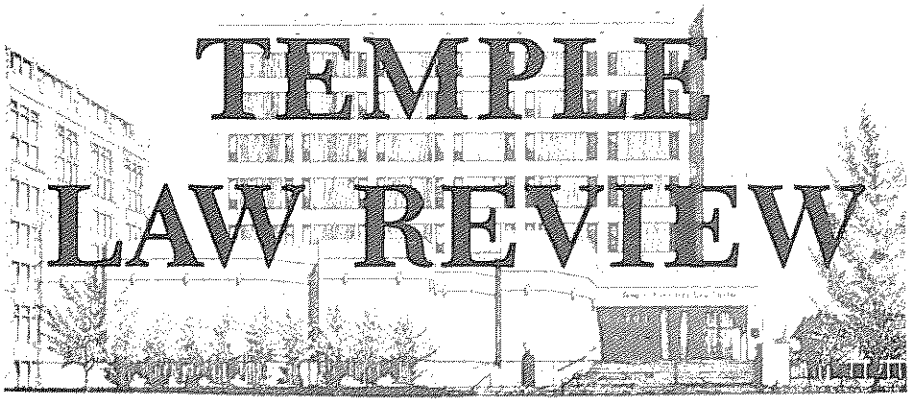

RECOVERED MEMORIES OF CHILDHOOD SEXUAL ABUSE: THE ADMISSIBILITY QUESTION

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INTRODUCTION

A recent Justice Department study suggests a shocking prevalence of childhood sexual abuse. The study examined reported incidents of rape, encompassing eleven states and the District of Columbia, and found that ten thousand women under the age of eighteen were raped in these jurisdictions in 1992.[1] The rape victims under eighteen represented half the total number of reported rapes from these jurisdictions.[2] One of six of these victims was under twelve years of age.[3] Ninety-six percent of the female victims under age twelve were raped by their fathers, other relatives, friends, or acquaintances.[4] This study only addressed incidents of rape against females, as opposed to other forms of sexual abuse, and included only reported cases. Because most cases of rape and sexual abuse go unreported, especially where the victim is a child,[5] the Justice Department findings underestimate the number of children affected by childhood sexual abuse.[6]

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1. Jeffrey G. Schneider, *Legal Issues Involving "Repressed Memory" of Childhood Sexual Abuse*, THE PSYCHOLOGIST'S LEGAL UPDATE (National Register of Health Service Providers in Psychology, Washington, D.C.), Aug. 1994, at 3, 15 n.26 (citing BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, CHILD RAPE VICTIMS (SELECTED FINDINGS IN THE FIELD)).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Linda M. Williams, *Recall of Childhood Sexual Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167, 1167 (1994) (noting importance of prospective studies in light of failure to report sexual abuse).

6. Even conservative estimates of incidents of childhood sexual abuse are staggering, ranging in the literature from 10% to 50% of the population. Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 524 (1993).

When children are sexually abused they can repress[7] or otherwise banish memories of their abuse well into adulthood.[8] Until recently, adults who wanted to bring tort actions against alleged perpetrators encountered the barrier erected by the statute of limitations.[9] Perhaps in response to the statistics regarding the prevalence of childhood sexual abuse and repression, many jurisdictions have recently allowed tolling of the statute where victims repress and subsequently recover memories of abuse.[10] As these cases begin to proceed to trial, tort defendants erect a second barrier: They claim that recovered memories of childhood sexual abuse should be excluded as unreliable evidence.

Victims can recover memories of childhood sexual abuse through clinical techniques, including hypnosis,[11] administered in a therapeutic context. This comment will refer to these memories as "clinically recovered" memories. Hypnosis can also be employed in the criminal context to recover memories in victims, defendants, and witnesses.[12] These memories will be referred to as "forensically recovered" memories.

As early as 1897, trial judges in the criminal context were deciding whether to admit forensically recovered memories.[13] Today, the majority fo-

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7. While some victims respond to childhood sexual abuse through repression, others respond through dissociation. Both are involuntary mechanisms by which traumatic or unacceptable ideas are kept out of conscious awareness. *See* Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1204-09 (1992) (discussing theoretical foundations of repression and dissociation). Keeping memories of experienced events from conscious awareness is a type of repression which may result in psychological problems later in life. *Id.* at 1205 (citing H.P. LAUGHLIN, THE EGO AND ITS DEFENSES 364-66, 375-78 (Aronson ed., 2d ed. 1979)). The mechanism of repression permits the victim to experience the event consciously, sometimes only briefly, after which the memory relocates in the unconscious due to the painful nature of recall. *Id.* (citing H.P. LAUGHLIN, THE EGO AND ITS DEFENSES 364 (Aronson ed., 2d ed. 1979)). Dissociation, on the other hand, is a psychic response to trauma which is characterized by the separation and breakdown of events from reality. *Id.* (citing Richard Kluft, *The Dissociative Disorders*, *in* TEXTBOOK OF PSYCHIATRY 557, 558-59 (John A. Talbott et al. eds., 1988)). The memories separate from consciousness (i.e., dissociate) and the psyche retreats into an altered state. The memories are thus registered and stored outside consciousness, resulting in an immediate "exclusion" of the event. *Id.* at 1206 (citing Richard Kluft, *Dissociation and Subsequent Vulnerability: A Preliminary Study*, 3 DISSOCIATION 167, 168 (1990)).

In this comment, the word "repression" will be used to denote all mechanisms by which a victim of childhood sexual abuse involuntarily excludes memories of the abuse.

8. See *infra* notes 140-42 and accompanying text for a discussion of specific research findings with respect to the prevalence of repression in cases of childhood sexual abuse.

9. See *infra* note 36 for a discussion of Tyson v. Tyson, 727 P.2d 226, 229-30 (Wash. 1986) (en banc) (disallowing intentional tort claim based solely on alleged repressed recollection of events with no means to verify independently after statute of limitations expired).

10. See *infra* part I.B for a discussion of the way in which the statute of limitations acts as a barrier to childhood sexual abuse claims and recent judicial and legislative responses.

11. See *infra* notes 18-31 and accompanying text for a discussion of the evolution of hypnosis as a means of recovering memory in the clinical context.

12. See *infra* notes 32-34 and accompanying text for a discussion of the use of hypnosis in the criminal context.

13. See *infra* notes 53-55 and accompanying text for a discussion of People v. Ebanks, 49 P. 1049 (Cal. 1897) (en banc) (first appellate decision regarding forensically recovered testimony).

rensic rule excludes such testimony *per se*.[14] Tort defendants in the emerging childhood sexual abuse cases will rely on the forensic rule to exclude clinically recovered memories. In light of two United States Supreme Court decisions[15] and recent memory research,[16] however, exclusion *per se* is an untenable response to the admissibility of both forensically and clinically recovered memories. The Supreme Court cases and memory research together suggest that courts should apply the minority forensic approach to both types of cases: a "totality of the circumstances" pre-trial determination.

Part I of this comment traces the history of clinical and forensic memory recovery and reports on the legal trend toward tolling the statute of limitations for victims of childhood sexual abuse. Part II evaluates the four judicial approaches to the admissibility of forensically recovered testimony and advocates that courts adopt the minority "totality of the circumstances" approach for the admissibility of both clinically and forensically recovered memories. Part III summarizes the current memory research; this research provides further support for the approach proposed in part II. Part IV discusses a recent federal case in which the court improperly excluded clinically recovered memories of alleged childhood sexual abuse because it failed to use the proposed approach. Part IV concludes by recommending factors which a trial judge, using a "totality of the circumstances" standard, could consider in ruling on the admissibility of clinically recovered memories of childhood sexual abuse.[17]

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14. See *infra* notes 48, 64-74, and accompanying text for a discussion of the exclusion *per se* approach.

15. See *infra* part II.C for a discussion of Rock v. Arkansas, 483 U.S. 44 (1987), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

16. See *infra* part III for a discussion of the implications of recent scientific research in the areas of hypnosis and memory.

17. This comment will not address the issue of memories of childhood sexual abuse which are spontaneously recovered without clinical assistance. However, it is important to note the existence of such memories and that they undermine the idea that all recovered memories of childhood sexual abuse are false, implanted by over-zealous therapists. For a discussion of those who believe that all such recovered memories are false, see *infra* note 193 regarding the False Memory Syndrome Foundation. By contrast, one overwhelming example of spontaneously recovered memories of childhood sexual abuse is the Father Porter Case. In that case, a former alter boy of a Massachusetts church spontaneously recovered memories of abuse by a Roman Catholic priest, Father James Robert Porter, and ran an advertisement in local newspapers which stated, "Remember Father Porter?" Elizabeth Mehren, *Unlocking Painful Secrets from the Past*, L.A. TIMES, June 7, 1992 (View), at 1. Many people responded to the advertisement, and because the priest had been transferred to numerous parishes by the archdiocese, many other adults across the country eventually came forward. *Id.* Father Porter ultimately admitted to the Vatican that he had abused these children. Victoria Beening, *Porter's Alleged Abuse Victims Angry with Vatican*, BOSTON GLOBE, Oct. 25, 1992 (Metro), at 28. In all, 68 men and women came forward and ultimately settled with the church in what was reported as the "largest case of its kind." Christopher B. Daly, *Sexual Abuse Case Settled by Church: 68 Named Priest as 1960s Molester*, WASH. POST, Dec. 4, 1992, at A1.

I. BACKGROUND

A. Recovering Memories: The Rise of Clinical and Forensic Hypnosis

The history of clinical hypnosis parallels the history of modern psychiatry and psychology.[18] In late nineteenth-century France, Jean-Martin Charcot pioneered the use of hypnosis to study the psychopathological symptoms of so-called "hysterical" women.[19] Inspired by Charcot, Sigmund Freud began using hypnosis in the early 1890s to recover memories of childhood conflicts and traumas in order to alleviate these symptoms.[20] However, Freud soon abandoned hypnosis in favor of "free association," a technique which relied on the patient's spoken stream of consciousness.[21]

In 1896, Freud discovered what he thought was the source of all adult female psychopathology, instances of childhood sexual abuse, which he called "seductions."[22] As early as 1897, however, Freud began a gradual rejection of the "seduction theory" and instead attributed adult hysteria to "the child's perverse desire."[23] This shift gave rise to Freud's theory of the Oedipal Complex and the psychoanalytic method generally.[24] Under the new theory, Freud regarded memories of childhood sexual abuse as mere unconscious fantasies mistaken for actual experiences. Nevertheless, Freud remained uncertain that the memories of his patients were fantasy and continued to report on instances of childhood seduction after 1897.[25]

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18. *See generally* Martin T. Orne et al., *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications*, *in* HYPNOSIS AND MEMORY 21, 21 (Helen M. Pettinati ed., 1988) (belief that hypnosis recovers memories is contemporaneous with disciplines of psychiatry and psychology).

19. Charles Bernheimer, *Introduction: Part One*, *in* IN DORA'S CASE: FREUD, HYSTERIA, FEMINISM 1, 6-8 (Charles Bernheimer & Claire Kahane eds., 1985).

20. *Id.*

21. Kanovitz, *supra* note 7, at 1210 & n.98 (1992) (citing ROBERT J. URSANO ET AL., PSYCHODYNAMIC PSYCHOTHERAPY 20-22 (1991)).

22. In *The Aetiology of Hysteria*, Freud wrote:

> I therefore put forward the thesis that at the bottom of every case of hysteria there are *one or more occurrences of premature sexual experience*, occurrences which belong to the earliest years of childhood, but which can be reproduced through the work of psycho-analysis, in spite of the intervening decades. I believe this is an important finding, the discovery of a *caput Nili* [source of the Nile] in neuropathology.

3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 203 (James Strachey trans. and ed., 1966) [hereinafter STANDARD EDITION] (emphasis in original) (citations omitted).

23. Bernheimer, *supra* note 19, at 14 (citing 1 STANDARD EDITION, *supra* note 22, at 259).

24. Kanovitz, *supra* note 7, at 1216 n.134.

25. *See* JEFFREY M. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY 107-19 (1984). Freud was uncertain of his abandonment of the theory, evidenced by several unpublished letters. *Id.* This uncertainty was omitted from subsequent discussions regarding the evolution of Freudian thought. *Id.* Masson claims that Freud retreated from the seduction theory because the scientific community, unwilling to face the consequences of such findings, dismissed both the theory and Freud generally. *Id.* at 107-44.

