

REPRESSED MEMORY EVIDENCE IN CIVIL SEXUAL ABUSE CASES

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ABSTRACT

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This article discusses the admissibility of repressed memory evidence in sexual abuse cases. It postures that current treatment of such evidence exemplifies the continued lack of understanding society has of how harshly sexual abuse impacts victims. Analysis focuses on whether discovery rules should toll statutes of limitations, whether or not “discovery” has occurred, whether or not courts should admit repressed memory evidence, and, if so, the applicable standard of proof needed to prove the abuse.

These issues require careful scrutiny of a variety of competing concerns. Proponents of the use of repressed memory evidence focus on the need for victims to have their day in court, and the difficulty victims have proving sexual abuse. Opponents, on the other hand, focus on defendants’ right of repose and the unreliability of repressed memory evidence. After comparing these various concerns, the article concludes that state legislatures should create statutory schemes that better balance competing concerns and that better predict the treatment of repressed memory evidence in court.

In addition to these concerns, much of the repressed memory debate centers on whether the victim recovered the memory spontaneously or via a therapeutic trigger method. With this in mind, the article suggests that statutory schemes could better balance the competing concerns by treating spontaneously recovered memories with more leniency than therapeutically recovered memories.

To delineate this argument, the article compares the current New York statutory scheme to the current California statutory scheme. It contends that California’s scheme provides a solid starting point and model for other states to follow and expand upon, while challenging New York’s scheme as far too imbalanced against victims.

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I. INTRODUCTION

Sexual abuse is by no means a new crime afflicting society, and it has certainly received increased attention in recent decades.¹ In spite of such increased attention, society remains backward-minded, failing to grasp the severity of psychological trauma sexual abuse victims endure. Treatment of various types of evidence during the litigation of sexual abuse cases, such as repressed memory evidence, illustrates this lack-luster attitude. Repression of memory occurs when ideas, perceptions, and memories of past trauma are forced into the unconscious.² Memory recovery can then occur spontaneously or with the help of various therapeutic techniques. Despite that recovered memory evidence allows victims otherwise barred by statutes of limitations to bring claims of sexual abuse, such evidence still receives a great deal of criticism.

Victims face three main hurdles when they bring sexual abuse lawsuits. First, they must get past the applicable statute of limitations, which requires a determination of not only whether a discovery rule will apply to toll the statute of limitations, but also what constitutes “discovery.” Second, victims must obtain a favorable ruling on the admissibility of recovered memory evidence. And finally, once admitted into court, victims must adequately prove the abuse according to the applicable standard of proof.

State legislatures could do a great deal more to ensure that victims navigate these hurdles with greater ease. Current approaches to application of discovery rules, rulings on admissibility,

¹ FERGUSSON, DAVID M. & MULLEN, PAUL E., *CHILDHOOD SEXUAL ABUSE – AN EVIDENCE BASED PERSPECTIVE* 1 (Sage Publications, Inc. 1999).

² Johnson, Laura, *Annual Survey of South Carolina Law: Evidence Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 942 (Summer 2000).

and application of standards of proof do not create enough predictability or consistency. While recovered memories do inherently contain an element of unreliability, legislatures should avoid a wholesale prohibition of recovered memory evidence. Statutes should exist to allow application of delayed discovery doctrines to all cases involving recovered memories. However, to help balance the aforementioned concerns, legislatures should then distinguish between therapeutically and spontaneously recovered memories, when delineating what exactly triggers “discovery.” That is, instances of spontaneous recovery should not trigger “discovery” as easily as instances of therapeutic recovery would. Beyond making a determination as to whether or not “discovery” has been triggered, judges should not hold any further gate-keeping power. Instead statutes should allow all recovered memory evidence into the courtroom for the jury to evaluate. Once inside the courtroom, legislatures should again distinguish between spontaneously and therapeutically recovered memories when delineating applicable standards of proof. Statutes should hold victims who recovered memory of abuse spontaneously to a lower standard of proof than victims who recovered memory of abuse via therapeutic techniques.

