe*,[112] in which the court refused to apply *Frye* to dog tracking evidence.[113] The *Roscoe* court reasoned that *Frye* was inapplicable to the proffered expert testimony because the testimony was not "bottomed on any scientific theory."[114] After quoting the *Roscoe* opinion, the *Logerquist* court noted that the expert testimony admitted by the *Roscoe* court was subsequently rendered invalid.[115] Nevertheless, the *Logerquist* court maintained that *Roscoe* was a prime example of the infallibility of any evidentiary scheme.[116]

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107. *See id.* at 122-23 (same).

108. 720 P.2d 73 (Ariz. 1986) (en banc) [hereinafter *Lindsey II*].

109. *See id.* at 74 (explaining that jury found defendant guilty of incest and sexual exploitation of minor).

110. *See Logerquist*, 1 P.3d at 119 (stating that trial judge in *Lindsey I* did not hold *Frye* hearing). In *Lindsey I*, the Arizona Court of Appeals held that the trial judge did not abuse his discretion by admitting the proffered testimony because the testimony did not address the credibility of the witness and, therefore, would not invade the province of the jury. *See* State v. Lindsey, 720 P.2d 94, 98 (Ariz. Ct. App. 1985) [hereinafter *Lindsey I*]. Because the expert was qualified to testify and the testimony was outside the ken of the average jury, the *Lindsey I* court permitted the testimony at trial. *See id.* at 98 (explaining that expert was qualified and testimony did not address credibility).

111. *Logerquist*, 1 P.3d at 119.

112. 700 P.2d 1312 (Ariz. 1984) (en banc).

113. *See Logerquist*, 1 P.3d at 119-20 (identifying case law deemed relevant to analysis) (citing *State v. Roscoe*, 700 P.2d 1312, 1319–20 (Ariz. 1984) (en banc)).

114. *Id.* at 120 (quoting *Roscoe*, 700 P.2d at 1319). In finding that the evidence was not bottomed on science, the *Roscoe* court stated that "[i]t was not the theories of Newton, Einstein or Freud which gave the evidence weight; if so, the *Frye* test should have been applied." *Id.* (quoting *Roscoe*, 700 P.2d at 1319).

115. *See id.* at 120 (stating that *Roscoe* court admitted evidence proffered by "charlatan").

116. *See id.* (explaining that *Frye* or *Daubert* could have held testimony admissible). Specifically, the court stated that "[j]ust as the refusal to apply *Frye* to [the] dog-scent evidence led to the admission of false testimony, so the application of *Frye* or *Daubert* could well have led to the exclusion of testimony from Einstein or Freud, both of whom advanced theories not generally accepted for many years." *Id.* (citations omitted).

The Supreme Court of Arizona continued to distinguish between scientific testimony and experience-based and observation-based testimony in *State v. Hummert*,[117] the next case relied upon by the *Logerquist* court.[118] In *Hummert*, the court applied *Frye* to expert testimony on DNA matching procedures and concluded that "expert opinion on probability percentages based on computations derived from DNA statistics was inadmissible."[119] The court excluded the testimony because the statistics employed were a "process or formula established by others and not generally acknowledged by scientists and statisticians in the field."[120] Nevertheless, the *Hummert* court relied on *Roscoe* to permit the experts to testify that the matching results of the DNA testing were unusual because the experts' testimony was based on experience and observation.[121]

2. *The Court Regards As Relevant Arizona Civil Cases Involving Syndrome Evidence*

The *Logerquist* court then boosted its reliance on ARE 702 by pointing to civil cases employing a relevancy analysis to opinion testimony on CSAAS and RTS.[122] Specifically, the court emphasized its holding in *State v. Varela*,[123] and noted that the *Varela* court held *Frye* inapplicable to general characteristics of child sexual abuse victims because such evidence is not "'new, novel or experimental scientific evidence.'"[124] The court also relied on its holding in *State v. Huey*,[125] which concerned expert testimony on RTS.[126] The court explained that the *Huey* court recognized the disagreement among the states on whether to permit testimony on RTS to prove whether a rape occurred.[127] Although not allowing the expert to

117. 933 P.2d 1187 (Ariz. 1997) (en banc).

118. *See Logerquist*, 1 P.3d at 120 (identifying case law deemed relevant to analysis); *see also* Eckstein & Thumma, *supra* note 65, at 18 (citing to *Roscoe*, *Hummert* and other cases to explain Arizona's distinction between scientific and non-scientific evidence).

119. *Logerquist*, 1 P.3d at 120.

120. *Id.*

121. *See id.* at 120-21 (quoting *Hummert*, 933 P.2d at 1192-93 (citations omitted)).

122. *See id.* at 121-22 (discussing civil cases regarding syndrome evidence).

123. 873 P.2d 657 (Ariz. Ct. App. 1993)

124. *Logerquist*, 1 P.3d at 121 (quoting *Varela*, 873 P.2d at 663-64). The *Logerquist* court also relied on another Arizona case in which the court allowed expert testimony on behavioral characteristics of child molesters and their victims. *See id.* at 121 (citing *State v. Tucker*, 798 P.2d 1349 (Ariz. App. 1990)). The *Logerquist* court emphasized that in both *Varela* and *Tucker* the testimony was admissible only to aid the jury in understanding the victim's behavior following the alleged traumatic event, and not as evidence that rape or child abuse occurred. *See id.* (explaining limitation of admissibility of syndrome evidence).