As a result of Freud's choice of "free association," the use of hypnosis declined dramatically until after World War II.[26] In 1958, the Council on Mental Health of the American Medical Association officially recognized hypnosis as an effective clinical technique for post-war stress in veterans.[27] The American Psychological Association similarly recognized it in 1960.[28] In addition to hypnosis and free association, psychiatrists and psychologists began to use other techniques to clinically recover memories, including relaxation and guided imagery,[29] automatic writing,[30] and the sodium amytal interview.[31]

Not long after its emergence in the clinical setting, hypnosis became a forensic tool for memory recovery. The police and prosecutors, aided by psychiatrists, psychologists, and specially trained lay persons, began using hypnosis to refresh memories of witnesses to or victims of crime,[32] generate investigative leads, and strengthen the case generally against defendants.[33] At the same time, counsel for the defense began using hypnosis to recover a defendant's memory or prove that statements made during hypnosis established the defendant's innocence.[34]

Because forensically recovered memories generally involve recent criminal activity, courts are not faced with statutes of limitations barriers before determining the admissibility of such memories. However, as courts address the admissibility of clinically recovered memories of childhood sexual abuse, they must first address the statutory barrier.

B. Overcoming the Traditional Barrier to Childhood Sexual Abuse Claims

As a practical matter, statutes of limitations historically prohibited consideration of adult claims of childhood sexual abuse.[35] However, in the last

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26. Kanovitz, *supra* note 7, at 1210 n.98.

27. ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, TRANCE ON TRIAL 57-58 (1989).

28. *Id.*

29. *See* Anees A. Shiekh & Charles S. Jordan, *Clinical Uses of Mental Imagery*, *in* IMAGERY: CURRENT THEORY, RESEARCH, AND APPLICATIONS 391, 394 (Anees A. Shiekh ed., 1983) (using mental imagery is analogous to "free association" in its ability to recover repressed memories).

30. *See* Kanovitz, *supra* note 7, at 1217 n.138 (citing M. GERALD EDELSTEIN, TRAUMA, TRANCE AND TRANSFORMATION 49-64 (1981)) (in automatic writing patient freely writes unconscious thoughts while performing other activities).

31. August Piper, Jr., *"Truth Serum" and "Recovered Memories" of Sexual Abuse: A Review of the Evidence*, 21 J. PSYCHIATRY & L. 447, 449-51 (1994) (sodium amytal interview involves ingestion by patient of barbiturate with alleged "truth serum" effects).

32. *See* Orne et al., *supra* note 18, at 21-22; SCHEFLIN & SHAPIRO, *supra* note 27, at 48-55.

33. Schneider, *supra* note 1, at 9; Orne et al., *supra* note 18, at 22. However, the use of forensic hypnosis to strengthen a case against a particular defendant has become unwise in those jurisdictions which hold forensically recovered testimony excluded *per se*. See *infra* notes 64-74 and accompanying text for a discussion of the exclusion *per se* approach.

34. Orne et al., *supra* note 18, at 21; SCHEFLIN & SHAPIRO, *supra* note 27, at 48-55.

35. See *infra* note 36 for a discussion of Tyson v. Tyson, 727 P.2d 226, 229-30 (Wash. 1986) (rejecting claim of recovered memories on statute of limitations grounds) (superseded by statute).

ten years, courts have begun to alter their position. Adults seeking tort remedies for childhood sexual abuse have sought to apply the "delayed discovery" rule to toll the statute of limitations. This rule states that the accrual of the cause of action is deferred until the plaintiff discovers, or should have discovered by the exercise of reasonable diligence, the basis for the claim.[36]

Two positions have been advanced by plaintiffs who seek application of the delayed discovery rule. First, some plaintiffs argue that their memories of childhood sexual abuse were repressed from conscious recall until after the tort statute of limitations expired.[37] Alternatively, some plaintiffs claim that

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According to another court (which ultimately tolled the statute), statutes of limitations were enacted for the purpose of "(1) recovering damages promptly; (2) penalizing plaintiffs who are not industrious in pursuing their claims; (3) providing security against stale demands; (4) relieving the defendant's fear of litigation; (5) preventing fraudulent claims; and (6) providing a remedy for the general inconvenience of delay." Lemmerman v. Fealk, 507 N.W.2d 226, 228 (Mich. Ct. App. 1993) (citing Nielsen v. Barnett, 485 N.W.2d 666, 669 (Mich. 1992)).

36. The first case to apply the delayed discovery rule was Urie v. Thompson, 337 U.S. 163, 170-71 (1949) (statute of limitations tolled where plaintiff suffered from silicosis and did not discover cause of action until many years later when plaintiff manifested disease). The cases after *Urie* generally involved medical malpractice and were modeled after Ruth v. Dight, 453 P.2d 631 (Wash. 1969) (en banc), in which a surgeon left a sponge in a patient which was discovered 22 years later. *Id.* at 636.

With respect to repressed memories of childhood sexual abuse, the first case to address the delayed discovery rule was Tyson v. Tyson, 727 P.2d 226 (Wash. 1986). In that case, the plaintiff repressed all memories of sexual abuse suffered until therapy, approximately 14 years later. *Id.* at 229-30. While recognizing that the delayed discovery rule should be applied when "the risk of stale claims is outweighed by the unfairness of precluding justified causes of action," the *Tyson* court refused to toll the statute of limitations and distinguished the "sponge cases" because they dealt with objectively verifiable evidence of negligence. *Id.* at 228. *Tyson* was superseded in 1988, however, by a statute which adopted the position of the *Tyson* dissent. WASH. REV. CODE § 4.16.340(1) (Supp. 1995). The statute states in pertinent part:

> All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:
>
> (a) Within three years of the act . . .;
>
> (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
>
> (c) Within three years of the time the victim discovered that the act caused the injury . . . .

WASH. REV. CODE § 4.16.340(1).

For a current case which follows the trend toward allowing delayed discovery, see Ault v. Jasko, 637 N.E.2d 870, 873 (Ohio 1994) (statute of limitations tolled where plaintiff repressed all memory of childhood sexual abuse between expiration of statute and late discovery of abuse).

37. *See, e.g.*, Johnson v. Johnson, 701 F. Supp. 1363, 1370 (N.D. Ill. 1988) (finding that Illinois courts would toll statute of limitations for plaintiffs who repressed memories of abuse) (superseded by statute); Phillips v. Johnson, 599 N.E.2d 4, 7 (Ill. Ct. App. 1992) (statute of limitations began running at time of discovery of previously repressed memories) (superseded by statute); Lemmerman v. Fealk, 507 N.W.2d 226, 230 (Mich. Ct. App. 1993) (in action for abuse occurring 50 years prior to bringing suit, court tolled statute of limitations and stated that "[a]dults who have repressed child sexual abuse bring to the courts unusual circumstances and injuries not readily conforming to the ordinary constructs on which periods of limitations are imposed"); Meiers-Post v. Schafer, 427 N.W.2d 606, 607 (Mich. Ct. App. 1988) (discovery rule applied when plaintiff repressed memory and there was corroboration of sexual assault); Peter-

they are unable to "make the connection" between their present psychological problems and the initial abuse until after the expiration of the statute of limitations.[38] In *Johnson v. Johnson*,[39] the United States District Court for the Northern District of Illinois standardized this distinction into Type I plaintiffs, those who fail to "make the connection," and Type II plaintiffs, those who have completely repressed their memories of abuse.[40] Courts that allow tolling of the statute of limitations generally seem to favor Type II plaintiffs over Type I. Indeed, courts in seven jurisdictions adopt the view that repression serves to trigger the delayed discovery rule[41] while courts typically refuse to toll in failure to "make the connection" cases.[42] One court

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sen v. Bruen, 792 P.2d 18, 24-25 (Nev. 1990) (action not time barred where evidence of childhood sexual abuse shown by clear and convincing evidence, regardless of knowledge and delay); Osland v. Osland, 442 N.W.2d 907, 909 (N.D. 1989) (where plaintiff was psychologically incapable of discovering her cause of action, discovery rule applied to toll statute of limitations); Olsen v. Hooley, 865 P.2d 1345, 1350 (Utah 1993) (if corroborated, alleged complete repression of memory would require tolling of statute of limitations); *cf.* Roe v. Doe, 28 F.3d 404, 406 (4th Cir. 1994) (statute of limitations not tolled between time plaintiff was allegedly abused and time when she actually remembered the events); Sanchez v. Archdiocese of San Antonio, 873 S.W.2d 87, 91 (Tex. Ct. App. 1994) (statute of limitations not tolled via discovery rule where victim of childhood sexual abuse knew of wrongfulness of conduct at time of its occurrence).

38. *See, e.g.*, Messina v. Bonner, 813 F. Supp. 346, 349-50 (E.D. Pa. 1993) (no tolling where plaintiff was aware of childhood sexual abuse but did not make connection between abuse and present psychological problems); E.W. v. D.C.H., 754 P.2d 817, 820-21 (Mont. 1988) (discovery rule not applied to plaintiffs who retained memory of events but failed to appreciate psychological consequences) (superseded by statute); E.J.M. v. Archdiocese of Phila., 622 A.2d 1388, 1394 (Pa. Super. Ct. 1993) (tort statute of limitations not tolled where plaintiff allegedly did not know that acts being inflicted upon him were "abuse" and would result in psychological harm).

39. 701 F. Supp. 1363 (N.D. Ill. 1988).

40. *Id.* at 1370.

41. *Johnson*, 701 F. Supp. at 1363; *Ault*, 637 N.E.2d at 873; Daly v. Derrick, 281 Cal. Rptr. 709, 718 (Cal. Ct. App. 1991); Callahan v. State, 464 N.W.2d 268, 273 (Iowa 1990); *Meiers-Post*, 427 N.W.2d at 606; *Petersen*, 792 P.2d at 18; Jones v. Jones, 576 A.2d 316, 317 (N.J. Super. Ct. App. Div.), *cert. denied*, 585 A.2d 412 (N.J. 1990); *E.W.*, 754 P.2d at 817 (in dicta); *Osland*, 442 N.W.2d at 907; Hammer v. Hammer, 418 N.W.2d 23, 25 (Wis. Ct. App. 1987), *review denied*, 425 N.W.2d 552 (Wis. 1988). *But see* Baily v. Lewis, 763 F. Supp. 802, 810 (E.D. Pa.) (applying Pennsylvania law), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991); Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1521 (S.D. Ill. 1990); Tyson v. Tyson, 727 P.2d 226, 230 (Wash. 1986) (superseded by statute).

42. See *supra* note 38 for cases which disallow tolling for plaintiffs who fail to "make the connection" between childhood abuse and subsequent psychological injuries.

Commentators note that allowing tolling of the statute of limitations only for complete repression may encourage plaintiffs to misrepresent the nature of their memories, claiming they completely repressed them as a "ticket of entry into the courtroom." David Spiegel & Alan W. Scheflin, *Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 411, 425 (1994). Professor Scheflin maintains that fairness requires application of the delayed discovery rule to both kinds of plaintiffs because childhood sexual abuse produces both shame and diminished confidence, two disincentives for timely actions. Telephone Interview with Alan W. Scheflin, Professor of Law, Santa Clara University (Feb. 2, 1995). To deny Type I plaintiffs also denies the scientific evidence which supports their position. *Id.*; see *supra* part III for a discussion of this scientific evidence.

recognized no exception to the statute of limitations and disallowed the claims of both types of plaintiffs.[43]

Like courts, legislatures can also toll the statute of limitations. Since 1989, nineteen states have enacted laws preserving tort claims for adults who were sexually abused as children and repressed their memories.[44] Presently, legislatures and courts in twenty-three jurisdictions toll the statute of limitations for plaintiffs who have repressed memories of childhood sexual abuse.[45]

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43. *See* Lindabury v. Lindabury, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (statute of limitations began running, at latest, at time of last act of abuse), *dismissed*, 560 So. 2d 233 (Fla. 1990).