II. HISTORY OF SEXUAL ABUSE

History shows the continual discovery and rediscovery of sexual abuse; however, only in recent decades has society begun to recognize and publicly expose cases of sexual abuse. Dr. Roland Summit’s statement from 1988 portrays a more traditional outlook of sexual abuse: “There is a sad, self-preserving irony about a world that cannot see its own cruelty with victims who can’t give voice to their pain. After 125 years of discarded enlightenment, we still act as if victims are freaks and as if it is a virtue to be ignorant of sexual victimization.”³ People may

³ CONTE, JON R., CRITICAL ISSUES IN CHILD SEXUAL ABUSE – HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 99 (Sage Publications, Inc., 2002).

have always accepted the possibility that sexual abuse can occur, but it remains debatable that people accept the reality that it actually does occur; especially the prevalence with which it occurs. Let us say that a person's friend or family member is a victim of sexual abuse. Would this change his look-the-other-way mentality towards the crime? This question remains debatable today just as it did prior to three decades ago. In fact, during the first seven decades of the 20th century, little was written about sexual abuse. Scholars did not consider rape and sexual abuse topics worth writing about.⁴ When writings produced, they were filled with skepticism and fear, and downplayed the seriousness of the issue.⁵ Before 1975, articles pertaining to rape and sexual abuse focused largely on the fear of fabricated allegations.⁶ Even as far back as Sir Matthew Hale, who served as Chief Justice of the Court of King's Bench in England for several years a couple centuries ago, and who did not appear to have undue skepticism of women alleging rape wrote, "It must be remembered, that rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."⁷ For generations afterward, law review authors and judges continued to quote this statement by Hale during discussions of sexual offenses. It is understandable that skepticism of sexual offenses should exist. However, the level of skepticism seen prior to 1975 went far beyond moderation.⁸

⁴ *Id.*, at 34.

⁵ *Id.*, at 30 and 33.

⁶ *Id.*, at 35-37.

⁷ *Id.*, at 35, as written in Hale's treatise, The History of the Pleas of the Crown, published in 1736.

⁸ *Id.*, at 41.

Due to the lack of documentation on sexual abuse before 1975, little is known about the prosecution of such cases prior to this time.⁹ One study done at the beginning of the 21st century by John E. B. Myers, Susan E. Diedrich, Devon Lee, Kelly Fincher, and Rachel M. Stern examined 463 appellate opinions of sexual abuse cases between 1900 and 1950. This study shows a steady but modest increase in the volume of sexual abuse prosecution between 1900 and 1950, with very few occurring between 1900 and 1910.¹⁰ These appellate decisions from 1900 to 1950 show less skepticism toward victims of sexual abuse than expected,¹¹ however, the study only examines appellate opinions. Thus, the study does not make clear whether or not the trial courts showed the same lack of skepticism.¹²

After 1975, the country witnessed the birth of the women's rights movement and the victims' rights movement, an increase in science, and a more modern idea of child protection. As a result, much more documentation of the subject exists from the past few decades.¹³ In addition, the prevalence of sexual abuse cases increased significantly during the 1980's and 1990's.¹⁴ However, the increase in written material and the resulting increase in awareness have not necessarily reduced the skepticism that has historically pervaded this area.¹⁵ For example, in 2002 prosecutors in Oregon dropped their case against a victim's father when she spoke up about other sexual abuse by her neighbor. They felt that her accusations against the neighbor created

⁹ *Id.*, at 42.

¹⁰ *Id.*, at 47 and 53.

¹¹ *Id.*, at 53.

¹² *Id.*, at 55-56.

¹³ *Id.*, at 42.

¹⁴ *Id.*, at 63.

¹⁵ *Id.*, at 42.

“evidence of past sexual behavior” that her father’s attorney would be able to use against her.¹⁶

In another Oregon case, school officials waited three to four years after hearing several underage girls complain of sexual abuse by their music instructor before calling the police in 1999.¹⁷ Also, in 1999 Sports Illustrated did a special report on sexual abuse in youth sports.¹⁸ This article focused particularly on a Little League coach from San Bernardino, California who received an 84 year prison sentence after pleading guilty to sexually abusing five children under his instruction between 1990 and 1996.¹⁹ Prior to this case he received a sentence of up to seven years at a state mental hospital for molesting other children.²⁰ He estimates that he molested several hundred children over 30 years.²¹ When parents of the San Bernardino Little League found out about his past of sexual abuse, they tried to inform Little League officials.

