

# Washington University Journal of Law & Policy

---

Volume 13 *Empirical Taxation*

---

January 2003

## Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?

Camille Fletcher

Follow this and additional works at: [http://openscholarship.wustl.edu/law\\_journal\\_law\\_policy](http://openscholarship.wustl.edu/law_journal_law_policy)



Part of the [Law Commons](#)

---

### Recommended Citation

Camille Fletcher, *Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?*, 13 WASH. U. J. L. & POL'Y 335 (2003),  
[http://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol13/iss1/10](http://openscholarship.wustl.edu/law_journal_law_policy/vol13/iss1/10)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?

Camille L. Fletcher\*

## I. INTRODUCTION

Many legal scholars contest the validity of repressed memories for evidentiary purposes. To gain support for repressed memory theory, proponents offer examples of horrifying experiences of little girls whose minds cannot handle severe trauma and who, in turn, repress the memories of these experiences.<sup>1</sup> Opponents of the theory likewise produce images of families torn apart by false accusations of child molestation and sexual abuse.<sup>2</sup> The truth appears to lie somewhere in between these two extreme views.

Repressed memories can be retrieved in different ways. For some, common occurrences, such as a glimpse of one's own child, may trigger recovery.<sup>3</sup> Others enter therapy for other psychological problems, and the repressed memory "comes out" during therapy.<sup>4</sup> Typically this therapy-based recovery occurs through hypnosis, suggestion, or regression therapy.<sup>5</sup> When a memory is "recovered" through therapy, outside influences can create room for greater error.<sup>6</sup>

---

\* J.D. Candidate, 2003, Washington University School of Law.

1. See *Franklin v. Duncan*, 884 F. Supp. 1435, 1438-40 (N.D. Cal. 1995), *aff'd*, 70 F.3d 75 (9th Cir. 1995). In this case, a witness claimed to recover a repressed memory of her father killing her childhood friend, twenty years after the incident occurred. *Id.* at 1438.

2. See Joseph A. Spadaro, Note, *An Elusive Search for the Truth: The Admissibility of Repressed and Recovered Memories in Light of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 30 CONN. L. REV. 1147, 1148 (1998).

3. See *Franklin*, 884 F. Supp. at 1440. In *Franklin*, a witness testified that she had recovered the memory of her childhood friend's murder while watching her daughter play on the floor. *Id.*

4. See Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 U. KAN. L. REV. 517, 519-20 (1996).

5. *Id.* at 523.

6. See *generally id.* at 521-25 (criticizing the validity of therapy-induced memory

For example, “recovery” may occur through supplementation of the patient’s memory.<sup>7</sup> While issues of reliability are not completely settled in the case of stimulus-triggered, spontaneous resurfacing of repressed memories, this type of memory recovery more easily avoids the potential problems of improper influence.<sup>8</sup>

This Note seeks to address the issues involved with repressed memories in legal settings. Part II of this Note examines the differences between the various methods of memory retrieval, showing how these differences may affect issues of reliability in general, as well as in court settings. Part III analyzes two ways that repressed memories are recovered: through therapy and through spontaneous resurfacing. Because courts do not differentiate between different types of repressed memory recovery, Part IV of this Note proposes several ideas for increasing the probative value or evidentiary weight of spontaneously recovered memories, as opposed to memories retrieved through therapy. Part V concludes that spontaneously resurfaced memories should be afforded greater evidentiary value and admissibility in the courts.

## II. BACKGROUND OF MEMORY RESEARCH AND REPRESSED MEMORY SYNDROME’S PLACE IN LITIGATION

Recovered memories<sup>9</sup> gained acceptance in the psychotherapy community before they were addressed by the legal community. In the early 1980s, therapists used the concept of recovered memories to explain a host of psychological maladies seen in therapy.<sup>10</sup> Soon thereafter, recovered memories made headlines when a number of celebrities claimed to have recovered repressed memories of childhood abuse.<sup>11</sup> This publicity propelled the concept of recovered

---

recovery).

7. *Id.*

8. *See infra* Part II.F.

9. The concept of repressed memories “refers to the complete absence of awareness or memory of a traumatic event from the time of its occurrence until a period of years thereafter.” Richmond, *supra* note 4, at 520.

10. *Id.* at 519-20. Psychotherapists have employed the concept of recovered memories to explain such maladies as sexual dysfunction, eating disorders, relationship difficulties, and low self-esteem. *Id.* at 519.

11. *Id.* at 520. Notable figures, including Roseanne Barr Arnold and Marilyn Van Derbur,

memories into the public eye.<sup>12</sup> Following the increase in public awareness, the legal community began to address repressed memories through both statutes and case law.<sup>13</sup>

### A. Theories on Memory and Cognition

Modern cognitive psychology<sup>14</sup> examines the Human Information Processing System.<sup>15</sup> This model of cognition is similar to the different forms of information storage on a computer.<sup>16</sup> Humans perceive stimuli through their sensory memory. The five senses of touch, smell, sight, sound, and taste allow the brain to take in data from the outside world. Sensory memory is extremely brief and automatic.<sup>17</sup> Next, information passes into the short-term memory, which bridges sensory memory and long-term memory by encoding sensory memory, thereby holding the data for a relatively brief amount of time.<sup>18</sup> The data, or memory, is then learned or forgotten.<sup>19</sup> The long-term memory represents data that has been learned.<sup>20</sup> Long-term memory involves the storage of information on a relatively permanent basis.<sup>21</sup> Thus, the “forgetting” of information substantially differs from the repression of a memory, which in turn differs from

---

publicly announced in the early 1990s that they had recovered repressed memories of childhood sexual abuse. *Id.*

12. *Id.*

13. *See infra* Part III.D. For examples of cases dealing with the issue of repressed memories, see Spadaro, *supra* note 2.

14. Cognitive psychology is the branch of psychology that encompasses how the mind, brain, and memory works. MARK H. ASHCRAFT, HUMAN MEMORY AND COGNITION 3 (1989).

15. Although most law review articles dealing with repressed memories begin with a discussion of Freud and his contribution to repressed memories theories, it is this author’s opinion that Freud’s views generally have little importance beyond the field of psychotherapy and his own theoretical model. In fact, authors of modern textbooks on cognition do not necessarily mention Freud in their historical introductions. *See id.*

The Information Processing System, on the other hand, is based upon the Atkinson and Shiffrin model of human memory, and is a widely accepted theory. *Id.* at 50.