44. The jurisdictions with special statutes of limitations for childhood sexual abuse claims are: Alaska (ALASKA STAT. § 09.10.140(b)(1)-(2) (1994) (within 3 years of date person discovered or should reasonably have discovered childhood sexual abuse)); California (CAL. CIV. PROC. CODE § 340.1 (West. Supp. 1990) (within 8 years of majority or 3 years of date person discovered or should reasonably have discovered childhood sexual abuse)); Connecticut (CONN. GEN. STAT. ANN. § 52-577d (West 1991) (within 17 years of majority); Illinois (ILL. ANN. STAT. ch. 110, para. 13-202.2 (Smith-Hurd Supp. 1992) (within 2 years of date person discovered or reasonably should have discovered, but not more than 12 years after person attains 18 years of age)); Iowa (IOWA CODE ANN. § 614.8A (West Supp. 1994) (within 4 years of discovery of injury or illness and causal relationship between injury and childhood sexual abuse)); Kansas (KAN. STAT. ANN. § 60-523 (1993) (within 3 years of either majority or discovery of illness of injury caused by childhood sexual abuse)); Maine (ME. REV. STAT. ANN. § 752-C (West Supp. 1994) (within 12 years of date cause of action accrues or 6 years of date person discovered or reasonably should have discovered harm)); Minnesota (MINN. STAT. ANN. § 541.073 (West Supp. 1994) (within 6 years of date person knew or should have known injury caused by childhood sexual abuse)); Missouri (MO. REV. STAT. § 537.046 (Supp. 1994) (within 5 years of majority or 3 years of date person discovered or reasonably should have discovered childhood sexual abuse)); Montana (MONT. CODE ANN. § 27-2-216 (1993) (within 3 years of either childhood sexual abuse or date person discovered or reasonably should have discovered abuse)); Nevada (NEV. REV. STAT. § 11.215 (Supp. 1993) (within 10 years of either majority or when person discovered or reasonably should have discovered childhood sexual abuse)); Oklahoma (OKLA. STAT. ANN. tit. 12, § 95(6) (West Supp. 1995) (within 2 years of either childhood sexual abuse or of date person discovered or reasonably should have discovered childhood sexual abuse)); Oregon (OR. REV. STAT. § 12.117(1) (1993) (within 6 years of majority or 3 years of date person discovered or reasonably should have discovered injury or casual connection between childhood sexual abuse and injury)); Rhode Island (R.I. GEN. LAWS § 9-1-51 (Supp. 1994) (within 7 years of either injury or of date person discovered or reasonably should have discovered injury)); South Dakota (S.D. CODIFIED LAWS ANN. § 26-10-25 (1992) (within 3 years of either childhood sexual abuse or of date person discovered or reasonably should have discovered abuse)); Utah (UTAH CODE ANN. § 78-12-25.1 (Supp. 1994) (within 4 years of majority or of date person discovered or reasonably should have discovered childhood sexual abuse)); Vermont (VT. STAT. ANN. tit. 12, §§ 522, 560 (Supp. 1994) (within 6 years of either abuse or discovery of abuse)); Virginia (VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1994) (within 10 years of either last act of abuse or removal of disability)); and Washington (WASH. REV. CODE § 4.16.340(1) (Supp. 1995) (within 3 years of either abuse or date when person discovered or reasonably should have discovered childhood sexual abuse)). *See generally* Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages*, 25 SANTA CLARA L. REV. 191, 191 (1985) (arguing that delayed discovery rule is appropriate for adult incest survivors).

In Pennsylvania, State Senator Stewart Greenleaf is sponsoring a bill that would toll the statute of limitations for 12 years after majority or 3 years from the time of discovery in cases of childhood sexual abuse. S. 597, 179th Pa. Gen. Assembly, Reg. Sess. (1995).

45. These 23 jurisdictions are comprised of the 19 jurisdictions with statutes, see *supra* note 44, and the following jurisdictions, which have favorable case law: *Meiers-Post*, 427 N.W.2d at

In addition, Representatives Pat Schroeder and Connie Morella recently co-sponsored a bill in the United States House of Representatives which would allow delayed discovery to toll the statute of limitations.[46] If this bill is enacted, statutes of limitations for plaintiffs in all fifty states will not begin to run until plaintiffs recover memories of childhood sexual abuse.

As a result of these changes, clinically recovered memories of childhood sexual abuse are now closer to being heard in courtrooms. The next hurdle, however, is admissibility. As a result of the similar techniques involved in clinically and forensically recovered memory cases, courts have already begun to rely on precedent in the forensic area to exclude clinically recovered memories.[47]

II. The Admissibility of Forensically Recovered Memories: A Case of Multiple Personalities

Courts currently use one of four major approaches to determine the admissibility of forensically recovered memories. A majority of state courts adopt the view that forensically recovered testimony is *per se* excludable.[48]

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610 (Mich.) (discovery rule applies if plaintiff repressed memory of abuse, which constituted "insanity," and abusive acts are corroborated by other evidence); *Jones*, 576 A.2d at 321 (N.J.) (delayed discovery applied when plaintiff repressed memories of abuse; repression constituting "insanity"); *Osland*, 442 N.W.2d at 909 (N.D.) (discovery rule applies when plaintiff incapable of discovering her cause of action within applicable limitations period); *Hammer*, 418 N.W.2d at 26 (Wis.) (delayed discovery applicable when plaintiff prevented from appreciating abusive nature of sexual acts and their causal relationship to her adult psychological problems).

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

In contrast, after a recent case in Chicago in which an accusation of abuse by a former parishioner against a Roman Catholic cardinal was retracted due to the parishioner's subsequent uncertainty, the Illinois Senate voted to ban all civil lawsuits by people over 30 who claim they were victims of childhood sexual abuse. *See* 1993 Ill. S.B. 1223; Edward Felsenthal, *Sexual Abuse Lawsuit*, Wall St. J., Mar. 1, 1994, at B9 (reporting that charges were dropped against Roman Catholic Cardinal Joseph Bernardin of Chicago after plaintiff retracted his accusations). However, for a discussion of the inconclusive nature of retractions generally, see *infra* note 154 and accompanying text.

47. See *infra* part IV for a discussion of the first federal district court decision on this issue, Borawick v. Shay, 842 F. Supp. 1501, 1508 (D. Conn. 1994), which relied on forensic precedents to exclude a plaintiff's clinically-recovered testimony of childhood sexual abuse.

48. *See, e.g.*, Contreras v. State, 718 P.2d 129, 136-37 (Alaska 1986) (witness prohibited from testifying in criminal trial about facts forensically recovered through hypnosis); Prewitt v. State, 460 So. 2d 296, 302 (Ala. Crim. App. 1984) (same); State v. Mena, 624 P.2d 1274, 1279-80 (Ariz. 1981) (same); People v. Shirley, 723 P.2d 1354, 1375 (Cal.) (same), *cert. denied*, 458 U.S. 1125 (1982); State v. Davis, 490 A.2d 601, 604 (Del. Super. Ct. 1985) (same); Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989) (same); Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985) (same), *cert. denied*, 479 U.S. 894 (1986); State v. Moreno, 709 P.2d 103, 105 (Haw. 1985) (same); People v. Zayas, 546 N.E.2d 513, 519 (Ill. 1989) (same); Peterson v. State, 448 N.E.2d 673, 678-79 (Ind. 1983) (same); State v. Haislip, 701 P.2d 909, 925 (Kan.) (same), *cert. denied*, 474 U.S. 1022 (1985); State v. Collins, 464 A.2d 1028, 1044 (Md. 1983) (same) (overruling earlier decision which adopted total admissibility); Commonwealth v. Kater, 447 N.E.2d 1190, 1196 (Mass. 1983) (witness prohibited from testifying as to forensically recovered memories); People v. Gonzales, 329 N.W.2d 743, 748 (Mich. 1982) (same); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980) (same); State v. Palmer, 313 N.W.2d 648, 655 (Neb. 1981) (same), *rev'd on other grounds*, 338

In contrast, a majority of federal courts and many state courts hold such testimony totally admissible and allow the jury to determine its credibility and weight.[49] Other state and federal courts have mandated procedural safe-

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N.W.2d 281 (Neb. 1983), *aff'd after remand*, 399 N.W.2d 706 (Neb. 1986) (en banc), *cert. denied*, 484 U.S. 872 (1987); People v. Hughes, 453 N.E.2d 484, 495 (N.Y. 1983) (same), *aff'd*, 531 N.E.2d 652 (1988), *cert. denied*, 492 U.S. 908 (1989); State v. Peoples, 319 S.E.2d 177, 187 (N.C. 1984) (same) (overruling earlier decision which adopted total admissibility); Robison v. State, 677 P.2d 1080, 1085 (Okla. Crim. App. 1984) (witness prohibited from testifying as to forensically recovered memories), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Nazarovitch, 436 A.2d 170, 178 (Pa. 1981) (same); State v. Tuttle, 780 P.2d 1203, 1212 (Utah 1989) (same), *cert. denied*, 494 U.S. 1018 (1990); State v. Martin, 684 P.2d 651, 656 (Wash. 1984) (same).

49. *See, e.g.*, Biskup v. McCaughtry, 20 F.3d 245, 252 (7th Cir. 1994) (forensically recovered memories admissible in criminal trial); Bundy v. Dugger, 850 F.2d 1402, 1415-20 (11th Cir. 1988) (same), *cert. denied*, 488 U.S. 1034 (1989); Robison v. Maynard, 829 F.2d 1501, 1508 (10th Cir. 1987) (same), *cert. denied*, 502 U.S. 970 (1991); United States v. Kimberlin, 805 F.2d 210, 233 (7th Cir. 1986) (same), *cert. denied*, 483 U.S. 1023, *and cert. denied*, 498 U.S. 969 (1990); Beck v. Norris, 801 F.2d 242, 244-45 (6th Cir. 1986) (same); Harker v. Maryland, 800 F.2d 437, 441 (4th Cir. 1986) (same); Clay v. Vose, 771 F.2d 1, 4 (1st Cir. 1985) (same), *cert. denied*, 475 U.S. 1022 (1986); United States v. Awkard, 597 F.2d 667, 669 (9th Cir. 1979) (noting that forensically recovered memories admissible in both criminal and civil context), *cert. denied*, 444 U.S. 885 (1979), *and cert. denied sub nom.* Williams v. United States, 444 U.S. 969 (1979); United States v. Adams, 581 F.2d 193, 198-99 (9th Cir.) (testimony based on forensic hypnosis admissible and relevant to weight of evidence obtained and credibility of witness in criminal trial), *cert. denied*, 439 U.S. 1006 (1978); United States v. Waskal, 539 F. Supp. 834, 838 (S.D. Fla. 1982) (same), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); United States v. Narcisco, 446 F. Supp. 252, 281-82 (E.D. Mich. 1976) (same).

State courts that have taken the same approach to forensically recovered memories include: Creamer v. State, 205 S.E.2d 240, 241-42 (Ga. 1974) (forensically recovered memories admissible); People v. Smrekar, 385 N.E.2d 848, 853-54 (Ill. App. Ct. 1979) (same), *cert. denied*, 498 U.S. 1029 (1991); Morgan v. State, 445 N.E.2d 585, 587 (Ind. App. Ct. 1983) (same); State v. Wren, 425 So. 2d 756, 759 (La. 1983) (same); State v. Greer, 609 S.W.2d 423, 435-36 (Mo. Ct. App. 1980) (same), *vacated on other grounds*, 450 U.S. 1027 (1981); State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983) (same); State v. Hutchinson, 661 P.2d 1315, 1320 (N.M. 1983) (same); State v. Brom, 494 P.2d 434, 436 (Or. Ct. App. 1972) (same); State v. Glebock, 616 S.W.2d 897, 904 (Tenn. Crim. App. 1981) (same); Hopkins v. Commonwealth, 337 S.E.2d 264, 270-71 (Va. 1985) (same), *cert. denied*, 475 U.S. 1098 (1986); Chapman v. State, 638 P.2d 1280, 1284 (Wyo. 1982) (same).

Oregon admits such testimony by statute, which, in pertinent part, provides for the following condition of admissibility:

> If either prosecution or defense in any criminal proceeding in the State of Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device.

OR. REV. STAT. § 136.675 (1993).

Only one circuit court thus far has rejected forensically recovered memories. *See* United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984) (hypnosis not excluded *per se* but excluded here where hypnotized witness had reason to know that suspect was already under suspicion).

guards as a pre-condition to admitting forensically recovered memories.[50] Finally, several circuits and state courts have adopted a "totality of the circumstances" approach, in which the court is required to make a pre-trial determination which relies on procedural safeguards as factors in its determination.[51] Under this latter analysis, failure to comply with all safeguards does not automatically exclude the testimony;[52] thus, compliance with the safeguards is a "non-determinative" factor in the admissibility analysis.

The "multiple personalities" of the judiciary in responding to this issue are best examined in two groups. First, *per se* exclusion and total admissibility will be examined together because they represent the extreme approaches. Next, procedural safeguards and the "totality of the circumstances" will be examined together because they represent the more moderate approaches and intersect in important ways.

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50. *See, e.g.*, State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (procedural safeguards required for admission of forensically recovered testimony). See *infra* text accompanying note 81 for a discussion of the specific factors outlined by the *Hurd* court.

Other courts which have adopted the procedural safeguard approach include: Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1122 (8th Cir. 1985) (*Hurd* safeguards applied in addition to consideration of whether hypnosis appropriate for type of memory loss involved and whether testimony is corroborated), *cert. denied*, 475 U.S. 1046 (1986); Brown v. State, 426 So. 2d 76, 91 (Fla. Dist. Ct. App. 1983) (*Hurd* factors adopted); State v. Beachum, 643 P.2d 246, 253 (N.M. Ct. App. 1981) (same), *cert. denied*, 644 P.2d 1040 (N.M. 1982); State v. Weston, 475 N.E.2d 805, 813 (Ohio Ct. App. 1984) (same); State v. Long, 649 P.2d 845, 848 (Wash. Ct. App. 1982) (same).

