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True or False: Expert Testimony on Repressed Memory

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TRUE OR FALSE: EXPERT TESTIMONY ON REPRESSED MEMORY

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I. INTRODUCTION

The ordinary human response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to know about or to utter aloud. This is the meaning of the word "unspeakable." Atrocities, however, refuse to be buried. As powerful as the desire to deny atrocities is the conviction that denial does not work. . . .

Remembering and telling the truth about terrible events are essential tasks, both for the healing of individuals and for the restoration of the social order. The conflict between the will to deny horrible events—the will to forget them—and the will to proclaim them aloud is the central dialectic of psychological trauma.¹

In the abstract, it is relatively easy for many people to accept the concept of traumatic amnesia. The idea that someone might bury the

1. Judith L. Herman, Address at the Annual Meeting of the American Psychiatric Association 2 (May 22, 1994) (transcript on file with *Loyola of Los Angeles Law Review*) [hereinafter Herman Address]; see also JUDITH L. HERMAN, *TRAUMA AND RECOVERY* 1 (1992) ("People who have survived atrocities often tell their stories in a highly emotional, contradictory, and fragmented manner which undermines their credibility . . . [F]ar too often secrecy prevails, and the story of the traumatic event surfaces not as a verbal narrative but as a symptom.").

memory of a terrifying experience in order to survive it and continue functioning is not beyond the realm of possibility to the average person.² Stranger things have happened. And there is still so much to be learned about how the human mind works.³

Yet the scenario of an adult recovering long-repressed memories of child sexual abuse⁴ can strike fear into the hearts of parents and others in constant contact with children. Visions of being hauled into court to defend against charges of child molestation scare those who are guilty, of course. But these visions are also threatening to the innocent who hear of psychotherapists brainwashing patients into believing they were abused as children and who shudder to think they could be accused of such an unspeakable atrocity.⁵ The fear is understandable; the mere passage of time makes it extremely difficult to disprove the charges.⁶

Accusations of child sexual abuse often make their way into the glare of media attention, and when they move into the legal arena, the intense emotions fueling the debate over repressed memory can reach a fever pitch. In the last decade increasing numbers of adult survivors have filed civil suits against their abusers.⁷ Due to the inherent difficulties in proving their cases, many plaintiffs call expert witnesses to help overcome the disbelief and skepticism of judges and juries.⁸

2. See, e.g., *People v. Beckley*, 456 N.W.2d 391, 404 (Mich. 1990) ("It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons.").

3. See, e.g., Leon Jaroff, *Lies of the Mind*, TIME, Nov. 29, 1993, at 52, 55 (reporting investigations and debates by American Psychological Association, American Psychiatric Association, and American Medical Association). For a summary of the most recent scientific research into the neurology of memory, see Sharon Begley & Martha Brant, *You Must Remember This*, NEWSWEEK, Sept. 26, 1994, at 68.

4. This Comment adopts the definition of "sexual abuse" in title 42 of the U.S. Code: (A) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

42 U.S.C. § 5106g(7)(A)-(B) (1988).

5. See *infra* parts II.D.2 (discussing litigation from defendant's perspective), IV.A.2 (noting claims that therapists implant false memories of child sexual abuse).

6. See *infra* note 118 (discussing loss of evidence, memories, and witnesses over time as policy rationale for statutes of limitations).

7. Julie S. Silberg, Comment, *Memory Repression: Should It Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1589-90 (1993).

8. See Elizabeth F. Loftus, *The Reality of Repressed Memories*, AM. PSYCHOLOGIST, May 1993, at 518, 522-23 (reporting juror simulation study in which more subjects were skeptical about repressed memory claim than nonrepressed memory claim); Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, A.B.A. J., Nov. 1993, at

However, psychologists and psychiatrists are deeply divided on the reliability of repressed memories recovered many years later.⁹ If the experts cannot agree, how are the courts to decide whether expert testimony on this subject should be admissible?

Part II of this Comment reviews current information on the incidence of child sexual abuse and the development of legal remedies for child sexual abuse claims. This is followed by an overview of the controversy regarding repressed memory and the issues involved in related litigation. Part III begins with data supporting the existence of repressed memories, then articulates the reasons for admitting expert evidence in actions brought by survivors of abuse. Part IV presents the arguments against the validity of repressed memories, then focuses on why expert testimony regarding repressed memories should be inadmissible in civil suits for child sexual abuse. Notwithstanding the dearth of case law on the specific issue of repressed memories, the analysis in Parts III through VI draws from analogous case law on the admissibility of expert testimony on child sexual abuse—cases where the victim is still a child, as opposed to an adult survivor¹⁰—and hypnotically refreshed testimony. Parts V and VI propose judicial and legislative solutions, respectively, which represent an effort to balance the conflicting interests of the parties involved.

II. BACKGROUND

A. *Prevalence of Child Sexual Abuse*

Until the 1970s, the prevalence of child sexual abuse had been seriously underestimated.¹¹ Documented skepticism and minimiza-

70, 70 ("Across the country, despite society's abhorrence of sex crimes, judges and juries are beginning to view with skepticism some sex abuse claims based on recovered memories."). Similar considerations affect litigation based not on repressed memory, but on the allegations of a child victim because "[c]hild sexual abuse is often exceedingly difficult to prove. Molestation occurs in secret, and the child is usually the only eyewitness." John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 3 (1989). "Faced with a vacuum of evidence, attorneys increasingly turn to physicians, psychiatrists, social workers, and psychologists to provide expert testimony regarding child sexual abuse." *Id.* at 4.

9. Compare *infra* part III.A (supporting theory of repressed memory) with part IV.A (criticizing theory of repressed memory).

10. In contrast to the scarcity of case law on expert testimony regarding repressed memory, "[b]eginning in approximately 1980, a substantial body of case law emerged on expert testimony in child sexual abuse litigation. An explosion of decisions occurred in the years following 1985." Myers et al., *supra* note 8, at 4.

11. See Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1196-97 (1992); David McCord, *Expert Psychological Testimony*

tion of the problem can be traced back to the 1890s when Sigmund Freud refused to believe large numbers of patients who reported that they had been sexually abused as children.¹² Freud first theorized that sexual contact with their fathers had caused his patients' symptoms, but he abandoned this theory when it caused a furor in Victorian-era Vienna and he became personally uncomfortable with the high prevalence of incest reported by patients.¹³ Nearly a century later, research based on general population samples suggests that the incidence of child sexual abuse in the United States is alarmingly high.¹⁴ The estimates for women range from 12%¹⁵ to 38%¹⁶ and for men, from 3%¹⁷ to 16%.¹⁸ Of these, at least 50% knew their abusers,¹⁹ and 24% to 50% were sexually abused by family members.²⁰

About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence, 77 J. CRIM. L. & CRIMINOLOGY 1, 2-5 (1986).

12. See, e.g., HERMAN, *supra* note 1, at 13-14; McCord, *supra* note 11, at 2-3.

13. CHRISTINE A. COURTOIS, *HEALING THE INCEST WOUND: ADULT SURVIVORS IN THERAPY* 7 (1988).

14. See, e.g., DEBRA WHITCOMB ET AL., *WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS* 2-4 (1985).

15. *Id.* at 2-3 (citation omitted).

16. WOMEN'S ACTION COALITION, *WAC STATS: THE FACTS ABOUT WOMEN* 48 (1993) (citations omitted) [hereinafter *WAC STATS*] ("[Thirty-eight percent] of women have been sexually abused by an adult relative, acquaintance or stranger before 18. [Twenty-eight percent] of women have been seriously abused before age 14, 12% by someone in their family."); Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 *CHILD ABUSE & NEGLECT* 133, 137 (1983).

17. WHITCOMB ET AL., *supra* note 14, at 2-4 (citation omitted).

18. *WAC STATS*, *supra* note 16, at 49; see also DAVID FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 56 (1979) (estimating incidence of child sexual abuse in American males at 8.6%).

19. Rayline A. De Vine, *Sexual Abuse of Children: An Overview of the Problem*, in U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 3, 5 (Barbara M. Jones et al. eds., 1980) [hereinafter *SEXUAL ABUSE OF CHILDREN*]. Other surveys suggest the figure may be higher. *WAC STATS*, *supra* note 16, at 49 ("Fewer than 20% of children are abused by strangers."); Lucy Berliner & Doris Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in *SEXUAL ABUSE OF CHILDREN*, *supra*, at 47, 47 (estimating that 85% of victims knew their abusers).

20. Allan R. De Jong et al., *Epidemiologic Variations in Childhood Sexual Abuse*, 7 *CHILD ABUSE & NEGLECT* 155, 157 (1983); see also De Vine, *supra* note 19, at 5 (reporting 30% to 50% were sexually abused by family members). Finkelhor estimates that less than one-third of all child sexual abuse consists of father-daughter abuse. DAVID FINKELHOR, *CHILD SEXUAL ABUSE* 226-27 (1984).

The American Psychological Association estimates that . . . [f]ather-daughter sexual involvement . . . account[s] for about 25 percent of [incest] cases; stepfather-stepdaughter relationships . . . account for 25 percent more. The rest are attributed to abuse by brothers, half-brothers, brothers-in-law, uncles, grandfathers,

Exact figures are unavailable for several reasons.²¹ Despite greater public awareness of child sexual abuse, many cases still go unreported.²² Statistics vary according to the methods by which they are compiled,²³ the populations studied,²⁴ and the definitions given to various terms.²⁵ Nevertheless, all experts agree that no matter what methodology is used, the research literature reports "astonishingly high rates of child sexual abuse."²⁶

Society's late-blooming awareness of child sexual abuse is remarkable for the impetus it has given to increased efforts to protect

adoptive fathers and cousins. Boys are also drawn into incestuous situations, but the data on their numbers are even more unreliable.

Nadine Brozan, *Helping to Heal the Scars Left by Incest*, N.Y. TIMES, Jan. 9, 1984, at B6.

21. RUTH S. KEMPE & C. HENRY KEMPE, *THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS* 13 (1984) ("It is presently impossible to give accurate estimates of the total incidence of sexual abuse in the United States; they vary enormously, depending upon how the information has been obtained.").

22. Silberg, *supra* note 7, at 1592-93. One researcher estimates that less than one-fifth of all cases of child sexual abuse are ever reported. FINKELHOR, *supra* note 20, at 232; *see also* WAC STATS, *supra* note 16, at 48 ("In 1991, 2.7 million reports of child abuse were recorded nationally; 15%, (or 404,100) were child sex abuse cases."); Judy Mann, *Sexual Abuse*, WASH. POST, Apr. 20, 1984, at B1 ("A retrospective study of 1,200 college-age women found that 28 percent had sexual experience with an adult before they were 13, but only 6 percent of the incidents had been reported to authorities.").

23. The two primary sources of estimated figures are: (1) reports to law enforcement or child protection authorities mandated by law in every state; and (2) sociological studies which use differing methodologies and definitions of child sexual abuse. John E.B. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1, 3 (1989-1990).

24. *See* FINKELHOR, *supra* note 20, at 228-29; Lucy Berliner, *Nature and Dynamics of Child Sexual Abuse*, in *A JUDICIAL PRIMER ON CHILD SEXUAL ABUSE* 1, 1-2 (Josephine Bulkley & Claire Sandt eds., 1994); Myers et al., *supra* note 8, at 52 & n.202.

25. *See, e.g.*, Meredith S. Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 25 FAM. L.Q. 193, 197, 200 (1991); Russell, *supra* note 16, at 133 ("There is no consensus among researchers . . . about what sex acts constitute sexual abuse, what age defines a child, nor even whether the concept of child sexual abuse is preferable to others such as . . . child molestation . . . or child rape."); Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 186-88 (1983); Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1380 n.89 (1994) ("A common problem that has rendered statistics concerning valid sexual abuse allegations less reliable is the confusion of the terms 'unsubstantiated' and 'false allegations': researchers and others have sometimes treated unsubstantiated allegations as false." (citations omitted)); *see also* David L. Corwin et al., *Child Sexual Abuse and Custody Disputes: No Easy Answers*, 2 J. INTERPERSONAL VIOLENCE 91, 94-95 (1987) (explaining that "unsubstantiated" means insufficient evidence existed to affirmatively conclude child was sexually abused); Myers, *supra* note 23, at 23 ("A fabricated report is a deliberate falsehood.").

26. Russell, *supra* note 16, at 144; *see also* Silberg, *supra* note 7, at 1591 ("The number of child sexual abuse victims is staggering." (footnote omitted)).

children and prosecute child molesters.²⁷ It is perhaps even more significant for adult survivors who were victims at a time in history when their needs were ignored, their trauma went untreated, and their secrets remained hidden.²⁸ Although reporting of child sexual abuse has increased in recent years²⁹—in part due to mandatory reporting laws³⁰—it has been, and continues to be, rare for victims to complain immediately after the abuse because of guilt, embarrassment, or fear.³¹ To cope with the horror of their experiences³² and the “conspiracy of silence”³³ that shields perpetrators from accountability, many child victims develop dissociative defense mechanisms³⁴ similar

27. See, e.g., 18 U.S.C. § 3509 (Supp. V 1994) (establishing child victims' and child witnesses' rights in child abuse and neglect cases). Provisions include alternatives to live in-court testimony such as live testimony by two-way closed circuit television, *id.* § 3509(b)(1), and videotaped depositions, *id.* § 3509(b)(2); privacy protections, including confidentiality of information, *id.* § 3509(d)(1), filing under seal, *id.* § 3509(d)(2), and protective orders, *id.* § 3509(d)(3); authority for the court to exclude from the courtroom “all persons, including members of the press, who do not have a direct interest in the case,” *id.* § 3509(e); preparation of a victim impact statement for the perpetrator's probation officer, *id.* § 3509(f); use of multidisciplinary child abuse teams to provide child services, *id.* § 3509(g), guardians ad litem to protect the child's best interests, *id.* § 3509(h), and adult attendants to provide emotional support to the child, *id.* § 3509(i); expedited proceedings and continuances where necessary, *id.* § 3509(j); extension of the statute of limitations until the child reaches the age of 25 years, *id.* § 3509(k); and permission for the use of testimonial aids such as “anatomical dolls, puppets, drawings, [or] mannequins,” *id.* § 3509(l). See *infra* note 30 for mandatory reporting statutes.

28. See HERMAN, *supra* note 1, at 7-9, 28-32. The author writes:

For most of the twentieth century, it was the study of combat veterans that led to the development of a body of knowledge about traumatic disorders. Not until the women's liberation movement of the 1970s was it recognized that the most common post-traumatic disorders are those not of men in war but of women in civilian life.

Id. at 28.

29. WHITCOMB ET AL., *supra* note 14, at 4.

30. E.g., 42 U.S.C. § 13031 (1988 & Supp. V 1994); CAL. PENAL CODE § 11166 (West 1992); GA. CODE ANN. § 19-7-5 (Harrison 1994); MINN. STAT. ANN. § 626.556 (West Supp. 1993); OHIO REV. CODE ANN. § 2151.421 (Anderson Supp. 1994).

31. See, e.g., JOSEPH E. CRNICH & KIMBERLY A. CRNICH, SHIFTING THE BURDEN OF TRUTH: SUING CHILD SEXUAL ABUSERS—A LEGAL GUIDE FOR SURVIVORS AND THEIR SUPPORTERS 51 (1992); Summit, *supra* note 25, at 186-87 (noting that “[m]ost . . . sexual abuse is never disclosed” and that “[o]f the minority of incest secrets that are disclosed . . . very few are subsequently reported to outside agencies”); Silberg, *supra* note 7, at 1592-93 (explaining why “seventy-five to ninety percent of all incest survivors reach adulthood without disclosing the abuse”).

32. See, e.g., Herman Address, *supra* note 1, at 4 (“[P]eople [in a state of terror] may experience profound perceptual distortion, including insensitivity to pain, depersonalization, derealization, time slowing, and amnesia.”).

33. See generally SANDRA BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST (1978) (examining dynamics of and society's response to incestuous assault).

34. More commonly known as posttraumatic stress disorder (PTSD), the psychological impact of traumatic events on a person

to those observed in combat veterans³⁵ and victims of other atrocities.³⁶ In addition, pioneering researchers report that "sexual abuse in childhood can leave victims with permanently weakened immune

may be either a combination of physical and mental disorders, or solely a residual mental incapacity continuing after a physical injury has healed. PTSD can exist even when a trauma victim has not suffered demonstrable physical injury. A sexually abused child . . . may exhibit symptoms of unnatural secrecy, feelings of helplessness or entrapment, delayed or conflicting disclosure, retraction, and various phobias. A practical consequence is that the child may repress or delay disclosing the sexual abuse until after the pertinent . . . statute of limitations has run.

James W. Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitation for Civil Child Sexual Abuse Litigation*, 50 OHIO ST. L.J. 753, 756-57 (1989) (citations omitted), *quoted in* Callahan v. State, 464 N.W.2d 268, 271 (Iowa 1990); *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 393 (4th ed. 1994) [hereinafter DSM-IV] (describing PTSD as "characterized by the reexperiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma").

35. *See* HERMAN, *supra* note 1, at 26-28, 32.

36. Those who characterize repressed memories of child sexual abuse as mere fantasy often draw a misconceived analogy to Holocaust survivors who suffered enormously during World War II yet never "forgot" what happened to them. *See, e.g.*, David G. Savage, *Doubt Growing by Experts on Cases of "Recovered Memory,"* L.A. TIMES, Nov. 26, 1993, at A1, A28 (reporting comparison drawn by psychiatrist Paul McHugh). The comparison is misguided for two reasons. First, it is not true. Bruno Bettelheim has described repressing his memories of Dachau and Buchenwald:

A split was soon forced upon me, the split between the inner self that might be able to retain its integrity, and the rest of the personality that would have to submit and adjust for survival.

Anything that had to do with the present hardships was so distressing that one wished to repress it, to forget it. Only what was unrelated to present suffering was emotionally neutral and could hence be remembered.

David Calof, *Facing the Truth About False Memory*, FAM. THERAPY NETWORKER, Sept./Oct. 1993, at 39, 42 (quoting Bruno Bettelheim).

Second, as terrible as the Nazi concentration camps were, the suffering was *en masse*. The fact that each prisoner's agony was shared by millions of others did nothing to ameliorate their pain, but it does distinguish the Holocaust from the situation in which most sexually abused children are trapped—completely alone, often feeling somehow responsible or deserving of the abuse, and reluctant to disclose it for fear of being blamed or not believed. *See, e.g.*, Mary S. Wylie, *The Shadow of a Doubt*, FAM. THERAPY NETWORKER, Sept./Oct. 1993, at 18, 26-27. Moreover, unlike the survivors of publicly acknowledged atrocities, adult survivors of child sexual abuse often do not know *why* they have signs of PTSD until they do the painful work of recovery. Calof, *supra*, at 40. Calof describes survivors as

veterans of intensely private wars that had taken place in barns, attics and suburban houses with the blinds drawn. Their wounds were never reported in newspapers or discussed with family members. There were rarely any witnesses other than the people who hurt them. . . . [T]heir childhood rapes and beatings were encoded into memory in fragments . . . when their hearts and minds were flooded with adrenaline. They didn't remember them the way one remembers a walk in the park, and they doubted the fragments they did recall.

Id. at 40-41.

function . . . 'Abuse seems to be a biology altering experience. It changes the brain's stress response system.'³⁷

Dissociation³⁸ can take a number of forms, including traumatic amnesia—more commonly known as repressed memory.³⁹ Simply put,

something happens that is so shocking that the mind grabs hold of the memory and pushes it underground, into some inaccessible corner of the unconscious. There it sleeps for years, or even decades, or even forever—isolated from the rest of mental life. Then, one day, it may rise up and emerge into consciousness.⁴⁰

Repression⁴¹ of traumatic memories keeps painful or unacceptable ideas, impulses, and feelings out of conscious awareness⁴² and "enable[s] the victim to survive by controlling thoughts and feelings to the point at which there is no recognition of victimization."⁴³ Recall of such memories can be triggered by psychotherapy,⁴⁴ hypnosis,⁴⁵ so-

37. Marilyn Elias, *Sexual Abuse Can Weaken Victim's Immune System*, USA TODAY, May 24, 1994, at 1A (quoting Dr. Frank Putnam of the National Institute of Mental Health).

38. The term "dissociation" refers to a group of disorders defined as "a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment." DSM-IV, *supra* note 34, at 477. Dissociative disorders include dissociative amnesia, "an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness." *Id.*

39. See John Briere, *Adult Memories of Childhood Trauma: Current Controversies, Abridged and Revised Version of an Invited Presentation to the American Psychiatric Association 1* (May 26, 1993) (on file with *Loyola of Los Angeles Law Review*).

40. Loftus, *supra* note 8, at 518.

41. It is important to distinguish *repression*, which "operates automatically, outside of conscious awareness and control," from *suppression*, "an active, deliberate, conscious attempt to forget acutely painful or unacceptable thoughts and wishes by diverting attention to other matters." Kanovitz, *supra* note 11, at 1204 n.60.