16. *Id.* For example, sensory memory in humans is akin to the receiving or input buffer device in a computer. *Id.* Short-term memory in humans is likened to the central processor of a computer. *Id.* Finally, long-term memory in humans is similar to the storage of programs and information on a computer’s hard drive. *Id.*

17. *Id.* at 56.

18. *Id.*

19. *Id.*

20. *Id.* at 58.

21. *Id.*

amnesia.<sup>22</sup>

Sigmund Freud proposed the first theory of memory repression, which served as a precursor to Repressed Memory Syndrome.<sup>23</sup> He described repressed memories as constituting a defense mechanism that enables people to suppress or “forget” overwhelming emotions, memories, or feelings.<sup>24</sup> This allows people to cope better with the world around them. The memory of the traumatic event still exists, but is buried deep within the human psyche.<sup>25</sup> By this theory, a person’s emotional survival depends upon the brain’s inability to retrieve the memory and bring it into consciousness.<sup>26</sup>

Repressed Memory Syndrome is distinguishable from a theory of memory *suppression*.<sup>27</sup> Memory suppression involves the conscious avoidance of a particularly painful memory.<sup>28</sup> People who suppress memories of abuse retain a general awareness of the abuse inflicted upon them.<sup>29</sup> They may not, however, retain knowledge of specific injuries resulting from that abuse or of specific events of past abuse.<sup>30</sup> To function normally in society, the abuse victim actively suppresses the memory of the childhood sexual abuse.<sup>31</sup> Suppressed memories differ from repressed memories in that repressed memories are not consciously “forgotten.” Further, once recalled to the conscious

---

22. When a person *forgets* data or “memories,” the loss is attributable either to retrieval error in the sensory memory, or to data interference in the short-term memory. In either case, the forgotten information never advanced to the long-term memory. *Id.* at 55. However, when a person *represses* a memory, the data is already stored in the long-term memory, but cannot be accessed by the part of the brain that is responsible for outputting data. *Id.* at 61. This is why the person is said to be “unable to remember” the incident. *Id.* The “memory” is encoded into the person’s brain, though she does not realize it. *Id.* In contrast, amnesia is a form of memory loss that is attributed to actual brain damage or physical injury. *Id.*

23. It is important to note that Freud made his proposals before modern views of memory functioning, such as the Information Processing System model, had been proposed. It is also important to note that while Freud is credited for the birth of psychoanalysis, his theory is only one of many in the field of personality or psychology.

24. Laura Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 942 (2000).

25. *Id.* at 942-43.

26. Spadaro, *supra* note 2, at 1155.

27. *Id.* at 1157.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

mind, repressed memories are recovered in whole.<sup>32</sup>

The American Psychological Association (APA) formally recognized Repressed Memory Syndrome in 1994. The APA referred to it, however, as “Dissociative Amnesia.”<sup>33</sup> This formal recognition of Repressed Memory Syndrome helps to legitimize the syndrome, and gives therapists specific criteria to consider when diagnosing patients.<sup>34</sup> However, not all therapists agree with the validity of the Syndrome.<sup>35</sup> In fact, many opponents of Repressed Memory Syndrome, both therapists and non-therapists, support a theory of “False Memory Syndrome.”<sup>36</sup>

---

32. *Id.* at 1158.

33. THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 478 (4th ed. 1994) [hereinafter DSM-IV]. The DSM-IV states the following about Dissociative Amnesia:

The essential feature of Dissociate Amnesia is an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness . . . . This disorder involves a reversible memory impairment in which memories of personal experience cannot be retrieved in a verbal form (or, if temporarily retrieved, cannot be wholly retained in consciousness).

*Id.* Dissociative amnesia (referred to in this Note as Repressed Memory Syndrome) usually consists of gaps in memory recall of a person’s life history that are later recovered. Johnson, *supra* note 24, at 943. The memory gaps identified with Repressed Memory Syndrome differ from normal gaps in memory because they are sporadic, involuntary, and associated with periods of trauma, distress, or impairment in a person’s life. *Id.*

Repressed Memory Syndrome is not particular to a certain age group. *Id.* Children, adults, and elderly can repress and subsequently recover memories. *Id.* For example, studies addressing victims of physical and sexual abuse, victims of torture and concentration camps, victims of kidnapping, combat soldiers, and individuals who have experienced accidents and natural disasters all provide evidence of the partial or full recovery of repressed memories. *Id.* at 944.

Sexually abused, traumatized children are especially susceptible to Repressed Memory Syndrome. *Id.* Sexually abused children cannot cope physically or psychologically with the abuse. *Id.* Children’s size, mental maturity, and dependant status often bar *physical* escape. *Id.* Thus, *mental* escape may become the only option. *Id.* Children find the memories of sexual abuse too overwhelming and must psychologically adjust in order to change their own perception of the situation. *Id.* Children who are victims of sexual abuse may acquire coping strategies such as “altering [their] state of consciousness” in order to “avoid reminders of traumatic events and, ultimately, memories of the event.” *Id.*

34. *Id.*

35. Harrison G. Pope et al., *Attitudes Toward DSM-IV Dissociative Disorders Diagnoses Among Board-Certified American Psychiatrists*, 156 AM. J. OF PSYCHIATRY 321, 322 (1999). The study, which surveyed 103 psychiatrists, found that many of those surveyed thought dissociative amnesia should not be included in the DSM-IV without reservations, or that it was not supported by strong scientific evidence. *Id.*

36. Opponents of Repressed Memory Syndrome point to the American Psychological Association’s statement concerning the possibility of memory implantation. David Lynch, *Post-Daubert Admissibility of Repressed Memories*, 20 CHAMPION, Nov. 1996, at 14, 17. The

False Memory Syndrome is a growing theory offered in response to Repressed Memory Syndrome.<sup>37</sup> People claiming they were erroneously accused of committing child sexual abuse initially theorized the existence of False Memory Syndrome.<sup>38</sup> Proponents of the theory assert that Repressed Memory Syndrome is scientifically invalid, and that repressed memories are inaccurate and unreliable.<sup>39</sup> Although there is growing support for False Memory Syndrome, the APA does not officially recognize it.<sup>40</sup>

### *B. Past Studies in Memory Research*

Psychologists typically use case studies when researching memory, as opposed to empirical experimentation. Normally case studies involve people who already suffer from the symptom being tested in the case study.<sup>41</sup> Although research based on case studies is