In addition, some courts admit the testimony and use the *Hurd* factors to impeach the witness—essentially a total admissibility position. *See, e.g.*, Pearson v. State, 441 N.E.2d 468, 473 (Ind. 1982) (*Hurd* factors go toward credibility not admissibility of forensically recovered testimony); House v. State, 445 So. 2d 815, 826-27 (Miss. 1984) (same).

51. *See, e.g.*, White v. Ieyoub, 25 F.3d 245, 248 (5th Cir. 1994) (under "totality of the circumstances," neither Due Process nor Confrontation Clause guarantees are violated by admission of forensically recovered testimony); *Biskup*, 20 F.3d at 254-55 (procedural safeguards not mandated by constitution but are "informative of relevant due process concerns"); McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir.) (balanced inquiry requires factual analysis on case-by-case basis, where procedural safeguards are relevant to admissibility inquiry but should not be relied on exclusively), *cert. denied*, 478 U.S. 1010 (1986); Wicker v. McCotter, 783 F.2d 487, 492 (5th Cir.) (forensically recovered testimony admissible on case-by-case basis where cross-examination provided opportunity to probe witness's identification of defendant), *cert. denied*, 478 U.S. 1010 (1986).

The first case to require this approach was State v. Iwakiri, 682 P.2d 571, 578-79 (Idaho 1984). See *infra* notes 88-98 and accompanying text for a discussion of *Iwakiri*. *See also* State v. Johnston, 529 N.E.2d 898, 905-06 (Ohio) (under clear and convincing burden of proof, forensically recovered testimony admissible provided that under "totality of the circumstances," evidence is reliable), *modified in part and rev'd in part on other grounds*, 529 N.E.2d 898 (Ohio 1988); State v. Armstrong, 329 N.W.2d 386, 395 (Wis.) (before admission of forensically recovered testimony, pre-trial hearing required which considers safeguards against possible confabulation and suggestibility), *cert. denied*, 461 U.S 946 (1983).

52. *See supra* note 51.

A. *Exclusion* Per Se *and Total Admissibility*

In the area of forensically recovered testimony, judicial views of admissibility have dramatically evolved, and indeed revolved, over time. The first appellate case in the United States to address the admissibility of forensically recovered memories was *People v. Ebanks*,[53] where the Supreme Court of California addressed the appeal of a murder conviction. In *Ebanks*, a forensic hypnotist sought to testify that the defendant denied his guilt while under hypnosis, and that the hypnotist believed the statements were true.[54] The trial judge excluded the testimony *per se* by stating that the United States did not recognize hypnosis, and that testimony based on it was therefore inadmissible.[55] This decision represented the prevailing view on forensically recovered testimony until 1968, when courts revisited the issue and ushered in a new era.

In 1968, the Maryland Court of Special Appeals addressed the admissibility of forensically recovered testimony in *Harding v. State*.[56] In *Harding*, the victim of a brutal shooting was hypnotized prior to trial and then testified as to her memories of the event. In contrast to *Ebanks*, the *Harding* court admitted the testimony of the victim over the defendant's objections, explaining that the jury should consider the reliability of the testimony as a matter of weight.[57] The jury in *Harding* convicted the defendant on the basis of the forensically recovered testimony.[58]

Courts which later followed the *Harding* total admissibility position viewed such testimony as the witness's present recollection of events, "refreshed" by hypnosis, and concluded that the witness was competent to testify.[59] These courts reasoned that effective cross-examination would enable the jury to assess the proper weight to be given to such testimony.[60] In *State v. Brown*,[61] one such case, the Supreme Court of North Dakota agreed that cross-examination was effective against forensically recovered testimony.[62]

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53. 49 P. 1049 (Cal. 1897).

54. *Id.*

55. *Id.* at 1053. The California Supreme Court upheld the conviction, noting, "[W]e shall not stop to argue the point, and only add the court was right." *Id.* A concurrence by three members of the court kept open the possibility of admitting testimony that a defendant may have committed the crime while in a "hypnotic condition." *Id.*

56. 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969).

57. *Id.* at 306.

58. *Id.* at 312.

59. *See, e.g.*, State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983); Chapman v. State, 638 P.2d 1280, 1282-84 (Wyo. 1982).

60. *Brown*, 337 N.W.2d at 151; *accord* People v. Smrekar, 385 N.E.2d 848, 854-55 (Ill. Ct. App. 1979) ("While the hypnosis could affect the mind of the witness in such a subconscious way that the cross-examination could not reach, all witnesses, are to some extent, subject to subconscious stimuli similarly obscure."), *cert. denied*, 498 U.S. 1029 (1991); *see also* Pearson v. State, 441 N.E.2d 468, 477 (Ind. 1982) (cross-examination is an effective deterrent to contamination of forensically recovered testimony); *Chapman*, 638 P.2d at 1282-84 (same).

61. 337 N.W.2d 138, 151 (N.D. 1983).

62. *Id.*

The *Brown* court stated that such testimony is no less reliable than, and suffers from the same problems as, conventional interrogation.[63]

More recently, a majority of jurisdictions have rejected *Harding*'s total admissibility position and returned to the exclusion *per se* approach.[64] Indeed, *Harding* itself was invalidated by the Supreme Court of Maryland in *State v. Collins*.[65] In adopting the exclusion *per se* rule, these courts view hypnosis as a scientific procedure capable of altering a witness's memory. Relying on experimental memory research, they find the memories unreliable because of a witness's (1) suggestibility, (2) tendency to "confabulate" or fill in memory gaps with details drawn from other experiences, and (3) undue confidence in post-hypnotic recall, so-called "memory hardening," which makes cross-examination ineffective.[66]

The exclusion *per se* courts rely on the seminal 1923 case of *Frye v. United States*,[67] in which a test was established for the admissibility of expert scientific evidence. In *Frye*, the United States Court of Appeals for the District of Columbia Circuit held that expert testimony based on scientific knowledge must "have gained *general acceptance* in the particular field in which it belongs" in order to be admissible.[68] The *Frye* court excluded the testimony of an expert concerning the results of a lie detector because the technique did not meet this "generally accepted" test.[69] Similarly, many courts today exclude the testimony of a witness who has undergone hypnosis because hypnosis itself is not "generally accepted" as a means of obtaining historically accurate recall.[70] While *Frye* is important because it influenced the development of the exclusion *per se* approach, the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[71] recently overruled *Frye*'s "generally accepted" test as the exclusive standard for determining the admissibility of expert scientific testimony under the Federal

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63. *Id.* at 149-51; *accord* State v. Hurd, 432 A.2d 86, 92 (N.J. 1980) (normal memory is "historically inaccurate").

64. See *supra* note 48 for a list of courts which currently exclude forensically recovered testimony *per se*.

65. 464 A.2d 1028, 1044-45 (Md. 1983) (testimony concerning matters first remembered during hypnosis is excluded *per se* while those recalled pre-hypnotically may be admitted); *see also* Polk v. State, 427 A.2d 1041, 1048 (Md. Ct. Spec. App. 1981) (same).

66. *See, e.g.*, Contreras v. State, 718 P.2d 129, 132 & n.10 (Alaska 1986) (citing Martin Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-18 (1979) (describing vulnerability of memory following hypnosis)). *See* also text accompanying *infra* note 143 for a discussion of the scientific research which formed the basis of the exclusion *per se* view.

67. 293 F. 1013 (D.C. Cir. 1923).

68. *Id.* at 1014 (emphasis added).

69. *Id.*

70. *See, e.g.*, State v. Mena, 624 P.2d 1274, 1279 (Ariz. 1981) (stating that since hypnosis has not gained *Frye*'s general acceptance in relevant community as method of recovering accurate memories, forensically recovered testimony should be excluded); People v. Shirley, 723 P.2d 1354, 1375 (Cal.) (same), *cert. denied*, 459 U.S. 860 (1982); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (same); State v. Palmer, 313 N.W.2d 648, 655 (Neb. 1981) (same).

71. 113 S. Ct. 2786 (1993).

Rules of Evidence.[72] Thus, the exclusion *per se* position currently rests on tenuous grounds.

While many jurisdictions exclude all forensically recovered memories, some of these same jurisdictions have modified the exclusion *per se* rule to allow the witness to testify with regard to those matters recalled exclusively prior to hypnosis.[73] This modified position is difficult to reconcile with the concern expressed by exclusion *per se* courts over ineffective cross-examination.[74] A witness whose memory has been allegedly contaminated by forensic hypnosis would likely be unable to differentiate between memories exclusively recalled prior to hypnosis and those remembered after the procedure.

B. Procedural Safeguards and "Totality of the Circumstances"

The third judicial response to the admission of forensically recovered memories has been to require procedural safeguards. This approach was first recommended by Dr. Martin Orne, testifying as the psychiatric expert in *State v. Hurd*,[75] the much-cited New Jersey Supreme Court decision.

In *Hurd*, a woman was stabbed repeatedly while sleeping in her apartment.[76] The woman survived the attack but initially was unable to identify her assailant.[77] After undergoing hypnosis with a psychiatrist, however, the victim named her ex-husband as the perpetrator.[78]

In contrast to those courts which exclude forensically recovered testimony *per se*, the *Hurd* court altered the *Frye* test from whether it was "generally accepted" that hypnosis produces historically accurate memories, to whether it was "generally accepted that hypnosis is "a means of overcoming amnesia and restoring the memory of a witness."[79] Under this reformulation, *Hurd* found that forensically recovered memories are as reliable as normal memories, which the court stated are often "historically inaccurate."[80]

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72. See *infra* notes 108-26 and accompanying text for a discussion of *Daubert*.

73. These jurisdictions are: Arizona (State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1295-97 (Ariz. 1982)); Iowa (State v. Seager, 341 N.W.2d 420, 431 (Iowa 1983)); Michigan (People v. Jackson, 319 N.W.2d 613, 618 (Mich. Ct. App. 1982), *rev'd on other grounds sub nom.* People v. Badel, 365 N.W.2d 56 (Mich 1984), *cert. granted sub nom.* State v. Jackson, 471 U.S. 1124 (1985), *aff'd*, 475 U.S. 625 (1986)); Minnesota (State v. Blanchard, 315 N.W.2d 427, 430 (Minn. 1982); State v. Koehler, 312 N.W.2d 108, 110 (Minn. 1981)); Nebraska (State v. Patterson, 331 N.W.2d 500, 503 (Neb. 1983)); New York (People v. Hughes, 452 N.Y.S.2d 929, 932 (N.Y. App. Div. 1982), *aff'd*, 453 N.E.2d 484 (N.Y. 1983); People v. Smith, 459 N.Y.S.2d 528, 542 (N.Y. Sup. Ct. 1983)); and Pennsylvania (Commonwealth v. Taylor, 439 A.2d 805, 808 (Pa. Super. Ct. 1982)).

74. See *supra* note 66 and accompanying text for a discussion of the concern over ineffective cross-examination. *See also Mack*, 292 N.W.2d at 770 (excluding testimony *per se*); *Mena*, 624 P.2d at 1280 (same); *Palmer*, 313 N.W.2d at 653 (same).

75. State v. Hurd, 432 A.2d 86, 97 (N.J. 1980) (citing Orne, *supra* note 66, at 317-18)).

76. *Id.* at 88.

77. *Id.*

78. *Id.* at 88-89.

79. *Id.* at 92.

80. *Id.*

The emphasis in *Hurd* thus shifted from the elusive goal of determining historical accuracy to the reliability of the hypnosis procedure itself.

The *Hurd* court adopted Dr. Orne's safeguards. According to Orne, the reliability of forensically recovered memories could only be assured by adhering to the following procedural safeguards: (1) the hypnotic session must be conducted by a licensed psychiatrist or psychologist with training in hypnosis; (2) the therapist must be independent from the police, the prosecution, and the defense; (3) any information given by the police, the prosecution, or the defense to the hypnotist prior to the session must be recorded in some form; (4) the witness's pre-hypnotic recollection must be recorded; (5) the hypnosis session itself must be recorded, preferably on videotape; and (6) attendance at the session must be limited to the clinician and the witness.[81] The *Hurd* court also required the party seeking to introduce forensically recovered memories to establish admissibility by clear and convincing evidence.[82] Applying these procedural safeguards, *Hurd* ultimately excluded the testimony of the victim because a police officer, present during the hypnotic session, asked suggestive questions, and because pre-hypnotic records were lacking.[83]

Although a number of courts have adopted the *Hurd* approach,[84] some have criticized it. Several courts have reasoned that a case-by-case determination using the *Hurd* safeguards would increase the variation in and amount of litigation, consuming too many judicial resources and producing conflicting results in different trial courts.[85] Further, the *Hurd* approach has been seen as a veiled exclusion *per se* rule because failure to comply with its determinative safeguards results in exclusion of the evidence.[86] Moreover, some

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81. *Id.* at 96-97.