42. HENRY P. LAUGHLIN, *THE EGO AND ITS DEFENSES* 358 (1970).

43. Naomi Berkowitz, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse Are Denied Access to Washington Courts*—Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 729 (1987).

44. *Id.*; see, e.g., Archibald v. Archibald, 826 F. Supp. 26, 28 (D. Me. 1993) (stating that plaintiff alleged therapy enabled her to remember physical and sexual assaults); Baily v. Lewis, 763 F. Supp. 802, 803 (E.D. Pa.) (noting that plaintiff asserted "that he 'first became consciously aware' of the alleged abuse . . . during the course of psychotherapy"), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991); Anonymous v. Anonymous, 584 N.Y.S.2d 713, 717 (Sup. Ct. 1992) (indicating that plaintiff claimed therapy stimulated recollection of abuse).

45. See, e.g., Borawick v. Shay, 842 F. Supp. 1501, 1503 (D. Conn. 1994) (stating that plaintiff claimed memories came back after hypnosis but were not "hypnotically refreshed").

dium amytal or sodium pentothal,⁴⁶ or events completely unrelated to therapy.⁴⁷

B. Legal Remedies for Child Sexual Abuse: An Overview

The first statutes prohibiting incest in the United States were property laws based on the idea that women and children were chattel;⁴⁸ these statutes were designed to prevent damage to the "stock."⁴⁹ As awareness of the harm caused by child sexual abuse increased, legislators toughened criminal penalties and established procedures to make courtrooms less frightening for child witnesses.⁵⁰ Until the 1980s, civil remedies were available only for child victims or adults who filed claims soon after attaining the age of majority.⁵¹ Survivors who had repressed their memories of the abuse and then recovered them many years later—when they were finally able to confront them—were effectively blocked from seeking legal redress for their injuries by traditional statutes of limitations.⁵²

Although no amount of money could completely and adequately compensate a person who has endured the horror of child sexual abuse,⁵³ a survivor who recovers traumatic memories in adulthood

46. See, e.g., Katy Butler, *A House Divided: Clashing Memories, Mixed Memories*, L.A. TIMES, June 26, 1994, at 12 (Magazine) (reporting case where accused father sued therapist and psychiatrist who used sodium amytal to recover daughter's memories of alleged child sexual abuse).

47. See *infra* part III.A.4.

48. Norrie Clevenger, Note, *Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil Actions Against Their Perpetrators After Attaining the Age of Majority*, 30 J. FAM. L. 447, 448 n.10 (1991-1992); see also *Nelson v. Jacobsen*, 669 P.2d 1207, 1215 (Utah 1983) (referring to "the archaic notion of 'wife as chattel'"); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 489 (1973) ("In eighteenth century English common law . . . [c]hildren were regarded as chattels of the family . . ."). For example, in a contest for guardianship, the California Supreme Court once stated:

The father's right, at least so far as the services of the child are concerned, is strictly a property right, for the loss of which—as in the case of servants generally—an action could at common law be maintained; and in other respects the right, though not commonly spoken of as such, is of essentially the same nature as the right of property.

In re Campbell, 130 Cal. 380, 382 (1900).

49. Clevenger, *supra* note 48, at 448 n.10.

50. See, e.g., Kanovitz, *supra* note 11, at 1197; *supra* note 27.

51. See CRNICH & CRNICH, *supra* note 31, at 32-41; Silberg, *supra* note 7, at 1601.

52. See CRNICH & CRNICH, *supra* note 31, at 33; Loftus, *supra* note 8, at 520; Clevenger, *supra* note 48, at 448; Silberg, *supra* note 7, at 1601-02.

53. Short-term effects of child sexual abuse include anxiety, fearfulness, sleep disturbances, insomnia, nightmares, somatic complaints, and psychosomatic disorders. See Arthur H. Green, *Overview of the Literature on Child Sexual Abuse*, in DIANE H. SCHETKY & ARTHUR H. GREEN, *CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS* 30, 41 (1988). Long-term effects may include an inability to trust,

may now bring a civil suit against the perpetrator in more than twenty-three states.⁵⁴ Remedies may include compensatory damages,⁵⁵ punitive damages,⁵⁶ or injunctive relief, such as a court order to protect children still under the care of the perpetrator.⁵⁷ To date at least twenty-one states have enacted special statutes of limitations for claims of child sexual abuse.⁵⁸ Typically, these statutes provide that the action must be filed within a certain number of years after the plaintiff either (1) reaches the age of majority or (2) knew or had reason to know that sexual abuse caused the injury.⁵⁹ Absent specific

low self-esteem, shame, guilt, depression, hysterical seizures, poor body image—which may be aggravated by pregnancy or venereal disease—social withdrawal, difficulties with peer relationships, impaired school performance, or disturbances in sexual functioning and gender role. *See id.* at 41-44. Extremely severe traumatization can lead to PTSD, multiple personality disorder, suicidal behavior, or borderline personality disorder. *See id.* at 42-44.

54. Loftus & Rosenwald, *supra* note 8, at 70; *see infra* notes 58, 61 and accompanying text.

55. A plaintiff may seek compensatory damages for lost income due to inability to work; medical, psychological, or psychiatric bills; pain and suffering; loss of consortium; or loss of enjoyment of life. CRNICH & CRNICH, *supra* note 31, at 27, 46. Injuries may include any of the following: phobias; intrusive flashbacks; nightmares; multiple personality disorder; depression; anxiety; gastrointestinal or gynecological disorders; sleep disorders; physical ailments with no organic origin; sexual dysfunction, including aversion, promiscuity, or prostitution; escapism through alcoholism, drug addiction, or eating disorders; suicidal thoughts or actions; self-mutilation; swallowing and gagging sensitivity; psychic numbing; inability to trust; feelings of guilt, shame, low self-esteem, or helplessness; clinging behavior; inability to recognize or express anger; inability to care for body; poor body image; high risk-taking or no risk-taking ability; and others. *See* E. SUE BLUME, *SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN* xxvii-xxx (1990); COURTOIS, *supra* note 13, at 9.

56. *See* CRNICH & CRNICH, *supra* note 31, at 47-48.

57. A plaintiff also may ask the court to order therapy for the perpetrator or to order the perpetrator to pay for therapy for other family members affected by the abuse. *Id.* at 49.

58. *See* ALASKA STAT. § 9.10.140 (1994); CAL. CIV. PROC. CODE § 340.1 (West Supp. 1995); COLO. REV. STAT. § 13-80-103.7 (Supp. 1993); CONN. GEN. STAT. ANN. § 52-577d (West 1991); FLA. STAT. ANN. § 95.11(7) (West Supp. 1995); ILL. ANN. STAT. ch. 735, para. 5/13-202.2 (Smith-Hurd Supp. 1994); IOWA CODE ANN. § 614.8A (West Supp. 1994); KAN. STAT. ANN. § 60-523 (Supp. 1993); ME. REV. STAT. ANN. tit. 14, § 752-C (West Supp. 1994); MINN. STAT. ANN. § 541.073 (West Supp. 1995); MO. ANN. STAT. § 537.046 (Vernon Supp. 1994); MONT. CODE ANN. § 27-2-216 (1993); NEV. REV. STAT. ANN. § 11.215 (Michie Supp. 1993); OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 1995); OR. REV. STAT. ANN. § 12.117 (Supp. 1994); R.I. GEN. LAWS § 9-1-51 (Supp. 1994); S.D. CODIFIED LAWS ANN. § 26-10-25 (Supp. 1992); UTAH CODE ANN. § 78-12-25.1 (Supp. 1994); VT. STAT. ANN. tit. 12, §§ 522, 560 (Supp. 1994); VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1994); WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1995).

59. *E.g.*, MINN. STAT. ANN. § 541.073 (requiring commencement of action "within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse").

legislation, some courts will apply the discovery rule⁶⁰ or other theories to toll the applicable statute of limitations under certain conditions.⁶¹ In determining whether a victim should have known of the

60. The discovery rule, also known as the doctrine of delayed discovery, "provides that the cause of action accrues when the plaintiff discover[ed], or through the use of reasonable diligence should have discovered, that [he or she was] injured and that the injury was caused by the defendant's misconduct." Melissa G. Salten, Note, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 213 (1984); see *Callahan v. State*, 464 N.W.2d 268, 272 (Iowa 1990) ("Th[e] repression syndrome, together with other considerations of fairness, have prompted courts to apply the discovery rule liberally in child sex abuse cases."); cf. *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (holding that discovery rule applied to time limitations of Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988)).

61. Some courts will apply the discovery rule to toll the statute of limitations for the period during which a victim is unaware of the harm or does not realize that the perpetrator's actions caused the harm. In some jurisdictions, application of the discovery rule initially depends on whether the case is categorized as Type 1 or Type 2, a distinction first made in *Johnson v. Johnson*, 701 F. Supp. 1363, 1367-70 (N.D. Ill. 1988).

Type 1 cases are those in which the plaintiff claims to have known about the child sexual abuse at or before majority but did not realize that physical or psychological problems were caused by the abuse. *Id.* Courts that apply the discovery rule to Type 1 cases reason that the emotional trauma caused by the abuse justifies tolling. See *Petersen v. Bruen*, 792 P.2d 18, 23-25 (Nev. 1990) (requiring clear and convincing corroboration); *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989); *Hammer v. Hammer*, 418 N.W.2d 23, 27 (Wis. Ct. App. 1987). Some courts refuse to apply the discovery rule in Type 1 cases on the ground that although the connection between the abuse and later problems was made only recently, the plaintiff admits being aware of the wrongful conduct; thus the plaintiff was put on notice of possible injury and had a duty to investigate possible claims. In these cases courts have concluded that application of the discovery rule would undercut the protection of the statute of limitations. See *Hildebrand v. Hildebrand*, 736 F. Supp. 1512, 1519-21 (S.D. Ind. 1990); *Marsha V. v. Gardner*, 231 Cal. App. 3d 265, 271-73, 281 Cal. Rptr. 473, 476-77 (1991); *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1020-21, 242 Cal. Rptr. 368, 373 (1987), *superseded by* CAL. CIV. PROC. CODE § 340.1; *E.W. v. D.C.H.*, 754 P.2d 817, 820 (Mont. 1988); *Bassile v. Covenant House*, 575 N.Y.S.2d 233, 235-36 (Sup. Ct. 1991); *Whattcott v. Whattcott*, 790 P.2d 578, 580-81 (Utah Ct. App. 1990).

Some courts will apply the discovery rule to Type 2 cases—those in which the plaintiff claims to have repressed the memory of the abuse until shortly before suit was filed and therefore did not know or could not reasonably have known of the actionable injury. See *Nicolette v. Carey*, 751 F. Supp. 695, 699-700 (W.D. Mich. 1990); *Johnson*, 701 F. Supp. at 1369-70; *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 1617-19, 265 Cal. Rptr. 605, 610-11 (1990); *D.P. v. M.J.O.*, 640 N.E.2d 1323, 1325 (Ill. App. Ct. 1994) (dictum); *Callahan*, 464 N.W.2d at 273; *Lemmerman v. Fealk*, 507 N.W.2d 226, 230 (Mich. Ct. App. 1993), *appeal granted*, 521 N.W.2d 14 (Mich. 1994); *E.W.*, 754 P.2d at 820 (by implication); *Petersen*, 792 P.2d at 23-25 (requiring clear and convincing corroboration); *McCullum v. D'Arcy*, 638 A.2d 797, 799-800 (N.H. 1994); *Jones v. Jones*, 576 A.2d 316, 321-22 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 412 (N.J. 1990); *Osland*, 442 N.W.2d at 909; *Hammer*, 418 N.W.2d at 27; cf. *Simmons v. United States*, 805 F.2d 1363, 1367-68 (9th Cir. 1986) (applying discovery rule where plaintiff's delayed knowledge was caused by counselor's sexual misconduct). However, some courts have refused to apply the discovery rule even in Type 2 cases. See *Roe v. Doe*, 28 F.3d 404, 408 (4th Cir. 1994) (applying South Carolina law); *Baily v. Lewis*, 763 F. Supp. 802, 811 (E.D. Pa.), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991); *Lindabury v. Lindabury*, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (per

abuse, courts apply an objective reasonable person standard, as opposed to a subjective test based on the victim's mental and emotional state.⁶²

As more and more survivors clear the initial hurdle of motions to dismiss on the basis of stale claims, the focus of judicial inquiry has shifted to the admissibility of evidence based on recovered memories of child sexual abuse.⁶³ At present very little case law exists on this point.⁶⁴ Many suits are eventually settled out of court, and most of the published opinions to date reflect decisions based on grounds other than evidentiary issues.⁶⁵ However, admissibility is an important issue in those cases that do go to trial. As the Utah Supreme Court observed, "Because of the dearth of empirical scientific evidence regarding the authenticity and reliability of revived memories, the inherent reliability and admissibility of expert witness testimony

curiam), *cause dismissed*, 560 So. 2d 233 (Fla. 1990); *Lovelace v. Keohane*, 831 P.2d 624, 631-32 (Okla. 1992); *Bowser v. Guttendorf*, 541 A.2d 377, 379-80 (Pa. Super. Ct. 1988); *Tyson v. Tyson*, 727 P.2d 226, 229-30 (Wash. 1986) (en banc), *superseded by* WASH. REV. CODE ANN. § 4.16.340.

A few courts will consider applying other theories, such as equitable estoppel, to toll the statute of limitations. See *John R. v. Oakland Unified Sch. Dist.*, 48 Cal. 3d 438, 444-46, 769 P.2d 948, 951-52, 256 Cal. Rptr. 766, 769-70 (1989); *Anonymous v. Anonymous*, 584 N.Y.S.2d 713, 722 (Sup. Ct. 1992). But see *Burpee v. Burpee*, 578 N.Y.S.2d 359, 360-62 (Sup. Ct. 1991) (refusing to apply equitable estoppel despite defendant's alleged admission of sexual abuse). Another tolling theory is fraudulent concealment. See *Baily*, 763 F. Supp. at 811; *Fager v. Hundt*, 610 N.E.2d 246, 252-53 (Ind. 1993). Alternatively, some courts may toll the statute of limitations for insanity. See *Carlson v. Rice*, 832 F. Supp. 17, 18 (D. Me. 1993); *Meiers-Post v. Schafer*, 427 N.W.2d 606, 610 (Mich. Ct. App. 1988); *Jones*, 576 A.2d at 321; *Anonymous*, 584 N.Y.S.2d at 718-19.

For a comprehensive treatment of extended statutes of limitation and application of the discovery rule in child sexual abuse suits, see Russell G. Donaldson, Annotation, *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child*, 9 A.L.R. 5th 321 (1993).

62. See, e.g., *Baily*, 763 F. Supp. at 806 (denying plaintiff benefit of discovery rule due to Pennsylvania's objective standard of reasonable diligence); *ABC & XYZ v. Archdiocese of St. Paul & Minneapolis*, 513 N.W.2d 482, 486 (Minn. Ct. App. 1994) (granting summary judgment where plaintiff had not repressed her memory of abuse, but claimed she was unable "to see the situation clearly and recognize that she had been a victim of abuse" until she learned that defendant priest had been accused of abusing other young women).

63. See, e.g., *Hewczuk v. Sambor*, No. 91-6562, 1993 U.S. Dist. LEXIS 2417, at *4-6 (E.D. Pa. Feb. 18, 1993); *Herald v. Hood*, No. 15986, 1993 Ohio App. LEXIS 3688, at *16-20 (Ohio Ct. App. July 21, 1993).

64. See *infra* part III.B.2 for a discussion of the *Hewczuk* and *Herald* cases. As experts in child sexual abuse litigation have noted, "[w]hen complex new subjects are introduced in the law of evidence, it takes a number of years for courts to achieve consensus regarding basic principles and applications." Myers et al., *supra* note 8, at 4-5.

65. Loftus, *supra* note 8, at 522; see, e.g., cases cited *supra* note 61.

regarding memory repression and revival may be an issue that will have to be reached at trial."⁶⁶

It is only a matter of time before evidentiary questions make their way to the appellate courts.⁶⁷ Judging from the way courts have dealt with novel scientific evidence in the past,⁶⁸ it is likely they will proceed with caution in this area as well. However, such an approach would be inconsistent with the liberal policy underlying the Federal Rules of Evidence and the rule announced by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶⁹ Instead, this Comment proposes that courts allow the trier of fact to weigh repressed memory evidence.

U.S. District Judge D. Lowell Jensen took this very position when he overturned the 1990 murder conviction of George Thomas Franklin.⁷⁰ At Franklin's California trial the prosecution relied heavily on the testimony of the defendant's daughter, who claimed she had repressed her memory of witnessing the crime for twenty years.⁷¹ Judge Jensen overturned the conviction on constitutional grounds: (1) the prosecution had violated Franklin's Fifth Amendment privilege against self-incrimination when it told the jury that the defendant's silence in response to his daughter's accusation was proof that he was guilty; and (2) the trial judge had improperly excluded defense evi-

66. *Olsen v. Hooley*, 865 P.2d 1345, 1350 (Utah 1993) (citation omitted).

67. See Kanovitz, *supra* note 11, at 1186 ("[R]ecent changes will force the legal system to examine whether the memory restoring techniques used in psychotherapy can produce memory that is trustworthy enough for the legal system to accept."); *id.* at 1193 (predicting that memory restoration techniques used in psychotherapy "are destined to become critical issues in these trials").

68. The most commonly cited authority for a conservative approach to novel scientific evidence is *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), *superseded by* FED. R. EVID. 702, *construed in* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

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.

Id. at 1014.

69. 113 S. Ct. 2786 (1993); see *infra* text accompanying notes 140, 259.

70. Rex Bossert, *Judge Overturns Conviction in "Memory" Case*, L.A. DAILY J., Apr. 5, 1995, at 1.

71. *Id.* See generally HARRY N. MACLEAN, *ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW passim* (1993) (describing successful prosecution of Franklin in San Mateo County, California, for murder of eight-year-old Susan Nason in 1969).

dence showing that details in the daughter's testimony could have been obtained from media accounts of the case.⁷² Significantly, Judge Jensen based his ruling on these two errors, *not* on the defense's argument that repressed memories are unreliable.⁷³

[The judge] said that while the debate among mental health experts continues, "they can never establish whether or not the asserted memory is true."

Jensen further said that while such testimony is not to be considered inherently unconstitutional, it "*is admitted into evidence and is then tested as to credibility by the time-honored procedures of the adversary system.*"⁷⁴

Speculation about future legal developments must include the possibility that state legislatures will take action to supersede conservative judicial decisions, as they have in California,⁷⁵ Illinois,⁷⁶ and Washington.⁷⁷ In addition, survivors' rights advocates are actively applying political pressure for reform on Capitol Hill.⁷⁸

C. The Controversy over Repressed Memory

The phenomenon of repressed memory has sparked a heated debate within the mental health profession⁷⁹ and the legal commu-

72. Bossert, *supra* note 70, at 1.

73. *Id.*

74. *Id.* (emphasis added).

75. See *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 242 Cal. Rptr. 368 (1987), *superseded by* CAL. CIV. PROC. CODE § 340.1 (West Supp. 1995).

76. See *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988), *superseded by* ILL. ANN. STAT. ch. 735, para. 5/13-202.2 (Smith-Hurd Supp. 1994).

77. See *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986) (en banc), *superseded by* WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1995).

78. See *infra* note 89 and text accompanying note 449.

79. See, e.g., Telephone Interview with Donald H. Stolar, Ph.D., associate clinical professor of psychiatry and assistant clinical professor of pediatrics, UCLA School of Medicine (Aug. 19, 1994) (transcript on file with *Loyola of Los Angeles Law Review*) [hereinafter Stolar Interview]. A few years ago experts appeared to be divided along clear lines. *Id.* On one side were practitioners who work with abuse survivors and witness the retrieval of repressed memories on a daily basis. *Id.* On the other side were memory researchers who conduct experiments in laboratories and reject clinicians' observations as proof of the validity of repressed memories. *Id.* According to Dr. Stolar, however, the gap between clinicians and researchers is narrowing because, as the result of recent malpractice verdicts against therapists, "clinicians now realize they have to be careful with their clients." *Id.* Nevertheless, the dispute continues unabated. For information supporting the validity of repressed memory theory, see HERMAN, *supra* note 1; LENORE TERR, *TOO SCARED TO CRY: PSYCHIC TRAUMA IN CHILDHOOD* (1990). For opposing views, see ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* (1994); MARK PENDERGRAST, *VICTIMS OF MEMORY: INCEST ACCUSATIONS AND SHATTERED LIVES* (1995).

nity.⁸⁰ It also has received a great deal of attention from the mass media,⁸¹ which occasionally obscures the issue with sensationalism, misinformation, and trivialization of the problem of child sexual abuse.⁸² The controversy is not so much over whether severely traumatic experiences can be tucked away into the unconscious.⁸³ As the chief justice of the Ohio Supreme Court has written,

[i]t is undisputed that memory may be repressed. Repression can be caused by extreme physical injury (such as that experienced by the "Central Park Jogger" who was brutally beaten and repeatedly raped and yet retains no memory of the incident), and by sheer mental shock . . . such as a war veteran who represses memories of battle even though he or she personally was not injured. Thus, undeniably there are also adult survivors of childhood sexual abuse who have repressed memories of those experiences due . . . to severe psychological shock.⁸⁴

Rather, there are sharp differences of opinion and many unanswered questions about nearly everything else.⁸⁵ Can repressed mem-

80. See, e.g., *Tyson*, 727 P.2d at 226-30 (majority and concurring opinions); *id.* at 230-39 (dissenting opinions); *Repressed Memories: Should Child Abuse Be Prosecuted Decades After an Alleged Incident Occurred?*, A.B.A. J., Sept. 1994, at 42.