---

American Psychological Association has recognized the possibility of pseudomemory construction of non-existent abuse. *Id.*

Opponents of Repressed Memory Syndrome also point to the American Medical Association's statement concerning repressed memories of sexual abuse. *Id.* at 17-18. The American Medical Association stated that these repressed memories were of "uncertain authenticity," and that external verification must be applied to the recovered repressed memory. *Id.*

37. See Johnson, *supra* note 24, at 948.

38. See *id.* In 1992, a group of people who claimed to be erroneously accused of child sexual abuse founded the False Memory Syndrome Foundation. *Id.* They created the Foundation to address false accusations, as well as the destruction of families that results from such accusations. *Id.* The founders hoped to combat perceptions that any repressed memory claim or specific accusation inherently must contain some truth. *Id.* This misperception causes the accused to be estranged from family members and others, even after being found not guilty in the legal system. *Id.*

39. See Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution about Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 162-63 (1993). Ernsdorff and Loftus describe how judges and juries react to repressed memory testimony and how they can be fooled by detailed accounts of supposedly recovered repressed memories. *Id.* at 162. The authors explain that, while initial repressed memories may be vague, they later transform into detailed accounts of the sexual abuse. *Id.* This detailed account impresses the judge and jury, who in turn give credence to the repressed memory. *Id.* In addition, by the time the accuser takes the witness stand, she can retell her story with confidence and clarity. *Id.* at 163. Ernsdorff and Loftus note that *false* memories can be retold with the same clarity and confidence as accurate memories. *Id.* The judge and jury are then faced with the difficult task of determining what is reality and what is a psychological construction.

40. Johnson, *supra* note 24, at 949.

41. The following example of a standard empirical scientific experiment shows why case

less reliable than that based on traditional experimentation, researchers conduct case studies on repressed memories due to significant ethical considerations.<sup>42</sup> Researchers have conducted several case studies on memory repression.<sup>43</sup>

One such case study found that sexual abuse victims repress memories of the abuse. Linda Meyer Williams conducted a case study involving women who were sexually abused as children.<sup>44</sup> She first interviewed these women as little girls, when they were admitted for medical treatment resulting from the abuse. She then interviewed them again many years later.<sup>45</sup> Williams found that over one-third of the participants failed to disclose their molestation during the later interview.<sup>46</sup> This finding implies that the women repressed the memory of sexual abuse in some capacity.<sup>47</sup> Opponents of Repressed

---

studies are used in researching repressed memories. A scientific experiment usually includes at least two groups: a control group and an experimental, or test, group. The control group might be given a placebo or nothing at all. Researchers use the control group to examine what would occur if the unknown element, or the element the psychologist is trying to prove, was not given to them. The test group is either given the element the psychologist is testing (e.g., a particular untested drug) or exposed to the condition that the psychologist is testing. In studying repressed memories, the control group would consist of people who have not gone through severe traumatic experiences. JOHN J. SHAUGHNESSY & EUGENE B. ZECHMEISTER, RESEARCH METHODS IN PSYCHOLOGY 345 (McGraw-Hill 1997) (1985). The test group would include people being exposed to similar traumatic experiences, such as sexual abuse. In order to filter out confounds, which are independent variables that change the outcome of the test, the participants would share similar socio-economic status and would have similar social experiences. *Id.* at 25. Additionally, the test group subjects must all experience the same traumatic event. *Id.*

A case study, in contrast, involves a person or group of people who have already gone through the event or have experienced the condition that the psychologist is trying to study. *Id.* at 308. A case study does not produce empirical data because the psychologist cannot control for confounds. Also, there is no control group against which to compare the case study participants. *Id.* Thus, a case study cannot prove causation, *id.* at 315, and case studies involving repressed memories can neither scientifically prove nor disprove the existence of Repressed Memory Syndrome.

42. Spadaro, *supra* note 2, at 1191-92. "No study can ethically be done to directly show repressed memory distortion, due to the fact that such a study would require the researcher to induce trauma to the subject." *Id.*

For a discussion of a possible argument against the unethical implications in studying altered memories, see Lynch, *supra* note 36, at 15-18.

43. See *infra* notes 44-59 and accompanying text.

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

45. *Id.*

46. *Id.*

47. Williams controlled for the possibility that the women might not disclose the

Memory Syndrome, however, criticized Williams' study for not conducting follow-up interviews to determine why the women failed to report past sexual abuse.<sup>48</sup>

Another case study found that people are able to repress memories, then later recover them.<sup>49</sup> Dr. Judith Lewis Herman conducted a case study, again involving women who were sexually abused as children.<sup>50</sup> In this study, Herman asked women who had reported past sexual abuse whether they had suffered memory loss concerning the abuse.<sup>51</sup> Approximately two-thirds of the participants claimed some level of memory loss in the past.<sup>52</sup> Participants reporting more extreme traumatic events were found more likely to experience memory loss of the abuse.<sup>53</sup> Herman's study implies that people are able to repress memories of past traumatic events, and then recover them at a later date.

In contrast to these case studies, a third found that people's memories may be highly susceptible to memory implantation.<sup>54</sup> Professor Elizabeth F. Loftus conducted a study relating to memory implantation.<sup>55</sup> Loftus used older family members to implant false memories in participants' minds regarding a fabricated incident of being lost in a shopping mall as a young child.<sup>56</sup> Some participants not only believed that the event occurred, but even supplied details to Loftus regarding the event beyond those which the older relatives had implanted.<sup>57</sup> Furthermore, some participants persisted in their belief that they were actually lost in the mall even after Loftus and family

---

information of sexual abuse because of a desire to conceal embarrassing and personal events. *Id.* at 1167. This was accomplished by asking several highly personal questions that the women answered without hesitation. *Id.*

48. See Spadaro, *supra* note 2, at 1159.

49. *Id.* at 1160.

50. *Id.*

51. *Id.*

52. *Id.*

53. Herman interviewed fifty-three women who reported that they had been sexually abused in the past. *Id.* Most of these women were able to produced evidence of this sexual abuse. *Id.*

54. See David Spiegel & Alan W. Schefflin, *Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory in Criminal and Civil Cases*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 411, 422 (1994).