More recently, Dr. Orne has concluded that "hypnotically induced memories should *never* be permitted to form the basis for testimony by witnesses or victims in a court of law." Orne et al., *supra* note 18, at 50 (emphasis in original). In essence, Orne now advocates an exclusion *per se* approach to forensically recovered memories. See *infra* notes 86, 92-93, and accompanying text for a discussion of how courts which take a "totality of the circumstances" approach essentially view the determinative procedural safeguard approach as advocating an exclusion *per se* position.

82. *Hurd*, 432 A.2d at 97.

83. *Id.* at 98.

84. See *supra* note 50 for courts which have followed *Hurd*.

85. *See, e.g.*, State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1294 (Ariz. 1982) (criticizing *Hurd*'s case-by-case analysis); People v. Shirley 723 P.2d 1354, 1365-66 (Cal.) (*Hurd* safeguards insufficient to prevent prejudice of forensically recovered testimony), *cert. denied*, 459 U.S. 860 (1982).

86. *See* State v. Iwakiri, 682 P.2d 571, 577 (Idaho 1984) (characterizing *Hurd* as *per se* rule of admissibility or inadmissibility depending upon whether standards are met).

In addition, another court rejected the *Hurd* safeguards in a case involving the use of "relaxation therapy" to clinically recover memories—what one commentator called "nonhypnosis hypnosis." Alan W. Scheflin, *Forensic Hypnosis: Unanswered Questions*, 22 AUSTL. J. CLINICAL & EXPERIMENTAL HYPNOSIS 25, 31 (1994) (citing State v. Varela, 817 P.2d 731, 733 (N.M. Ct. App. 1991) (involving use of "relaxation therapy" on child who then recovered memories of sexual abuse)). However, Professor Scheflin posed the question: "Why should the name of the technique make any difference? The real issue is whether the evidence is reliable." *Id.* at 32. See

commentators warn against the use of strict procedural safeguards with respect to scientific techniques because focusing on particular safeguards obscures the most relevant inquiry—whether or not the technique works.[87]

The Supreme Court of Idaho in *State v. Iwakiri*[88] first proposed the fourth approach to the admissibility of forensically recovered testimony: a "totality of the circumstances" standard.[89] The *Iwakiri* court considered the admissibility of a forensically recovered identification of a criminal defendant.[90]

The *Iwakiri* court held total admissibility unacceptable because of situations where forensic hypnosis might taint the witness's testimony.[91] Similarly, the court rejected a *per se* rule of general exclusion or a *per se* rule of exclusion for failure to comply with the procedural safeguards because, under such rules, reliable testimony would sometimes be excluded.[92] These latter two approaches were found to "tie [the courts'] hands in determining the competency of the witness to testify."[93]

Having rejected the three approaches to the admissibility of forensically recovered evidence then in use, the *Iwakiri* court developed a fourth approach. The court mandated a preliminary determination on the admissibility of forensically recovered testimony in light of the "totality of the circumstances."[94] The court suggested a non-determinative consideration of the *Hurd* safeguards to provide guidance to the trial court in making this determination.[95] The *Iwakiri* court recognized that forensically recovered memories are not unlike other altered memories, such as eyewitness memories and

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supra notes 29-31 and accompanying text for a discussion of other clinical therapies, like hypnosis, which are used to recover memories.

87. *See generally* Bert Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 735 (1994) ("Using multiple-factor tests to evaluate science is like trying to light up a ball park with a few mis-aimed spotlights."). See *infra* notes 174-79 and accompanying text for a discussion of the inappropriate use of procedural safeguards in Borawick v. Shay, 842 F. Supp. 1501 (D. Conn. 1994), the United States District Court of Connecticut case which addressed the admissibility of clinically recovered memories and the critique by the authors of *Scientific Knowledge* of the authority on which it relies.

88. 682 P.2d 571 (Idaho 1984).

89. *Id.* at 578. See *supra* note 51 for other courts which followed *Iwakiri* and adopted a "totality of the circumstances" approach.

90. *Iwakiri*, 682 P.2d at 573. The witness had been hypnotized prior to trial in order to refresh her memory of the defendant, who had been charged with kidnapping. The witness recovered memories of the defendant being inside a home with the two victims. *Id.*

91. *Id.* at 577. See *supra* note 66 and accompanying text for a discussion of these problems.

92. *Iwakiri*, 682 P.2d at 577-78.

93. *Id.* at 577. The *Iwakiri* court concluded that *per se* rules which exclude facts pertinent to the case are serious impediments to the ascertainment of truth, which is the ultimate goal of the law. *Id.* at 575.

94. *Id.* at 578.

95. *Id.* at 577-78. The *Iwakiri* court also suggested a modification to the *Hurd* safeguards to allow other people (e.g., lawyers or psychiatrists) to be present during the forensic hypnotic session if their presence is shown to be essential and steps are taken to prevent them from influencing the session. *Id.*

conversations with other witnesses.[96] In carving out a middle ground, therefore, the *Iwakiri* court reasoned that a pre-trial determination would provide an assurance of reliability before submission of the evidence to the jury.[97] The Supreme Court of Idaho remanded the issue for a consideration of reliability under its newly articulated standard.[98]

To date, there are no general rules on the admissibility of clinically recovered, as opposed to forensically recovered, memories. Indeed, Missouri seems to be the only state with a clear rule. In *Alsbach v. Bader*,[99] it followed the forensic trend and excluded the testimony of a car accident victim whose memory was clinically recovered through hypnosis.[100] However, the United States Supreme Court has suggested a framework for the admissibility of these memories which advises against exclusion *per se*.[101]

C. *A Framework for Admissibility:* Rock *and* Daubert *Suggest a "Totality of the Circumstances" Pre-Trial Determination*

In 1987, the United States Supreme Court ruled on the admissibility of forensically recovered testimony in *Rock v. Arkansas*.[102] In *Rock*, the Court addressed a dispute over the right of a previously hypnotized criminal defendant to testify at her own trial.[103] The Supreme Court of Arkansas had excluded the testimony *per se* by following other states with exclusion *per se* rules.[104] The United States Supreme Court reversed, however, holding the state's reliance on a *per se* prohibition of all forensically recovered testimony

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96. *Id.* at 578-79 (citing FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI (1927) ("The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of both English and American trials."), *quoted in* Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 1030 (1977)).

97. *Id.* The court went on to hold that even if a trial court finds the witness incompetent to testify about some matters tainted by hypnosis, other matters (either pre-hypnosis or otherwise) may still be admissible. *Id.*

Once the court makes a competency determination, a witness should then testify on direct examination concerning his or her memory of the events without indicating that the memories were recovered under hypnosis. *Id.* The opposing party can then impeach the witness on cross-examination by noting inconsistent pre-hypnotic statements or the fact that the witness was hypnotized, and both parties can bring in experts to discuss the dangers and benefits of hypnosis. *Id.* at 580.

98. *Id.*

99. 700 S.W.2d 823 (Mo. 1985).

100. *Id.* at 824, 830.

101. *See infra* part II.C.

102. 483 U.S. 44 (1987).

103. *Id.* at 45. The defendant in this case was accused of murdering her husband with a gun, but she could not recall the precise details of the event. *Id.* at 45-46. After undergoing hypnosis, however, she was able to remember that she did not have her finger on the trigger of the gun, and that it fired during a scuffle with her husband in which he grabbed her hand. In response to these memories, the defendant's attorney had the gun analyzed by an expert who discovered that the gun was defective and prone to fire without pulling the trigger. *Id.*

104. *Id.* at 48-49.

an impermissible violation of the Sixth Amendment right of a criminal defendant to testify on her own behalf.[105] Justice Blackmun, writing for the majority, found that the state failed to show that hypnosis was either so unreliable or so invulnerable to the conventional means of challenging credibility that exclusion *per se* was warranted.[106] The *Rock* Court approved of "guidelines" that would assist the trial court in making an admissibility determination.[107]

Although its holding is limited to the Sixth Amendment rights of criminal defendants who have undergone hypnosis, *Rock* is essentially a declaration by the United States Supreme Court that the judicial system is capable of accommodating testimony based on memory-recovery techniques. The *Rock* holding thus represents a serious threat to the exclusion *per se* position. At the same time, its suggested "guidelines" advise against total admissibility.

Rock and forensically recovered testimony were recently alluded to in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[108] the United States Supreme Court decision which overruled *Frye* as the exclusive test for the admissibility of expert scientific testimony in the federal courts.[109] The *Daubert* Court held *Frye*'s "generally accepted" test incompatible with Rule 702 of the Federal Rules of Evidence.[110] *Daubert* requires trial judges to evaluate such testimony at the outset, based on the twin aims of relevance and reliability.[111]

In determining reliability, *Daubert* requires that the subject of the evidence be "scientific knowledge" under Rule 702.[112] However, the *Daubert* Court stated that the subject matter need not be " 'known' to a certainty; arguably there are no certainties in science."[113] Instead, the testimony is reliable if based on "appropriate validation—*i.e.*, good grounds, based on what

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105. *Id.* at 61. The Court stated: "A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that *may be reliable* in an individual case." *Id.* (emphasis added).

106. *Id.*

107. *Id.* The *Rock* Court stated: "The State would be well within its powers if it established *guidelines* to aid trial courts in the evaluation of post-hypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.* (emphasis added). The Court referred to the *Hurd* safeguards, *see supra* text accompanying note 81, as being suitable "guidelines." *Id.* at 60-61.

108. 113 S. Ct. 2786 (1993).

109. *Id.* at 2798-99.

110. *Id.* at 2794. Rule 702 of the *Federal Rules of Evidence* states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

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

112. *Id.* The *Daubert* Court defined "scientific" as a "grounding in the methods and procedures of science" and "knowledge" as "more than subjective belief or unsupported speculation." *Id.*

113. *Id.*

is known."[114] In determining relevancy, the *Daubert* Court first cited to Federal Rule of Evidence 401 for the general proposition that "[t]he Rule's basic standard of relevance is a liberal one."[115] The Court then followed Rule 702 in requiring that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[116]

Although not a "definitive checklist or test,"[117] the *Daubert* Court suggested the following factors as a guide to pre-trial determination of the admissibility of expert scientific testimony: (1) testing;[118] (2) peer review and publication;[119] (3) the known or potential rate of error in the case of particular scientific techniques;[120] and (4) whether the theory of technique is "generally accepted."[121] *Frye* is thus gone but not forgotten. It appears now as a non-determinative consideration of scientific reliability.[122]

The *Daubert* Court responded in advance to the fear that its decision would lead to widespread jury confusion in the face of "pseudoscientific [expert] assertions."[123] In doing so, the Court cited to *Rock* and stated:

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114. *Id.* (internal quotation marks omitted).

115. *Id.* at 2794.

Rule 401 of the *Federal Rules of Evidence* states: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

The Court also cites to Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988), which discussed the *Federal Rules* and what the Court calls their "general approach of *relaxing* the traditional barriers to 'opinion' testimony." *Daubert*, 113 S. Ct. at 2794 (emphasis added).

116. *Daubert*, 113 S. Ct. at 2795 (internal quotation marks omitted). The *Daubert* Court explained that relevance depends on the connection to the particular facts of the case, providing the example of the study of the phases of the moon, which may be relevant for purposes of determining whether it was dark on a certain night, but irrelevant for determining whether an individual behaved irrationally on that same night. *Id.* at 2796.

117. *Id.*; *see also* Black et al., *supra* note 87, at 751 (noting that the test under *Daubert* not new determinative four-factor test, but what distinguishes science from other forms of knowledge).

118. *Daubert*, 113 S. Ct. at 2796-97.

119. *Id.* at 2797. The Court noted, however, that "in some instances, well-grounded but innovative theories will not have been published." *Id.*

120. *Id.*

121. *Id.* The Court stated that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and a 'known technique that has been able to attract only minimal support within the community,' may properly be viewed with skepticism." *Id.* (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

122. The *Daubert* Court also reminded trial judges to be mindful of Rule 703 of the *Federal Rules of Evidence*, which admits otherwise inadmissible hearsay if "of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject, FED. R. EVID. 703"; Rule 706, which allows the court itself to appoint an expert, FED. R. EVID. 706; and Rule 403, which permits the exclusion of relevant evidence if its potential for prejudice outweighs its probative value, FED. R. EVID. 403. *Daubert*, 113 S. Ct. at 2797-99. The Court also noted that trial judges can exercise more control over experts than over lay witnesses because of the tendency of expert evidence to sway the jury who may have difficulty evaluating it. *Id.* (citing Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

123. *Daubert*, 113 S. Ct. at 2798.