Unfortunately, the perpetrator convinced them that he had changed his ways and that they had nothing to worry about.²² These examples clearly demonstrate the continued skepticism and ignorance of today, as summarized in the 1999 Sports Illustrated article: “Societal ignorance about the nature of pedophilia is another thing that keeps victims from coming forward...society doesn’t understand what happened to them, doesn’t understand the seduction process.”²³

¹⁶ *A Child’s Calls Unanswered*, THE OREGONIAN, Sept. 9, 2002.

¹⁷ Danks, Holly, *Music Teacher Sentenced for Sex Abuse of Students*, THE OREGONIAN, Feb. 16, 2001, at D5.

¹⁸ Nack, William, and Yaeger, Don, *Who’s Coaching Your Kid? The Frightening Truth About Child Molestation in Youth Sports*, SPORTS ILLUSTRATED, Sept. 13, 1999, at 40-53.

¹⁹ *Id.*, at 42.

²⁰ *Id.*, at 50.

²¹ *Id.*, at 42.

²² *Id.*, at 53.

²³ *Id.*, at 50.

As sexual abuse prosecution and litigation has increased during the past few decades, so too has professional and scientific involvement.²⁴ Increased involvement by professionals has led many to start questioning the truth of sexual abuse allegations, suggesting that many allegations have a basis in weak or flawed evidence. For example, in 1987, E.P. Benedeck and D.H. Schetky wrote:

Child psychiatrists, pediatricians and mental health professionals have recently been concerned by a deluge of referrals requesting evaluation of young children in regard to allegations of sexual abuse. A new cottage industry/profession has evolved and a group of experts in this specialist area have emerged to fill a serious need. Many of these experts, although well meaning, seem to be self-proclaimed and biased, always finding sexual abuse where alleged.²⁵

With the increased involvement of professionals came an increased involvement by the scientific community. As the general public became more aware of the prevalence of sexual abuse, research in the field has increased²⁶ such that the “general scientific research community”²⁷ no longer has the same degree of skepticism regarding sexual abuse allegations. Over time researchers have concluded that sexual abuse is by no means uncommon, that children of certain social status and from certain family situations have a greater risk of sexual abuse, and that exposure to sexual abuse can be linked to mental health issues and other problems later in life. These conclusions have led to even further awareness by the public of sexual abuse.²⁸

²⁴ Fergusson, at 5.

²⁵ Fergusson, at 5-6.

²⁶ *Id.*

²⁷ Fergusson, at 6.

²⁸ Fergusson, at 7.

Along with the increased scientific involvement, courts began seeing the introduction of expert testimony in sexual abuse cases.²⁹ This phenomenon also came about as part of the post 1980 reform era.³⁰ Of the 463 cases evaluated in the study done by Myers, et al., none between 1900 and 1950 involved use of experts by the prosecutors.³¹ The idea of using experts from the mental health profession stemmed from the lack of evidence that generally existed in sexual abuse cases.³² Even today, significant debate centers on the appropriateness of these experts because some issues relating to sexual abuse are not yet beyond doubt and question.³³

III. DEVELOPMENT OF REPRESSED MEMORY SYNDROME

a. Introduction

As previously mentioned, repression of memory occurs when a person forces memories associated with trauma from their conscious to their unconscious.³⁴ Victims do not forget these memories, rather they stow the memories away elsewhere for later discovery. Unlike suppression of memory, where victims remain aware of the traumatic memory but choose to avoid it by shoving it aside in their mind, repression of memory occurs when the memory is actually “inaccessible to the conscious mind.” Repression of memory does not destroy the

²⁹ Clark, Karla-Dee, *Innocent Victims and Blind Justice: Childrens' Rights to be Free From Childhood Sexual Abuse*, Spring 1990 N.Y.L. SCH. J. HUM. RTS. 214, 248. Clark comments that “The use of expert testimony in child sexual abuse cases is just beginning to take form.”

³⁰ Conte, at 56.

³¹ *Id.*, at 55.

³² *Id.*, at 59.