125. 699 P.2d 1290 (Ariz. 1985) (en banc).

126. *See Logerquist*, 1 P.3d at 121 (giving facts of *Huey*).

127. *See id.* at 122 (stating holding in *Huey*).

testify as to the ultimate issue of rape, the *Huey* court permitted the expert to opine about the impact of PTSD on a rape victim's behavior.[128]

3. *The Court Identifies Analogous Case Law in Other Jurisdictions*

The *Logerquist* court identified three cases from other jurisdictions that it deemed relevant to its analysis.[129] First, the court focused on a Colorado case that permitted physician testimony on relevancy grounds because the physician's observations informed his opinion, not "'any novel or newly developed scientific device or process.'"[130] Second, the court recognized that California had rendered a decision analogous to *Huey*, in which it permitted an expert to explain a rape victim's behavior following the trauma, but disallowed opinions on whether a rape occurred.[131] Third, the court relied upon the decision of the California Court of Appeals in *Wilson v. Phillips*,[132] because the case was "directly on point" and demonstrated that *Frye* was inapplicable to "expert opinion that the circumstances and plaintiffs' behavior [are] 'consistent with other individuals who had repressed their memories of childhood sexual abuse.'"[133]

4. *The Court Explains the Application of ARE 702 to Expert Testimony on Repressed Memories*

The court concluded that Arizona law did not require a *Frye* hearing when an expert offered testimony based on inductive reasoning.[134] Such a hearing was appropriate only when deductive reasoning informed the expert's opinions.[135] The court clarified its holding by emphasizing its decision in *Hummert* that *Frye* applied only when the expert "reaches a conclusion by applying a scientific theory or process based on the work or

128. *See id.* (explaining holding in *Huey*).

129. *See id.* at 122-23 (explaining applicability of case law from other jurisdictions).

130. *Id.* at 122 (quoting *Colwell v. Mentzer Investments, Inc.*, 973 P.2d 631, 636 (Colo. Ct. App. 1998)). The court rendered *Colwell* relevant because the case contained "operative facts [that] are quite similar to those in this case." *Id.* at 122. *Colwell* was a medical causation case in which a physician testified, "based on experience, observation, and study of literature . . . [that] stress could trigger otherwise asymptomatic multiple sclerosis." *Id.* The *Colwell* court applied a reliability inquiry under the state's expert testimony rule that did not turn upon general acceptance, but required the testimony aid the jury and not overwhelm or mislead the jury. *See id.* (explaining holding in *Colwell*). The court permitted the testimony after noting that the physician qualified as an expert and that he testified only to his observations and not to "any novel or newly developed scientific device or process." *Id.* (quoting *Colwell*, 973 P.2d at 636).

131. *See id.* at 122 (citing *People v. Bledsoe*, 681 P.2d 291, 298-99 (Cal. 1984)).

132. 73 Cal. App. 4th 250 (1999), *cert. denied*, No. S081229, 1999 Cal. LEXIS 7143, at *1 (Oct. 6, 1999).

133. *Logerquist*, 1 P.3d at 122-23 (quoting *Wilson*, 73 Cal. App. 4th at 253).

134. *See id.* at 133 (summarizing holdings in case).

135. *See id.* at 123, 133 (explaining application of *Frye*).

discovery of others."[136] When experts base their testimony on "'their own experimentation and observation and opinions based on their own work,'" they need not show general acceptance.[137]

The court ended its analysis of the admissibility of the *Frye* standard by applying the articulated relevancy test to the testimony of the plaintiff's witness, Dr. Bessel A. van der Kolk.[138] The court held that Dr. van der Kolk qualified as an expert on repressed memories based on his education, experience and eminent recognition in the fields of psychology and medicine.[139] The court also noted that the plaintiff planned to call Dr. van der Kolk to testify only to his observations and experience with persons who claim to suffer from repressed memory.[140] Therefore, the court concluded that the plaintiff could call Dr. van der Kolk as a witness "to testify to his opinions based on the results of his experience, his observations, his own research and that of others with which he is familiar, and the care of his patients."[141]

In summarizing its conclusions on the *Frye* issue, the court emphasized that repressed memories involve a non-scientific issue, thereby not requiring *Frye* analysis.[142] Nevertheless, the majority expressed skepticism about the validity of such testimony.[143] The majority agreed with the dissenters that heightened scrutiny should apply to repressed memory testimony, but concluded that cross-examination would sufficiently test the validity of the proffered testimony.[144]

B. *The* Logerquist *Court Refuses to Incorporate a Reliability Standard into ARE 702*

Because the court held that ARE 702 applied to the expert testimony, the court next declined to read *Daubert/Kumho* into ARE 702 for four reasons.[145] First, the court emphasized the lack of consensus among scholars on the aptness of the rationale and conclusions of the *Daubert* and *Kumho*

136. *Id.* at 123 (citing *State v. Hummert*, 933 P.2d 1187, 1195 (Ariz. 1997) (en banc)).