81. A recent computer search of major news sources containing the terms "repress" and "memory" yielded 4,974 items published or released in the last two years. Search of LEXIS, Nexis library, CURNEWS file (Mar. 1, 1995).

82. See, e.g., Donn Fry, *Controversial Memories: Three Authors Offer Reservations, Support on Trusting Memory and the Theory of "Recovering" It*, SEATTLE TIMES, Aug. 22, 1994, available in LEXIS, News Library, MAJPAP file ("Oprah, Geraldo and Sally Jessy couldn't have come up with a more hotly contentious topic than 'recovered memory' if they'd invented it. . . . [T]he debate reached mass consumption through tabloid TV.").

A comparable phenomenon has occurred in media treatment of Parental Alienation Syndrome, a theory propounded by Dr. Richard Gardner in self-published books and in-court testimony claiming that "when children demonstrate ill, or even ambivalent, feelings toward their fathers or report during divorce proceedings that their fathers abuse them, it is most often the mother's doing." Wood, *supra* note 25, at 1367 (footnotes omitted). Although this theory received some favorable media coverage, it was soundly refuted by many psychological and legal experts in the area of child sexual abuse, albeit in professional journals, which are less likely to be read by the general public. *Id.* at 1373-74 & nn.54-56, 1392.

83. See, e.g., *Ault v. Jasko*, 637 N.E.2d 870, 873 (Ohio 1994) (holding discovery rule applicable in repressed memory claim); *id.* at 875 (Wright, J., dissenting) (conceding that memory can be repressed).

84. *Id.* at 875 (Wright, J., dissenting) (citation omitted).

85. See, e.g., *id.* (Wright, J., dissenting) ("[T]here is sharp disagreement in the psychology community as to whether a repressed memory actually can be retrieved and, if it can, whether the memory is accurate."); Cheryl L. Karp, *The Repressed Memory Controversy*, FAM. ADVOC., Winter 1995, at 70, 70 (referring to "enormous controversy about whether . . . childhood memories can be fully retrieved in adulthood without major distortion").

ories be retrieved? If so, how accurate are they? What are the best methods for facilitating recollection? Can false memories be implanted? How can fantasy be distinguished from authentic recall?

Those who would close the courtroom doors to child sexual abuse survivors and expert witnesses question the validity of repressed memory theory⁸⁶ and claim that overzealous or negligent therapists implant false memories.⁸⁷ They cry "Witch hunt!" and accuse plaintiffs and their supporters of wreaking havoc in previously happy families.⁸⁸ Those who campaign for legal reforms to recognize survivors' rights argue that most recovered memories are authentic and a natural reaction to trauma.⁸⁹

Complicating the issue further is the undeniable fact—acknowledged by both camps—that mental health malpractice does occur.⁹⁰ For example, some therapists tell their patients that they are "resisting" if they claim to have no memories of child sexual abuse and that they must have been abused if they exhibit certain symptoms.⁹¹ Although survivors "show significantly more depression, personality disorders, substance abuse, phobias, and suicidal behaviors" than

86. See, e.g., Gary 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 (1993) (arguing for exclusion of repressed memory evidence).

87. See *infra* part IV.A.2.

88. Wylie, *supra* note 36, at 18, 20 (relating anguished accounts of parents who claim their children have falsely accused them of child sexual abuse); see also Michael Yapko, *The Seductions of Memory*, FAM. THERAPY NETWORKER, Sept./Oct. 1993, at 31, 33 ("Uncovered memories . . . can tear families apart and engender economically ruinous legal battles when survivors decide to take accused parties to court.").

89. One of the most active groups campaigning for survivors' rights is the American Coalition for Abuse Awareness, based in Washington, D.C. Letter to Members from Sherry A. Quirk, President, American Coalition for Abuse Awareness (Oct. 18, 1994) (on file with *Loyola of Los Angeles Law Review*). It was formed in 1992 to unify the many organizations, groups, and individuals involved in addressing the legal issues of child sexual abuse throughout the United States. *Id.* Among its goals are the "enactment of federal and state legislation establishing (1) the right of a child to be free from sexual victimization and (2) appropriate protections to ensure that such victimization does not occur," the "enactment of federal and state legislation that extends or eliminates the statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse," and the establishment of "a national body to make policy recommendations on issues related to childhood sexual abuse, the protection of children, and the rights of adult survivors of childhood sexual abuse." *Id.*

90. See, e.g., Loftus & Rosenwald, *supra* note 8, *passim* (describing successful malpractice suits brought against therapists by patients or accused parents).

91. Stolar Interview, *supra* note 79.

adults who were not abused as children, "[n]one of these symptoms or diagnoses . . . are exclusive to having been abused."⁹² Moreover, proving psychological malpractice or negligence is never easy. Demonstrating causation is complicated, because patients are troubled before they enter therapy, and juries must struggle to distinguish old from new psychological injuries

Similarly, jurors may have difficulty identifying unprofessional behavior. For example, treatment of acute appendicitis is straightforward, while there are many accepted ways to tackle schizophrenia.⁹³

Without more, however, the occurrence of questionable therapeutic techniques is a poor reason to dismiss as "nonsense" all claims and expert testimony relating to memory repression.⁹⁴ Few would call for the abolition of workers' compensation statutes merely because fraudulent claims are occasionally filed. Neither is it likely that product liability or medical malpractice litigation will be banished from the courts because some suits are frivolous or unwarranted. As in any other area of law, some claims are valid and some are not. It is, and always has been, for the trier of fact to decide whether the plaintiff presents a credible case.⁹⁵

D. *Child Sexual Abuse Litigation Based on Repressed Memory*

In a civil suit for child sexual abuse, the question is *not* whether repressed memories are real or just a myth; there is scientific evidence indicating that this phenomenon does in fact occur.⁹⁶ Rather, the issues are particularized and dependent on the procedural posture of each case. For instance, at a pretrial motion for summary judgment or dismissal, where the judge must decide whether the plaintiff's claim is time barred, the question is: Was the plaintiff's memory of being sexually abused truly repressed so that he or she could not reasonably have been aware of the harm before the statute of limitations ex-

92. Donald Stolar, Ph.D., *Letters to the Times: "Recovered Memories,"* L.A. TIMES, Dec. 18, 1993, at B7.

93. Loftus & Rosenwald, *supra* note 8, at 72.

94. See Butler, *supra* note 46, at 35 (citing corroborated story of incest survivor Marilyn Van Derbur Adler and sociologist Linda Meyer Williams' study at University of New Hampshire as proof that "some instances of recovered memory are credible"); *infra* text accompanying notes 161-63 (discussing results of Williams' study).

95. See, e.g., 7 B.E. WITKIN, CALIFORNIA PROCEDURE § 285, at 287 (3d ed. 1985) (stating that jurors are "the sole and exclusive judges of the credibility of the witnesses").

96. See *infra* part III.A.1-2.

pired?⁹⁷ At trial, the questions are: (1) Was the plaintiff sexually abused as a child; and (2) was the defendant the perpetrator who harmed the plaintiff?⁹⁸

If the answer is yes at the pretrial motion, the plaintiff's claim should be heard on its merits.⁹⁹ If the answers are yes at trial, the plaintiff should recover damages, the defendant should be held accountable, and the defendant's family and community should be put on notice so they can take precautions to protect their children.¹⁰⁰

1. Litigation from the survivor's perspective

Although some states have recognized survivors' right to legal redress, survivors still face formidable obstacles.¹⁰¹ Many judges and jurors share society's widespread skepticism about the validity of repressed memory claims.¹⁰² This deep-rooted tendency to blame or disbelieve the victim dates back at least a century.¹⁰³

"In situations where it's a parent's word against an adult daughter's, it may be easier to believe the adult who appears to be a normal, upstanding citizen, compared with a distraught woman in therapy. Perpetrators almost always look better than victims because they are the ones dishing it out, not the ones who are taking it."¹⁰⁴

97. See, e.g., *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa 1990).

98. See, e.g., cases cited *infra* part III.B.2.

99. E.g., *Nicolette v. Carey*, 751 F. Supp. 695 (W.D. Mich. 1990) (defendant's motion for summary judgment denied); *Evans v. Eckelman*, 216 Cal. App. 3d 1609, 265 Cal. Rptr. 605 (1990) (dismissal reversed); *D.P. v. M.J.O.*, 640 N.E.2d 1323 (Ill. App. Ct. 1994) (dismissal reversed); *Callahan*, 464 N.W.2d 268 (summary judgment for defendant reversed); *Lemmerman v. Fealk*, 507 N.W.2d 226 (Mich. Ct. App. 1993), *appeal granted*, 521 N.W.2d 14 (Mich. 1994) (summary disposition for defendant reversed); *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990) (dismissal reversed); *McCollum v. D'Arcy*, 638 A.2d 797 (N.H. 1994) (lower court's denial of motion to dismiss affirmed); *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987) (summary judgment for defendant reversed).

100. See CRNICH & CRNICH, *supra* note 31, at 49 (noting that courts can issue protective orders for children still under care of perpetrator).

101. At the outset, an attorney may decline to take a child sexual abuse case. Laura Davis, *Foreword* to CRNICH & CRNICH, *supra* note 31, at vii ("Survivors . . . have been told they didn't have enough proof . . . 'there's not enough chance of winning money to make your case worthwhile' . . . or that their abuse was 'too bizarre to be believed in court.'").

102. See, e.g., Karp, *supra* note 85, at 71 ("Although there is greater awareness of sexual abuse and domestic violence today, the tendency is still to doubt the victims and their experiences and interpretations.").

103. See HERMAN, *supra* note 1, at 10-19.

104. Wylie, *supra* note 36, at 25 (quoting Richard Kluft, director of the Dissociative Disorders Program at the Institute of Pennsylvania Hospital). Manifesting this inclination to blame the victim, one Pennsylvania court refused to toll the accrual of a child sexual abuse claim for insanity or incapacity because the plaintiff

Additionally, a great deal of media attention has been directed toward this topic in a variety of forms, including news reports, magazine articles, documentaries, dramatizations, tabloid press, and tabloid television.¹⁰⁵ Unfortunately, much of this coverage blurs the distinction between genuine claims and sensational stories that sell because of their shock value. As a result, survivors often find their credibility questioned by a public that confuses painful memories of childhood abuse with fantastic claims of, for example, space alien abductions.¹⁰⁶

Perhaps the most effective deterrent to child sexual abuse litigation, aside from the financial expense of filing suit, is the emotional price to be paid.¹⁰⁷ A survivor must be prepared to face experiences similar to those of complainants in criminal prosecutions for rape—"brutal cross-examination, interminable delays, insensitive attorneys, abusers who [can] afford expensive lawyers and expert witnesses, or legal loopholes and technicalities that invalidate[] their claim."¹⁰⁸ Furthermore, filing a claim of child sexual abuse may provoke a counterclaim or other retaliation by the abuser.¹⁰⁹ "Often, the first method used by abusers when their acts are made public is psychological warfare. They may do anything from cajoling to promising reform to threatening suit for defamation. [Plaintiffs] may even receive threats of violence, either direct or indirect, to [themselves], supportive [family] members . . . and family pets."¹¹⁰ Additional deterrents include an

does not allege that he was unaware of the actions at the time they occurred. He concedes in fact that at the time of the incidents of abuse, he was aware that they were occurring, that he found the incidents "frightening," and that they hurt, both "physically" and "emotionally." He also testified that at the time the abuse occurred, he "knew it was horrifying." He claims rather that he could not bring his claim earlier, because he repressed the memory of the experiences. It was thus plaintiff's own incapacity, *albeit, one allegedly caused by the injury*, and not the nature of the injury itself that resulted in his inability to pursue his claim.

Baily v. Lewis, 763 F. Supp. 802, 807-08 (E.D. Pa.), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991) (citations omitted) (emphasis added).

105. See PENDERGRAST, *supra* note 79, at 455-56 ("In the world of infotainment, sex abuse sells. . . . [W]e see [incest] constantly in our movies, soap operas, talk shows, news broadcasts . . . books, newspapers and magazines . . .").

106. See, e.g., *id.* at 134-35 (analogizing recovered memories of child sexual abuse to hypnotic memories of UFO abductions); Jeanne McDowell, *It Came from Outer Space*, *TIME*, Nov. 29, 1993, at 56, 56.

107. Davis, *supra* note 101, at vii.

108. *Id.*

109. CRNICH & CRNICH, *supra* note 31, at 57.

110. *Id.* at 52.

inevitable loss of privacy¹¹¹ and changes in relationships with family and friends.

Families under the stress of lawsuits often break down, even when the suit is . . . against an outsider. When one family member sues another, the results can be even more dramatic. . . . Family members not named in the suit may choose sides, deciding to believe one member's story over another's. If the perpetrator abused other family members, they may side with the abuser out of their own denial . . . or because they are still under the abuser's control and domination. Other family members may decide to believe neither side and contend that nothing is wrong, but that the victim merely imagined the sexual abuse. Some family members may become estranged from both sides. The survivor may also be blamed for family disruptions caused by the lawsuit. One incest survivor was told by one of her siblings that she was destroying the careers of her siblings because "no one would hire someone whose father was a pervert."

The revelations and stress caused by depositions and trial testimony may cause other family members to remember their own abuse. This may produce extreme hostility and anger toward the victim—anger at being forced to recall events that they don't want to remember.¹¹²

Additional emotional trauma is bound to result if the survivor loses the lawsuit.¹¹³ Arguably, the repercussions are magnified in child sexual abuse litigation due to the highly charged nature of the accusations.¹¹⁴ Despite the fallibility of judges and juries, most members of the public—and maybe even the survivor—will perceive a verdict as "the truth" and therefore disbelieve the plaintiff's claims.¹¹⁵

111. A plaintiff may face interrogatories, depositions, discovery requests for journals, diaries, letters, or other recovery work, and questions at trial that deal with highly personal information such as one's psychological and sexual life. *Id.*

112. *Id.* at 55-56 (noting possible adverse effects on plaintiff's relationships with spouse, partner, or children).

113. *Id.* at 57; cf. Leslie Berkman, "I Was Really Hurt by the Verdict", L.A. TIMES, May 22, 1994, at A3 (reporting incest survivor Holly Ramona's reaction after her father won malpractice suit against her therapists); Molly Fisk, *Holly Ramona: Losing a Lawsuit, Yet Keeping Her Self-Respect*, HEALING WOMAN, Sept. 1994, at 3, 3 ("After the verdict I had a really hard time . . . Part of me says, 'Just shut up and withdraw . . . because talking doesn't get you anywhere.'" (quoting Holly Ramona)).

114. See CRNICH & CRNICH, *supra* note 31, at 14-16.

115. *Id.* at 57.

Moreover, a survivor may suffer further indignity by being forced to pay damages for defamation.¹¹⁶

In light of all the obstacles faced by abuse survivors who seek legal redress, the admission of expert testimony to provide general background information about repressed memory would not unfairly tip the balance in favor of the plaintiff. Where repressed-memory claims are based on authentic recollections of child sexual abuse, "the law should not protect perpetrators who successfully traumatize their victims into repression."¹¹⁷

2. Litigation from the defendant's perspective

When legislatures extend statutes of limitations and courts apply the discovery rule in child sexual abuse cases, defendants argue that their right of repose¹¹⁸ and reputational interests¹¹⁹ have been seriously eroded. There can be no doubt about it: If a defendant has been falsely accused, substantial damage is done to his or her name,¹²⁰ not to mention probable disruption to family life, career or business, and physical or psychological health. Inevitably, some will be falsely accused.¹²¹ However, this is a problem in all types of litigation—including criminal cases where a defendant's liberty may be at stake.¹²²

Furthermore, contrary to the popular myth that it has become "fashionable" to claim one was sexually abused as a child or that patients in therapy are simply looking for an easy answer and a scapegoat for their problems, "therapists report that survivors tend to

116. *Id.*

117. Ernsdorff & Loftus, *supra* note 86, at 145.

118. The policy rationale underlying all statutes of limitations is "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944).

119. The U.S. Supreme Court recognized reputation as a liberty interest protected by the Due Process Clause of the Fourteenth Amendment in Goss v. Lopez, 419 U.S. 565 (1975). "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied." *Id.* at 574 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

120. See PENDERGRAST, *supra* note 79, at 13 (arguing that "[w]hen you are accused of sexual abuse in our society . . . you are automatically presumed guilty unless proven innocent beyond a shadow of a doubt"); *infra* part V.B.3.

121. *But cf.* Summit, *supra* note 25, at 190 ("Very few children, no more than two or three per thousand, have ever been found to exaggerate or to invent claims of sexual molestation.").

122. As one California court has stated, "[i]t is neither necessary nor justifiable to bar an entire category of actions merely because the emotional nature of the injury may allow some spurious claims to proceed further than would otherwise be possible." *Evans*, 216 Cal. App. 3d at 1617, 265 Cal. Rptr. at 609-10.

underestimate or deny the damage that has been done to them, even while describing consciously remembered scenes of terrible trauma."¹²³ Nonetheless,

there is a low, growling undercurrent . . . that alleged sex abuse is just another handy excuse allowing spoiled kids to evade adult responsibility for their own problems. More than once it is suggested that the child abuse "industry" is simply one more opportunistic infection feeding on the metastasizing culture of victimization in America.¹²⁴

Alternatively, a defendant might argue that allowing expert testimony on repressed memory would give the plaintiff an unfair advantage at trial.¹²⁵ However, there is nothing to stop a defendant from presenting an expert witness who will offer a contradictory opinion.¹²⁶

3. Litigation from the therapist's perspective

Although some repressed memories of child sexual abuse surface spontaneously,¹²⁷ therapists who work with survivors are finding themselves drawn into the crossfire both in and out of court.¹²⁸ Intimidation tactics have consisted of "threatening phone calls, pickets in front of [therapists'] houses or offices, entrapment attempts, or legal harassment."¹²⁹ The highly publicized \$475,000 verdict won by Californian Gary Ramona in a malpractice suit against his daughter's ther-

123. Wylie, *supra* note 36, at 26-27.

The tendency to minimize severe trauma to oneself, or even accept blame for it, is . . . related to the intense shame trauma victims feel—that they must have been bad enough to deserve it. . . . Paradoxically, taking on the blame also gives survivors a sense of meaning and control. To avoid feeling like inanimate, helpless things, it is preferable to believe they *did* something that logically caused the traumatic response.

Id. at 27.

124. *Id.* at 22.

125. See Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 62 (referring to "fear that juries might be improperly influenced by awe of scientific expertise to subordinate their own judgment on a contested issue of ultimate fact to that of the expert").

126. See, e.g., *infra* text accompanying notes 223-28.

127. See *infra* part III.A.4.

128. See HERMAN, *supra* note 1, at 9.

129. Herman Address, *supra* note 1, at 13.

apists¹³⁰ has encouraged other alleged abusers to file similar third-party "retaliation" suits against therapists.¹³¹

Already this trend has had the salutary effect of alerting therapists to the need for proper training and other precautions.¹³² If it continues, however, it may eventually deter therapists from offering much-needed help to abuse survivors.¹³³

4. Litigation from society's perspective

Civil suits for child sexual abuse may deter perpetrators who "fall through the cracks" of the criminal justice system.¹³⁴ If abusers are not held accountable, they will continue to prey on children,¹³⁵ and taxpayers will share the burden of therapy expenses, lost wages, lower productivity, and generational cycles of abuse.¹³⁶

130. See Butler, *supra* note 46, at 12; see also Joyce-Couch v. DeSilva, 602 N.E.2d 286 (Ohio 1991) (upholding jury malpractice award against therapist who mishandled plaintiff's recovered-memory therapy).

131. Ellen Alperstein, *Prosecution Complex*, L.A. TIMES, Aug. 21, 1994, at 12, 12 (Magazine) ("There are 8,000 to 10,000 lawsuits against therapists pending in U.S. courts . . . and at least 1,000 of them are in California.").

The outcome of the Ramona trial in California threatens to heighten psychologists' vulnerability to claims they have contaminated the memories of clients. Not only the patient, but the spouse or family can now sue in court. It's also "open season" for filing related complaints with state boards of psychology or with an ethics committee of a state psychological association.

Introduction to Thomas F. Nagy, *Guidelines & Direction When Treating Clients with Repressed Memories*, NAT'L PSYCHOLOGIST, July/Aug. 1994, at 8, 8.