³³ Fergusson, at 7.

³⁴ Johnson, at 942.

memory, rather, the memory later requires stimuli to re-appear in the conscious mind.³⁵ As it can often take quite a while for these memories to re-surface in the conscious mind, the theory of repressed memory relies on the idea that victims have not always had awareness of the injury.³⁶

Most psychologists buy into the theory that the human mind can actually repress memories.³⁷ In 1896 Sigmund Freud first proposed the idea that memories do actually last a long time but that the human mind will bury certain traumatic memories as a defense mechanism. He extended this theory to suggest that in particular the human mind can repress memories that cause anxiety, such as childhood abuse. Most therapists and psychoanalysts accept Freud's idea about repressed memories,³⁸ an idea he describes as slowly excavating a "buried city...layer by layer."³⁹

b. The Repressed Memory Debate

The debate about repressed memory evidence stems less from a lack of belief that people can actually repress memories and instead from whether these repressed memories, once recovered, have enough reliability.⁴⁰ Evaluation of repressed evidence has to balance the need to protect victims of abuse with the need to protect individuals from false accusations.⁴¹ Opponents

³⁵ Spadaro, Joseph A., 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, 1157 (Spring 1998).

³⁶ *Id.*

³⁷ *Id.*, at 1154.

³⁸ *Id.*, at 1186.

³⁹ Johnson, at 943.

⁴⁰ Smith, Colette Mulrenan, Comment, *Recovered Memories of Alleged Sexual Abuse: An Analysis of The Theory of Repressed Memories Under the Washington Rules of Evidence*, 18 SEATTLE U. L. REV. 51, 60 (Fall 1994).

⁴¹ Spadaro, at 1167.

worry about reliability of recovered memories because the idea of repression has basis only in unsubstantiated speculation and anecdotal evidence. Proponents, on the other hand, feel that recovered memories do have scientific validity and accuracy, and that regardless, many mental health theories are difficult to prove with empirical evidence. In particular, these proponents argue that gathering empirical evidence of repressed memory would be nearly impossible, practically and ethically, because it would require exposing victims to extreme trauma.⁴²

Specifically, opponents find issue with the various trigger methods for recovering repressed memories. Some triggering mechanisms cause spontaneous resurfacing, while other mechanisms draw out the memories over time. Spontaneous triggers include flashbacks, fleeting glances, surprise memories, or other stimuli. Opponents of repressed memory evidence have less of an issue with recovery of memories via one of these spontaneous triggering methods because the likelihood of memory implantation dramatically decreases in such instances. These opponents become less happy with spontaneously recovered memories when people subsequently seek therapy to help “draw out the repressed memories more fully.”⁴³

Therapy induced memory recovery causes even more speculation and dispute.⁴⁴ The most common devices used in therapy to draw out repressed memories include guided imagery and hypnosis.⁴⁵ Hypnosis involves artificially inducing a state of sleep or trance. Guided imagery, a

⁴² *Id.*, at 1158.

⁴³ Fletcher, Camille L., Note, *Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?* 13 WASH. U. J.L. & POL'Y 335, 348 (2003).

⁴⁴ Johnson, at 947.

⁴⁵ Richmond, Douglas R., *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 KAN. L. REV. 517, 523 (May 1996).

form of hypnosis, involves starting with known facts and then guiding a person towards a purported factual base.⁴⁶ Other devices also include group therapy, books, and questionnaires.⁴⁷ Opponents claim issue with such devices because they fear there is too much risk of implantation of false memories.⁴⁸ In addition to concern of false implantation of memories, opponents worry about the suggestibility of witnesses and distortion of recovered memories by filling in memory gaps with false details.⁴⁹ Such opponents fear that therapists aim to heal patients and in doing so have a tendency of too easily labeling symptoms as results of early childhood sexual abuse.⁵⁰ Moreover, opponents worry that the “absolute belief or conviction in the accuracy of the therapeutically induced memory”⁵¹ will create ineffective cross-examination.⁵²

The concern over implantation of false memories led individuals who had been wrongly accused of sexual abuse to form the False Memory Syndrome Foundation (FMS) in 1992. Interestingly, however, even supporters of FMS believe that humans can repress memories but argue that many times people falsely claim to have recovered memories of abuse.⁵³

⁴⁶ *Id.*, at 523-524.