55. *Id.*

56. *Id.*

57. *Id.*

members confessed it was only an experiment.<sup>58</sup> The case study reveals the ease with which authority figures can implant false memories in others' minds.<sup>59</sup>

### *C. Repressed Memory Syndrome in Criminal and Civil Cases*

Most cases involving repressed memories arise as civil suits, rather than as criminal actions, due mainly to the lower burden of proof needed to find liability.<sup>60</sup> Greater leniency of the statute of limitations has also induced an increase in the number of civil cases brought against perpetrators of abuse, as well as against therapists.<sup>61</sup> Thus, most cases involving repressed memories constitute claims of intentional infliction of emotional distress and tortious sexual abuse.<sup>62</sup>

A typical repressed memory case, criminal or civil, involves allegations of childhood sexual abuse.<sup>63</sup> One such case involved Eileen Franklin-Lipster.<sup>64</sup> Eileen allegedly recovered her repressed memory while watching her daughter play on the floor.<sup>65</sup> She testified at trial that when she was eight years old, she watched her father sexually assault and kill her schoolmate.<sup>66</sup> Her father then allegedly told her not to tell anyone about the incident and to forget that it ever

---

58. *Id.*

59. John Briere and Jon Conte, as well as Steven N. Gold, Dawn Huges, and Laura Hohnacker, also conducted case studies. Spadaro, *supra* note 2, at 1189.

In 1993, John Briere and Jon Conte conducted a study with 450 participants. *Id.* They found that 60% reported having a lapse of memory concerning sexual abuse at some point in their lives. *Id.*

In 1994, Steven N. Gold, Dawn Hughes, and Laura Hohnacker conducted a study with 105 participants. *Id.* They found that approximately 30% reported no memory of sexual abuse; 10% reported no definite memory of abuse, but did have a vague sense of abuse; another 14% reported a partial memory of childhood abuse. *Id.*

60. *See id.* at 1151. In civil cases, the plaintiff's burden of proof is by a preponderance of the evidence. In contrast, during criminal proceedings a defendant must be found guilty beyond a reasonable doubt.

61. *Id.*

62. *Id.* It appears difficult *not* to have a reasonable doubt when a case rests solely on the testimony of one person's memory about an event that happened in the distant past, and about which the person claims only recently to have remembered.

63. Spadaro, *supra* note 2, at 1164.

64. Franklin v. Duncan, 884 F. Supp. 1435 (N.D. Cal. 1995), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

65. *Id.* at 1438.

66. *Id.*

happened.<sup>67</sup> The jury convicted Franklin-Lipster's father of first degree murder, and the judge sentenced him to life in prison.<sup>68</sup>

In *Borawick v. Shay*,<sup>69</sup> the plaintiff recovered repressed memories through hypnosis therapy.<sup>70</sup> Before hypnosis therapy, she did not "remember" her aunt and uncle sexually abusing her.<sup>71</sup> The plaintiff testified, however, that during the course of her therapy she recovered repressed memories of the sexual abuse.<sup>72</sup> She allegedly recovered the first repressed memory while driving home from lunch one day.<sup>73</sup> She also testified that she recovered more repressed memories of sexual abuse in subsequent days.<sup>74</sup> The defendant filed a motion to exclude her testimony,<sup>75</sup> and the magistrate judge granted the motion.<sup>76</sup> The motion was granted based on the hypnotist's lack of qualifications and the overall unreliability of the plaintiff's testimony.<sup>77</sup>

---

67. *Id.* at 1440. In addition, he told her that no one would believe her and that he would kill her if she told anyone. *Id.*

68. *Id.* at 1438.

69. *Borawick v. Shay*, 842 F. Supp. 1501 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995).

70. *Id.*

71. *Id.* at 1502-03.

72. *Id.*

73. *Id.* at 1502.

74. *Id.* at 1502-03.

75. *Id.* at 1502.

76. *Id.* at 1501.

77. Spadaro, *supra* note 2, at 1180-81. Magistrate Judge Joan G. Margolis contended that certain safeguards must be present to balance plaintiffs' and defendants' interests in such a sensitive case. *Id.* at 1180. Judge Margolis stated that these safeguards should at least provide "that the hypnotist be appropriately qualified, that he or she avoid adding new elements to the subject's description, and that a permanent record be available to ensure against suggestive procedures . . . [and that] other evidence [be present] to corroborate the hypnotically enhanced testimony." *Id.* In *Borawick*, the plaintiff's hypnotist met neither the safeguards nor the other required qualifications. *Id.* at 1181.

In addition, the court contended that Joan Borawick had accused many other people of sexually abusing her. *Id.* at 1180. She had claimed that men who were members of the Masons raped her when she was three years old, others had injected her with drugs, and that chanting people with black gowns had forced her to drink blood during a disturbing ritual. *Id.* The court asserted that Borawick's wild accusations not only ruined her own credibility, but also ruined the reliability of her claims of memory recovery during hypnosis therapy. *Id.* at 1181-82.

Lawsuits that deal with repressed memories generally implicate two main issues: the statute of limitations<sup>78</sup> and the admissibility of testimony concerning repressed memory therapy.<sup>79</sup>

#### *D. Repressed Memory Syndrome and the Statute of Limitations*

As the courts and the public become increasingly aware of Repressed Memory Syndrome, “discovery” statutes tolling the statute of limitations in sexual abuse cases have become increasingly common.<sup>80</sup> In the context of Repressed Memory Syndrome, a discovery statute may toll the statute of limitations until certain causes of actions are discovered, or at least until causes of actions should have been discovered with reasonable due diligence.<sup>81</sup>

The State of Washington was the first to apply its general discovery statute to civil actions involving childhood sexual abuse.<sup>82</sup> Other states have since followed suit.<sup>83</sup> While most states now directly apply their discovery statutes in sexual abuse situations,<sup>84</sup> some states still depend upon the courts for this implementation in childhood sexual abuse cases.<sup>85</sup>

---

78. *Id.* at 1164.

79. *Id.* at 1170.

80. *Id.* at 1166.

81. *See* Ernsdorff & Loftus, *supra* note 39, at 142.

82. *See* WASH. REV. CODE ANN. § 4.16.340(1) (West Supp. 2003).