"[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible evidence*."[124]

Daubert applies generally to scientific expert testimony under the Federal Rules of Evidence. Applying its reasoning to *Rock*'s forensically recovered memories, the *Daubert* holding can be read to suggest the following: Notwithstanding the "shaky" grounds on which the science of forensically recovered memories may rest, excluding testimony based on it per se for lack of "certainty" is improper.[125] The *Daubert* Court mandated an alternative method to ensure reliability—the pre-trial determination—and proposed a number of non-determinative considerations to assist the trial judge in making that determination.[126] *Daubert* and *Rock* therefore both represent a middle ground between total admissibility and exclusion *per se*.

Analogizing from *Rock* (respecting the testimony of criminal defendants) and *Daubert* (respecting the testimony of expert witnesses), forensically recovered testimony in all contexts should not be excluded *per se*, nor should it be subject to total admissibility.[127] The *Rock* Court approved of "guidelines" for the trial court,[128] while the *Daubert* Court mandated a pre-trial determination.[129] The "totality of the circumstances" standard likewise rejects both the exclusion *per se* and total admissibility positions while requiring a pre-trial determination which considers procedural safeguards.[130] Thus, the United States Supreme Court has, through *Rock* and *Daubert*, essentially suggested the *Iwakiri* court's "totality of the circumstances" standard for the admissibility of forensically recovered memories.

To date, however, the Court has not decided the standard for determining the admissibility of clinically recovered memories. When faced with this issue, the Court will likely apply the "totality of the circumstances" standard that it has already suggested in the forensic context. Therefore, trial courts should use this standard to make a pre-trial determination concerning the admissibility of clinically recovered memories of childhood sexual abuse. Furthermore, testimony based on clinically recovered memories arises in a civil tort context. As a result, the "totality of the circumstances" standard is appropriate because civil standards are typically more liberal than criminal

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124. *Id.*

125. *See id.* at 2795 (stating that there are no certainties in science).

126. *Id.* at 2795-97. See *supra* notes 118-21 and accompanying text for a discussion of these considerations.

127. It is indeed a sensible strategy to make experts and lay witnesses subject to the same standard in both clinically and forensically recovered memory cases, because the methods used to recover memories and the way in which these methods are employed in a given case will ultimately be the central issue for the admissibility of both lay and expert testimony.

128. Rock v. Arkansas, 483 U.S. 44, 61 (1987).

129. *Daubert*, 113 S. Ct. at 2795-97.

130. See *supra* notes 75-87 and accompanying text for a discussion of the procedural safeguard approach.

standards which determine the admissibility of forensically recovered memories.[131]

III. Memory Research: Further Support for a "Totality of the Circumstances" Standard

While the courts debate the proper standard for determining the admissibility of forensically recovered memories, the scientific community is engaged in a similar battle: whether or not memories of childhood sexual abuse can be repressed and reliably recovered in the clinical setting. These conflicts mirror Sigmund Freud's struggle between believing his patients were recovering memories of real childhood sexual abuse and believing that those memories were fantasies based on unresolved childhood desires.[132]

The memory research relevant to this inquiry is divided into four areas: (1) the reliability of memory generally, including eyewitness and childhood memories; (2) the extent to which victims of childhood sexual abuse can repress their memories; (3) the effects of hypnosis on memory recovery generally and in the specific context of clinically recovered memories of childhood sexual abuse; and (4) the extent to which clinicians can implant false memories of abuse in patients, both with and without hypnosis. The current memory research suggests that clinical techniques for recovering memory, including hypnosis, can sometimes yield accurate memories of childhood sexual abuse. The admissibility of these memories should therefore be the subject of a "totality of the circumstances" pre-trial determination concerning reliability.

Experimental researchers agree that normal memory is malleable, reconstructive, and has the potential for inaccuracy.[133] Indeed, researchers do not dispute the conclusion that eyewitness testimony based on prior events is unreliable.[134] The problems generally associated with the reliability of eyewitness memory include faulty perception at the input stage of memory, revisions during the storage phase of memory, and "contamination" during the retrieval or output stage.[135] One researcher concluded a summary of recent

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131. *See generally* Landry v. Bill Garrett Chevrolet, Inc., 430 So. 2d 1051, 1054-57 (La. Ct. App.) (differentiating between demanding criminal standards, aimed at determining guilt or innocence while protecting constitutional rights, and less demanding civil standards, aimed at fairly applying law to facts), *rev'd*, 434 So. 2d 1103 (La. 1983) (remanding for decision on merits with no requirement of foundation for hypnotically enhanced testimony).

132. See *supra* notes 22-25 and accompanying text for a discussion of Freud's ambivalent abandonment of the "seduction theory."

133. *See* Loftus, *supra* note 6, at 530-33.

134. *See, e.g.*, Elizabeth F. Loftus, Eyewitness Testimony 97-99 (1979) (citing studies showing how authority and approach of interrogator affect reliability of identification).

135. *See* Kanovitz, *supra* note 7, at 1219-20 & n.147 (citing, *inter alia*, Elizabeth F. Loftus & James F. Doyle, Eyewitness Testimony: Civil and Criminal (1987); Eyewitness Testimony: Psychological Perspectives (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 Me. L. Rev. 53 (1991); Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 Cal. L. Rev. 1402 (1985)).

findings on eyewitness identification by asserting that there was no "typical eyewitness situation or . . . typical eyewitness."[136] These findings indicate that all memories are potentially unreliable.

With respect to early childhood memories, the traditional research suggested that "childhood amnesia" commonly represented a barrier to memory until a child reached the age of three or four.[137] As a result, clinicians typically viewed memories of events that occurred when a child was under this age with extreme suspicion. However, more recent studies suggest that memories can pre-date this three- to four-year-old boundary.[138] In addition, memory research focusing on childhood traumas concludes that, while such traumas may reduce memory for the details of the event, they do not reduce the memory that the event occurred.[139] Thus, traumatic memories from childhood, perhaps even early childhood, can be recalled. The next relevant issue is whether children are likely to repress such memories.

Recent findings indicate that a significant minority of documented childhood abuse victims repress memories of the abuse into adulthood.[140] Chil-

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136. D.A. Bekerian, *In Search of the Typical Eyewitness*, 48 AM. PSYCHOLOGIST 574, 575 (1993).

Notwithstanding the problems with the reliability of eyewitness memory, courts have regularly admitted the testimony of eyewitnesses and rely on cross-examination and cautionary instructions to prevent inaccurate eyewitness testimony from misleading the jury. *See, e.g.*, People v. Guzman, 121 Cal. Rptr. 69, 72-73 (Cal. Ct. App. 1975) (non-prejudicial to cross-examine eyewitness and instruct jury regarding possible flaws in eyewitness testimony). Alternatively, some courts rely on expert testimony to explain the problems with eyewitness recall. *See, e.g.*, People v. McDonald, 690 P.2d 709, 726 (Cal. 1984) (trial court committed abuse of discretion in excluding testimony of expert who testified about inaccuracies of eyewitness identifications where case turned on reliability of identifications).

137. Loftus, *supra* note 6, at 523.

138. *See* Williams, *supra* note 5, at 1171 ("Although cognitive developmental capacities undoubtedly affect the memory of very young children and are translated into adult lack of recall of the abuse, in this study, 5 of 11 women who were under 4 years of age at the time of the victimization recalled the abuse.") (footnotes omitted); JoNell A. Usher & Ulric Neisser, *Childhood Amnesia and the Beginning of Memory for Four Early Life Events*, 122 J. EXPERIMENTAL PSYCHOL.: GEN. 155, 164 (1993) ("[T]he offset of the [childhood] amnesia varies with the kind of experience in question. Some events are likely to remain in memory even if they occur at age 2 . . . .").

139. Kanovitz, *supra* note 7, at 1233 (child victims of repeated abuse remember fewer details of particular incidents of abuse than those of single-incident abuses but still remember true abuse in childhood) (citing Lenore C. Terr, *Childhood Traumas: An Outline and Overview*, 149 AM. J. PSYCHIATRY, 10, 14-18 (1991); LENORE C. TERR, TOO SCARED TO CRY, 182-85 (1990)).

Research also suggests that statements based on actual facts contain a large number of details, often unusual or superfluous, make reference to unexpected complications, portray the subject's mental state, contain spontaneous corrections, and contain admissions of lack of memory and expressions of self-doubt. John F. Kihlstrom, *Hypnosis, Delayed Recall, and the Principles of Memory*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 337, 342 (1994) (citations omitted). Analogizing from this, these findings have counter-intuitive implications for determining the reliability of clinically recovered memories in court. Specifically, when a witness articulates consistent details, without hesitation or gaps in memory, the less certain the court can be that the memories are reliable.

140. A recent study of 129 women, admitted to hospitals as children with documented sexual abuse and re-interviewed 17 years later, found that 38% did not recall the sexual abuse they

dren are more likely to repress memories of violent episodes of sexual abuse.[141] In addition, children who are sexually abused by someone they know are more likely to repress their memories.[142] These findings indicate that childhood memories of sexual abuse can be repressed, especially in cases of violent abuse inflicted by someone the victim knew.

The next issue concerns the reliability of repressed memories when recovered in the clinical context. Most of the assumptions about clinically recovered memories draw from the experimental research on the general effects of hypnosis. Experimental researchers claim that memories recovered through hypnosis are unreliable for at least three reasons. First, subjects in hypnosis studies are susceptible to suggestion and may recover memories based on an attempt to please the researcher rather than because of events which actually occurred. Second, subjects may fabricate memories to fill in memory gaps. Third, subjects may exhibit undue confidence in their hypnotically recovered memories.[143] However, the general reliability problems associated with hypnotically-recovered memories are no different than the reliability concerns with normal memory, as discussed above.[144]

Some experimental hypnosis researchers conclude that "hypnosis will not improve *normal* memory in *normally* functioning persons for *nonmeaningful* information."[145] Victims of childhood sexual abuse, however, do not have such normal memories for non-meaningful information; rather, they have traumatic memories which have caused memory impairment.[146] Memories of emotional events like childhood sexual abuse appear to be encoded

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experienced as children. Williams, *supra* note 5, at 1170. Another study, examining survivors of childhood sexual abuse uninvolved with the legal system, reported that 39% of the victims experienced some period of amnesia for the events. Renee L. Binder et al., *Patterns of Recall of Childhood Sexual Abuse as Described by Adult Survivors*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 357, 359 (1994).

141. John Briere & Jon Conte, *Self-Reported Amnesia for Abuse in Adults Molested as Children*, 6 J. TRAUMATIC STRESS 21, 26 (1993); Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 5 (1987).

142. *See* Williams, *supra* note 5, at 1172 (stating that those molested by friend, peer, or family member were less likely to recall abuse).

143. *See generally* Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 333-42 (1980) (arguing that hypnotic memories are unreliable and lack probative value).

144. *See supra* notes 133-36 and accompanying text.

An in-press review of the scientific literature summarized the current findings: "We basically know that people distort information, confabulate and fill in gaps, and can be influenced by leading questions *in hypnosis or out of hypnosis*." D. Corydon Hammond, *Hypnosis, False Memories, and Guidelines for Using Hypnosis with Potential Victims of Abuse*, *in* CLINICAL HYPNOSIS AND MEMORY: GUIDELINES FOR CLINICIANS AND FOR FORENSIC HYPNOSIS 1, 3 (J. Alpert ed.) (The American Society of Clinical Hypnosis Press, in press) (emphasis added).

145. Hammond, *supra* note 144, at 2-3 (citing M.H. Erdelyi, *Hypnotic Hypermnesia: The Empty Set of Hypermnesia*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 379 (1994)) (emphasis in original).

146. *See* Kanovitz, *supra* note 7, at 1213 (noting that laboratory research on hypnosis has not matched clinical success with hypnosis).

differently.[147] As well, researchers have found that experimental subjects tend to recall more when meaningful information is being remembered.[148] With respect to meaningful, emotional events like childhood sexual abuse, then, clinical techniques for recovering memory may yield reliable information.

These suggestions were supported by the American Medical Association's Council on Scientific Affairs, which reached the general conclusion that hypnosis most frequently results in more information being reported, containing inaccurate as well as accurate details.[149] Thus, hypnosis and other techniques can yield memories of childhood sexual abuse which may be reliable and may contain accurate details.