⁴⁷ Johnson, at 946.

⁴⁸ *Id.*, at 941.

⁴⁹ Eisenberg, Matthew J., Comment, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 TEMPLE L. REV. 249, 261 (Spring 1995).

⁵⁰ Johnson, at 947.

⁵¹ Richmond, at 526.

⁵² Eisenberg, at 262.

⁵³ Johnson, at 949.

IV. IMPACT OF DISCOVERY RULES AND STATUTES OF LIMITATIONS ON CASES
INVOLVING REPRESSED MEMORY

a. Statute of Limitations and Discovery Rules

The hot debate over recovered memories centers on a few main issues involved in sexual abuse lawsuits. First, it must be determined whether or not the claim will be barred by the applicable statute of limitations. Due to the basic idea behind repressed memory that victims remain unaware of any injuries from sexual abuse until the memory is recovered, the question of whether or not this unawareness should prevent the statute of limitations from running must be determined.⁵⁴

Typically a statute of limitations will begin running at the time the injury occurs, regardless of whether the victim is aware of the injury. Sexual abuse claims differ slightly in that statutes of limitation do not run until after the victim turns eighteen. Frequently in sexual abuse claims the victim will not remember the trauma until after the statute of limitation has run, which would ordinarily mean that the victim would not have a claim.⁵⁵ Proponents argue the unfairness to victims of this kind of approach, saying that those accused gain an “unfair advantage by strict application of a limitations time bar.”⁵⁶ Thus, the importance of victims having their day in court must then be weighed against the importance of defendants’ right of repose in order to determine whether or not statutes of limitation should toll until memory of the abuse occurs.⁵⁷ Devices such as discovery rules will do just this. These rules say that when there is delayed discovery of

⁵⁴ Spadaro, at 1164.

⁵⁵ Atkins, Lisa A., Comment, *Remembered Memories... True or False? Should the Discovery Rule be Applied to Toll the Statute of Limitations?* 24 CAP. U.L. REV. 581, 584 (1995).

⁵⁶ Spadaro, at 1164.

⁵⁷ Atkins, at 594.

the cause of action, the statute of limitation does not run until the cause of action has been discovered.⁵⁸

b. Current Applications of Discovery Rules

In deciding whether to toll a statute of limitations in a repressed memory case by applying a delayed discovery rule, a court must weigh the interest of plaintiffs in having their day in court with the defendant's interest in planning for the future without constant worry of liability. Most civil cases involving repressed memories do not reach the appellate level. Most state courts, however, find that the interest of the plaintiffs', as well as the need to deter sexual abuse, outweigh the interests of defendants', and as such, allow application of delayed discovery rules in cases involving repressed memories.⁵⁹ In other words, courts liberally apply discovery rules to repressed memory cases because to do otherwise would leave victims without any recourse for awful crimes such as sexual abuse.⁶⁰

The discovery doctrine has received a wide range of interpretations. Some states have actually rejected the doctrine entirely when applied to repressed memory cases.⁶¹ Narrower interpretations have required victims to show proof of the abuse in order to toll the applicable statute of limitations.⁶² Courts that take these narrow approaches in cases of repressed memory

⁵⁸ *Id.*, at 585.

⁵⁹ Montoya, Jerald M., Comment, *Requiring Clear and Convincing Proof in Tort Claims Involving Recently Recovered Repressed Memories*, 25 SW. U. L. REV. 173 (1995).

⁶⁰ Atkins, at 587.

⁶¹ Spadaro, at 1165.

⁶² In *Tyson v. Tyson*, 727 P.2d 226, 228 (Wash. 1986), the court held that a victim must show "objective, verifiable evidence of the original wrongful act and the resulting physical injury. In *Moriarty v. Garden Sanctuary Church of*

seem to focus on the strength of the evidence when interpreting discovery rules. These courts seem to look farther out towards the trial and assess the evidence that is likely to come in to support a claim of abuse before determining whether or not to allow the applicable discovery rule to toll the statute. In other words, when it appears that the victim has solid evidence to prove his or her allegations courts seem more inclined to allow the discovery rule to toll the applicable statute of limitations.