83. At least twenty-seven states have similar discovery statutes. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1 (West Supp. 2002); ILL. COMP. STAT. ANN. § 5/13-202.2 (West Supp. 2002); MASS. GEN. LAWS ANN. ch. 260, § 4C (West Supp. 2002); MO. ANN. STAT. § 537.046 (West Supp. 2002); NEV. REV. STAT. ANN. 11.215 (Michie 2002); N.M. STAT. ANN. § 37-1-30 (Michie Supp. 2002); OKLA. STAT. ANN. tit. 12, § 95(6) (West 2000); S.D. CODIFIED LAWS § 26-10-25 (Michie 1999); VA. CODE ANN. § 8.01-249(6) (Michie Supp. 1999); WIS. STAT. ANN. § 893.587 (West 1997).

84. *See, e.g.*, MO. ANN. STAT. § 537.046 (West Supp. 2002). Missouri’s statute provides:

In any civil action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within five years of the date the plaintiff attains the age of eighteen or within three years of the date the plaintiff discovers or reasonably should have discovered that the injury or illness was caused by child sexual abuse, whichever later occurs.

*Id.*

85. *See* Peterson v. Huso, 552 N.W.2d 83 (N.D. 1996). The North Dakota Supreme Court used the applicable discovery statute to determine that the statutory language, pertaining to the accrual of claims for relief, tolls the statute of limitations for causes of action for sexual assault and battery until the actual discovery of such action by the plaintiff. *Id.* at 86 (citing N.D. CENT.

Two main mechanisms delay the statute of limitations in repressed memory cases. First, discovery statutes may increase the time allowed to initiate lawsuits in sexual abuse cases by tolling the statute of limitations.<sup>86</sup> Similarly, other statutes may allow extensions to the statute of limitations for a period of time after reaching the age of majority.<sup>87</sup> Second, some statutes require objective and substantiated evidence to make a claim for childhood sexual abuse.<sup>88</sup> Although most states now permit the tolling of the statute of limitations in repressed memory cases of sexual abuse, this rule is not unanimous.<sup>89</sup> Also, because the statutes deal only with civil cases, it is difficult to determine how repressed memories affect the statute of limitations in criminal cases involving sexual abuse.

### *E. Expert Testimony in Repressed Memory Cases*

Although most states allow tolling of the statute of limitations in repressed memory cases, parties to a proceeding still need expert testimony to explain both the reason for the delay between the incidence of sexual abuse and the filing of the current claim, as well as the ambiguous nature of Repressed Memory Syndrome.<sup>90</sup> Expert

---

CODE § 28-01-18(1) (1999)).

86. Ernsdorff & Loftus, *supra* note 39, at 142.

87. *Id.*

88. *See, e.g.*, CAL. CIV. PROC. CODE § 340.1 (West Supp. 2002); OKLA. STAT. ANN. tit. 12, § 95(6) (West 2000).

89. *See, e.g.*, Doe v. Maskell, 679 A.2d 1087 (Md. 1996). The Maryland Supreme Court refused to extend a discovery rule's coverage to repressed memories. *Id.*

90. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 580 (1993). Several courts require expert testimony on Repressed Memory Syndrome. Johnson, *supra* note 24, at 961. For example, in *Moriarty v. Garden Sanctuary Church of God*, 511 S.E.2d 699 (S.C. Ct. App. 1999), *aff'd*, 534 S.E.2d 672 (S.C. 2000), the South Carolina Court of Appeals mandated expert witness testimony in all lawsuits involving childhood sexual abuse in order to prove the allegations of repressed memory. Johnson, *supra* note 24, at 961.

Other courts have also required expert testimony in cases dealing with repressed memories. *Id.* at 962. Courts require expert testimony because expert witnesses are able to explain to the jurors the "extent of scientific knowledge concerning memory and its accuracy of recalled events, as well as external factors and surrounding circumstances which may influence memory." *Id.*

In *State v. Hungerford*, the New Hampshire Supreme Court held that plaintiffs' testimony pertaining to Repressed Memory Syndrome "could not be understood by the average juror without the assistance of expert testimony." 697 A.2d 916, 922 (N.H. 1997). "Their memory of the events described above, according to the theory, has undergone a physiological process unlike ordinary memory, with which an average juror would be familiar." *Id.*

testimony is also needed to legitimize Repressed Memory Syndrome in the minds of the jury.<sup>91</sup>

In 1993, the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*, set forth a new test to aid trial judges in determining the reliability of expert testimony.<sup>92</sup> The Court proposed four factors to consider when reviewing expert testimony: (1) the ability of the expert's theories and methods to be tested, (2) whether these theories and methods have been subject to peer review, (3) the rate of error present in the study or test results, and (4) the overall degree of acceptance in the scientific community.<sup>93</sup>

After evidence passes the *Daubert*, now Federal Evidence Rule 702 test,<sup>94</sup> federal courts must still apply the balancing test found in Rule 403. This test balances the probative value of evidence against the unfair prejudice the evidence might cause when heard by a jury.<sup>95</sup> When applying a Rule 403 balancing test, judges must consider the persuasiveness of the expert's testimony, as well as the risk of

---

Some commentators believe that the value of expert witness testimony in repressed memory cases outweighs the added cost and burden of these experts. See Johnson, *supra* note 24, at 963. They assert that both the complex nature and lack of agreement concerning Repressed Memory Syndrome requires expert witnesses to assist jurors in making sense of the confusing body of research. *Id.*

91. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 580 (1993). While the intricacies of repressed memory theory are beyond the average juror's experience and understanding, jurors often find Repressed Memory Syndrome intuitively plausible. Johnson, *supra* note 24, at 962. Not surprisingly, lawsuits involving repressed memories "are usually fraught with the potential for wrongful conviction." *Id.* This great potential for wrongful conviction in repressed memory cases stems from American society's fascination with childhood sexual abuse allegations and the fact that although Repressed Memory Syndrome is scientifically documented, the psychological community has been unable to reach consensus on its probative value. *Id.*

92. 509 U.S. at 588.

93. *Id.* at 593-94. On December 1, 2000, Federal Rule of Evidence 702 was amended in order to codify *Daubert*. Rule 702, in its present form 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702 (emphasis added).