According to one practicing psychologist, the *Ramona* decision has made many of his colleagues nervous because third parties can now sue therapists. Stolar Interview, *supra* note 79. They are "holding [their] breath to see how generalized it will get" and wondering if courts will next allow third-party suits for wrongful death if a patient commits suicide. *Id.*

132. See Nagy, *supra* note 131, at 8.

133. Wylie, *supra* note 36, at 29.

134. However, efforts are underway to fill in these "cracks." For example, California has enacted legislation to reform the criminal statute of limitations for child sexual abuse. Paula L. Boland & Sherry A. Quirk, *Repressed Memories: Should Child Abuse Be Prosecuted Decades After an Alleged Incident Occurred? Yes: Victims May Need Time to Recognize the Offense*, A.B.A. J., Sept. 1994, at 42 (citing Act of Sept. 8, 1993, ch. 390, 1993 Cal. Stat.).

135. See, e.g., Berliner, *supra* note 24, at 8 (stating that child sexual abuse offenders "remain at risk to re-offend indefinitely" and "that recidivism still occurs as long as thirty years later"); Andrew Vachss, *Sex Predators Can't Be Saved*, N.Y. TIMES, Jan. 5, 1993, at A15 (citing "survey that tracked released child molesters for 20 years [and] revealed a 43 percent recidivism rate regardless of [psychiatric] therapy").

136. See PENDERGRAST, *supra* note 79, at 506.

On the other hand, the public bears the costs of litigation over matters that necessarily involve thorny problems of proof.¹³⁷ In addition, the possibility that one can be unjustly held liable for child sexual abuse may be so threatening to those who have constant contact with children that they may consciously or unconsciously withdraw or restrict displays of affection.¹³⁸ The loss of this contact is unfortunate, because affection from parents, teachers, camp counselors, and the like is totally appropriate and, indeed, necessary for children to thrive.¹³⁹

5. Litigation from the courts' perspective

As in so many areas of the law where cherished rights clash, it is difficult, if not impossible, to craft hard and fast rules that will do justice in every case. Consequently, in civil suits based on repressed memories of child sexual abuse, courts should adopt a flexible case-by-case approach that comports with the generally liberal view of expert testimony underlying the Federal Rules of Evidence.¹⁴⁰

Unless and until genuine recovered memories can be reliably distinguished from false ones,¹⁴¹ expert testimony gives judges and jurors a theoretical framework for the facts in a particular case. Judges who are unfamiliar with the phenomenon of repressed memory will benefit from this expert testimony when a defendant moves to dismiss on the ground that the action is time barred.¹⁴² Likewise, jurors might find it helpful in deciding whether the allegations are true.¹⁴³ On the other hand, in some cases the prejudicial effect of admitting expert testimony might outweigh its utility.¹⁴⁴ In light of the arguments set forth below, this Comment recommends a compromise solution: Allow ex-

137. Cf. Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199, 222-23 (1993) (predicting that high degree of proof required for standing "will increase the cost of litigation").

138. See PENDERGRAST, *supra* note 79, at 520.

139. For a summary of data relating to the harmful effects of inadequate physical affection on children, see James W. Prescott, *Deprivation of Physical Affection as a Primary Process in the Development of Physical Violence*, in CHILD ABUSE AND VIOLENCE 66 (David G. Gil ed., 1979).

140. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993); Margaret A. Berger, *United States v. Scop: The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV. 559, 565 (1989).

141. See Loftus, *supra* note 8, at 534.

142. See, e.g., cases cited *supra* note 61.

143. See, e.g., cases cited *infra* part III.B.2.

144. See *infra* part IV.B.2.

pert evidence to the extent that it is helpful and exclude those aspects of it that are unduly prejudicial or unreliable.¹⁴⁵

III. "TRUE": THE ARGUMENTS FOR RECOGNITION OF REPRESSED MEMORY

A. *Validity of Repressed Memory Theory*

On one side of the debate are those who believe that there is a reliable body of knowledge about the phenomenon of repressed memory.¹⁴⁶ According to Dr. Judith L. Herman,

close-up exposure, especially early and prolonged exposure to human cruelty, has a profound effect on memory. Disturbances of memory are cardinal symptoms of posttraumatic stress disorder. They are found equally in the casualties of war and political oppression . . . and in the casualties of sexual and domestic oppression These disturbances have been difficult to comprehend because they are apparently contradictory. On the one hand, traumatized people remember too much. On the other hand, they remember too little. . . . The memories intrude when they are not wanted, in the form of nightmares, flashbacks, and behavioral re-enactments. Yet the memories may not be accessible when they are wanted. Major parts of the story may be missing, and sometimes an entire event or series of events may be lost.¹⁴⁷

This is not to say, however, that a particular survivor's memory is accurate or reliable. As this Comment suggests, an expert witness should not be allowed to express an opinion on this specific issue.¹⁴⁸

1. Research findings

Experts are doing battle not only in courtrooms, but also in research laboratories, professional journals, popular literature, and the

145. See *infra* part V.A.

146. See, e.g., *Lemmerman v. Fealk*, 507 N.W.2d 226, 230 (Mich. 1993), *appeal granted*, 521 N.W.2d 14 (Mich. 1994) (noting "the present broad acknowledgment that child sexual abuse can be suppressed"); *Ault v. Jasko*, 637 N.E.2d 870, 873 (Ohio 1994) (Resnick, J., concurring) ("[S]ufficient scientific evidence verifies that incidents of repressed memory in child sexual abuse cases do occur."); *Tyson v. Tyson*, 727 P.2d 226, 237 (Wash. 1986) (en banc) (Pearson, J., dissenting) ("The policy behind [extending the discovery rule to adult survivors] has been demonstrated: [T]he nature of child sexual abuse, according to extensive expert commentary, is often so secretive, so humiliating, and so devastating that a victim typically represses the events until the abuse is 'discovered' . . .").

147. Herman Address, *supra* note 1, at 3.

148. See *infra* text accompanying notes 403-05.

mass media.¹⁴⁹ Countering the experiments that demonstrate the malleability of memory¹⁵⁰ is ongoing scientific research that strongly suggests the validity of repressed memory theory.¹⁵¹ In one study of fifty-three women who had self-reported histories of child sexual abuse, sixty-four percent reported absent or incomplete memories of their abuse at some point in the past.¹⁵² Nine of twelve "who suffered overtly violent abuse reported that they had been amnesic for these experiences for a prolonged period of time."¹⁵³ The researchers thus found "a relationship . . . between frankly violent or sadistic abuse experiences and the resort to massive repression as a defense."¹⁵⁴

Another study questioned 450 adult clients who had reported sexual abuse at age sixteen or younger.¹⁵⁵ Of these, "267 subjects (59.3%) identified some period in their lives, before age 18, when they had no memory of their abuse."¹⁵⁶ The researchers reported that the [v]ariables most predictive of abuse-related amnesia were greater current psychological symptoms, molestation at an early age, extended abuse, and variables reflecting especially violent abuse (e.g., victimization by multiple perpetrators, having been physically injured as a result of the abuse, victim fears of death if she or he disclosed the abuse to others).¹⁵⁷

Psychologist John Briere, co-author of this latter report, discussed the limitations of both of these studies in that they rely on data from retrospective self-reporting.¹⁵⁸ Although unable to "rule out the possibility that subjects' recall . . . was not affected by other variables such as passage of time, continuing memory impairment, current psychological distress or dysfunction [or] . . . the possibility that subjects lied or otherwise confabulated their abuse,"¹⁵⁹ Briere writes:

The large (and relatively equal) percentage of subjects reporting some level of amnesia in each study . . . appears to

149. See *supra* notes 79-82 and accompanying text.

150. See *infra* part III.A.3.

151. See *infra* text accompanying notes 152-83.

152. Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 2-5 (1987).

153. *Id.* at 5.

154. *Id.*

155. John Briere & Jon Conte, *Self-Reported Amnesia for Abuse in Adults Molested as Children*, 6 J. TRAUMATIC STRESS 21, 23 (1993).

156. *Id.* at 21.

157. *Id.*

158. John Briere, *Studying Delayed Memories of Childhood Sexual Abuse*, APSAC ADVISOR, Summer 1992, at 17, 18.

159. *Id.*

suggest either that abuse-related amnesia is a common, "real" phenomenon, or that an unknown phenomenon of major proportion caused more than half of 500+ women and men to misrepresent their childhood histories.¹⁶⁰

Researcher Linda Meyer Williams avoided the limitations of self-reporting subjects by interviewing 129 women seventeen years after they had been brought as children to a hospital emergency room following documented sexual abuse.¹⁶¹ Of these women, thirty-eight percent denied that they had been abused.¹⁶² Although it is possible they simply chose to keep the information private, "the questions put to them at the time of the interview concerned equally intimate material about their personal and sex lives that they did not hesitate to answer fully."¹⁶³

Another point of contention in the scientific debate questions the logic of linking the results of experiments showing that false memories can be implanted to the phenomenon of repressed memories of child abuse.

"There is data to suggest that traumatic memory is physiologically encoded differently than normal memory. . . . [W]e have to be very careful about drawing conclusions about trauma memory from lab studies of ordinary memory, conducted on nontraumatized volunteers, usually college students who might be doing it for class credit, or getting paid. We really cannot apply these experiments wholesale to the issue of traumatic memory."¹⁶⁴

For example, psychologist Elizabeth Loftus cites as proof "for the fact that it is possible to create false memories for childhood events"¹⁶⁵ experiments in which she and her students successfully implanted false memories of being lost in a mall at the age of five or six into the minds of adult subjects.¹⁶⁶ Critics, however, point to the ap-

160. *Id.*

161. Linda M. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167, 1170-73 (1994).

162. *Id.*

163. Mary S. Wylie, *Trauma and Memory*, FAM. THERAPY NETWORKER, Sept./Oct. 1993, at 42, 42; see Williams, *supra* note 161, at 1170.

164. Wylie, *supra* note 36, at 27 (quoting Christine A. Courtois, Director of the Center for Abuse Recovery and Empowerment in Washington, D.C.).

165. LOFTUS & KETCHAM, *supra* note 79, at 99.

166. *Id.* at 97-99; Begley & Brant, *supra* note 3, at 68; Loftus, *supra* note 8, at 532; Wylie, *supra* note 163, at 42.

ples-and-oranges problem of likening these experiments to memories of child sexual abuse.¹⁶⁷

The memory—real or implanted—of being lost in a mall once as a child . . . would . . . have less far-reaching life consequences than being repeatedly beaten and raped by one's father. Profound terror, grief, isolation and pain . . . have a tremendous impact on long-term emotional, cognitive and even physiological functioning And extreme and/or chronic trauma is believed to have peculiar effects on memory not obtainable under any imaginable (not to mention ethical) laboratory conditions; obviously, truly traumatic events cannot be staged with human subjects to prove the impact of trauma on memory.¹⁶⁸

According to Harvard researcher Bessel Van Der Kolk, "chronic, severe childhood trauma may permanently alter the neurobiology that integrates cognitive memory and emotional arousal."¹⁶⁹ This theory focuses on the limbic system of the brain, which functions to assemble the fragments of memory scattered into the auditory cortex (sounds), visual cortex (appearance), sensory cortex (touch), and olfactory cortex (taste and smell).¹⁷⁰ "[W]hen a child is continually exposed to trauma, the operation of the limbic system . . . is sharply and chronically disrupted. The brain is so overwhelmed, so many times, by negative stimulation and arousal that it cannot accommodate and integrate all the information it is receiving."¹⁷¹ This severing of memory and emotion helps explain why some survivors experience flashbacks and body memories unaccompanied by conscious recollections—phenomena which skeptics find hard to believe.¹⁷²

2. Related research on traumatic amnesia

Scientists' efforts to understand other types of traumatic amnesia appear to lend support to studies that have focused primarily on repressed memories of childhood sexual abuse. Experiments with lab animals confirm that hyperarousal caused by terror has an impact on

167. Wylie, *supra* note 163, at 43.

168. *Id.*

169. *Id.*

170. See Begley & Brant, *supra* note 3, at 68-69.

171. Wylie, *supra* note 163, at 43.

172. *Id.*; see, e.g., *infra* text accompanying note 180.

memory storage.¹⁷³ Research by Roger Pitman at Manchester Veterans Administration Hospital "demonstrate[s] that activation of trauma-specific memories in combat veterans with PTSD [that is, posttraumatic stress disorder] produces highly elevated physiologic responses that fail to extinguish, even over periods of half a lifetime."¹⁷⁴ Through experiments in abnormal memory retrieval at Yale University, John Krystal was able to induce flashbacks in combat veterans diagnosed with PTSD but could not induce them in veterans who did not have PTSD.¹⁷⁵

Studies of civilian disasters by David Spiegel at Stanford University show that "people who spontaneously dissociate at the time of the traumatic event are the most vulnerable to develop symptoms of PTSD, including . . . disturbances of memory retrieval, intrusive recall, and amnesia."¹⁷⁶ In her New York University doctoral dissertation, Danya Vardi has shown "deficits on a number of measures of autobiographical memory in incest survivors, deficits that were not evident in rape survivors or normal control subjects."¹⁷⁷ Richard McNally of Harvard University interviewed subjects and observed that

combat veterans with PTSD have difficulty retrieving specific autobiographical memories on cue, especially after being exposed to a combat videotape. . . . [T]he men who showed the greatest disturbances in autobiographical memory were those who still dressed in combat regalia twenty years after the war. These men remembered nothing in words and everything in action.¹⁷⁸

In Lenore Terr's clinical study of twenty children with documented histories of preschool trauma, none could verbally describe events that occurred before they were twenty-eight months old.¹⁷⁹

Nevertheless, these experiences were indelibly encoded in memory and expressed nonverbally as symptoms. Eighteen of the twenty children showed evidence of traumatic memory in their behavior and their play. They had specific fears and somatic symptoms related to the traumatic events, and

173. Herman Address, *supra* note 1, at 4 ("[H]igh levels of circulating catecholamines result in enhanced learning that stubbornly resists subsequent extinction. This is an animal analogue . . . of the indelible imprint of traumatic events on memory.").

174. *Id.*

175. *Id.* at 5.

176. *Id.*

177. *Id.* at 5-6.

178. *Id.* at 6.

179. TERR, *supra* note 79, at 181-82.

they re-enacted these events in their play with extraordinary accuracy. A child who had been sexually molested by a babysitter in the first two years of life could not, at age five, remember . . . being abused, but in his play he repeatedly enacted scenes that exactly replicated the pornographic movie made by the babysitter.¹⁸⁰

Terr concluded from this study that the nature of the trauma may influence the child's ability to remember it.¹⁸¹ The children in Terr's study were more likely to remember short, one-time events than long, repeated ordeals.¹⁸² In addition, the longer and more frequent the abuse, the less accurate the memories.¹⁸³

3. The experience of clinicians

Despite increasing criticism of the mental health profession in general and a rise in malpractice suits against particular therapists, clinicians who specialize in the treatment of adult survivors of child sexual abuse steadfastly attest to the authenticity of the recovered memories. For these therapists, "[t]he unendurable and impossible-to-fake agony of the clients is the most powerful evidence for the truth of their experiences."¹⁸⁴ As one writer notes, "the severity and complexity of [clients'] pathology and the palpable quality of their pain makes an extraordinary impression on even initially skeptical therapists."¹⁸⁵

Although therapists' observations are vulnerable to the criticism that they are merely anecdotal and unproven by scientific methods, some laboratory researchers point to "the need for integrating clinical data in experimental research."¹⁸⁶ This need arises due to the extreme levels of emotional pain exhibited by survivors in therapy, which is "not ethically reproducible in mood and memory experimentation."¹⁸⁷

Symptoms vary depending on several factors, including the age of the child at the time of abuse, the length of time the child was abused, the child's relationship to the perpetrator, and how the family re-

180. Herman Address, *supra* note 1, at 6; see TERR, *supra* note 79, at 248-51.

181. TERR, *supra* note 79, at 182-83.

182. *Id.*

183. *Id.* at 183.

184. Wylie, *supra* note 36, at 26.

185. *Id.*

186. Jean L. Yates & William Nasby, *Dissociation, Affect, and Network Models of Memory: An Integrative Proposal*, 6 J. TRAUMATIC STRESS 305, 306 (1993).

187. *Id.* at 305.

sponded if the child tried to disclose.¹⁸⁸ Dissociative responses to terror can occur spontaneously in some people, while others "may learn to induce this state voluntarily, especially if they are exposed to traumatic events over and over. [For example,] [p]olitical prisoners instruct one another in simple self-hypnosis techniques in order to withstand torture."¹⁸⁹ According to Dr. Herman,

In my clinical work with incest survivors, again and again I have heard how as children they taught themselves how to enter a trance state. . . . [I]f you ask survivors, "What did you do while the actual assault was taking place?" they will say, "Well, there was a little crack on the ceiling, and I focused my vision on that," "I learned how I could leave my body and float up onto the ceiling and watch what was going [on] with a sense of detached calm. I felt very sorry for that little girl on the bed who was being raped, but it wasn't me."¹⁹⁰

Nevertheless, researchers on this side of the debate *do* acknowledge the possibility that some patients' memories might be false.¹⁹¹ Where that is the case, they advise therapists that "deluded or mislead [sic] individuals should be disabused of their confusion lest they falsely accuse innocent people and/or waste precious time and resources on unnecessary treatment."¹⁹² Clinicians must keep in mind that, although survivors do show a certain constellation of symptoms, those symptoms are not exclusive to having been abused.¹⁹³ As one therapist put it, "There *are* such things as repressed memories, but bad therapists tell clients they're resisting by not having any memories and that they were necessarily abused if they had certain symptoms."¹⁹⁴

4. Spontaneous recall

Many recovered memories are *not* triggered by therapy, hypnosis, sodium amytal, or sodium pentothal.¹⁹⁵ Thus, it follows that the

188. Stolar Interview, *supra* note 79.

189. Herman Address, *supra* note 1, at 4.

190. *Id.* at 4-5.

191. See, e.g., Briere, *supra* note 158, at 17.

192. *Id.*

193. Stolar Interview, *supra* note 79.

194. *Id.*

195. See, e.g., *Hewczuk v. Sambor*, No. 91-6562, 1993 U.S. Dist. LEXIS 2417, at *2-3 (E.D. Pa. Feb. 18, 1993) (plaintiff's near-drowning while swimming triggered vague feeling of having experienced similar trauma; evidence later established that during childhood plaintiff's foster parents nearly drowned her by holding her face under water in toilet bowl); *McAfee v. Cole*, 637 A.2d 463, 465 (Me. 1994) (plaintiff alleged he repressed all

theory of false memory implantation by therapists does not explain all cases of survivors whose memories of child sexual abuse surface in adulthood. As one author said, "If such memories were induced only by pesky therapists, survivors . . . would not spontaneously recover them outside therapy. But they do."¹⁹⁶

Documented examples include John Robitaille of Providence, Rhode Island, who, upon hearing a radio report about the arrest of a priest on charges of child molestation, suddenly recalled having been sexually abused by that same priest when he was eleven years old.¹⁹⁷ Los Angeles attorney Shari Karney, who helped lead the campaign for California's extended statute of limitations for child sexual abuse,¹⁹⁸ experienced her first flashback of incest while cross-examining a man who had been accused of molesting his daughter in a child custody case.¹⁹⁹ Insurance adjuster Frank Fitzpatrick remembered being molested as a child by Father James Porter while he was lying in bed feeling an unexplainable anguish.²⁰⁰

Brown University ethics professor Ross Cheit began to retrieve his lost memories when he learned that his nephew was about to join a boys chorus of which Cheit had been a member.²⁰¹

Though he could not yet name the reason, Cheit felt sickened by the news—and gradually began sinking into a bewildering depression. He didn't link it to the phone call; indeed, he blamed anything and everything else for what his wife . . . now calls "the months Ross lost his mind." [A few months later,] while on vacation, he had something like a dream.

He woke with the baffling sense that a man he had not seen or thought of in 25 years was powerfully present in the room. William Farmer had been the administrator of the San Francisco Boys Chorus summer camp, which Cheit had at-

memories of sexual abuse until "he saw a television report that [defendant] had been charged with sexually abusing other persons").

196. Calof, *supra* note 36, at 42.

197. *Id.*

198. See Kathryn Bold, *Solid Support After "Shattered Trust,"* L.A. TIMES, Feb. 8, 1994, at E2; Letter from Shari L. Karney, Esq. to Friends (Jan. 29, 1994) (on file with *Loyola of Los Angeles Law Review*).