137. *Id.* at 123 (quoting *Hummert*, 933 P.2d at 1195).

138. *See id.* at 124 (applying ARE 702 to proffered testimony).

139. *See id.* (applying ARE 702 to proffered testimony). The court also attached Dr. van der Kolk's curriculum vitae to the opinion and relied upon it to find that he qualified as an expert. *See id.* at 124.

140. *See id.* (applying ARE 702 to proffered testimony).

141. *Id.*

142. *See id.* at 133 ("This case turns on a non-scientific issue.").

143. *See id.* at 134 (stating that "most reasonable position, scientific or unscientific, is to maintain skepticism about Plaintiff's claims").

144. *See id.* (saying that jury should assess validity of repressed memories despite court's skepticism of testimony).

145. *See id.* at 124-33 (refusing to incorporate *Daubert* into ARE 702). Before addressing the reasons for rejecting *Daubert*, the court first reviewed the federal development of evidentiary standards regarding expert testimony and then outlined Arizona's development of evidentiary standards. *See id.* at 124-25.

opinions.[146] Second, the court maintained that unlike FRE 702, ARE 702 did not incorporate a reliability standard based on the language of the rule, the intent of the drafters and subsequent case law applying ARE 702.[147] Third, the court asserted that a reliability component was not necessary because Arizona law applied the general acceptance standard conservatively, thereby eliminating confusion on its application.[148] Finally, the court concluded that a *Daubert* analysis would not prevent unreliable evidence from reaching the jury because judges lacked the training to perform substantive evaluations and the time to conduct exhaustive evidentiary hearings.[149]

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146. *See id.* at 125 (explaining that "Daubert and its progeny have not been received with unanimous approbation"). The court explained that scholars have criticized *Daubert* because it drastically changed the trial court's approach to evidence by placing a higher burden upon the court. *See id.* at 125-26 (discussing criticisms of *Daubert*)). Additionally, the court noted that the United States Supreme Court did not reconcile *Kumho* with an earlier United States Supreme Court case. *See id.* at 126 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 898 (1993)). In *Barefoot*, the court permitted psychiatric testimony on dangerousness despite the position of the APA that "psychiatrists 'are incompetent to predict [such future behavior] with any acceptable degree of reliability.'" *Id.* at 126 (quoting *Barefoot*, 463 U.S. at 898).

The *Logerquist* court recognized that the United States Supreme Court may have intended to distinguish between criminal and civil cases. *See id.* at 127 (explaining possible rationale for reconciling *Barefoot* and *Kumho*). Consequently, expert testimony in criminal cases, as in *Barefoot*, must pass relevancy analysis, whereas expert testimony in civil cases, as in *Kumho*, must satisfy *Frye*. *See id.* at 127 (giving possible rationale for reconciling *Barefoot* and *Kumho*). Nevertheless, the court emphasized that Arizona case law did not impose different evidentiary standards on expert testimony based on nature of the suit, nor did the court recognize such disparity as necessary. *See id.* (stating that Arizona case law differs from federal case law).

147. *See id.* at 128 (differentiating ARE 702 from FRE 702). Before distinguishing ARE 702 from FRE 702, the court questioned whether the United States Supreme Court correctly interpreted a reliability standard into FRE 702. *See id.* The court noted that neither the text nor the commentary to the rule referenced a reliability standard, and early attempts at a federal evidentiary framework never addressed this component. *See id.* (criticizing enactment of reliability standard in *Daubert*).

148. *See id.* at 128-29 (giving rationale for not incorporating *Daubert* into ARE 702).

149. *See id.* at 129-30 (doubting whether *Daubert/Kumho* will prevent "junk science" from reaching jury). The court next explained in dicta that even if judges were capable of evaluating the reliability of evidence, *Daubert* and its progeny remove from the jury its constitutionally protected right to weigh the evidence and its credibility. *See id.* at 130. The court interpreted *Kumho* and *Joiner* to mandate that the judge inquire into the reliability and credibility of qualified witnesses, thereby encroaching on duties relegated to the jury. *See id.* at 131 (stating that decisions by United States Supreme Court encroach on duties of jury). The court emphasized, however, that it did not reject *Daubert* or its progeny on constitutional grounds. *See id.* at 132 (saying that constitutional conclusions are dicta).

C. *The* Logerquist *Court Disputes the Appropriateness of ARE 70 and the Rejection of* Daubert

In a concurring opinion, Vice Chief Justice Jones, joined by Chief Justice Zlaket, agreed that ARE 702 applied to the expert testimony at issue, but wrote separately to emphasize their concerns with *Daubert* and *Kumho*.[150] The justices intimated, however, that their cynicism about *Daubert* and *Kumho* was not solidified.[151] They will remain skeptical of the decisions, "at least until a solid measure of acceptable consistency emerges under their application."[152]

In a dissenting opinion, Justice Martone raised several concerns about the majority's decision.[153] First, the distinction that governed whether *Frye* or ARE 702 applied would produce incomprehensible evidentiary rulings that would permit unreliable evidence to reach the jury.[154] Second, the majority improperly interpreted Arizona case law that actually supported applying *Frye* before admitting opinion testimony on an issue.[155]

150. *See id.* at 134 (Jones, J., concurring) (agreeing with majority opinion). The concurring judges emphasized their "sense of resistance to the *Daubert* principle because it gives the trial judge, a non-expert in scientific matters, near absolute power to make a one-person determination of what is and what is not valid science." *Id.* at 136 (Jones, J., concurring).