94. In this Note, "Rule" refers specifically to the Federal Rules of Evidence.

95. FED. R. EVID. 403.

misleading the jury given the difficulty of placing proper weight on expert testimony as compared with other witnesses' testimony.<sup>96</sup> Within the scientific community, differences in opinion regarding the reliability of Repressed Memory Syndrome make the Rule 403 balancing test especially important in repressed memory cases.<sup>97</sup>

#### *F. Spontaneous Resurfacing of Repressed Memories*

In one category of recovery, repressed memories resurface spontaneously through a triggering mechanism, such as a flashback or a fleeting glance.<sup>98</sup> Spontaneous resurfacing of repressed memories tends to occur instantaneously, although one such memory may trigger the resurfacing of other repressed memories.<sup>99</sup>

The spontaneity of the triggering mechanism makes it unlikely that memory implantation plays a role because little human interaction is involved in the recovery process.<sup>100</sup> People who spontaneously recover a repressed memory may seek therapy, however, to draw out the repressed memories more fully.<sup>101</sup>

#### *G. Repressed Memories Recovered in Therapy*

Therapy may also trigger the recovery of repressed memories.<sup>102</sup> Therapy creates a risk-free environment so that any thoughts, repressed or otherwise, may be expressed safely.<sup>103</sup> Therapists use many devices in attempting to draw out repressed memories.<sup>104</sup> These

---

96. Richmond, *supra* note 4, at 544-45. Courts have used section 403 of the Federal Rules of Evidence to keep expert testimony out of a trial. *Id.*

97. *Id.* A potential problem arises under discovery statutes that toll statutes of limitations. *Id.* Many do not clearly address the issue of when the tolling of the statute of limitations for childhood sexual abuse ends and the running of the statute resumes. *Id.* It may end once the repressed memory is first "recovered," when the person successfully completes therapy, or somewhere in between. *Id.*

98. Ernsdorff & Loftus, *supra* note 39, at 138.

99. See Borawick v. Shay, 842 F. Supp. 1501 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995) (explaining Plaintiff's claims that initial memory recovery led to a chain reaction of other recovered memories).

100. See *infra* note 119.

101. See *infra* note 120.

102. Ernsdorff & Loftus, *supra* note 39, at 138.

103. *Id.* at 138-39.

104. See *infra* notes 124-28 and accompanying text.

devices include questionnaires,<sup>105</sup> group therapy,<sup>106</sup> books,<sup>107</sup> fantasy therapy,<sup>108</sup> and hypnosis.<sup>109</sup> These devices potentially implant or supplement memories in patients instead of recovering repressed memories.<sup>110</sup>

Therapists may unwittingly implant memories in their patients either because the therapists are more concerned with the process than the outcome of therapy,<sup>111</sup> or because the therapists believe that other disorders, such as bulimia, result from repressed memories of sexual abuse.<sup>112</sup> As would be expected, given the reliability concerns related to therapy-based recovery, some lawsuits involving therapy-recovered repressed memories have revealed false claims.<sup>113</sup>

---

105. *See infra* note 124.

106. *See infra* note 125.

107. *See infra* note 126.

108. *See infra* note 127.

109. *See infra* note 128. Even though psychologists debate the validity and accuracy of hypnotically recovered memories, courts recognize many problems concerning hypnotically recovered memories. Kristy L. Topham, *Borawick v. Shay: The Admissibility of Hypnotically-Induced Memories*, 27 GOLDEN GATE U. L. REV. 423, 432 (1997). Repressed memories recovered through hypnosis are susceptible to suggestibility, confabulation (where a person fills in the gaps of her memory in order to make the memory logical and understandable), and memory hardening. *Id.* In addition, repressed memories recovered through hypnosis might be a "mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." *Id.* As mentioned, the debate concerning hypnotically recovered memories adds another dimension to the general debate on Repressed Memory Syndrome. *Id.*

The validity of hypnotically recovered repressed memories is beyond the scope of this Note, except in that repressed memories recovered through hypnosis provide an example of repressed memories recovered through therapy generally. The additional debate focusing on hypnosis as a means to recover valid, accurate memories extends this Note's proposal that a difference in reliability and accuracy exists between the two trigger mechanisms involved in repressed memories.

110. Julie Schwartz Silberg, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1598 (1993). Therapists can implant false or fabricated memories easily through the tone of their voices or the phrasing of their questions. *Id.* In addition, five to ten percent of humans are considered "highly suggestible." *Id.*

111. Ernsdorff & Loftus, *supra* note 39, at 161.

112. *See supra* note 10 and accompanying text.

113. *See supra* note 2.

### III. ANALYSIS OF REPRESSED MEMORY SYNDROME AND FALSE MEMORY SYNDROME

Opponents of Repressed Memory Syndrome tend to consider repressed memories, as a whole, to be unreliable.<sup>114</sup> Most critics, however, use examples of repressed memories recovered through therapy as their primary means of debunking the theory.<sup>115</sup> This is probably due to the nature of the two methods of recovering repressed memory, spontaneous resurfacing and therapy.

Spontaneous resurfacing occurs as a result of two main actions.<sup>116</sup> Various triggering events, such as catching a glimpse of one's own child, may cause a spontaneous resurfacing of a repressed memory.<sup>117</sup> Spontaneous flashbacks may also cause the resurfacing of a repressed memory.<sup>118</sup> Because recovery of the repressed memory is spontaneous in either case, less room exists for outside influences to taint the recovered memory.<sup>119</sup> Thus, this type of repressed memory recovery seems more reliable than those memories recovered through therapy.<sup>120</sup>

---

114. See *supra* note 2.

115. See *supra* note 2.

116. See Ernsdorff & Loftus, *supra* note 39, at 138.

117. Franklin v. Duncan, 884 F.Supp. 1435 (N.D. Cal. 1995), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

118. See Ernsdorff & Loftus, *supra* note 39, at 138. A "flashback" is defined as:

[R]eliving of a traumatic experience as if it were currently happening. Flashbacks can be stimulated by normal life experiences, especially milestones, such as marriage, birth of a baby, or death. They can be evoked by sexual encounters, or even by something as mundane as a particular laugh or certain expression.