Researchers have met with limited success in intentionally implanting "false memories."[150] Although research using hypnosis has shown a limited ability to implant false memories in adults with rich imaginations and extreme capacities for hypnosis, the so-called "highly hypnotizable," these adults compromise only a small percentage of the population.[151] Moreover, commentators have criticized these studies and conclude that even the ability to implant "false memories" among "highly hypnotizable" subjects is unremarkable.[152] Furthermore, researchers have not yet produced "false mem-

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147. Hammond, *supra* note 144, at 1.

148. *Id.* at 4 (citing Henry L. Bennett, *Perception and Memory for Events During Adequate General Anaesthesia for Surgical Operations*, *in* HYPNOSIS AND MEMORY 193, 203 (Helen M. Pettinati ed., 1988)).

149. Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. AM. MED. ASS'N 1918, 1921 (1985); *accord* Matthew H. Erdelyi, *Hypermnesia: The Effect of Hypnosis, Fantasy, and Concentration*, *in* HYPNOSIS AND MEMORY 64, 90 (Helen M. Pettinati ed., 1988) (stating that both hypnosis and free association produce more correct recalls and more false recalls).

150. *See* Loftus, *supra* note 6, at 532 (summarizing studies on implanting false memories). Dr. Elizabeth Loftus, a much-cited experimental researcher and critic of the reliability of repressed memories, reports that she successfully implanted false childhood memories in adults. *Id.* These memories, which concerned being lost in a mall during childhood, were implanted by the repeated suggestions of a trusted family member. Thus, Dr. Loftus's study may reveal more about the way in which families construct the reality of its members than about the ability of subjects to confabulate. In addition, the relationship between memories of being lost in a mall and being sexually abused seem tenuous at best. *See supra* note 153 and accompanying text.

151. *See* Kanovitz, *supra* note 7, at 1237-38 (noting that vast majority of people are not susceptible to implantation of false memories through hypnosis). Professor Kanovitz points out that the current negative judicial view of hypnosis is largely drawn from the findings of Orne and Diamond. *Id.* at 1234 n.212. However, Kanovitz states that "scientific research findings have never demonstrated that hypnosis affects most subjects this way." *Id.* (citing Peter W. Sheehan, *Confidence, Memory and Hypnosis*, *in* HYPNOSIS AND MEMORY 99-100 (Helen M. Pettinati ed., 1988)) ("Evidence on the whole has been against, rather than in support of, the hypothesis that hypnosis generally creates inherent distortion in memory reports. . . . There is no general, pervasive distortion effect for hypnosis.").

In fact, the research suggests that the "highly hypnotizable" compromise only 10% to 15% of the population. *Id.* at 1235 n.214 (citing JOSEPHINE R. HILGARD, PERSONALITY AND HYPNOSIS: A STUDY OF IMAGINATIVE INVOLVEMENT 88, 219-24, 270-74, 285-87 (2d ed. 1979)).

152. Professor Kanovitz critiques a study in which researchers claimed to have implanted memories in sleeping subjects of being recently awakened by a loud bang (the idea being that

ories" of the "emotional intensity and gravity of early sexual trauma."[153] Notwithstanding these findings, "false memory" advocates point to instances of withdrawn accusations of abuse, so-called "retractions," and claim that "false memories" were implanted by over-zealous therapists; however, the mental health community, researchers, and legal commentators generally agree that "retractions" alone do not indicate the non-existence of abuse.[154]

As a whole, the current memory research suggests that all memory, both hypnotically recovered and normal, eyewitness and childhood, is potentially unreliable. Research also shows that victims of childhood sexual abuse can repress their memories. Once repressed, these memories can be clinically recovered through hypnosis and other techniques, sometimes yielding accu-

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this represents a trauma). In reality, only 22% of the subjects, selected especially for their highly hypnotic capabilities, were capable of accepting this memory. Kanovitz, *supra* note 7, at 1236 (citing J.R. Laurence et al., *Duality, Dissociation, and Memory Creation in Highly Hypnotizable Subjects*, 34 INT'L J. EXPERIMENTAL & CLINICAL HYPNOSIS 295, 302-03 (1986)). Twenty-seven percent were confused, while 51% rejected the attempt at memory alteration. *Id.* Professor Kanovitz concludes: "This experiment proves, at most, that it is sometimes possible to implant false autobiographical memories in subjects who are extremely hypnotizable." *Id.* When several of the same researchers attempted to reproduce their results in subjects with normal hypnotic capability, the results were even less successful than those attained with the "highly hypnotizable" subjects. *Id.* at 1236 & n.219 (citing Louis Labelle et al., *Hypnotizability, Preference for an Imagic Cognitive Style, and Memory Creation in Hypnosis*, 99 J. ABNORMAL PSYCHOL. 222 (1990)).

153. Michael R. Nash, *Memory Distortion and Sexual Trauma: The Problem of False Negatives and False Positives*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 346, 349 (1994).

154. One example of a "retraction" is the recent and much-publicized case of Ramona v. Isabella, No. 61898 Cal. (Napa County Super. Ct. 1994), where the Napa County Superior Court allowed a third-party plaintiff to recover from a therapist and hospital for clinically implanting so-called "false memories" in his daughter, after she retracted allegations that he had abused her as a child. The American Psychiatric Association has stated that "hesitancy in making a report, and recanting following the report can occur in victims of documented abuse. Therefore, these seemingly contradictory findings *do not exclude the possibility that the report is based on a true event.*" American Psychiatric Association Board of Trustees, *Statement on Memories of Sexual Abuse*, *reprinted in* 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 261, 263 (1994). (emphasis added). Indeed, according to one clinical researcher, a "retraction of accusations *per se* is no assurance of nonabuse." Daniel C. Schuman, *False Accusations of Physical and Sexual Abuse*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 5, 20 (1986); *accord* Spiegel & Scheflin, *supra* note 42, at 419 ("Even if a memory is shown to be inaccurate, this does not prove that an event never happened . . . ."). Indeed, Spiegel and Scheflin submit that "[e]ach case must be examined *on its own merits*." *Id.* at 420 (emphasis added).

Furthermore, although this comment does not address the issue of tort actions against therapists, Professor Scheflin suggests that *Ramona* has been misrepresented in the media, causing unnecessary panic in the therapeutic community. Alan W. Scheflin, *Hypnosis: 1994 and Beyond*, 21 HYPNOS 196, 200 (1994). Professor Scheflin submits that *Ramona* was only possible because of a strange "quirk in California law," the so-called Molien doctrine. *Id.* This doctrine states that a duty is owed to third persons when a person voluntarily undertakes to perform a service competently which directly implicates the third person. *Id.* (referring to Molien v. Kaiser Found. Hosps., 616 P.2d 813, 817 (Cal. 1980) (holding doctor can be found liable for intentional infliction of emotional distress by husband of patient whom doctor had negligently diagnosed with syphilis because he told patient to tell husband and marriage subsequently disintegrated)). In *Ramona*, the therapist was held liable because she invited the father to the hospital where she accused him of sexual abuse, thus implicating him directly under *Molien*. *Id.*

rate memories. Thus, clinical techniques for memory recovery are useful because they sometimes produce reliable memories.

Current memory research therefore provides further support for the "totality of the circumstances" standard for the admissibility of clinically recovered memories. An exclusion *per se* rule would prevent a witness from testifying to potentially accurate memories, while a total admissibility position might permit the admission of inaccurate memories. A "totality of the circumstances" pre-trial determination would allow the trial judge to consider the facts of the case and the evolving research data when determining admissibility. Moreover, this standard would allow courts to avoid perpetuating the scientifically insupportable idea that both clinically and forensically recovered memories are less reliable, and therefore less accurate, than normal memory.[155]

IV. The Admissibility Question Arises

In *Borawick v. Shay*,[156] the United States District Court for the District of Connecticut was the first federal case to address the admissibility of clinically recovered memories of childhood sexual abuse. Examination of this case demonstrates the necessity of using the "totality of the circumstances" approach.

In *Borawick*, the plaintiff sought compensatory and punitive damages against her aunt and uncle for allegedly sexually assaulting her during childhood.[157] The plaintiff remembered these incidents after undergoing clinical hypnosis.[158] Connecticut had removed the first barrier to adult tort claims based on childhood sexual abuse by extending the statute of limitations.[159] The plaintiff then faced the second barrier to a clinically recovered childhood sexual abuse claim, the admissibility of her memories, when the defendant filed a motion *in limine* seeking to exclude those memories.[160]

A. *What* Borawick *Did*

The *Borawick* court first traced the history of the admissibility of novel scientific evidence, starting with *Frye*.[161] The court explained that in *United States v. Williams*, the United States Court of Appeals for the Second Circuit abandoned *Frye* in favor of a more liberal balancing test which weighed the

155. In addition to the memory research discussed here, for a discussion of the courts which also recognize the similarity between normal memory and forensically recovered memory, see *supra* notes 63, 80, 96, and accompanying text.

156. 842 F. Supp. 1501 (D. Conn. 1994).

157. *Id.* at 1501-02.

158. *Id.* at 1502-03.

159. *Id.* at 1502 n.1 (citing Conn. Gen. Stat. § 52-577d, which states that plaintiffs can bring cause of action for childhood sexual abuse for 17 years after majority).

160. *Id.* at 1502.

161. *Id.* at 1503.

probative value of the evidence against its potential to prejudice or confuse the jury.[162]

While the issue before the court concerned clinically recovered memories, the *Borawick* court proceeded to describe the various approaches to the admissibility of forensically recovered testimony.[163] Notably, the court excluded any reference to the "totality of the circumstances" position. Conceding that the *Hurd* safeguards were "unfair, if not impossible" to apply to plaintiffs in a clinical setting, the court nevertheless held that clinically recovered memories were only admissible if minimum safeguards were met. The court required compliance with three of the *Hurd* safeguards: (1) that the hypnotist be qualified; (2) that the hypnotist avoid suggestions; and (3) that a permanent record of the hypnosis session be available.[164] The court reserved its ruling on defendant's motion *in limine* to allow the plaintiff to depose the hypnotist.[165]

The plaintiff deposed the hypnotist and offered the deposition as evidence to the court.[166] In a Supplemental Ruling on Defendant's Motion *in limine*, the *Borawick* court determined that the hypnotist was unqualified to render an expert opinion because he only had a high school degree and admitted to being a "stage hypnotist."[167] Thus, the court held the plaintiff's testimony inadmissible and granted the defendant's motion to exclude the testimony.[168] In addition, the court lowered the burden on the plaintiff of establishing admissibility by the clear and convincing standard announced in *Hurd*,[169] to establishing admissibility by a preponderance of the evidence.[170]

Finally, in a motion for reconsideration, the plaintiff argued that the court's ruling in her case was inconsistent with *Daubert*'s repudiation of *Frye*.[171] In response to the plaintiff's motion, the court claimed first that it did not base its rulings on *Frye*, but rather on the more liberal test of *United States v. Williams*,[172] which was not modified by the Supreme Court's ruling in *Daubert*. However, the court summarily stated that its ruling was, in fact, "wholly consistent with *Daubert*."[173]

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162. *Id.* (citing United States v. Williams, 583 F.2d 1194 (2d Cir. 1978) (regarding spectrographic voice analysis), *cert. denied*, 439 U.S. 1117 (1979)).

163. *Id.* at 1504. The court discussed the total admissibility, exclusion *per se* and procedural safeguard positions. *Id.*

164. *Id.* at 1505.

165. *Id.*

166. *Id.* at 1507. The plaintiff also offered the affidavits of other physicians. *Id.* at 1506 n.1.

167. *Id.* at 1508.

168. *Id.*

169. *See supra* text accompanying note 82.

170. *Id.* at 1508 n.6. See *infra* text accompanying note 186 for a discussion of the appropriateness of this burden under the proposed "totality of the circumstances" pre-trial determination of admissibility.

171. *Borawick*, 842 F. Supp. at 1509. See *supra* notes 67-72, 108-126, and accompanying text for a discussion of *Frye* and *Daubert*.

172. 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

173. *Borawick*, 842 F. Supp. at 1509.