151. *See id.* at 136 (Jones, J., concurring) (explaining viewpoint on *Daubert* and *Kumho*).

152. *Id.* (Jones, J., concurring).

153. *See id.* at 136-40 (Martone, J., dissenting) (explaining rationale for refusing to join majority).

154. *See id.* at 137 (Martone, J., dissenting) (exposing flaws in majority analysis). Specifically, Judge Martone emphasized that the majority failed to recognize that inductive reasoning is essential to the scientific method, thereby rendering observation and experience difficult to separate from science. *See id.* (Martone, J., dissenting) (criticizing majority's analysis). Additionally, Judge Martone asserted that the court should have applied *Frye* to Dr. van Der Kolk's testimony because his testimony included references to studies documented in the scientific literature. *See id.* (Martone, J., dissenting) (holding that expert testimony in present case was based on science).

155. *See id.* at 137-38 (Martone, J., dissenting) (expressing different views on application of *Hummert*, *Lindsey* and *Roscoe* to present case). Specifically, Judge Martone emphasized that *Hummert* allowed expert testimony matches in DNA evidence under *Frye*, but limited testimony on statistical probability because those techniques were not generally accepted. *See id.* at 137 (Martone, J., dissenting) (explaining holding in *Hummert*). Consequently, the opinion testimony regarding the DNA matching results was proper because the court had admitted the scientific matching testimony. *See id.* (Martone, J., dissenting) (same). Judge Martone asserted that *Hummert* required the trial court to assess the admissibility of repressed memories before permitting opinion testimony on behavioral characteristics of repressed child victims of sexual abuse. *See id.* at 137-38 (Martone, J., dissenting) (explaining appropriate application of *Hummert* to present case).

Judge Martone also distinguished *Lindsey* by emphasizing that the child incest testimony in *Lindsey* was based on recognized principles of behavioral science. *See id.* at 138 (Martone, J., dissenting) (explaining distinction between present case and *Lindsey*). In contrast, "[r]epressed memory has not been generally recognized. It is a new and controversial theory which attempts to explain the brain's response to trauma under the banner of science." *Id.* (Martone, J., dissenting).

More importantly, the decision by the California Court of Appeals that required repressed memory testimony pass relevancy analysis lacked persuasive authority in view of the unanimous application of a high-level standard by other jurisdictions.[156] Therefore, Justice Martone found that *Frye* applied and that repressed memory testimony could not satisfy the standard.[157] Justice Martone concluded his analysis by emphasizing that the time was ripe for Arizona to adopt *Daubert* and that trial judges have the time and skills necessary to conduct reliability hearings.[158]

Finally, Justice McGregor filed a dissenting opinion in which she emphasized three deleterious results from the majority's opinion.[159] First, by rejecting *Daubert*, Arizona became one of the few states retaining *Frye*, thereby stripping Arizona from judicial discourse on the development of evidence laws related to expert testimony.[160] Second, *Frye* limited the admissibility of "reliable, but newly-developed, scientific principles," to which *Daubert*'s more flexible standard was amenable.[161] Third, admitting unreliable testimony under a low-level evidentiary standard undermined the legal system's assurance to preserve justice.[162]

V. CRITICAL ANALYSIS

The Supreme Court of Arizona improperly concluded that expert testimony on repressed memories requires a low-level relevancy standard.[163]

Additionally, Judge Martone emphasized that *Roscoe* permitted invalid testimony to reach the jury, a conclusion the court could have avoided by requiring "a preliminary showing of reliability." *See id.* (Martone, J., dissenting) (explaining effect of *Roscoe* decision).

156. *See id.* at 137 (Martone, J., dissenting) (noting that majority overlooked numerous state supreme court rulings on admissibility of repressed memory testimony and, instead, favored ruling of one state intermediate court).

157. *See id.* at 138-39 (Martone, J., dissenting) (applying *Frye* to repressed memories).

158. *See id.* at 139-40 (Martone, J., dissenting) (giving rationale for Arizona to adopt *Daubert*).

159. *See id.* at 140-42 (McGregor, J., dissenting) (explaining problems generated by majority opinion).

160. *See id.* at 141 (McGregor, J., dissenting) (stating that Arizona has placed itself "within a tiny minority of jurisdictions that have chosen to adopt a unique interpretation of Rule 702"). In addition to limiting Arizona's opportunity to inform judicial discourse on evidentiary issues, Judge McGregor expressed concern that the majority's ruling would cause distinct differences between federal and state decisions in Arizona. *See id.* at 141 (McGregor, J., dissenting) (explaining effect of majority opinion).

161. *Id.* at 141 (McGregor, J., dissenting).