*Id.*

119. *Id.* As Ernsdorff and Loftus state, "The environment in which a memory is recalled may have subtle, or perhaps not so subtle, influences." *Id.* See also Johnson, *supra* note 24, at 946. Opponents of Repressed Memory Syndrome focus their criticism on the distortion, suggestibility, and malleability of memories, thus making false memories more likely in repressed memory cases. *Id.* Critics claim that, if ordinary memories are susceptible to outside suggestions, then a repressed memory of an event that may have occurred decades ago must be even more so. *Id.* In spontaneous resurfacing of repressed memories, these criticisms are less likely to matter since the repressed memory has less opportunity to be filtered through the suggestions and prodding of a therapist. *Id.*

120. The environment surrounding the retrieval of a repressed memory may influence that memory. This implies that environment may also influence the accuracy and reliability of the memory. Thus, it is logical to conclude that a spontaneously recovered repressed memory is more reliable than a repressed memory recovered during therapy, as the latter has more

Spontaneous resurfacing of repressed memories, however, is not completely free from the reliability issues that plague therapy-recovered repressed memories. For example, people who recover repressed memories through triggering events or flashbacks may seek therapy to explain the painful memory, to cope with it, or simply to learn more about it.<sup>121</sup>

The second recovery method is therapy. Since therapy is believed to be a safe, no-pressure environment, some scholars claim therapy is the ideal place for repressed memories to surface.<sup>122</sup> Others criticize therapy-recovered repressed memories because therapists now diagnose Dissociative Amnesia more frequently than in the past.<sup>123</sup> Many criticize therapists for retrieving repressed memories in ways that include questionnaires,<sup>124</sup> group therapy,<sup>125</sup> books,<sup>126</sup> fantasy therapy,<sup>127</sup> and hypnosis.<sup>128</sup> Each of these techniques allows the

---

exposure to potential environmental pressures and influences.

121. Some people enter therapy simply because they have a feeling or premonition that they were sexually abused as children, even before experiencing any spontaneous resurfacing of memories. Johnson, *supra* note 24, at 947. These patients implicitly demand recovery of repressed memories from the moment they enter therapy. *Id.*

122. See Ernsdorff & Loftus, *supra* note 39, at 138-39. Many times, therapy provides a safe haven where the patient may open up to the repressed memories. *Id.* at 138. The therapist may act as a comforting companion to ease the patient through the painful process. *Id.*

123. See Johnson, *supra* note 24, at 947. More therapists diagnose dissociative amnesia because there is greater awareness of the phenomenon of repressed memories and awareness of the prevalence of childhood sexual abuse in society. *Id.* Further, the DSM-IV recognizes Repressed Memory Syndrome as legitimate. *Id.*

124. Ernsdorff & Lotus, *supra* note 39, at 159. Questionnaires can be used to bias a patient. *Id.* For example, one therapist gives a questionnaire to patients, containing detailed questions dealing with incest, but only general questions concerning one's education, health, and work status. *Id.*

125. *Id.* at 159-60. Group therapy benefits survivors of traumatic events, but it can also bias patients and implant false memories. *Id.* Patients may desire to belong to the group to gain acceptance by taking on the memories and thoughts of fellow group members. *Id.* Patients may also be influenced by fellow group members when they listen to detailed accounts of childhood sexual abuse and see others nodding, agreeing, and affirming the detailed account. *Id.* Expectations of therapists and group members influence the patient, especially when the patient's history of behavior is similar to the one sharing her detailed account of past sexual abuse. *Id.*

126. *Id.* at 160. Some therapists give patients books containing information about sexual abuse when they suspect the patient may have been sexually abused. *Id.* The books include a list that describes vague or common feelings that are associated with sexual abuse. *Id.* However, these feelings are also associated with common feelings of people who have not been sexually abused. *Id.*

127. *Id.* Therapists use a technique in which they ask patients to "fantasize," "make stories

therapist to suggest past incidents of sexual abuse as a means for the patient to become a mentally healthy adult.<sup>129</sup> These techniques, however, may implant memories of abuse that never existed.<sup>130</sup> In addition, techniques like group therapy may further reinforce these “memories” by cementing them into the patient’s mind as reality.<sup>131</sup> The false memories may then be repeated, embellished, and strengthened.<sup>132</sup>

Although therapy-recovered repressed memories can be accurate, their reliability is more suspect for legal purposes than in normal therapist-client interaction.<sup>133</sup> Some patients’ problems may be a result of repressed memories, but therapy creates more room for therapist-induced suggestion.<sup>134</sup> Thus, repressed memories recovered during therapy seem less likely to be reliable than those recovered during spontaneous resurfacing.

---

up,” or “guess” at the cause of the feelings they are currently feeling. *Id.* Patients are encouraged to input detail and expand on the theory of the cause. *Id.* Many patients later confuse the “fantasized” memories with real memories, believing that the “fantasized” memories reflect reality and the cause of their current feelings. *Id.*

128. Spadaro, *supra* note 2, at 1180. In *Borawick*, the court listed safeguards for the retrieval of repressed memories through hypnosis, which included having a qualified hypnotist who refrains from adding new elements or memories to the patient’s description of events, and who makes a permanent record of the procedures available to the court. *Borawick v. Shay*, 842 F. Supp. 1501 (D. Conn. 1994), *aff’d*, 68 F.3d 597 (2d Cir. 1995).

129. Ernsdorff & Loftus, *supra* note 39, at 161. Some therapists are not concerned with the accuracy of a retrieved memory. *Id.* They treat the retrieved memory as a means to mental health and not the end. *Id.* Thus, if a patient feels better about herself or is “healed” of other psychological problems, then whether she was actually abused in the past does not matter to the therapist. *Id.*

130. See Spadaro, *supra* note 2, at 1195-96.

131. Ernsdorff & Loftus, *supra* note 39, at 145.

132. *Id.*

133. See Johnson, *supra* note 24, at 947. Therapists are accused of inserting memories into patients’ minds. *Id.* Most accusers point to the power therapists have over their patients because of the natural need many patients have to please or receive attention from their therapists. *Id.*

134. See Spadaro, *supra* note 2, at 1160-61. Several studies have determined that people’s recall or retrieval of memory is extremely susceptible to outside influences that may change or modify the memories being retrieved. *Id.* See also Ernsdorff & Loftus, *supra* note 39, at 155. Some psychologists maintain that the “therapeutic environment can be so suggestive that if a therapist goes looking for a memory of childhood sexual abuse, ‘it is more likely they’ll find it whether it happened or not.’” *Id.*

#### IV. PROPOSAL FOR DIFFERENTIATING BETWEEN SPONTANEOUS RESURFACING AND RECOVERY DURING THERAPY

The debate surrounding Repressed Memory Syndrome places courts in a delicate situation. They must balance the interests of victims who have actually suffered abuse with the interests of alleged perpetrators who were falsely accused of abuse. The Federal Rules of Evidence promote the admissibility of evidence, but call for judges to be gate-keepers and exclude evidence that unfairly prejudices juries.<sup>135</sup>

Because courts must balance the concerns of true victims with those of the falsely accused, they should focus on the *recovery methods* of repressed memories. This would allow courts to filter unwarranted claims by giving judges more assurance of valid or reliable repressed memories. Testimony of repressed memories when recovered by reliable methods has more probative value, aiding courts' efforts to differentiate between genuine and false claims of repressed memories of sexual abuse. The differentiation between the repressed memory recovery methods may also arm juries with the necessary information to reach a just outcome.