199. Bold, *supra* note 198, at E2; Calof, *supra* note 36, at 42.

200. Miriam Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 52, 54. "When Fitzpatrick went public with his suit against . . . Porter, several of the nearly 100 Porter victims who came forward said they remembered only when they heard about the case on the news." *Id.*

201. *Id.* at 52.

tended in the late '60s between the ages of 10 and 13. Cheit could picture him clearly—the big stomach and bent shoulders, the round head, wispy hair. Over the course of the day, he recalled still more. How Farmer would enter his cabin night after night, just as the boys were going to sleep. How he would sit on Cheit's bed, stroking the boy's chest and stomach while he urged him in a whisper to relax, relax. "I was frozen," says Cheit. "My stomach clenched against his touch. And then he would slowly bring his hand into my pants."²⁰²

In his subsequent search for Farmer, Cheit found corroborating evidence for his memories when he visited Madi Bacon, the founder of the chorus, who admitted that she almost fired Farmer once "for what she called 'hobnobbing' with one of the boys."²⁰³ Bacon later denied knowing anything about Farmer's alleged crimes.²⁰⁴ Upon hearing that Cheit had filed a suit against the chorus, Bacon responded, "I don't see what good it's going to do for a young man with a family to be known publicly as having been abused. I mean it's such bad taste."²⁰⁵

When Cheit finally found Farmer in Oregon and called him there, Farmer admitted the molestation and said that he had lost jobs and left California because of "it," but balked when Cheit suggested that he register as a sex offender.²⁰⁶ Eventually, the San Francisco Boys Chorus settled, agreeing to apologize and pay \$35,000.²⁰⁷ However, Farmer still faces criminal charges and Cheit's continuing civil lawsuit against him.²⁰⁸

B. Arguments in Favor of Admitting Expert Testimony

While mental health professionals continue their research into repressed memory, the courts must confront the difficulties of adjudicating present child sexual abuse claims now—before science is able to provide additional answers to pressing questions. As an initial matter, survivors can claim that the validity of the theory is already implicitly recognized by those jurisdictions that have enacted extended statutes

202. *Id.*

203. *Id.* at 56.

204. *Id.*

205. *Id.* at 60.

206. *Id.* at 62.

207. Katy Butler, *S.F. Boys Chorus Settles Abuse Case*, S.F. CHRON., Sept. 1, 1994, at A2.

208. *Id.*

of limitations and have applied the discovery rule to survivors' suits.²⁰⁹ Practically speaking, however, the arguments for admissibility do not end there.

1. Fundamental fairness and the right to redress

In response to a defendant's pretrial motion to dismiss a claim for child sexual abuse based on repressed memory, a plaintiff will attempt to persuade the judge that fundamental fairness and the right to redress outweigh the underlying purposes of statutes of limitations.²¹⁰ Many courts have recognized that in cases where an injured party does not know or cannot be expected to know of an injury until long after the statute of limitations has expired, it is unfair to automatically foreclose that person's cause of action.²¹¹ In a case where the plaintiff had repressed memories of sexual abuse for fifty years—abuse which her father admitted committing when she confronted him as an adult—the Michigan Court of Appeals stated:

[I]f plaintiff's allegations are well based, defendants had sole control over the facts giving rise both to plaintiff's cause of action and her repression of it. Moreover, *to protect parents or relatives at the expense of the children works an intolerable perversion of justice*. Finally, we believe that it will not encourage the wholesale filing of fraudulent claims to allow this plaintiff to bring a lawsuit at age fifty-four as opposed to age eighteen.²¹²

However, in *Tyson v. Tyson*,²¹³ the Washington Supreme Court held the discovery rule inapplicable in a father-daughter incest case.²¹⁴

209. See, e.g., *Lemmerman v. Fealk*, 507 N.W.2d 226, 230 (Mich. Ct. App. 1993), *appeal granted*, 521 N.W.2d 14 (Mich. 1994); *ABC & XYZ v. Archdiocese of St. Paul & Minneapolis*, 513 N.W.2d 482, 485-86 (Minn. Ct. App. 1994); *Herald v. Hood*, No. 15986, 1993 Ohio App. LEXIS 3688, at *2-4 (Ohio Ct. App. July 21, 1993).

210. See *Lemmerman*, 507 N.W.2d at 230 (reversing summary judgment for defendants). In holding the discovery rule applicable to the 54-year-old plaintiff's claim for child sexual abuse, the court rejected the contention that corroborating evidence should be required. *Id.* at 229. "Mandating corroboration is inconsistent with the history of the [discovery] rule's application. . . . A plaintiff should not be denied the benefit of the rule on the basis that he or she would have difficulty proving his or her case." *Id.*; accord *McCollum v. D'Arcy*, 638 A.2d 797, 799 (N.H. 1994).

211. See, e.g., *Ruth v. Dight*, 453 P.2d 631, 635-36 (Wash. 1969).

212. *Lemmerman*, 507 N.W.2d at 230 (citations omitted) (emphasis added).

213. 727 P.2d 226 (Wash. 1986), *superseded by* WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1995).

214. *Id.* at 230.

In an eloquent dissent—later vindicated when the majority's holding was superseded by statute²¹⁵—Judge Pearson observed:

[I]t is the sexual abusers of children who have had full knowledge, throughout the statutory period, that their actions constituted sexual abuse. The victims, as children, could not have had full knowledge of the wrongfulness of their abusers' acts and, in particular, the permanent damages that result. . . . The purpose behind extending the discovery rule to adult survivors of childhood sexual abuse is not to provide a guaranteed remedy to such plaintiffs. The purpose is to provide an *opportunity* for an adult . . . to prove not only that she was abused and that the defendant was her abuser, but that her suffering was such that she did not and could not reasonably have discovered all the elements of her cause of action at an earlier time.²¹⁶

Thus, if a judge is unfamiliar with the theory of repressed memory, expert testimony can provide insight for deciding whether to apply the discovery rule.²¹⁷ As the Oklahoma Supreme Court noted in a repressed memory case, "We do not mean that expert testimony from a treating psychotherapist would actually validate a plaintiff's claim of past sexual abuse. But . . . expert testimony by a mental health professional would aid the trier of law in determining whether the plaintiff is entitled to invoke the discovery rule."²¹⁸

Judges may also benefit from expert testimony in deciding whether to toll the statute of limitations for disabilities such as insanity or fraudulent concealment.²¹⁹ One court recognized this when it remanded a case so that the plaintiff could submit "affidavits or depositions of qualified witnesses providing expert opinion to support the scientific validity of repressed memory and to establish that her normal powers of perception and recollection had been obscured by the phenomenon as a result of her father's sexual acts with her."²²⁰ The court felt it needed further factual support to decide whether genuine

215. See WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1995).

216. *Tyson*, 727 P.2d at 236-37 (Pearson, J., dissenting).

217. See, e.g., *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa 1990) (citing to plaintiff's affidavits "furnished by experts [which] discussed the phenomenon of repression by child sex abuse victims").

218. *Lovelace v. Keohane*, 831 P.2d 624, 631 (Okla. 1992).

219. See, e.g., *Anonymous v. Anonymous*, 584 N.Y.S.2d 713, 718 (Sup. Ct. 1992) (summarizing affidavit of psychiatrist who examined plaintiff).

220. *Fager v. Hundt*, 610 N.E.2d 246, 252-53 (Ind. 1993).

issues remained for trial on the question of whether the statute of limitations could be tolled for fraudulent concealment.²²¹

2. Case precedent for admitting expert testimony at trial

When repressed memory claims actually have made it to trial, two scenarios are typical: (1) the plaintiff offers expert evidence, and the defendant objects;²²² or (2) both parties call expert witnesses to the stand.²²³ Courts have admitted expert testimony on repressed memory in both civil and criminal cases. When Gary Ramona sued his daughter's therapists, claiming that they had "implanted" Holly Ramona's memories of abuse,²²⁴ Dr. Lenore Terr testified for the defendants,²²⁵ and Dr. Park Dietz and Dr. Elizabeth Loftus testified for the plaintiff.²²⁶ In the 1990 California murder trial of George Franklin,²²⁷ the defense called psychologist Elizabeth Loftus to the stand to provide counterpoint to Dr. Terr's testimony for the prosecution.²²⁸ A federal judge in Massachusetts allowed expert testimony in a case where the plaintiff had repressed her memory of traumatic strip searches by a Plymouth County sheriff.²²⁹ In another case, the New York Court of Appeals held that the trial court did not err in permitting a psychiatrist to testify and affirmed the defendant's murder conviction.²³⁰

The case that goes most directly to the issue raised in this Comment is *Herald v. Hood*.²³¹ In *Herald*, the defendant appealed a jury verdict awarding his niece \$150,000 in compensatory damages and \$5

221. *Id.* at 253.

222. See, e.g., *Hewczuk v. Sambor*, No. 91-6562, 1993 U.S. Dist. LEXIS 2417, at *4-6 (E.D. Pa. Feb. 18, 1993).

223. See *Butler*, *supra* note 46, at 34.

224. See *id.*; *supra* text accompanying notes 46, 130.

225. See *Butler*, *supra* note 46, at 34.

226. See *id.*; *Herman Address*, *supra* note 1, at 19. In the question-and-answer session after Herman's speech, Terr and Dietz discussed the *Ramona* verdict. *Id.* at 19-20.

227. See *supra* text accompanying notes 70-74.

228. *LOFTUS & KETCHAM*, *supra* note 79, at 40-49, 56.

229. *Cole v. Snow*, 586 F. Supp. 655, 667 (D. Mass. 1984) (awarding plaintiff \$27,040 for future medical costs and \$150,000 "for the emotional and physical consequences of these unjustified strip searches").

230. *People v. Fisher*, 423 N.E.2d 53, 54 (N.Y. 1981). The court explained:

This witness' opinion did not go directly to the issue of the truth or falsity of [the eyewitness'] story. In essence, it went to explain, with reasonable medical certainty, that it was possible for an individual to initially unconsciously block out certain facts or feelings . . . which follow in the train of a traumatic event, but to recall them at a later time.

Id.

231. No. 15986, 1993 Ohio App. LEXIS 3688, at *1 (Ohio Ct. App. July 21, 1993).

million in punitive damages—reduced by the trial court to \$2.5 million.²³² Julie Herald had repressed memories of the sexual abuse she suffered from ages three to fifteen.²³³ Herald had confronted Dennis Hood with the allegations when she recovered her memories fifteen years later; in response, Hood “indicated in telephone conversations that she was ‘the only one’ he had ever molested[,] . . . then met with Julie Herald at her therapist’s office and, according to two witnesses, admitted he had sexually abused her.”²³⁴ Nevertheless, Hood denied the allegations at trial.²³⁵ On appeal, Hood asserted fourteen assignments of error, three of which involved the issue of expert testimony.²³⁶ The court held: (1) the trial court neither abused its discretion nor prejudiced the defendant when it allowed a licensed professional counselor with extensive experience in sex abuse counseling to testify “regarding the existence of the psychological phenomenon of ‘repression’ ”;²³⁷ (2) the trial court did not abuse its discretion in permitting expert opinions embracing the ultimate issue to be decided by the jury—that is, that the plaintiff was sexually abused as a child;²³⁸ and (3) the trial court did not commit prejudicial error when it allowed the plaintiff’s counselor to testify, despite her having obtained knowledge in privileged group therapy sessions.²³⁹

A case with similar results is *Hewczuk v. Sambor*,²⁴⁰ in which a district court judge denied the defendants’ renewed motion for judgment as a matter of law and their alternative motion for a new trial.²⁴¹ In *Hewczuk* the plaintiff had sued her foster parents for physical and sexual abuse, the memories of which she had suppressed for thirty years.²⁴²

232. *Id.* at *1-2.

233. *Id.* at *2.

234. *Id.*

235. *Id.*

236. *Id.* at *16-20.

237. *Id.* at *16-18. The defendant nonetheless objected because the expert was not a licensed psychologist but had made a psychological diagnosis. *Id.*

238. *Id.* at *18-19. Ohio Evidence Rule 704, providing that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact,” is identical to Federal Rule of Evidence 704. OHIO R. EVID. 704.

239. *Herald*, 1993 Ohio App. LEXIS 3688 at *20 (“[A]n expert witness is capable of disregarding information obtained in a privileged situation and testifying only on the basis of non-privileged facts and information.”).

240. 1993 U.S. Dist. LEXIS 2417 at *6.

241. *Id.* at *1.

242. *Id.* at *2.

[T]he trial evidence established that, while in defendants' foster care . . . in early 1960, plaintiff was horribly mistreated (forced to eat her own vomit and drink her own urine; smeared with fecal matter and forced to eat it; bathed in extremely hot water; nearly drowned when her face was held under water in a toilet bowl; and, on at least one occasion, sexually assaulted); and that her memory of these atrocities was suppressed [until] she had begun to have "flashbacks" and partial awareness of the earlier trauma in the summer of 1990.²⁴³

Initially, the defendants argued that Joan Hewczuk's claim was barred by Pennsylvania's two-year statute of limitations, but the judge ruled that the question of when the claim accrued was for the jury to decide.²⁴⁴ At trial a medical witness testified as to "the existence and duration of plaintiff's repression of memory."²⁴⁵ The court found that this testimony "was plainly relevant to the limitations issues, and the jury was properly instructed that they could consider it."²⁴⁶

3. Plaintiff's handicaps in meeting the burden of proof

Concern over the danger of survivor litigation flooding the courts ignores reality. In addition to the emotional and financial difficulties of bringing suit,²⁴⁷ plaintiffs who go to trial must overcome severe handicaps in meeting the burden of proof by a preponderance of the evidence.²⁴⁸ Like child victims of sexual abuse, adult survivors often are hampered by the lack of corroborating evidence in the form of eyewitnesses to the perpetrator's acts²⁴⁹ or documentation of physical

243. *Id.*

244. *Id.* at *1.

245. *Id.* at *6.

246. *Id.* "On the basis of the testimony of plaintiff's expert, the jury could properly find that one of the consequences of the childhood trauma inflicted by the defendants was the suppression of plaintiff's memories of these events." *Id.* at *4.

247. *See supra* part II.D.1. Generally, courts have been unwilling to postpone accrual of child sexual abuse actions merely because the emotional difficulties inherent in this type of case prevented plaintiff from filing a timely complaint. *David A. v. Superior Court*, 20 Cal. App. 4th 281, 288, 24 Cal. Rptr. 2d 537, 542 (1993), *review denied*, No. S037126, 1994 Cal. LEXIS 821 (Cal. Feb. 24, 1994).

248. The preponderance of evidence standard of proof in civil cases is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *BLACK'S LAW DICTIONARY* 1182 (6th ed. 1990).

249. *See, e.g.,* *People v. Beckley*, 456 N.W.2d 391, 402 (Mich. 1990) ("In most criminal sexual conduct cases there are no nonparticipant witnesses to the crime, which reduces the cases to weighing the defendant's credibility against that of the victim's.").

injuries.²⁵⁰ More likely than not the defendant will deny the allegations and do everything possible to discount the plaintiff's testimony.²⁵¹ Oftentimes family members and friends who might have helpful information are unwilling to testify.²⁵² Just as "[t]he perceived inherent weakness of these cases, which often pitted a young traumatized child against a seemingly respectable adult, caused many prosecutors to bolster their cases with expert testimony,"²⁵³ adult plaintiffs also may proffer expert witnesses to support their claims.²⁵⁴ For both child and adult victims, "[t]he implication that the victim imagined or fantasized the sexual abuse is an undercurrent in every case Expert witnesses are needed in this area *not* to render opinions as to whether a [victim] is telling the truth but to . . . counter the implicit defense of fabrication or imagination."²⁵⁵ In fact, the need may be even greater for adult plaintiffs. The mere passage of time exacerbates the difficulty of finding physical evidence and corroborating lay witnesses.²⁵⁶ In addition, because children naturally appear more "innocent" and vulnerable, jurors may be less sympathetic to adult plaintiffs, particularly since defendants usually enter the courtroom as nonthreatening senior citizens²⁵⁷—hardly the stereotypical image of a child molester.²⁵⁸

250. See, e.g., *id.* ("[G]iven the fact that disclosure in child sexual abuse cases is generally delayed because of coercion, guilt, or some other reason, there will be no physical evidence to corroborate the victim's allegations.").

251. See CRNICH & CRNICH, *supra* note 31, at 11; see also Karp, *supra* note 85, at 71 (reporting research finding "that many individuals who had previously acknowledged their violent or abusive behavior now carry around articles on false memory to fuel new denials—and thus be in a position to continue their perpetrations").

252. See CRNICH & CRNICH, *supra* note 31, at 14-16.

253. Rebecca J. Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97, 97 (1985).

254. See, e.g., *Hewczuk v. Sambor*, No. 91-6562, 1993 U.S. Dist. LEXIS 2417, at *4-6 (E.D. Pa. Feb. 18, 1993); *Herald v. Hood*, No. 15986, 1993 Ohio App. LEXIS 3688, at *16-20 (Ohio Ct. App. July 21, 1993).

255. Roe, *supra* note 253, at 105 (emphasis added).

256. See *supra* note 118 (discussing loss of evidence, memories, and witnesses over time as policy rationale for statutes of limitations).

257. See Wylie, *supra* note 36, at 20 (describing alleged perpetrators as "parents in their late fifties, sixties and seventies").

258. See Rosy A. Ekpenyong, Book Review, 79 J. CRIM. L. & CRIMINOLOGY 569, 571 (1988) (reviewing SETH L. GOLDSTEIN, *THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION, AND INTERVENTION* (1987)) (referring to "the myth of the offender as a solo sex fiend and a poor, depraved, scar-faced stranger who waits in the bushes for young prey"). Contrary to what most people imagine, child molesters can be "apparently normal adults," see Summit, *supra* note 25, at 190, "well educated," see Myers et al., *supra* note 8, at 130, and "middle- or upper-class[,] . . . respected professionals," Fahn, *supra* note 25, at 205-06.

4. Satisfying the requirements for expert testimony under the Federal Rules of Evidence

The policy underlying the Federal Rules of Evidence (FRE) generally favors the admission of expert opinions.²⁵⁹ If expert testimony in repressed memory cases is subject to the limitations proposed in this Comment,²⁶⁰ it can satisfy all of the specific FRE requirements applicable to expert evidence.²⁶¹

Assuming that the witness is qualified as an expert,²⁶² the chief requirement for the admission of expert testimony is that it "assist the trier of fact to understand the evidence or to determine a fact in issue."²⁶³ This requirement is met in repressed memory cases because "[w]hen middle-aged plaintiffs make allegations of childhood sexual abuse, jurors are likely to be puzzled over the delay in filing suit. Many will question how the plaintiff could have 'forgotten' being sexually victimized as a child."²⁶⁴

The main purpose of allowing expert testimony in repressed memory litigation is analogous to the rationale for using expert testimony in child sexual abuse prosecutions. Several courts have recognized that "[a child's] reactions to a sexual assault, especially if the assailant is a family member, are unique to the particular crime. This uniqueness puts the evidence beyond the jury's ability to properly evaluate the facts in issue absent expert testimony."²⁶⁵ Affirming this

259. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794 (1993) (referring to "the 'liberal thrust' of the Federal Rules [of Evidence] and their 'general approach of relaxing the traditional barriers to 'opinion' testimony'" (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988))); Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 888 (1982); Myers et al., *supra* note 8, at 6.

260. See *infra* part V.A.

261. The FRE's threshold requirement for all types of evidence is relevancy. FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any [material] fact more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Expert testimony is relevant in a repressed memory suit because it has a tendency to prove that the plaintiff may have suffered amnesia as a result of child sexual abuse.

262. See *infra* text accompanying notes 408-12.

263. FED. R. EVID. 702.

264. Kanovitz, *supra* note 11, at 1203.

265. *Beckley*, 456 N.W.2d at 401; see also *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (finding that assessment of child victim's credibility in sexual abuse case was out of jury's common experience); *State v. Middleton*, 657 P.2d 1215, 1220 (Or. 1983) (relying on voir dire responses to support conclusion that average individual is unfamiliar with emotional trauma associated with sexual assault). Without expert testimony, "jurors may impose standards of normalcy on child victim/witnesses who consistently respond in distinctly abnormal fashion." *Id.* at 1222 (Roberts, J., concurring).

view, the American Bar Association's National Legal Resource Center for Child Advocacy and Protection has reported that

[t]he characteristics and dynamics of child sexual abuse are areas about which most jurors do not have general knowledge. If anything, the average layperson's perceptions regarding . . . child sexual abuse are based upon myth and emotional reactions. In fact, the family dynamics which give rise to sexual abuse of a child are often complex and contrary to these common perceptions.

. . . Only people who have worked intensively with incestuous families possess the specialized knowledge of the characteristics and dynamics of child sexual abuse.²⁶⁶

Under common law, expert opinions are admissible only on matters that are not common knowledge.²⁶⁷ Using this stricter test, one might argue that expert testimony regarding repressed memory should be inadmissible. However, the drafters of the FRE eliminated this requirement,²⁶⁸ concluding that

the jury can also benefit from expert testimony on subjects with which it has a degree of familiarity. . . . In some cases, the expert can add insight and depth to the jury's understanding of familiar subjects. In others, expert testimony may disabuse jurors of commonly held misconceptions about relatively common events. . . . The question is not whether the subject is beyond common understanding, but whether the expert can assist the jury²⁶⁹

Moreover, even as media reports and portrayals of repressed memory—some more accurate than others—reach a wider audience, expert evidence still should be admissible because it assists the trier of

266. Lucy Berliner et al., *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in *CHILD SEXUAL ABUSE AND THE LAW* 166, 169-70 (Josephine Bulkley ed., 1982).