162. *See id.* at 141-42 (McGregor, J., dissenting) (worrying that unreliable testimony has deleterious effect on legal system). Judge McGregor also expressed concern that the majority read *Daubert* too broadly when the majority emphasized that *Daubert* permitted the trial judge to assess credibility. *See id.* at 142 (McGregor, J., dissenting) (explaining that *Daubert* requires the trial judge to assess scientific validity, not credibility).

163. *See id.* at 134 (holding that ARE 702 applies to repressed memory testimony).

The court should have applied *Frye* based on its holding in *Hummert*, in which the court held that expert DNA testimony founded on statistical probability calculations must satisfy the general acceptance standard.[164] Similar to DNA statistical calculations, scholars have researched and discussed the repressed memory phenomenon for a number of years; yet, the phenomenon still lacks general acceptance.[165] Moreover, like DNA statistical testing, the repressed memory phenomenon has generated considerable debate in the scientific community.[166]

The court also could not circumvent *Frye* by finding that repressed memory testimony involves a non-scientific issue.[167] Such a result overlooks the empirical work that the psychological and psychiatric communities have conducted on repressed memories.[168] Furthermore, even if "repressed memories has its roots in clinical therapy, a domain in which validity is not a factor of overriding concern," it nonetheless involves observation—the starting point for scientific reasoning.[169]

In addition to failing to apply *Frye* to repressed memory testimony, the court also failed to explain why the decisions of the federal district courts and state supreme courts involving repressed memories do not inform its

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164. *See* State v. Hummert, 933 P.2d 1187, 1195 (Ariz. 1997) (en banc) (holding testimony based on DNA statistical calculations inadmissible under *Frye*); State v. Bible, 858 P.2d 1152, 1188-89 (Ariz. 1993) (en banc) (finding testimony based on DNA statistical calculations inadmissible under *Frye*).

165. *Compare Bible*, 858 P.2d at 1187 ("[The DNA statistical calculations] at issue are not generally accepted in the relevant scientific community."), *with* State v. Hungerford, 697 A.2d 916, 928 (N.H. 1997) ("We cannot say that the [repressed memory] phenomenon has gained acceptance in the psychological community.").

166. *Compare Bible*, 858 P.2d at 1187 (explaining that conflicting studies and views have created "controversy" in scientific community on DNA statistical testing), *with Hungerford*, 697 A.2d at 925 (stating that "level of [publication] submission is high, but the debate over methodology and the meaning of results continues").

167. *See Logerquist*, 1 P.3d at 133 ("This case turns on a non-scientific issue."). One scholar argues that courts should refrain from asking whether the field constitutes a science. *See* Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS J. 229, 239 (2000). Rather, Michael Saks sees true development in expert testimony jurisprudence requiring courts to "ask whether a field addresses an empirical matter, and, if so, what evidence demonstrates how well it can perform with respect to that empirical matter." *Id.*

168. *See generally* WORKING GROUP ON INVESTIGATION OF MEMORIES OF CHILDHOOD ABUSE, AM. PSYCHOLOGICAL ASS'N, FINAL REPORT (1996) (providing overview and criticism of empirical literature on repressed memories from proponent and opponent perspective).

169. *Logerquist*, 1 P.3d at 133 (citations omitted); *see also* Marilee M. Kapsa & Carl B. Meyers, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313, 325 (1999) (explaining that "border between scientific and [non-scientific testimony] is fluid"); Michael H. Graham, *The* Daubert *Dilemma: At Last a Viable Solution?*, 179 FED. RULES DECISIONS 1, 11 (1998) ("To conclude that 'no methodology or technique,' i.e. explanative theory, is involved with respect to opinion testimony presenting 'scientific, technical or other specialized knowledge' is simply untenable." (citations omitted)).

holding.[170] One possible distinguishing feature of these cases is that they were decided by states employing a *Daubert* or *Daubert*-like analysis to expert testimony.[171] Yet, the court elected to rely upon a California case, which turns upon a distinction that has yet to inform when *Frye* applies under Arizona law.[172]

Even if ARE 702 applies to repressed memory testimony, the court made two questionable omissions and assumptions in refusing to adopt *Daubert*.[173] First, although the court recognized that Arizona law places constraints on when evidentiary standards apply to expert testimony, it failed to recognize that Arizona is not completely inseparable from the laws of other jurisdictions.[174] For instance, states that have applied *Frye* in the past have recently replaced it with a *Daubert* or *Daubert*-like analysis.[175] Arizona will likely follow suit because the concurring justices are open to adopting *Daubert* in the future.[176]

Second, judges are in a more informed position to assess the validity of repressed memories than the jury.[177] Judges receive training and

170. *See Logerquist*, 1 P.3d at 115-16 (citing cases addressing admissibility of repressed memory testimony but providing no analysis of their conclusions).

171. *See* Shahzade v. Gregory, 923 F. Supp. 286, 287-90 (D. Mass. 1996) (applying reliability standard); Isely v. Capuchin Province, 877 F. Supp. 1055, 1064-66 (E.D. Mich. 1995) (same); State v. Walters, 698 A.2d 1244, 1246-48 (N.H. 1997) (same); *Hungerford*, 697 A.2d at 925-34 (same); State v. Quattrocchi, No. P92-3759, 1999 WL 284882, at *9-16 (R.I. Apr. 26, 1999) (applying reliability and general acceptance standard); Franklin v. Stevenson, 987 P.2d 22, 27-28 (Utah 1999) (applying reliability standard).