Prior courts and researchers have considered Repressed Memory Syndrome in cases to determine the reliability of repressed memories, the admissibility of expert testimony, and the restrictions of statutes of limitations.<sup>136</sup> Proponents of Repressed Memory Syndrome extol its virtues and reliability, while opponents of Repressed Memory Syndrome criticize it as unreliable and without merit.<sup>137</sup> Courts, proponents, and opponents, however, ignore the difference between various types of memory retrieval when determining whether retrieved memories are credible. They fail to examine whether the retrieval mechanism of the repressed memory affects, or should affect, Repressed Memory Syndrome cases.

---

135. *See infra* note 138.

136. *See, e.g.*, *Franklin v. Duncan*, 884 F. Supp. 1435 (N.D. Cal. 1995), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

137. *See Spadaro, supra* note 2, at 1158.

*A. Greater Awareness and Limiting Instructions*

Perhaps the least controversial proposal would be to raise awareness among judges and attorneys of the different retrieval mechanisms in repressed memory cases and the resulting reliability of testimony recovered by each retrieval mechanism. Judges may then consider how the repressed memory was retrieved when applying the Rule 403 balancing test.<sup>138</sup> In cases where judges are not well-versed in the various retrieval mechanisms, lawyers should be knowledgeable enough to educate judges. Heightened awareness of retrieval mechanisms will provide a more complete analysis for determining the probative value of testimony involving repressed memories. In addition, the court should give jury instructions that account for the varying reliability of repressed memories retrieved through different mechanisms. The instruction should inform the jury that more evidentiary weight should be given to repressed memories recovered through spontaneous resurfacing than through therapy.<sup>139</sup>

---

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

Evidence of repressed memories retrieved in therapy has less probative value than repressed memories recovered through spontaneous resurfacing. Thus, under the Rule 403 balancing test, it would be much harder to allow evidence of repressed memories retrieved in therapy to go to a jury.

139. This jury instruction would probably be most effective if the trial contained expert testimony concerning various retrieval mechanisms, and if given after a jury instruction on the credibility of witnesses. The below instruction would provide an example of how this principle can be employed:

Witness’ Repressed Memory Testimony

In reference to witness’ testimony concerning repressed memories, you may consider the way in which the witness came to remember the repressed memory. You may consider whether the witness remembered the repressed memory through a therapy setting or through a spontaneous resurfacing, such as from a flashback or triggering mechanism. In deciding what weight and value you ought to give the witness’ testimony, you are warranted in placing more weight in the testimony if the repressed memory was remembered or retrieved through a spontaneous resurfacing than if it was remembered or retrieved through therapy.

### *B. Expanding Daubert in Repressed Memory Cases*

A second proposal builds upon the expert testimony criteria set forth in *Daubert*.<sup>140</sup> In addition to the four items an expert witness must disclose according to *Daubert*,<sup>141</sup> therapists should also be required to document and reveal the process they used to recover the repressed memories, the number of clients they have treated for repressed memories of childhood sexual abuse,<sup>142</sup> and the success rates and follow-up data for clients that have Dissociative Amnesia. These additional requirements focus on the specific therapist and the individual's retrieved memory, as opposed to the scientific body of knowledge on Repressed Memory Syndrome.

These additional requirements would have the bonus of giving courts a more accurate insight into the particular expert witness. Also, the requirements would give the presiding judge more insight into whether the value of the expert's testimony outweighs any prejudice it might cause among jurors.<sup>143</sup>

### *C. Allow Spontaneously Recovered, but not Therapy Recovered Memories*

Another proposal calls for courts to differentiate between repressed memories recovered through therapy and those recovered through spontaneous resurfacing. Judges could allow testimony of spontaneously resurfaced memories into court without collaborating evidence. They could also allow evidence of therapy-recovered

---

140. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

141. *Id.* at 593-94. *See also supra* Part II.E.

142. This additional requirement would aid the judge in determining whether the therapist used the excuse of childhood sexual abuse to "cure" all mental problems. Excessive reliance on the diagnosis of dissociative amnesia or past childhood sexual abuse may uncover the fact that the repressed memory of childhood sexual abuse was implanted in the patient's mind by the therapist.

143. For example, if a psychologist has never before treated a client for Repressed Memory Syndrome, then his testimony regarding the patient's recovered memories may be less probative, and thus outweighed substantially, by the prejudice his testimony would garner. However, a psychologist who has seen, diagnosed, and treated many patients for Repressed Memory Syndrome would have more experience in detecting true cases of repressed memories. Thus, his testimony concerning a patient's recovered memory may be *more* probative, and thus *not* be outweighed substantially, by the prejudice his testimony might produce.

memories, but only when accompanied by corroborating evidence, proof of injury, or heightened requirements of therapists. This proposal recognizes the fundamental difference between the two types of repressed memory retrieval, allocating the burden of proof to meet these differences accordingly. It also recognizes that while repressed memories recovered in therapy settings are generally less reliable, therapy may sometimes be a useful medium by which repressed memories can be recovered. Thus, therapy-recovered repressed memories will not be precluded outright in court settings.

#### V. CONCLUSION

Researchers, judges, commentators, and courts debate the validity and reliability of Repressed Memory Syndrome. While most opponents of Repressed Memory Syndrome claim that repressed memories are unreliable, they usually point to incidences involving therapy-recovered repressed memories to support their claims. Without research comparing spontaneous recovery with therapy-induced recovery of repressed memories, it is difficult to determine whether opponents would automatically reject spontaneously resurfacing as well. Regardless, spontaneously resurfaced repressed memories seem more reliable than therapy-recovered repressed memories, as well as less vulnerable to the outside influences often found in therapy settings. Judges, attorneys, and jurors should learn about the different triggering mechanisms of repressed memory recovery. In addition, courts should give more evidentiary weight to repressed memories recovered through spontaneous resurfacing than to those recovered through therapy.