B. *What* Borawick *Did Wrong*

Closer inspection reveals that the *Borawick* court's ruling was not, as it claimed, "wholly consistent" with *Daubert* for two reasons. First, the *Borawick* court relied on procedural safeguards as a determinative test of admissibility. Although the court recognized that many of the safeguards developed in *Hurd* were inapplicable in the clinical context,[174] it nevertheless used three of the *Hurd* safeguards[175] as an absolute test of admissibility.[176] This absolute test suggests that *Borawick* applied a procedural safeguards approach rather than the *Rock-Daubert-Iwakiri* "totality of the circumstances" standard.[177] Second, the *Borawick* court held the testimony of the plaintiff inadmissible because one of the procedural safeguards was not complied with—the hypnotist was not qualified. By focusing its inquiry solely on the qualifications of the hypnotist, the court in *Borawick* ended up bypassing the central inquiry required by *Daubert*: whether the testimony is reliable.[178] The *Borawick* court thus failed to determine whether the hypnotic sessions may have recovered potentially reliable memories of an alleged instance of childhood sexual abuse, notwithstanding the shaky qualifications of the hypnotist. Although safeguards and guidelines are a useful guide for framing the admissibility question under a "totality of the circumstances" standard, as *Rock*, *Daubert*, and *Iwakiri* all recognized, they should not be used in a determinative fashion.[179]

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174. *Id.* at 1505. These inapplicable safeguards include the requirement that the therapist be independent of the police, the prosecution, and the defense; that any information given by the police to the hypnotist prior to the session be in written form; and that attendance at the session be limited to the hypnotist and the witness. State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981).

175. See *supra* text accompanying note 164 for a discussion of the safeguards used by the *Borawick* court.

176. *See Borawick*, 842 F. Supp. at 1505 (requiring that 3 safeguards be met for admissibility).

177. See *supra* text accompanying notes 127-30 for a discussion of way in which *Rock*, *Daubert*, and *Iwakiri* all suggest this approach.

178. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795-96 (1993). For another discussion of the difficulty of relying exclusively on the qualifications of experts, see Black et al., *supra* note 87, at 732.

179. See *supra* text accompanying notes 128-30 text for a discussion of *Rock*, *Daubert* and *Iwakiri*'s agreement with this proposition. In addition, the authors of *Scientific Knowledge* discuss United States v. Williams, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979), the case relied on by the court in *Borawick*, as a prime example of placing too much reliance on procedural safeguards. The authors conclude that "[s]tandards developed by a techniques proponent and limitations on when and how the technique might be used have little to do with the fundamental question of *whether it really works*." Black et al., *supra* note 87, at 738 (emphasis added).

The problem with reliance on minimum determinative safeguards is that analyses using this approach often become less like inquiries into scientific validity and relevance and more like bars to plaintiffs who cannot show conformity with the technical requirements of the safeguards. See *supra* notes 86, 92-93, and accompanying text for a discussion of the *Iwakiri* court's assertion that procedural safeguards can create an exclusion *per se* position.

C. *What* Borawick *Should Have Done: Recommendations for a "Totality of the Circumstances" Pre-Trial Determination*

The nature of a "totality of the circumstances" pre-trial determination is suggested by *Daubert* itself: "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."[180] In keeping with this view of a pre-trial determination, trial courts should consider multiple factors which bear on the reliability of clinically recovered memories. Courts should not treat any one factor, or any combination of factors, as determinative.

The following four factors may help courts to make a pre-trial determination concerning the admissibility of clinically recovered memories of childhood sexual abuse. First, the trial court should consider whether the clinician adequately recorded the memories of the alleged victim prior to, during, and subsequent to the administration of the memory-recovery technique.[181] If the memories were recorded properly, the trial judge can better determine whether any statements made by the clinician during treatment were *unduly* suggestive to the alleged victim, in which case the testimony might be excluded.[182] Second, the trial court should consider the existence of corroboration, either direct or circumstantial.[183] Corroboration would suggest the

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

181. Although preferable, videotaping of every clinical session may be inhibited by privacy and cost considerations. An audio tape or detailed notes might achieve the same objective.

182. However, clinical techniques for recovering memories are always suggestive to the extent that they guide patients back to particular places and times; the emphasis, therefore, on "unduly" suggestive, is well worth noting.

In considering whether statements made by the clinician during therapy were suggestive, the suggestibility of the patient should also be examined. For example, is the patient "highly hypnotizable" and therefore more subject to suggestions? See *supra* notes 151-52 and accompanying text for a discussion of the ability to implant memories in "highly hypnotizable" subjects. Hypnotizability can be measured with "a high degree of accuracy by scientifically validated tests." *See* Kanovitz, *supra* note 7, at 1238 & n.227 (citing numerous tests for measuring hypnotizability). Professor Kanovitz argues that trial judges could obtain this information by invoking Rule 35 of the *Federal Rules of Civil Procedure* or state rules based on it, which allows judges to order examinations when health is in controversy. *Id.* at 1238. If the patient is "highly hynotizable," and the statements indicate suggestion, the court might then exclude the testimony.

183. Some courts which have allowed "delayed discovery" to toll the statute of limitations require corroboration. See *supra* notes 37 and 45 for delayed discovery cases which require corroboration. *See generally* Herman & Schatzow, *supra* note 141, at 10 (74% of women involved in therapy for childhood sexual abuse were able to obtain corroboration).

Corroboration might take many forms. It could be obtained directly from the perpetrator or another person (e.g., a family member, neighbor, or peer) who observed the abuse or the results of abuse. *See* Herman & Schatzow, *supra* note 141, at 10 (40% of childhood sexual abuse survivors studied were able to obtain corroboration from perpetrator, other family members, or physical evidence, including diaries or photographs, and 34% obtained corroboration from another child who had been abused). Corroboration might also be circumstantial. For example, a medical, school, police or hospital record indicating some condition or event from which the abuse might be inferred. However, the lack of corroboration, as with all of these factors, should not exclude the memories *per se*, nor should it prove the non-occurrence of the abuse. Otherwise, victims would have no remedy in cases where the abuse is non-violent or occurs in a private setting, making corroboration more difficult to obtain.

reliability of clinically recovered memories, in which case the testimony might be admitted. Third, trial courts should consider whether the alleged victim knew the alleged perpetrator and whether the abuse was violent. In both cases, repression into adulthood is more likely.[184] If repression is thus indicated, the testimony might also be admitted. Fourth, trial courts should consider whether the clinician who administered the memory-recovery technique is both licensed and qualified.[185] If the clinician is qualified, then clinically recovered memories might likewise be admitted more readily.

In terms of the burden of proof, the *Borawick* court was correct in altering the burden on the plaintiff in clinically recovered memory cases from *Hurd*'s clear and convincing standard, a criminal standard, to the lower preponderance of the evidence standard, the more common civil burden.[186] This burden should likewise apply in a pre-trial determination under the "totality of the circumstances" standard.

CONCLUSION

In light of an increasing trend towards tolling the statue of limitations in cases of repression, greater numbers of claims of clinically recovered memories of childhood sexual abuse will make their way into court. These lawsuits perhaps respond to emerging statistics revealing the existence and prevalence of childhood sexual abuse and repression.[187]

Based on the United States Supreme Court decisions in *Rock v. Arkansas*[188] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[189] a "totality of the circumstances" pre-trial determination is suggested for the admissibility of both clinically and forensically recovered memories. In terms of these memories, the total admissibility, exclusion *per se*, and procedural safeguards positions are incapable of providing adequate standards to ensure reliability while ensuring that legitimate memories are heard by a jury. While the *Borawick* court allowed the plaintiff to bring a claim under the Connecticut

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184. See *supra* notes 141-42 and accompanying text for a discussion of the research which suggests that repression is more likely where the victim knew the perpetrator and the abuse was violent.

185. This *Hurd* safeguard is worth considering, although not in the determinative way in which *Borawick* used it. *See supra* notes 174-79 and accompanying text.

Licensed clinicians with masters of social work might also be included along with psychiatrists and psychologists, as long as they receive a comparable amount of training in hypnosis. For one example of a recent effort towards standardizing hypnosis training, see D. CORYDON HAMMOND & GARY R. ELKINS, STANDARDS OF TRAINING IN CLINICAL HYPNOSIS (American Society of Clinical Hypnosis Press, 2d prtg. 1994).

186. *See* Borawick v. Shay, 842 F. Supp. 1501, 1505 (D. Conn. 1994) (stating that plaintiff subject to preponderance of the evidence standard in civil lawsuit). *See generally* Black et al., *supra* note 87, at 765 (stating that "requiring corroboration sufficient to establish that a hypothesis is more likely correct than not," preponderance of evidence standard, is more in line with burden of plaintiff in civil action).

187. See *supra* Introduction and notes 140-42 for a discussion of recent studies which indicate the frequency of childhood sexual abuse and repression.

188. 483 U.S. 44 (1987).

189. 113 S. Ct. 2786 (1993).

statute of limitations covering childhood sexual abuse, its use of a determinative procedural safeguard approach to exclude clinically recovered memories was unacceptable.

In deciding whether to admit testimony concerning clinically recovered memories of childhood sexual abuse, then, a trial court should make a pretrial determination, considering the four factors outlined in part IV.C. As the memory research and case law evolve in this emerging area, a court should also consider other facts and circumstances that it may deem relevant. To do otherwise would deny victims the only known tools for lifting the repression associated with these traumatic events, clinical memory recovery techniques. If these techniques yield a potential perpetrator, the law should not cloak this person in its protective robes without first prudently and fairly inquiring into the reliability of the memories.

Nietzsche posited that human history eternally returns.[190] This idea is significant on both an individual and cultural level. On the individual level, some victims of childhood sexual abuse repress memories which "return" to them through clinical memory-recovery techniques. On a cultural level, Freud's theory of "childhood seduction" and his struggle with whether his patients' memories were real or imagined, has also "returned."[191] On the one hand, recent studies indicate that a staggering number of cases of childhood sexual abuse exist.[192] On the other hand, many self-styled "victims" of "false memory"—parents and others who allege they have been falsely accused—dismiss these memories as fantasy.[193] In Freud's Vienna, the story of

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190. *See generally* Philippe Nonet, *What is Positive Law?*, 100 YALE L.J. 667, 676-77 (1990) (citing F. NIETZSCHE, JENSEITS VON GUT UND BÖSE, BEYOND GOOD AND EVIL § 56 (W. Kaufmann trans., 1966) ("The world-affirming man has not only settled for and learned to endure what was and is, but wills to have it, just as it was and is, *repeated in all eternity*. . . .") (emphasis added)).

191. See *supra* notes 20-25 and accompanying text for the background on Freud's theoretical evolution.

192. See *supra* notes 1-6 and accompanying text for a discussion of the Justice Department's recent findings on reported cases of childhood sexual abuse.

193. Recently, a support group has been formed for adults who claim to have been falsely accused by their children after undergoing recovered-memory therapies. Centered in Philadelphia, the False Memory Syndrome Foundation has received much attention for claiming that memories of childhood sexual abuse, when recovered in therapy, are false. *See generally*, Stephen Fried, *War Of Remembrance*, PHILADELPHIA 66 (Jan. 1994). However, "[t]he organization's detractors . . . are baffled by the marriage of support group to credible scientists who decry the danger of support-group mentality." *Id.* at 68-69.

The False Memory Syndrome Foundation does serve an important function by calling attention to the potential reliability problems of clinically recovered memories. However, these problems exist with all memories. See *supra* notes 133-36 and accompanying text for the scientific research which suggests that all memories are unreliable. In addition, members of the scientific board of the False Memory Syndrome Foundation have called attention to an alternative agenda, one which suggests that the Foundation may have other goals besides the vindication of false accusations. For example, a founding member of the board of the False Memory Syndrome Foundation, Ralph Underwager, a memory researcher in his own right, was reported as telling a Dutch journal that sex with children is a "responsible choice for the individual." *Id.* at 71. Dr. Underwager, in a paper on recovered memory, had stated, "The cost of belief in such memories

childhood sexual abuse was told by a patient on a couch to a lone psychiatrist who was free to construct an uncontested case history. Today, plaintiffs are telling these stories to lawyers and judges. Now that many plaintiffs have overcome the traditional barrier imposed by the statute of limitations, courts should not prevent these stories from being told to juries without a "totality of the circumstances" pre-trial determination of admissibility. History and its eternal return demand no less.

Matthew J. Eisenberg

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are devastating to families, society, and the social contract we need *to continue our civilization*. The anguish and pain generated by these claims is devastating to those accused." Hollida Wakefield & Ralph Underwager, *Recovered Memories of Alleged Sexual Abuse: Lawsuits Against Parents*, 10 BEHAV. SCI. & L. 483, 503 (1992) (emphasis added).

Underwager also recently charged a psychologist and prosecuting attorney with defamation because they publicly challenged his findings. Underwager v. Salter, 22 F.3d 730, 731-32 (7th Cir.), *cert. denied*, 115 S. Ct. 351 (1994). The court found the claim baseless because Underwager was a limited public figure and the defendants showed no actual malice. *Id.* at 734-36. Although Underwager has since resigned from the board of the False Memory Syndrome Foundation, Hollida Wakefield, his co-author, remains an active member. *Id.* at 734 (citing Stephen Fried, *War of Remembrance*, PHILADELPHIA 66, 72 (Jan. 1994)).