172. *See* Eckstein & Thumma, *supra* note 65, at 18 (explaining Arizona's distinction between types of expert testimony but making no reference in text or footnotes to cases that develop distinction analogous to California law). Arizona has permitted medical and psychological testimony under ARE 702, but has not determined that this type of testimony automatically requires low-level admissibility analysis. *See* State v. Moran, 728 P.2d 248, 252 (Ariz. 1986) (admitting psychological testimony); State v. Hummer, 911 P.2d 609, 613 (Ariz. Ct. App. 1995) (admitting medical testimony).

173. *See Logerquist*, 1 P.3d at 128-29 (holding that reliability component is not necessary and trial judges lack training to conduct complex evaluations of scientific evidence).

174. *See id.* at 128 (recognizing that case law narrowly applies *Frye*). Arizona courts, like courts adopting *Daubert*, have criticized *Frye* and, although Arizona does not adopt *Daubert*, the courts appear to apply a test "for considering novel scientific expert evidence that might be described as the 'Fraubert' test." Eckstein & Thumma, *supra* note 65, at 19, 42.

175. *See* State v. Coon, 974 P.2d 386, 402-03 (Alaska 1999) (applying *Daubert* to sound spectrograph); State v. Porter, 698 A.2d 739, 746 (Conn. 1997) (applying *Daubert* to polygraphs); State v. Begley, 956 S.W.2d 471, 475 (Tenn. 1997) (applying *Daubert* to DNA evidence).

176. *See Logerquist*, 1 P.3d at 136 (Jones, J., concurring) (explaining that court's skepticism of *Daubert* may expire).

177. *See* Jacqueline Hough, Note, *Recovered Memories of Childhood Sexual Abuse: Applying the* Daubert *Standard in State Courts*, 69 S. CAL. L. REV. 855, 877 (1996) (countering doubts about inability of judges to assess reliability by focusing on available tools, training and experience).

manuals on scientific evidence, can permit the filing of supplemental Brandeis briefs to provide general background information on the proffered testimony, and can appoint an expert to assist the court in its analysis.[178] Moreover, as the majority in *Logerquist* emphasized, judges are often called upon to render decisions regarding complex issues not commonly recognized as falling within their expertise.[179] To expect that a jury, lacking the additional training, assistance and experience offered to judges, can evaluate an area of expertise in which no consensus exists is highly specious.[180]

Even if the court correctly rejected *Daubert*, the court misapplied ARE 702 based on the language of prior case law.[181] Specifically, in *Hummert*,

178. *See* Faigman et al., *supra* note 20, § 1-3.8, at 43-45 (1997), 24-25 (2000 Supp.) (discussing role of court-appointed experts under rules of evidence); Hough, *supra* note 177, at 877-79 (identifying factors supporting and undermining judges as gatekeepers). *See generally* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994) (providing guide to assist judges in assessing admissibility of scientific evidence); JOEL S. CECIL & THOMAS E. WILLGING, FED. JUDICIAL CTR., COURT APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (1993) (providing guide to assist judges in utilizing court-appointed experts); John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183 (1996) (reviewing manual published by Federal Judicial Center and providing praise and criticism for its contents); *Second Annual Appellate Judges and Lawyers Symposium: Scientific Methodology and the Admissibility of Expert Testimony: Setting the Stage:* Frye, Daubert, *and the States*, 9 KAN. J.L. & PUB. POL'Y 2 (1999) (capturing speeches presented to judges and attorneys at symposium on admissibility of scientific evidence). *But see* Mark Lewis & Mark Kitrick, Kumho Tire Co. v. Carmichael: *Blowout from the Overinflation of* Daubert v. Merrell Dow Pharmaceuticals, 31 U. TOL. L. REV. 79, 93-94 (1999) (criticizing unfettered control *Daubert* grants to judges and surmising that "[j]udges have been placed in an unnecessarily demanding new role").

Brandeis briefs are supplemental briefs submitted to the court to provide general information regarding relevant social phenomena. *See, e.g.*, Hough, *supra* note 177, at 877-78 (noting that Brandeis briefs on repressed memories "may be valuable in informing the judge about the phenomena of repression and delayed recall theory generally as well as the phenomenon of false memory theory"). These briefs are named after Justice Louis Brandeis, who, prior to serving on the United States Supreme Court, filed briefs with the Court regarding non-legal authority relevant to particular cases. *See id.* at 877 n.89 (explaining purpose of Brandeis briefs).

179. *See Logerquist*, 1 P.3d at 128-29 (holding that trial court judges are capable of "making prompt and accurate *Frye* determinations in even the most difficult and arcane disciplines").

180. *See* Lazo, *supra* note 1, at 1402 ("If both parties call experts who give conflicting testimony, the ensuing battle of the experts may confuse rather than convince the jury.").