267. "[T]he subject matter must be closely related to a particular profession, business or science and not within the common knowledge of the average layman." *Bridger v. Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966).

268. See FED. R. EVID. 702; see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1980) (stating that Rule 702 "thus expands slightly the practice of most jurisdictions of permitting expert testimony only when the subject matter was otherwise beyond lay comprehension").

269. Myers et al., *supra* note 8, at 7.

fact.²⁷⁰ This is especially true in light of the many commonly held myths about children²⁷¹ and biases against victims of sexual assault.²⁷²

There is abundant documentation of society's distrust of rape complainants.²⁷³ As Dr. Judith L. Herman observed in her study of psychological trauma:

It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement, and remembering. . . .

. . . .

. . . Throughout the history of the field, dispute has raged over whether patients with posttraumatic conditions are entitled to care and respect or deserving of contempt, whether they are genuinely suffering or malingering, whether their histories are true or false and, if false, whether imagined or maliciously fabricated. In spite of a vast literature documenting the phenomenon of psychological trauma, debate still centers on the basic question of whether these phenomena are credible and real.²⁷⁴

Courts have noted skepticism of child complainants "because of a child's susceptibility to external influences"²⁷⁵ and the common mis-

270. FED. R. EVID. 702. The advisory committee's note to Rule 702 states in pertinent part:

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.

FED. R. EVID. 702 advisory committee's note (citation omitted) (quoting Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952)).

271. See *infra* text accompanying notes 275-79, 282-83.

272. See *supra* text accompanying notes 12, 102-04; *infra* text accompanying notes 273-74.

273. See, e.g., *Beckley*, 456 N.W.2d at 402; HERMAN, *supra* note 1, at 7-8, 115-17; Comment, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657, 1661-63 (1984).

274. HERMAN, *supra* note 1, at 7-8.

275. *Beckley*, 456 N.W.2d at 402.

perceptions that children fantasize about sexual acts;²⁷⁶ that children will report injuries immediately,²⁷⁷ fully,²⁷⁸ and consistently;²⁷⁹ that sex offenders are always strangers;²⁸⁰ that physical injury almost always results from sexual abuse;²⁸¹ that child victims show fear, anger,

276. See, e.g., *id.* (noting prevalence of view that children fantasize about sexual acts).

277. See, e.g., *People v. Bowker*, 203 Cal. App. 3d 385, 394, 249 Cal. Rptr. 886, 891 (1988) ("[A]n expert could testify that . . . delayed reporting is not inconsistent with the secretive environment often created by an abuser . . ."), *review denied*, No. S007116, 1988 Cal. LEXIS 614 (Cal. Nov. 10, 1988); *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984) (upholding admission of expert testimony that "a sexually molested child finds it quite difficult to talk about sexual indiscretions with an adult"); *Smith v. State*, 688 P.2d 326, 327 (Nev. 1984) (holding expert evidence admissible in prosecution's rebuttal after defense cross-examined victim about reporting delays); *State v. Petrich*, 683 P.2d 173, 176, 180 (Wash. 1984) (admitting social worker's testimony on correlation between length of reporting delays and relationship of parties—that is, delay is longest when victim knows defendant).

There are numerous reasons for delayed allegations of abuse, including secrecy, helplessness, entrapment, and accommodation. See Summit, *supra* note 25, at 181-86. Children may not disclose abuse until they perceive an opportunity to do so or a greater likelihood that they will be believed, such as when the abuser moves out of the family's residence or, because parents have divorced, the children no longer feel a responsibility to keep the family together. Fahn, *supra* note 25, at 203; Kathleen C. Faller, *Possible Explanations for Child Sexual Abuse Allegations in Divorce*, 61 AM. J. ORTHOPSYCHIATRY 86, 88 (1991); see Myers et al., *supra* note 8, at 87; Summit, *supra* note 25, at 186-87; Wood, *supra* note 25, at 1393 & nn.192-93.

278. See, e.g., *People v. Roscoe*, 168 Cal. App. 3d 1093, 1099, 215 Cal. Rptr. 45, 49 (1985) (stating that expert testimony would be admissible to explain that "victims of molestation typically make poor witnesses, and are reluctant to disclose or discuss the sordid episodes").

The child may add more details as he or she becomes more comfortable with the interviewers and appreciates the distance now enjoyed from the offender. Expert testimony also may be important to explain the readily observable phenomenon among children to minimize the amount of sexual abuse. . . . Children tend to reveal only what they need to in order to be protected from further abuse.

Roe, *supra* note 253, at 107.

279. See, e.g., *State v. Pettit*, 675 P.2d 183, 185 (Or. Ct. App.) (holding that psychiatrist may testify as to ability of child sexual abuse victims to remember dates and to relate details consistently and promptly), *review denied*, 683 P.2d 91 (Or. 1984). Inconsistency may occur for several reasons. According to experts in the field:

First, when a child is repeatedly abused for months or years, individual molestations blur together. If the child is asked to describe particular episodes, the child may become confused, and such confusion may lead to inconsistent versions of events. Second, the ambivalence experienced by many victims sometimes causes them to offer inconsistent accounts of abuse. Such inconsistency is found in children of all ages. Third, with young children, inconsistency in describing past events may be a product of developmental immaturity.

Myers et al., *supra* note 8, at 88. Most courts admit expert evidence to explain why children's descriptions of sexual abuse may be inconsistent. Myers, *supra* note 23, at 18-19.

280. See Elaine R. Cacciola, Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 178-79 (1986).

281. *Id.*; see also Myers et al., *supra* note 8, at 34-35 & nn.120-22, 37 (stating that physical or laboratory evidence of child sexual abuse is not found in majority of cases); Debra C.

or other negative feelings toward their abuser;²⁸² and that the recantation of an accusation must mean that the abuse did not occur.²⁸³ Consequently, a number of courts reason that "[g]iven the possibility of these misconceptions, it would be helpful and appropriate to allow expert testimony in child sexual abuse cases."²⁸⁴ Likewise, an expert witness would serve to dispel the mythology that has developed around the concept of repressed memories recovered in adulthood.²⁸⁵

Federal Rule of Evidence 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to [the expert] at or before the hearing."²⁸⁶ Given the limitations proposed below,²⁸⁷ an expert who testifies solely to provide the factfinder with background information on repressed memory is in little danger of violating this rule. The basis of the expert's opinion should consist of current research findings, learned treatises, professional journals, clinical experience,

Moss, *Do Kids Lie?*, A.B.A. J., Dec. 1, 1988, at 25, 25 ("One myth is that there is no sexual abuse if a doctor finds no physical evidence of abuse. The truth is that most young children are molested by fondling."); Susan Romer, Comment, *Child Sexual Abuse in Custody and Visitation Disputes: Problems, Progress, and Prospects*, 20 GOLDEN GATE U. L. REV. 647, 667 (1990) ("Often, there is no physical evidence of abuse.").

282. Research indicates that child victims often display no fear or anxiety in the presence of their abuser. See Jon R. Conte et al., *Evaluating Children's Reports of Sexual Abuse: Results from a Survey of Professionals*, 61 AM. J. ORTHOPSYCHIATRY 428, 434 (1991).

A child who has been sexually abused, perhaps over much of his or her life, by an adult with whom the child has an otherwise positive relationship may show no fear because fear has not been induced by the experience or because the child has learned that abuse does not take place while other adults . . . are present.

Id.; see also Corwin et al., *supra* note 25, at 98 ("That sexually abused children often display affection for the parents who have abused them is acknowledged by many professionals working with incestuous families . . ."); Fahn, *supra* note 25, at 203 (noting that child victim "may feel torn by loyalty toward [the] abuser" and "still desires affection from the parent"); Myers et al., *supra* note 8, at 88 ("It is not uncommon for abused children to want to live with and demonstrate affection toward the abusing parent."). The explanation for this behavior is that "[t]he only healthy option left for the child is to learn to accept the situation and to survive. There is no way out, no place to run. The healthy, normal, emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse." Summit, *supra* note 25, at 184.

283. See, e.g., *Middleton*, 657 P.2d at 1220 (noting that children commonly recant in time between disclosure and trial for reasons that should compel courts to allow experts to explain this phenomenon to jury). "Children may recant for a number of reasons that include the guilt that they feel for the destruction of the family and the potential imprisonment of a 'loved one.'" Roe, *supra* note 253, at 108; cf. *infra* text accompanying notes 331-34 (discussing adults who recant allegations of child sexual abuse).

284. *Beckley*, 456 N.W.2d at 402.

285. See, e.g., cases cited *supra* part III.B.2.

286. FED. R. EVID. 703.

287. See *infra* part V.A.

and the like,²⁸⁸ all of which are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."²⁸⁹

Perhaps the most common argument for exclusion of expert evidence is based on FRE 403: Its prejudicial impact substantially outweighs its probative value.²⁹⁰ However,

[t]he argument that such expert psychological testimony is prejudicial because it bears on the credibility of a witness, and thus invades the province of the jury, is simply wrong. Expert testimony cannot "invade the province of the jury" unless the jury is instructed that it *must* agree with the expert's assessment.²⁹¹

Thus, despite defendants' frequent protestations that expert witnesses invade the province of the jury and lend a prejudicial aura of credibility to plaintiffs' claims,²⁹² courts have allowed expert testimony because, quite simply, jurors are free to disregard it.²⁹³ In fact, the judge may reinforce this point when giving instructions to the jury.²⁹⁴ Moreover, if courts adopt the limitations suggested in this Comment,²⁹⁵ they will further decrease the risk of prejudice to the defendant.

5. Applying the *Daubert* standard

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁹⁶ the United States Supreme Court held that Federal Rule of Evidence 702 super-

288. See PENDERGRAST, *supra* note 79, at 529; cf. Berliner et al., *supra* note 266, at 168, 170 (discussing proper bases for expert opinions in child sexual abuse cases).

289. FED. R. EVID. 703.

290. See FED. R. EVID. 403.

291. Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 443 (1985) (citations omitted).

292. See discussion *infra* part IV.B.2.

293. *United States v. Morgan*, 554 F.2d 31, 33 (2d Cir.) ("The argument has long since been laid to rest that, where an expert expresses an opinion on an assumed state of facts, he is usurping the province of the jury."), *cert. denied*, 434 U.S. 965 (1977).

294. See, e.g., LEONARD B. SAND ET AL., 3 MODERN FEDERAL JURY INSTRUCTIONS—CIVIL, ¶ 76.01, at 76-25 (1994) ("You should not, however, accept this witness' testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.").

295. See *infra* part V.A.

296. 113 S. Ct. 2786 (1993).

seded the seventy-year-old *Frye* "general acceptance" test²⁹⁷ for admissibility of expert testimony and novel scientific evidence.²⁹⁸ Under the more liberal standard of *Daubert*, the scientific testimony given by a witness need not be known to a certainty, for, as Justice Blackmun wrote, "arguably, there are no certainties in science."²⁹⁹ It would seem, then, that the debate among scientists over the validity of repressed memory theory need not preclude expert evidence about it at trial.

However, *Daubert* does require federal judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."³⁰⁰ One would thus expect defendants to argue that (1) recovered memories of child sexual abuse are too unreliable to be admitted as evidence;³⁰¹ and (2) the current state of scientific knowledge about repressed memory is too contradictory and inconclusive to be a reliable basis for expert testimony.³⁰²

An alternative argument for parties wishing to call experts is that opinion testimony regarding repressed memory should not be subject to *Daubert* at all. Because theories supporting and challenging the phenomenon of repressed memory theory are more properly characterized as social or behavioral science—that is, "soft" as opposed to "hard" science—it would be unfair to apply any standard beyond Rule 702's criterion of helpfulness to the jury.³⁰³

By analogy, state courts adhering to the *Frye* standard are split on the issue of whether it should be applied to the expert opinion of a psychiatrist or psychologist. Those courts that decline to do so recognize "a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sci-

297. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (restricting expert testimony and scientific evidence to that which is "sufficiently established to have gained general acceptance in the particular field in which it belongs"), *superseded by* FED. R. EVID. 702, *construed in* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993).

298. *Daubert*, 113 S. Ct. at 2799.

299. *Id.* at 2795.

300. *Id.* For commentary debating how the reliability of scientific evidence should be measured, see Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715 (1994).

301. *See infra* part IV.B.1.

302. Compare *supra* part III.A (discussing research on traumatic amnesia) with *infra* part IV.A (describing experiments that demonstrate unreliability and malleability of memory).

303. *See supra* text accompanying notes 263-67.

ences.”³⁰⁴ As one court put it, “[p]sychologists, when called as experts, do not talk about things or objects; they talk about people. They do not dehumanize people with whom they deal by treating them as objects composed of interacting biological systems. Rather, they speak of the whole person.”³⁰⁵

These issues—whether the *Daubert* standard should be applied to expert evidence on repressed memory theory and, if so, whether it is satisfied—have yet to be resolved in the courts.³⁰⁶ Undoubtedly, the future debate on these evidentiary questions will turn on the results of ongoing scientific research into memory.

IV. “FALSE”: THE ARGUMENTS AGAINST REPRESSED MEMORY

A. *Invalidity—or Questionability—of Repressed Memory Theory*

According to academic critics, “the theory behind memory recovery has never been verified experimentally.”³⁰⁷ Memories that surface during therapy are particularly vulnerable to charges of unreliability “because psychotherapy is a healing technique and not a search for truth.”³⁰⁸

1. Insufficient scientific evidence

Most experts agree that more research needs to be done.³⁰⁹ Researcher David Holmes reviewed sixty years of scientific literature and found no controlled laboratory studies supporting the concept of memory repression.³¹⁰ Psychiatrist George Ganaway, who has seen more than 200 patients with severe dissociative disorders, described anecdotal reports of recovered memories as “‘empirical observations lacking in scientific underpinnings.’”³¹¹ Questions still remain to be

304. *Beckley*, 456 N.W.2d at 404.

305. *Id.* (quoting Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1035 (1988)).

306. None of the cases discussed in part III.B.2, *supra*, address the applicability of *Daubert* to expert testimony on repressed memory theory.

307. Loftus & Rosenwald, *supra* note 8, at 71.

“Sixty years of experiments that would demonstrate the phenomenon have failed to produce any evidence of its existence. The notion of repression has never been more than an unsubstantiated speculation tied to other Freudian concepts and speculative mechanisms. The only support repression has ever had is anecdotal and contributed by psychoanalysts who presume the existence of the repression mechanism.”

Id. (quoting sociology professor Richard Ofshe of University of California at Berkeley).

308. *Id.*

309. *See, e.g.*, Loftus, *supra* note 8, at 533.

310. *Id.* at 519.

311. *Id.* (quoting George Ganaway) (citation omitted).

answered: When repressed memories are recovered years later, are they accurate?³¹² Also,

[i]s it true that repression of extremely traumatic experiences is common? Do these experiences invade us despite the fact that "all the good juice of consciousness has drained out[?]" . . . Do [combat veterans and incest survivors] share in common the use of "massive repression" as a mechanism for coping? If so, how do we explain findings obtained with children who witness parental murder and other atrocities [and do not repress the memory]? . . .

. . . Is it necessarily true that all people who display symptoms of severe mental distress have had some early childhood trauma (probably abuse) that is responsible for the distress?³¹³

Without answers to questions such as these, there is a real danger that fabricated memories will cause irreparable damage to the reputations of potentially innocent people.³¹⁴ Furthermore, uncritical acceptance of all repressed memories as true, "no matter how dubious[is] . . . bound to lead to an increased likelihood that society in general will disbelieve the genuine cases of childhood sexual abuse that truly deserve our sustained attention."³¹⁵

2. Implantation of false memories

According to one theory, "[t]o say that memory might be false does not mean that the person is deliberately lying."³¹⁶ A survivor might honestly believe false memories

as a way to provide a screen for perhaps more prosaic but, ironically less tolerable, painful experiences of childhood. Creating a fantasy of abuse with its relatively clear-cut distinction between good and evil may provide the needed logical explanation for confusing experiences and feelings. The core material for the false memories can be borrowed from the accounts of others who are either known personally or encountered in literature, movies, and television.³¹⁷

312. See, e.g., *id.* at 524.

313. *Id.* at 533-34 (citations omitted).

314. *Id.* at 534 (citation omitted).

315. *Id.*

316. *Id.* at 525.

317. *Id.*

Under this view a primary source for fabricated memories are popular self-help guides such as *The Courage to Heal*,³¹⁸ *Repressed Memories*,³¹⁹ and *Secret Survivors*.³²⁰ Another oft-named source of false memories is the therapist's office.³²¹ Some attribute confabulation³²² to the well-meaning but misguided efforts of therapists who unintentionally suggest repressed memories of childhood trauma to their troubled patients.³²³ Dr. Herman has observed:

Therapists . . . sometimes fall prey to the desire for certainty. Zealous conviction can all too easily replace an open, inquiring attitude. In the past, this desire for certainty generally led therapists to discount or minimize their patients' traumatic experiences. . . . [T]he recent rediscovery of psychological trauma has led to errors of the opposite kind. Therapists have been known to tell patients, merely on the basis of a suggestive history or "symptom profile," that they definitely have had a traumatic experience. . . . Any expression of doubt can be dismissed as "denial."³²⁴

One of the most vocal critics of repressed memory therapy is the False Memory Syndrome Foundation (FMSF), an organization formed in 1992 by parents who claim to have been falsely accused of child sexual abuse.³²⁵ The members of this volunteer advocacy group lend moral support to each other and lobby public opinion through the media.³²⁶ In essence, the FMSF's position is that claims of survivors are based on false memories implanted by "a large, amorphous, profit-oriented 'sex abuse industry,' a conglomerate of New-Age healers,

318. ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL* (3d ed. 1994). Critics have called this book the "bible" of the incest book industry." Loftus, *supra* note 8, at 525.

319. RENEE FREDRICKSON, *REPPRESSED MEMORIES: A JOURNEY TO RECOVERY FROM SEXUAL ABUSE* (1992). This book contains a disclaimer advising readers that "[t]he information in this book is intended for educational purposes only. It is not intended to replace diagnosis and treatment by competent professionals." *Id.* at 7.

320. BLUME, *supra* note 55.

321. See, e.g., Yapko, *supra* note 88, at 31-37.

322. "Confabulation" is "a filling in of gaps in memory by free fabrication." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 475 (1976).

323. Loftus, *supra* note 8, at 526. Therapists' "facile acceptance and . . . validation of uncorroborated trauma memories" may be, at least in part, an overreaction to the profession's long history of dismissing such memories as pure fantasy. *Id.* (quoting George Ganaway).

324. HERMAN, *supra* note 1, at 180.

325. Richard Simon, *From the Editor*, FAM. THERAPY NETWORKER, Sept./Oct. 1993, at 2; Wylie, *supra* note 36, at 20, 22.

326. See Wylie, *supra* note 36, at 18-23.

self-help movement promoters, political activists, radical feminists, social service providers and mental health professionals."³²⁷

Their protestations are similar to those heard from others accused of sexually abusing a child: Even if the defendant is ultimately cleared of all charges, the accusation alone is enough to ruin his or her reputation, marriage, family life, friendships, career, or business.³²⁸ When an adult survivor sues, the added element of memory repression provides another ground for argument, and, since the authenticity of recovered memories is inherently difficult to prove, it is the issue on which survivors and therapists are most vulnerable to attack.³²⁹ It is important to remember, however, that "[b]ecause accused persons are motivated to verbally and even mentally deny an abusive past, simple denials cannot constitute cogent evidence that the victim's memories are not authentic."³³⁰

The FMSF and other critics of repressed memory therapy often support their position by pointing to cases of recantation. A highly publicized example was the suit brought and then dropped by Steven Cook against Cardinal Joseph Bernardin of Chicago in 1993.³³¹ In these cases the recanters blamed, and sometimes sued, therapists for implanting memories which they have come to believe are false.³³²

It cannot be denied that *some* memories may indeed be false. It is useful to keep in mind, however, that recantation is common among

327. *Id.* at 22. On the other hand, in the context of sexual abuse cases where the victim is a child, Professor John E.B. Myers has written that the allegation most likely to be false is the one asserting there is "a wave of fabricated allegations." Myers, *supra* note 23, at 25.

328. Wylie, *supra* note 36, at 20.

329. See, e.g., LOFTUS & KETCHAM, *supra* note 79, *passim*; RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA *passim* (1994); PENDERGRAST, *supra* note 79, *passim*.