181. *Compare* State v. Hummert, 933 P.2d 1187, 1193 (Ariz. 1997) (en banc) (holding that ARE 702 permits "experts [to] testify concerning their *own experimentation* and observation and opinions based on their own work" (emphasis added)), *with Logerquist*, 1 P.3d at 124 (holding that Dr. van der Kolk "can be asked to testify to his opinions based on the results of his experience, his observations, his own research and *that of others with which he is familiar*, and the care of his patients" (emphasis added)).

the court limited testimony admissible under ARE 702 to the expert's own experimentation and observations and excludes testimony based on "the work or discovery of others."[182] The court foreshadowed this limitation in *Roscoe*, in which the court noted that published studies on dog tracking evidence existed to support the expert's opinions, but "the scientific data was not [offered as] the basis of the foundation for the evidence nor for its presentation to the jury."[183] The language from these cases insinuates that reliance on studies, particularly those conducted by third parties, likely guides whether the testimony satisfies ARE 702.

This focus on studies appears akin to decisions by the Supreme Court of Florida that involve expert testimony in child sexual abuse cases.[184] Specifically, the Supreme Court of Florida held that testimony on the behaviors of child victims of sexual abuse is admissible on relevancy grounds when that testimony is pure opinion testimony based solely on training and experience.[185] The court stressed, however, that testimony based on studies and tests, combined with testimony based on training and experience, does not constitute pure opinion testimony.[186] Consistent with the language in *Roscoe* and *Hummert* as well as the Supreme Court of Florida's analysis, Dr. van der Kolk's testimony did not qualify as opinion testimony because he intended to rely on studies conducted by others.[187] Consequently, the Supreme Court of Arizona should have held the expert testimony inadmissible under ARE 702.

VI. IMPACT/CONCLUSION

The Supreme Court of Arizona should have upheld the trial court's order to exclude expert testimony on repressed memories under *Frye* or should have remanded the case for a hearing consistent with *Daubert*.[188]

182. *Hummert*, 933 P.2d at 1195.

183. State v. Roscoe, 700 P.2d 1312, 1320 n.2 (Ariz. 1984).

184. *See* Hadden v. State, 690 So. 2d 573, 577-78 (Fla. 1997) (discussing Florida's adherence to *Frye* despite adoption of state rules of evidence); *see also* Holdsworth, *supra* note 7, at 124-25 (comparing decision by Florida Supreme Court on child sexual abuse accommodation syndrome with repressed memory testimony); Steele, *supra* note 8, at 968-69 (explaining Florida's approach to expert testimony).

185. *See Hadden*, 690 So. 2d at 580 (examining distinction between pure opinion testimony and scientific testimony); Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993) (same).

186. *See Hadden*, 690 So. 2d at 580-81 (stating that expert's testimony went beyond pure opinion testimony); *Flanagan*, 625 So. 2d at 828 (differentiating between pure opinion testimony and profile testimony); *see also* Steele, *supra* note 8, at 968 (explaining that Florida's distinction differentiates opinion testimony "based solely upon the experience of the expert" and opinion testimony "based upon experience as well as knowledge of clinical studies performed by third parties").

187. *See* Logerquist v. McVey, 1 P.3d 113, 117 (Ariz. 2000) (en banc) (reproducing letter by Dr. van der Kolk to Logerquist's attorney explaining basis for his testimony).

188. *See id.* at 136 (Martone, J., dissenting) (holding that court should have affirmed trial court ruling or should have remanded case for *Daubert* hearing).

Instead, the court admitted the testimony on relevancy grounds after applying an unclear distinction between scientific testimony and experience-based or observation-based testimony that likely will generate a myriad of interpretations by Arizona courts.[189] Consequently, the *Logerquist* decision provides a good example of the United States Supreme Court's concern that discriminating between the types of expert testimony is "unlikely to produce clear legal lines capable of application in particular cases."[190]

The *Logerquist* decision not only has removed Arizona from judicial discourse on evidentiary issues involving expert testimony, but also has effectively created an approach that reaches far beyond the boundaries of the state. Although a majority of states have adopted a reliability component into their evidentiary scheme, several states still retain *Frye*, and a few states have yet to render a decision on this issue.[191] The decision of the Supreme Court of Arizona may influence these courts to take a circuitous route to avoid addressing the reliability of repressed memories.[192] Even those states that have adopted *Daubert* can read the ruling in *Logerquist* as an invitation to find new ways of dealing with whole categories of evidence that it deems inappropriate for reliability analysis.[193]

The *Logerquist* decision also will significantly impact persons defending against claims of childhood sexual abuse. Admitting testimony of questionable validity increases the risk of false accusations of abuse and subsequent adverse verdicts.[194] In fact, individuals wrongly accused of childhood sexual abuse are now seeking redress from therapists for implanting the memories.[195] No amount of monetary compensation, how-

189. *See id.* at 141 (McGregor, J., dissenting) (expressing concern that "distinction will [not] prove useful and suspect it will produce inexplicable evidentiary rulings").

190. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148 (1999).

191. *See* Faigman et al., *supra* note 20, § 1-3.0 at 11-12 n.7 (1997), 3 n.4 (Supp. 2000) (identifying how states divide on what evidentiary standard applies).

192. *Cf. Logerquist*, 1 P.3d at 122-23 (relying on California case that first applied relevancy standard to expert testimony on repressed memories).

193. *Cf.* Mary L. Tenopyr, *A Scientist-Practitioner's Viewpoint on the Admissibility of Behavioral and Social Scientific Information*, 5 PSYCHOL. PUB. POL'Y & L. 194, 200 (1999) (examining impact of *Daubert* on behavioral science evidence and warning that "failure of many courts to apply *Daubert* to clinical testimony can lead to an illogical and potentially unfair treatment of different types of evidence").

194. *See* Carro & Hatala, *supra* note 4, at 1270 ("Without question, many persons have been falsely accused of sexually abusing their children or other minors since repressed memory therapy became an oft-used psychotherapeutic technique."). Carro and Hatala point out that statistics indicate the number of accusations of childhood sexual abuse increased from a total of 250 by March 1992 to 11,000 by March 1994. *See id.* (explaining need to protect falsely accused). A large number of these accusations may represent the falsely accused. *See* Victor Dricks, *False "Memories" of Sexual Abuse Rip Families Apart; "Syndrome" Sparks Heated Debate*, PHOENIX GAZETTE, Mar. 25, 1993, at A1 (estimating that number of falsely accused sexual abusers may reach as high as 20,000 total).

195. *See* Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, 79 A.B.A. J. 70, 70 (1993) (discussing cases related to accused sexual abuser seeking money damages from therapist for implanting false memories of abuse);

ever, can overcome the pervasive harm generated from the stigma of being an accused child sexual abuser.[196]

Child sexual abuse is tragic and undeniable, and courts should attempt to remedy the harm caused to innocent victims.[197] The Arizona Supreme Court, however, overlooks the need to ensure the reliability of expert testimony and, as a result, places the accuracy of decisions in repressed child sexual abuse cases at issue.[198] Other jurisdictions should

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Larry B. Spikes & Angela L. Rud, *"Restored Recollections": Claims Based on Repressed Memories of Abuse*, 62 DEF. COUNSEL J. 89, 89 (1995) (same). A California jury awarded $500,000 to a father who sued his daughter's therapists for implanting false memories of sexual abuse. *See* Loftus & Rosenwald, *supra*, at 70 (giving facts of case).

196. *See* David F. Partlett, *Recovered Memories of Child Sexual Abuse and Liability: Society, Science, and the Law in a Comparative Setting*, 4 PSYCHOL. PUB. POL'Y & L. 1253, 1286 (1998) (looking at deleterious effect on accused created by litigating repressed child sexual abuse claims). Litigation of repressed child sexual abuse cases stigmatizes and defames the accused, thereby inflicting psychological, financial and material harm. *See id.* (identifying deleterious effects of accusing person of sexual abuse). Accusations destroy the family structure, with alleged victims severing relations for a significant period. *See* Dricks, *supra* note 194, at A1 (reporting that Arizona State University professor accused of incest by his adult daughter had little contact with her for year after she recovered memories of abuse). In addition to the social ramifications that accusations generate, they also compel the accused to enter a legal arena weighed heavily against him or her. *See* Carro & Hatala, *supra* note 4, at 1270 (explaining imbalance in vigorously "respect[ing] the adult survivor of incest," but granting less vigilance in protecting individuals falsely accused of sexual abuse). David F. Partlett stresses that, "[e]ven though the accusations may not be established, the mobilization of legal machinery, opportunity for privileged press scrutiny and publication, and societal opprobrium are damage enough." Partlett, *supra*, at 1287.

197. *See* Judith L. Alpert et al., *Final Conclusions of the American Psychological Association Working Group on Investigation of Memories of Child Abuse*, 4 PSYCHOL. PUB. POL'Y & L. 933, 933 (1998) ("Controversies regarding adult recollections should not be allowed to obscure the fact that childhood sexual abuse is a complex and pervasive problem in America that has historically gone unacknowledged."). *See generally* Angela Browne & David Finkelhor, *The Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66-77 (1986) (reviewing empirical studies on effects of childhood sexual abuse and finding deleterious long-term and short-term effects, including fear, depression, psychopathology and self-destructive behavior).

198. *See* Commonwealth v. Dunkle, 602 A.2d 830, 838 (Pa. 1992) (excluding expert testimony that explains why child victims of sexual abuse delay or omit reporting, while recognizing gravity of childhood sexual abuse in society). In the context of expert testimony in child sexual abuse cases, courts must balance the need to protect young victims and the need to uphold the judicial process. *See id.* (explaining that protecting child victims of sexual abuse cannot come at price of judicial process). As the Supreme Court of Pennsylvania stated:

> We are all aware that child abuse is a plague in our society and one of the saddest aspects of growing up in today's America. Nevertheless, we do not think it befits this Court to simply disregard long-standing principles concerning the presumption of innocence and the proper admission of evidence in order to gain a greater number of convictions. A conviction must be obtained through the proper and lawful admission of evidence in order to maintain the integrity and fairness that is the bedrock of our

follow the lead of the federal district courts and state supreme courts that apply a high-level evidentiary standard to repressed memory testimony.

Tomika N. Stevens

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jurisprudence. No shortcuts are permissible that erode this concept, no matter how noble the purpose.

Id.