330. Loftus, *supra* note 8, at 525.

331. In November 1993 Cook filed a lawsuit against Cardinal Bernardin after therapy uncovered memories of being sexually abused as a teenager. PENDERGRAST, *supra* note 79, at 485. Cook later withdrew the claim, "explaining that he now realized how questionable hypnotically induced memories could be." *Id.*

332. See, e.g., *id.* at 315-58; Sally Jacobs, *Sex Abuse Memories in Question*, BOSTON GLOBE, Apr. 4, 1993, at 1 (reporting that former patient sued therapist after "conclud[ing] she had been abused not by anyone in her family, but by a therapist preoccupied with sexual abuse"); Jaroff, *supra* note 3, at 52 (stating that woman decided memories of abuse by father were false and sued California psychiatric hospital for "pain that she and her family suffered"). In *Joyce-Couch v. DeSilva*, 602 N.E.2d 286 (Ohio Ct. App. 1991), the court upheld a jury malpractice verdict against a therapist who mishandled repressed memory therapy. *Id.* at 293. In fact, the court of appeal reversed and remanded, determining that "[t]he trial court should have instructed the jury on punitive damages and allowed the jury to determine if they were appropriate." *Id.*

child victims of sexual abuse³³³ and that the causal factors—feelings of loss, fear, loyalty, and guilt—may continue operating well into adulthood.³³⁴

3. Research findings

Research purporting to show that false memories can be implanted buttresses the position taken by the FMSF and like-minded critics. Hundreds of studies done over the last two decades seem to support the hypothesis that false memories can be created or that real memories can be distorted.³³⁵ For example, subjects exposed to misinformation "have recalled . . . a cleanshaven man as having a mustache, straight hair as curly, and even something as large and conspicuous as a barn in a bucolic scene that contained no buildings at all."³³⁶

In one study researchers asked subjects how they heard the news of the explosion of the space shuttle *Challenger* in 1986—first on the morning after the accident and then again almost three years later.³³⁷ Comparison revealed that none of the later memories were 100% accurate and more than one-third were extremely inaccurate.³³⁸ Another experiment tested the recollections of spectators who witnessed a football player go into cardiac arrest on the field.³³⁹ In interviews conducted six years after the event, subjects who had received a false suggestion absorbed it into their memories; more than twenty-five

333. Fahn, *supra* note 25, at 204. Children often retract allegations in cases of substantiated sexual abuse. Summit, *supra* note 25, at 188. The victim's conflict of loyalty, fear of consequences, and sense of responsibility for "the chaotic aftermath of disclosure" can lead to such retractions. *Id.*

Following disclosure, powerful forces may work to convince the child to change the facts or to recant altogether. Such forces are particularly strong in intrafamilial abuse cases, where the perpetrator, with or without the cooperation of the nonabusing parent, seeks to persuade the child to change or deny prior allegations. There may be ample opportunity to instill fear, guilt, and ambivalence.

Myers et al., *supra* note 8, at 87 (footnote omitted). Most courts admit expert testimony to explain why children recant sexual abuse allegations. Josephine Bulkley et al., *Key Evidentiary Issues in Child Sexual Abuse Cases*, in *JUDICIAL PRIMER ON CHILD SEXUAL ABUSE* 63, 72 (Josephine Bulkley & Claire Sandt eds., 1994); Myers, *supra* note 23, at 18.

334. See 140 CONG. REC. H87 (daily ed. Feb. 1, 1994) (statement of Rep. Schroeder (D-Colo.)) ("The trauma [child sexual abuse] victims face doesn't end when they reach adulthood. The road to recovery is excruciatingly long and often stretches far into adulthood.").

335. Loftus, *supra* note 8, at 530.

336. *Id.* (citation omitted).

337. Ulric Neisser & Nicole Harsch, *Phantom Flashbulbs: False Recollections of Hearing the News About Challenger*, in *AFFECT AND ACCURACY IN RECALL: STUDIES OF "FLASHBULB" MEMORIES* 9, 13 (Eugene Winograd & Ulric Neisser eds., 1992).

338. *Id.* at 18-19.

339. Loftus, *supra* note 8, at 531 (citing data in unpublished doctoral dissertation by J. Abhold at University of Arkansas, 1992).

percent believed they had seen blood on the player's jersey although there had been none.³⁴⁰ Likewise, subjects have remembered voting in a certain election when in reality they had not³⁴¹ and described an assault that never happened after hearing the "victim" lie about the incident.³⁴²

However, clinicians who bear witness to the recovery of authentic memories in their daily practice "contend that what's being measured in the lab, which shows that false memories can be implanted, [may not be] the same thing" as recovered memories of actual child sexual abuse.³⁴³ Ethical obligations—not to mention common decency—bar researchers from inducing comparably severe trauma in laboratory subjects.³⁴⁴ Hence, the fact that *ordinary* memories can be implanted or distorted may be irrelevant to the question of whether the theory of repressed *traumatic* memory is valid.³⁴⁵

B. Arguments Against Admitting Expert Testimony

According to those who challenge the validity of repressed memory, the legislatures that have extended their statutes of limitations and courts that have applied the discovery rule for child sexual abuse claims may have acted precipitously.³⁴⁶ Representing this view, one psychologist argued that "when we move from the privacy of the therapy session, in which the client's reality may be the only reality that is important, into the courtroom, in which there can be but a single reality, then we as citizens in a democratic society are entitled to more solid evidence."³⁴⁷

Common reasons for barring expert testimony on repressed memory include: (1) it is too unreliable,³⁴⁸ (2) its prejudicial impact

340. *Id.*

341. *Id.* at 532 (citation omitted).

342. Jeffrey J. Haugaard et al., *Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings*, 15 L. & HUM. BEHAV. 253, 259-65 (1991).

343. Stolar Interview, *supra* note 79.

344. See Yates & Nasby, *supra* note 186, at 305; Wylie, *supra* note 163, at 43; Stolar Interview, *supra* note 79.

345. Stolar Interview, *supra* note 79.

346. See, e.g., *Ault v. Jasko*, 637 N.E.2d 870, 874 (Ohio 1994) (Moyer, C.J., dissenting) ("We simply do not have in the record . . . sufficient scientific, empirical or other information from which to craft a rule of law that will protect those accused of being abusers and those who have been abused or believe they have been abused as children.").

347. Loftus, *supra* note 8, at 534.

348. A number of commentators have argued that psychiatric and psychological opinions *in general* are not sufficiently reliable for legal purposes. See, e.g., Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the*

on the jury outweighs its probative value;³⁴⁹ (3) expert witnesses are inherently biased because they are compensated by proponents³⁵⁰ for their testimony; and (4) if both sides proffer experts, the ensuing "battle of the experts" confuses the jury more than it assists the jury's understanding of the issue.³⁵¹

1. Repressed memory evidence is too unreliable

At a pretrial motion to dismiss, where the judge must decide whether the evidence of memory repression is sufficient to trigger an extended statute of limitations or application of the discovery rule, the defendant typically will argue that the plaintiff's memories have been rendered unreliable by the passage of time.³⁵² In accepting this argument, one court reasoned:

[N]o empirical, verifiable evidence exists of the occurrences and resulting harm which plaintiff alleges. . . . There is no objective manifestation of these allegations. Rather, they are based on plaintiff's alleged recollection of a memory long buried in the unconscious which she asserts was triggered by psychological therapy.

. . . [T]he testimony of . . . family, friends, schoolteachers and treating psychologists . . . would [not] provide objective evidence that the alleged acts occurred. . . . Witnesses' recollections . . . usually become less reliable in a matter of minutes, much less years. Thus, the more time had passed, the less trustworthy such testimony would be.³⁵³

Accordingly, the defendant will ask the court to find that the peace-of-mind rationale underlying statutes of limitations³⁵⁴ outweighs the plaintiff's right to redress.

At trial a similar argument is advanced: Even if recovered memories are "genuine," they cannot be scientifically verified and there-

Courtroom, 62 CAL. L. REV. 693 (1974); Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331 (1985).

349. See Cacciola, *supra* note 280, at 204; *infra* part IV.B.2.

350. In the context of evidence, a proponent is a party who offers evidence. BLACK'S LAW DICTIONARY 1218 (6th ed. 1990).

351. See, e.g., Graham, *supra* note 125, at 47; Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1130; *infra* part IV.B.4.

352. See, e.g., *Tyson v. Tyson*, 727 P.2d 226, 228 (Wash. 1986) (en banc), *superseded by* WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1995).

353. *Id.* at 229.

354. Statutes of limitations compel plaintiffs to file timely claims in order to protect parties from having to defend themselves against stale claims. See *supra* note 118 and accompanying text.

fore should not be admitted as evidence of child sexual abuse.³⁵⁵ A number of experts share this viewpoint.³⁵⁶ They point to studies purporting to show that "it is possible to create an entire memory for a traumatic event that never happened"³⁵⁷ and the fact that, absent independent corroboration, there is no scientifically validated way to distinguish authentic memories from confabulations.³⁵⁸

When hypnosis is used to assist the retrieval process, the reliability of recovered memories becomes even more problematic.³⁵⁹ According to one therapist who utilizes this method in his practice, a person under hypnosis produces more material—some of it true, some of it seemingly real.³⁶⁰ It could be unintentionally and unconsciously confabulated; the person doesn't really know—and can't know—for sure.³⁶¹ To the patient it can feel very real, but unless there is some kind of external corroboration, memories retrieved through hypnosis should be used only for leads, not evidence.³⁶²

The opposing view distinguishes between hypnosis used to treat witnesses for amnesia caused by recent violent experiences and hypnosis used to restore memory for experiences that occurred in childhood—a distinction that courts have failed to make.³⁶³ One commentator wrote:

[N]o court has given serious and thoughtful consideration to the question of whether memory restored by clinical hypnosis is more trustworthy than memory restored in a forensic context.

355. See *supra* part IV.A.1.

356. See *supra* part IV.A.3.

357. LOFTUS & KETCHAM, *supra* note 79, at 90.

358. *Id.*

359. Stolar Interview, *supra* note 79.

360. *Id.*

361. *Id.*

362. *Id.* To illustrate the distinction between using hypnotically refreshed memories as an investigative tool and using them as evidence, Dr. Stolar cited two examples from personal experience. The Los Angeles County Sheriff's Department once requested his assistance in a murder case and asked him to hypnotize a friend of the suspect to see if she could recall anything the suspect might have said about the crime. *Id.* Under hypnosis, she recalled the suspect saying that he killed the victim and threw the gun off the Santa Monica pier. *Id.* Divers subsequently found the gun at that location. *Id.* By contrast, in another case, Dr. Stolar hypnotized a witness to a hit-and-run accident who could remember only the first two numbers of the suspect's license plate number. *Id.* Under hypnosis, the witness came up with a full number, but further investigation revealed that it was nonexistent. *Id.*

363. Kanovitz, *supra* note 11, at 1192 n.17.

. . . Events like automobile crashes and attacks by strangers often occur under adverse conditions that may interfere with the patient's ability to correctly perceive important details of the event. Hypnosis cannot retrieve information if it was never stored in memory. . . . Lack of memory for details exaggerates the tendency of hypnotized subjects to incorporate suggestions and confabulate missing information. . . . Consequently, hypnosis may be a less reliable memory restoration technique for victims of catastrophic accidents and violent events involving strangers than for victims of sexual abuse perpetrated by members of their own family.³⁶⁴

2. Prejudicial impact outweighs probative value

On the narrower question of whether the jury should hear expert testimony, one of the most common reasons given for exclusion is based on Federal Rule of Evidence 403: The prejudicial impact of expert testimony on repressed memory outweighs its probative value.³⁶⁵ The charge of unfair prejudice stems from the perceived tendency of juries to give too much weight to such evidence due to the expert witness' aura of authority.³⁶⁶ In several cases, for example, courts have held that expert testimony regarding rape trauma syndrome was unfairly prejudicial because it "gave a stamp of scientific legitimacy to the truth of the complaining witness's factual testimony."³⁶⁷

Moreover, at least one court has questioned the credibility of mental health experts who testify for abuse survivors.

[T]he testimony of treating psychologists or psychiatrists would not reduce, much less eliminate, the subjectivity of plaintiff's claim. Psychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence. The fact that plaintiff asserts she discovered the wrongful acts

364. *Id.*

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

366. See, e.g., *United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977).

367. *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1984) (quoting *People v. Izzo*, 282 N.W.2d 10, 11 (Mich. Ct. App. 1979)).

through psychological therapy does not validate their occurrence.³⁶⁸

Courts have excluded unquestionably relevant evidence in circumstances which "entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme."³⁶⁹ Thus, a defendant in a child sexual abuse case may argue that the admission of expert testimony on memory repression would violate Rule 403.

3. Experts for hire

Another frequently heard argument against the admissibility of expert evidence focuses on the problem of unscrupulous expert witnesses for hire.³⁷⁰ Because the proponent pays for the expert's services, it is hardly unexpected that the expert's opinion will support the proponent's position.³⁷¹ There is also an increased risk of false testimony from expert witnesses due in part to the fact that their testimony consists of opinions, not facts; thus, they cannot be prosecuted for perjury.³⁷²

Nevertheless, expert evidence continues to "play a large (and perhaps growing) role in litigation,"³⁷³ despite the fact that this concern has existed for more than a hundred years. As one nineteenth-century commentator observed, "Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses* . . . [I]t is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them."³⁷⁴

Furthermore, parties can be expected to produce "the best witness, not necessarily the best qualified expert."³⁷⁵ They also might avail themselves of tactical maneuvers to defeat either the assurances

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

369. FED. R. EVID. 403 advisory committee's note.

370. See *Graham*, *supra* note 125, at 45 (noting that problem existed as early as 1858).

371. See *id.* at 47.

372. Jeremiah M. Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 39 WASH. L. REV. 665, 678 (1964).

373. Gross, *supra* note 351, at 1116. "Some expert can almost always be found to testify to any plausible (and many implausible) expert opinions; if nothing else, a friendly expert can serve to undermine any expert who testifies for the opposition." *Id.* at 1130.

374. *Id.* at 1114 (quoting John P. Taylor, *TREATISE ON THE LAW OF EVIDENCE* §§ 45-50, at 65-69 (3d ed. 1858) (emphasis in original)).

375. *Graham*, *supra* note 125, at 47.

of trustworthiness built into the Federal Rules of Evidence³⁷⁶ or effective pretrial discovery of expert witnesses.³⁷⁷ Such tactics further undermine the factfinder's search for truth.

4. Battle of experts confuses jury

Allowing the defense to call experts of its own may be a less satisfactory solution for the defendant than exclusion of the plaintiff's expert evidence. If both parties call experts who give conflicting testimony, the ensuing battle of the experts may confuse rather than convince the jury³⁷⁸ and thus be grounds for exclusion under Rule 403.³⁷⁹ This is yet another problem with expert evidence that has persisted for more than a century.³⁸⁰

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.³⁸¹

Alternatively, if the contradictory opinions of the experts cancel each other out in the jurors' minds, a defendant may object on the grounds that Rule 403 also allows exclusion in order to avoid "undue delay, waste of time, or needless presentation of cumulative evidence."³⁸²

V. PROPOSED JUDICIAL SOLUTIONS

The metaphor of the scales of justice represents the law's attempt to balance conflicting interests. When difficult evidentiary issues arise, the judge's task is to find a middle ground which accommodates

376. For example, a party might try to introduce otherwise inadmissible evidence "through the back door" as the basis of an expert's opinion in order to show that the reasonable reliance requirement of Rule 703 has been met. *Id.* at 77-78.

377. For example, an attorney might postpone selection of an expert until the last moment, answer interrogatories about an expert in a summary and conclusive manner, or direct the expert not to prepare a report. *Id.* at 85-86.

378. *See, e.g., id.* at 47; Gross, *supra* note 351, at 1130 ("Disputes in fields of expert knowledge are overemphasized at the expense of areas of general agreement, and it is difficult, or impossible, for the trier of fact to learn the consensus in a field.").

379. *See supra* note 365 and accompanying text.

380. Gross, *supra* note 351, at 1114, 1130.

381. *Winans v. New York & Erie R.R.*, 62 U.S. (21 How.) 88, 101 (1858).

382. *FED. R. EVID.* 403.

the rights of all parties.³⁸³ In the analogous areas of child sexual abuse prosecutions and hypnotically refreshed testimony, the majority of jurisdictions allow expert testimony—but only within the bounds of carefully prescribed limits.³⁸⁴ Hence, this Comment recommends a similarly balanced approach to repressed memory litigation.

A. Limit the Permissible Scope of Expert Testimony

Expert testimony should be limited to general background information³⁸⁵ about adults who recover repressed memories of childhood sexual abuse. The primary purpose of such evidence would be to educate the jurors and dispel any misconceptions they may have about this subject matter.³⁸⁶ Restricting expert opinions in this way need not render the expert opinion irrelevant under Rule 402.³⁸⁷ As noted by the FRE Advisory Committee, "Evidence which is essentially background in nature . . . is universally offered and admitted as an aid to understanding. . . . A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission."³⁸⁸

Impermissible uses for expert testimony in repressed memory cases would include allowing the witness to: (1) directly bolster or attack the proponent's credibility; (2) state an opinion on whether the plaintiff actually repressed memories of child sexual abuse; (3) state an opinion on whether the plaintiff's memories are accurate, that is, whether child sexual abuse in fact occurred and, if so, whether the defendant was the perpetrator; and (4) testify as to subjects outside the witness's area of expertise. Both sides would be well advised to file a motion in limine asking the judge to define at a pretrial conference the specific parameters of admissibility.³⁸⁹ If the judge grants the motion, the court can protect the jury from hearing prejudicial, inad-

383. For example, Rule 403 gives judges the final word in close questions of admissibility. See *supra* note 365 and accompanying text.

384. See *infra* notes 400-02 and accompanying text.

385. For commentary on a similarly tailored approach to expert "framework" testimony in child sexual abuse prosecutions, see Christopher B. Mueller, *Meta-Evidence: Do We Need It?*, 25 *LOV. L.A. L. REV.* 819, 834-35 (1992).

386. See *supra* text accompanying notes 12, 102, 264.

387. "Evidence which is not relevant is not admissible." *FED. R. EVID.* 402.

388. *FED. R. EVID.* 401 advisory committee's note.

389. See *FED. R. EVID.* 104(a); *MCCORMICK ON EVIDENCE* 202-04 (John W. Strong ed., 4th ed. practitioner treatise ser. 1992).

missible evidence, and counsel will have a stronger basis for strategic decisions.³⁹⁰

Generally speaking, courts should consider the following factors in establishing the ground rules for admissibility in a particular case: (1) the age of the plaintiff at the time of the alleged abuse;³⁹¹ (2) the relationship between the plaintiff and the defendant;³⁹² (3) the length of time of the alleged abuse;³⁹³ (4) the degree of violence associated with the alleged abuse;³⁹⁴ and (5) the means by which the memory was recovered.³⁹⁵

Placing limits on expert evidence regarding repressed memory is, simply put, a compromise. It recognizes the danger of prejudice to the defendant³⁹⁶ as well as the plaintiff's difficulties in meeting the burden of proof.³⁹⁷ Moreover, it is an approach consistent with the moderate lines of court decisions that have addressed the admissibility of expert testimony on child sexual abuse and hypnotically refreshed testimony.

In prosecutions for child sexual abuse, courts have taken three approaches to the admissibility of expert testimony. The liberal view allows a qualified expert not only to testify about common symptoms of child sexual abuse, but also to give an opinion as to the truthfulness of a child witness.³⁹⁸ The conservative view prohibits expert opinions

390. MCCORMICK ON EVIDENCE, *supra* note 389, at 202.

391. See Briere & Conte, *supra* note 155, at 26 ("[E]arly molestation onset . . . [was] related to an increased likelihood of amnesia"); Herman & Schatzow, *supra* note 152, at 4 ("A strong association was observed between the degree of reported amnesia and the age of onset . . . of the sexual abuse."); Williams, *supra* note 161, at 1171-73 ("[A]buse that occurred at an earlier age was more likely to be forgotten . . ."); Stolar Interview, *supra* note 79.

392. See Berliner, *supra* note 24, at 6 ("Sexual abuse experiences involving . . . a close relationship to the offender are associated with greater negative impact . . ."); Williams, *supra* note 161, at 1174 ("Sexual abuse by a stranger is more likely to be remembered . . ."); Stolar Interview, *supra* note 79.

393. Herman & Schatzow, *supra* note 152, at 4 ("A strong association was observed between the degree of reported amnesia and the . . . duration of the sexual abuse."); Williams, *supra* note 161, at 1172 ("Those molested by strangers were more likely to recall the abuse than those molested by someone they knew . . ."); Stolar Interview, *supra* note 79.

394. Briere & Conte, *supra* note 155, at 26 ("[A]buse-specific amnesia was associated with violent abuse (e.g., involving physical injury, multiple perpetrators, fears of death if the abuse was disclosed) . . ."); Herman & Schatzow, *supra* note 152, at 5 ("[A] relationship was observed between . . . violent or sadistic abuse experiences and the resort to massive repression as a defense.").

395. See *supra* text accompanying notes 44-47, part III.A.4.

396. See *supra* part IV.B.2.

397. See *supra* part III.B.2.

398. See *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984) (holding that where expert diagnosed complainant as sexually abused child, defendant's objection on grounds of unreliability went to weight, not admissibility of testimony).

as to whether a child was sexually abused, as well as any support—direct or indirect—for a child's allegations.³⁹⁹ The intermediate view bars direct commentary on a victim's credibility but allows expert testimony to rebut a defense of fabrication by, for example, explaining a victim's delay in reporting, reluctance to disclose, or recantation.⁴⁰⁰

Likewise, in civil cases where the admissibility of hypnotically refreshed testimony is at issue, the authorities are split. One approach

399. See *State v. Castore*, 435 A.2d 321, 326 (R.I. 1981) (stating that gynecologist's opinion based on history given by child improperly bolstered complainant's credibility); *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (holding that expert's identification of child as incest victim was impermissible because no witness may testify "that another mentally and physically competent witness is telling the truth").

400. See *United States v. Banks*, 36 M.J. 150, 163 (C.M.A. 1992) (finding reversible error in judge's admission of psychologist's "profile" of a family ripe for child sexual abuse" if offered to establish defendant's guilt, but not if offered "to argue relevant adjudicative facts—for example to prove [defendant's] alleged marital sexual dysfunction to establish a motive for the[] offenses"); *Hall v. Arkansas*, 692 S.W.2d 769, 773 (Ark. Ct. App. 1985) (indicating that expert testimony regarding dynamics of child sexual abuse cases would be admissible only if offered "to rebut a misconception about the presumed behavior of a . . . victim"); *People v. Bowker*, 203 Cal. App. 3d 385, 393-94, 249 Cal. Rptr. 886, 891 (1988) (holding that expert testimony should be limited to rebuttal evidence after attack by defendant on victim's credibility and must be targeted at specific misconception about child sexual abuse), *review denied*, No. S007116, 1988 Cal. LEXIS 614 (Nov. 10, 1988); *People v. Roscoe*, 168 Cal. App. 3d 1093, 1099, 215 Cal. Rptr. 45, 49 (1985) (finding that expert may state that "as a class[,] victims of molestation typically make poor witnesses, and are reluctant to disclose or discuss the sordid episodes"); *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984) (allowing expert to explain victims' reluctance to disclose); *People v. Beckley*, 456 N.W.2d 391, 399 (Mich. 1990) (holding that "evidence of behavioral patterns of sexually abused children is admissible 'for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse' " (quoting *People v. Beckley*, 409 N.W.2d 759, 763 (Mich. Ct. App. 1987) (per curiam))); *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987) (allowing expert to testify about behavior patterns that are seemingly inconsistent with crime victims in general); *Smith v. State*, 688 P.2d 326, 327 (Nev. 1984) (permitting prosecution's expert to rehabilitate victim's credibility after defense counsel cross-examined victim about reporting delay); *State v. Middleton*, 657 P.2d 1215, 1219-20 (Or. 1983) (stating that courts should allow experts to explain why children commonly recant abuse allegations and contrasting child molestation with other kinds of crimes such as burglary, where, if victim recanted before trial, jury likely would believe victim fabricated complaint); *State v. Pettit*, 675 P.2d 183, 185 (Or. Ct. App.) (admitting psychiatrist's testimony on ability of child sexual abuse victims to remember dates and relate details consistently and promptly), *review denied*, 683 P.2d 91 (Or. 1984); *State v. Petrich*, 683 P.2d 173, 179-80 (Wash. 1984) (allowing social worker to testify about reporting delays in general, but precluding opinion as to whether child victim was telling truth); *State v. Fitzgerald*, 694 P.2d 1117, 1121 (Wash. Ct. App. 1985) (holding that pediatrician's opinion that children had been molested effectively vouched for child's truthfulness and thus was improperly admitted); *State v. Maule*, 667 P.2d 96, 99 (Wash. Ct. App. 1983) (implying in dicta that expert's theory based on typical characteristics of sexually abused children did not meet requirements for expert testimony and that it would be reversible error to allow any statistical testimony showing who would be most likely to abuse children).

permits a witness who has undergone hypnosis to testify as to those facts or events recalled before or after such hypnosis.⁴⁰¹ The other view allows hypnotically refreshed testimony only as to facts or events recalled before hypnosis and requires that a proper foundation be laid.⁴⁰²

Although Rule 704(a) allows expert opinions on ultimate issues,⁴⁰³ this Comment recommends that they be excluded in order to maintain a balance between the parties' conflicting interests⁴⁰⁴ and to avoid the potential for inconsistent application of Rule 403, which is completely within the discretion of the trial judge.⁴⁰⁵

B. Minimize Prejudicial Impact by Using Procedural Safeguards

1. Judge as gatekeeper and referee

Under the Federal Rules of Evidence, the role of the judge is to act as gatekeeper for evidence offered at trial.⁴⁰⁶ In *Daubert*, the Supreme Court stated:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.⁴⁰⁷

401. *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509-10 (9th Cir. 1974); *Connolly v. Farmer*, 484 F.2d 456, 457 (5th Cir. 1973).

402. *Lemieux v. Superior Court*, 644 P.2d 1300, 1303 (Ariz. 1982); *Austin v. Barker*, 85 N.Y.S. 465, 466-67 (App. Div. 1904).

403. "[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a).

404. *See supra* part II.D.1-2.

405. The court may exclude evidence, no matter how relevant, if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, the danger of misleading the jury, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403. *Compare supra* notes 290-92 and accompanying text (arguing that Rule 403 need not be grounds for exclusion of expert testimony regarding repressed memory) with part IV.B.2 (arguing that prejudicial impact of such expert testimony substantially outweighs its probative value).

406. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 & n.7 (1993).

407. *Id.* at 2796 (citation and footnote omitted).

One of the threshold questions a judge might face is "the qualification of a person to be a witness."⁴⁰⁸ Most courts take a liberal, flexible approach to the evaluation of an expert's qualifications.⁴⁰⁹ However, to ensure that the testimony assists the trier of fact, an expert witness in a repressed memory suit should be a licensed psychiatrist, psychologist, or clinical social worker with education, training, and experience in working with adult survivors of child sexual abuse.⁴¹⁰ Such an approach would be consistent with case law governing expert qualifications in criminal prosecutions of child sexual abuse.⁴¹¹

The Federal Rules of Evidence provide additional tools with which the judge can minimize the risk of prejudice by controlling the parties' presentation of proof. For instance, Rule 611(a) gives the judge "reasonable control over the mode and order of interrogating witnesses";⁴¹² Rule 615 enables the judge to exclude any witness from the courtroom;⁴¹³ and Rule 705 allows the judge to demand that experts disclose the facts or data underlying their opinions.⁴¹⁴

408. See FED. R. EVID. 104(a) ("In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges."); FED. R. EVID. 702 (requiring that witness be "qualified as an expert by knowledge, skill, experience, training, or education"). Preliminary evidentiary matters should be established by a preponderance of the evidence. See *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

409. See *Gardner v. General Motors Corp.*, 507 F.2d 525, 528 (10th Cir. 1974) (stating that an expert witness "should not be required to satisfy an overly narrow test of his [or her] qualifications").

410. See *Berliner et al.*, *supra* note 266, at 168, 170.

411. See, e.g., *People v. Beckley*, 456 N.W.2d 391 (Mich. 1990). The Michigan Supreme Court wrote:

In cases involving sexual abuse of children, expert testimony has been presented by physicians, crisis counselors, social workers, police officers, and psychologists.

The study of child sexual abuse is an emerging . . . specialized field of human behavior. Not all psychiatrists, psychologists, and social workers will qualify to give expert testimony on the subject. . . . [W]hat [is] determinative [is] the nature and extent of knowledge and actual experience

Id. at 399-400 (citations omitted).

412. "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a).

413. "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." FED. R. EVID. 615.

414. "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705.

2. Cross-examination

Vigorous cross-examination can provide yet another safeguard against prejudicial or unreliable expert testimony. Because trial judges have discretion to allow cross-examination that ventures beyond "the subject matter of the direct examination and matters affecting the credibility of the witness,"⁴¹⁵ they may—and usually do—apply this discretion broadly, especially when experts "give opinions on matters normally outside the common knowledge and experience of laypeople."⁴¹⁶

On cross-examination counsel may impeach an expert witness by using the same methods used for lay witnesses.⁴¹⁷ A well-prepared adversary also will inquire into the expert's "qualifications, experience, and sincerity; weaknesses in the opinion's basis; the sufficiency of the assumptions; and the soundness of the opinion."⁴¹⁸ Additionally, counsel may try to show bias by questioning the witness about financial remuneration for his or her expert testimony.⁴¹⁹ "Continued employment by a party, or prior testimony for the same party or the same attorney, also may establish financial interest."⁴²⁰

To attack the facts or opinions on which the expert has based an opinion, counsel may ask whether the absence of certain evidence or a conflicting version of the evidence would affect the expert's testimony.⁴²¹ If cross-examination reveals that the expert has relied solely on anecdotal reports of patients recovering long-buried memories of childhood trauma or, on the other hand, the expert's knowledge is limited to laboratory experiments on memory for nontraumatic events, "the court may strike the expert's opinion as based upon conjecture or speculation."⁴²²

415. FED. R. EVID. 611(b).

416. Graham, *supra* note 125, at 71.

417. See, e.g., *United States v. Terry*, 702 F.2d 299, 316 & n.20 (2d Cir.), *cert. denied*, 461 U.S. 931, and *cert. denied*, 464 U.S. 992 (1983); see also Gross, *supra* note 351, at 1168 (listing "felony convictions, bias, inconsistent statements, [and] errors of fact" as possible grounds for impeachment).

418. Graham, *supra* note 125, at 69-70.

419. *Id.* at 73.

420. *Id.* (citations omitted).

421. *Id.* at 70.

422. *Id.* at 68; see, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985) ("If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded. The jury will not be permitted to be misled by the glitter of an expert's accomplishments outside the courtroom." (citations omitted)), *cert. denied*, 487 U.S. 1234 (1988).

Another possible avenue of impeachment is to confront the expert with contradictory statements in a learned treatise which has been properly authenticated.⁴²³ Although the expert need not recognize the treatise as a reliable authority, the cross-examiner may call his or her own expert to testify as to its authoritativeness.⁴²⁴

Nonetheless, the cross-examination of an expert witness has its challenges.⁴²⁵ One expert on experts has observed:

[O]pposing counsel on cross-examination must probe weaknesses in the basis and reasoning of the witness, whether or not the expert disclosed his or her basis upon direct examination, without letting the witness reinforce prior direct testimony in the process. Opposing counsel faces an expert witness more familiar with the subject matter than counsel. Counsel may use learned treatises to assist in fencing with the witness. Unfortunately, "fencing with the witness" is the impression the cross-examination of an expert often gives the jury, an impression trial counsel would prefer to avoid. The growing number of experts whose livelihood depends in large part upon the litigation process compounds the difficulty in conducting a successful, destructive cross-examination. Such experts, with their vast amount of litigation experience, become exceptionally proficient in the art of expert witness advocacy.⁴²⁶

3. Fictitious party names

Some states allow filing suit under fictitious party names to protect each party's privacy as well as the defendant's reputation.⁴²⁷ For example, under California's extended statute of limitations for child sexual abuse, any complaint filed by a plaintiff twenty-six years of age or older may not name the defendant "except by 'Doe' designation . . . until there has been a showing of corroborative fact as to the charging allegations against any defendant alleged to have committed an act or

423. Graham, *supra* note 125, at 71. Unlike the common law, which admitted learned treatises for impeachment purposes only, the Federal Rules of Evidence allow them to be offered as substantive evidence as well. See FED. R. EVID. 803(18).

424. Graham, *supra* note 125, at 72.

425. See Gross, *supra* note 351, at 1167-71.

426. Graham, *supra* note 125, at 74.

427. See, e.g., *Roe v. Doe*, 28 F.3d 404 (4th Cir. 1994); *David A. v. Superior Court*, 20 Cal. App. 4th 281, 24 Cal. Rptr. 2d 537 (1993), review denied, No. S037126, 1994 Cal. LEXIS 821 (Feb. 24, 1994); *D.P. v. M.J.O.*, 640 N.E.2d 1323 (Ill. App. Ct. 1994); *Anonymous v. Anonymous*, 584 N.Y.S.2d 713 (Sup. Ct. 1992).

acts of childhood sexual abuse against the plaintiff."⁴²⁸ To amend the complaint with the defendant's true name, the plaintiff's attorney must execute a certificate of corroborative fact for the court's *in camera* review.⁴²⁹

Alternatively a court may take the initiative and order that the parties' names be protected.⁴³⁰ That is precisely what one New York court did, explaining: "[G]iven the infamous stigma that attaches to the accused abuser . . . and the extremely sensitive nature of an action such as this, the Court is amending the caption, sua sponte, for the purpose of protecting the name of the defendant"⁴³¹

4. Court-appointed expert witnesses

Under Federal Rule of Evidence 706,⁴³² a federal court may appoint expert witnesses on its own motion or on the motion of any party.⁴³³ Presumably the exercise of this discretionary power would significantly reduce the problems of prejudice that arise when parties call their own experts, as well as the risk of jury confusion resulting from a battle of the experts.⁴³⁴ However, it is a device rarely used by courts.⁴³⁵ One possible reason for the neglect of Rule 706 is that it fails to provide sufficient guidance to judges in deciding when to in-

428. CAL. CIV. PROC. CODE § 340.1(j) (West Supp. 1995).

429. *Id.* § 340.1(k)-(l).

430. See *Anonymous*, 584 N.Y.S.2d at 724 (citation omitted).

431. *Id.*

432. Rule 706(a) states, in pertinent part:

The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. . . . [T]he witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

FED. R. EVID. 706(a).

Rule 706(b) provides for the compensation of expert witnesses "by the parties in such proportion and at such time as the court directs." FED. R. EVID. 706(b). Under Rule 706(c) the court, in its discretion, may disclose to the jury the fact that the court appointed the expert witness. FED. R. EVID. 706(c). Rule 706(d) allows the parties to call "expert witnesses of their own selection" in addition to any called by the court. FED. R. EVID. 706(d).

433. FED. R. EVID. 706(a). Even without Rule 706, a court may appoint expert witnesses pursuant to Rule 614. JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S EVIDENCE, ¶ 706[01], at 706-8 & n.1 (1994); see FED. R. EVID. 614 ("The court may, on its own motion or at the suggestion of a party, call witnesses . . .").

434. Gross, *supra* note 351, at 1188; see also WEINSTEIN & BERGER, *supra* note 433, ¶ 706[01], at 706-8 to -9 (footnote omitted) (explaining that judges summon their own expert witnesses "to restore impartiality, to eliminate venality, to procure a higher caliber of expert and . . . to assist the jury to reach a meaningful decision").

435. Gross, *supra* note 351, at 1190-91.

voke the rule or who to appoint as an expert.⁴³⁶ Another suggested explanation, however, attributes the rarity of court-appointed witnesses to "concerted opposition from the trial bar"⁴³⁷ ostensibly due to fear of serious harm to our adversarial system of justice.⁴³⁸ Under this theory trial lawyers regard a court-appointed expert as "dangerous" and "liable to give unanticipated answers to questions from either party. Trial lawyers cringe at risks like that. They would rather rely on adversarial experts, who may be less credible but will certainly be more tractable and predictable."⁴³⁹

VI. PROPOSED LEGISLATIVE SOLUTIONS

A. Legislative Reform of Rules of Evidence

Generally, legislative reform is preferable to judge-made law because it provides more stability and uniformity for both courts and litigants.⁴⁴⁰ Indeed, judges often invoke the doctrine of stare decisis and the constitutionally mandated separation of powers when they decline to set new precedents.⁴⁴¹ Judges who feel constrained by existing laws sometimes invite legislators or appellate courts to make reforms.⁴⁴² In a case where the defendant allegedly admitted sexually abusing his daughter between the ages of eight and eleven, the court reluctantly declined to apply the discovery rule and dismissed the complaint, explaining:

The decision of this Court . . . should not be viewed as reflecting an insensitivity to the possible legislative need for a more specific statute addressing the special circumstances of adult survivors of childhood sexual abuse when the

436. *Id.* at 1191.

437. *Id.* at 1198.

438. *Id.* at 1197.

439. *Id.* at 1201.

440. See Silberg, *supra* note 7, at 1609-10.

441. See, e.g., *Bassile v. Covenant House*, 575 N.Y.S.2d 233, 237-38 (Sup. Ct. 1991). In *Bassile* the plaintiff claimed that PTSD prevented him for 16 years from perceiving the causal connection between sexual abuse in childhood and subsequent psychological injuries. *Id.* at 234-35 (referring to plaintiff's complaint at ¶ 13). The trial judge granted defendants' motion to dismiss because New York law does not provide for application of the delayed discovery rule. *Id.* at 236. In doing so, he noted that "there are many complex and even conflicting considerations to be reflected upon and weighed in the balance, including expert medical and psychological evidence" and believed it would be "inappropriate and injudicious to intrude into an area best suited for legislative scrutiny." *Id.* at 238 (quoting *Steinhardt v. Johns-Manville Corp.*, 430 N.E.2d 1297, 1299 (N.Y. 1981), *appeal dismissed and cert. denied*, 456 U.S. 967 (1982)).

442. *Burpee v. Burpee*, 578 N.Y.S.2d 359, 363 (Sup. Ct. 1991).

trauma has contributed to provable psychological damage and the initiative to assert a right of action is blocked by repression of memory Perhaps it is time for the Legislature to address this important issue⁴⁴³

Even when lawmakers see fit to enact reforms, however, statutes and evidentiary rules are necessarily written in generalized language.⁴⁴⁴ It remains for the courts to construe them—if the language is ambiguous or susceptible to more than one reasonable interpretation⁴⁴⁵—and to apply them to the facts of individual cases.⁴⁴⁶ Nonetheless, legislators should not sidestep their responsibility to craft laws that keep pace with the times, and this includes the evolving body of knowledge about traumatic amnesia. This Comment suggests that Congress and state legislatures amend their rules of evidence to adopt the balanced approach described in Part V.

B. House Concurrent Resolution 200

In addition to enacting binding laws, legislators provide leadership by taking powerful symbolic actions. For example, U.S. Congresswoman Pat Schroeder introduced House Concurrent Resolution 200 during the second session of the 103d Congress.⁴⁴⁷ Because the House Judiciary Committee failed to take action before the November 1994 elections, this resolution died when Congress adjourned.⁴⁴⁸

This Comment urges Congresswoman Schroeder to reintroduce the resolution in its original language. "Expressing the sense of Congress in support of efforts to provide justice for adult survivors of childhood sexual abuse," this resolution would urge the states and the District of Columbia to, among other things, "enact comprehensive legislation that affords victims of childhood sexual abuse access to civil courts and . . . consider legislation allowing criminal prosecution based on the evidence offered by adult survivors of such abuse."⁴⁴⁹

443. *Id.* (citations omitted).

444. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 19 (5th ed. 1984).

445. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise"); see also 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 81-91 (5th ed. 1992 rev.) (explaining the "plain meaning rule").

446. KEETON ET AL., *supra* note 444, at 19.

447. 140 CONG. REC. H87 (daily ed. Feb. 1, 1994) (statement of Rep. Schroeder (D-Colo.)).

448. Telephone Interview with Aide to Congresswoman Schroeder (Apr. 10, 1995).

449. H.R. Con. Res. 200, 103d Cong., 2d Sess. (1994).

Although congressional resolutions are nonbinding,⁴⁵⁰ the enactment of House Concurrent Resolution 200 would send an important message of symbolic support to survivors of child sexual abuse throughout the country.

VII. CONCLUSION

Absent legislation specifically authorizing or prohibiting the use of expert testimony in repressed memory cases, courts should allow qualified witnesses to provide background information that will help judges decide whether a claim should proceed to trial and help jurors understand the evidence in the case before them. Fairness calls for a case-by-case approach to setting appropriate limits on the scope of the expert testimony and procedural safeguards to minimize its prejudicial impact. If there ever comes a time when experts can reliably distinguish authentic memories from implanted ones, the evidentiary analysis should, of course, change accordingly.

To survive abuse at the hands of an adult requires more strength than any child should have to muster. To move beyond survival and toward recovery takes uncommon courage, faith, and patience. To speak the unspeakable and seek legal redress demands much more. It asks judges and jurors—indeed, all of society—to face questions most would rather not address.

It might seem easier for everyone, plaintiffs included, if traumatic memories would simply remain buried, if survivors would just “forget it and get on with their lives,” or if courts could summarily bar tort claims filed after a specified period of time. Then no one would have to decide—often without the benefit of eyewitness testimony or physical evidence—who is telling the truth about events that may or may not have happened years ago. No one would have to risk living with the devastating consequences of an erroneous decision,⁴⁵¹ whether it be denying recovery to a plaintiff who truly was sexually abused as a child or branding an innocent defendant as a child molester.

The solution that truly would be easiest for everyone is also the most elusive: guaranteed freedom for every child from sexual, physi-

450. Christy Scattarella, *National Spotlight on Adult Survivors of Child Molestation*, SEATTLE TIMES, May 16, 1994, at B3 (“Resolutions communicate Congress’ intent to states and urge them to adopt their own laws.”).

451. See Myers et al., *supra* note 8, at 71 (“‘Children’s recovery from the effects of abuse, the protection of the community and the protection of innocent persons depends on accurate decision making.’” (quoting Lucy Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES* 48 (B. Nicholson & J. Bulkley eds., 1988))).

cal, and emotional abuse. Precisely how to achieve that goal is the most difficult question of all.

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