Since many courts will actually apply discovery rules in cases involving repressed memory, the issue typically becomes determining what constitutes “discovery,” so as to kick in a delayed discovery rule and toll the statute of limitations. Victims argue for delayed discovery in a couple different ways. For example, some argue that they repressed the memories of abuse from their conscious recall until after the expiration of the statute of limitations, while others argue that they did not make a connection between the abuse and their present problems until after the statute of limitations expired.⁶³

Unfortunately for plaintiffs, states that allow application of discovery rules apply a myriad of approaches rather than maintaining a consistent application of the doctrine. As a result, even with clear discovery rules on the books, victims cannot know for sure whether or not they will receive their day in court. Most broad interpretations of the discovery doctrine require varying degrees of knowledge on the part of victims. For example, some states require that victims show that they could not have made the causal connection between the abuse and the effects of the abuse even after “reasonable care and diligence.”⁶⁴ Other states hold that the statute

God, 334 S.C. 150, 173 (Ct. App. 1999), the court held that a victim must show “independently verifiable objective” evidence and “expert opinion testimony.”

⁶³ Eisenberg, at 255-256.

⁶⁴ Spadaro, at 1170.

of limitations will run as soon as the victim becomes aware of the abuse, irrespective of whether or not the victim has knowledge of the causal connection.⁶⁵ And still others will toll the applicable statute of limitation until the victim has both knowledge of the abuse and knowledge of causation.⁶⁶

Discovery of the actual abuse means that the victim completely repressed the memory, while discovery of causation means that the victim had awareness of the abuse but just had not discovered the link between current psychological issues and the abuse until later. As such, courts tend to prefer setting the “discovery” time to the time at which the victim discovers the actual abuse (complete repression) as opposed to the time at which the victim discovers the causal connection.⁶⁷ Requiring knowledge of causation in addition to knowledge of the abuse itself makes it more likely that “discovery” will occur much later and thus toll the statute of limitation longer.

V. RELIABILITY OF REPRESSED MEMORY

a. Standards Applied to Scientific and Quasi-Scientific Based Expert Testimony

Once a claim of sexual abuse survives the applicable statute of limitations, the victim must then deal with admissibility of recovered memory evidence into the courtroom.⁶⁸ To make this determination, the reliability of recovered memory must be examined. As this type of evidence will come into court through expert testimony, analysis of reliability begins by looking at the typical standards applied to expert testimony. Unfortunately, evaluation of scientific expert testimony does not receive an abundance of guidance from case law, federal evidence

⁶⁵ Id., at 1169.

⁶⁶ Id., at 1170.

⁶⁷ Eisenberg, at 255.

⁶⁸ Spadaro, at 1170.

rules, or the various state evidentiary rules. As of 1923, and up until 1975 when the Federal Rules of Evidence went into effect, courts followed the standard for evaluating scientific evidence as set forth in *Frye v. United States*.⁶⁹ Under *Frye*, courts deem such evidence reliable if it has gained general acceptance in the particular field in which it belongs.⁷⁰

This general acceptance test began to lose some footing at the same time the Federal Rules of Evidence came into play,⁷¹ although, many states still apply the *Frye* standard.⁷² To summarize, the Federal Rules of Evidence require relevancy, which means that the evidence must tend to make the existence of an event or fact “more or less probable than it would be without the evidence.”⁷³ In addition, even if relevant, the evidence cannot be unfairly prejudicial so as to substantially outweigh any probative value of the evidence.⁷⁴ With regard to expert testimony, courts require reliability as well as relevancy. Sufficient reliability exists if sufficient facts or data support the testimony and if reliable principles and methods were used and applied to specific facts of the case at hand.⁷⁵

Federal Rule of Evidence §702 did little, if anything, to clarify the standard for scientific evidence.⁷⁶ Courts at the time had split views on whether to apply the general acceptance test of

⁶⁹ Bernstein, David E., *Junk Science in the United States and the Commonwealth*, Winter 1996 Yale Journal of International Law 123, 126-128.

⁷⁰ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁷¹ *Id.*, at 1014. Bernstein, *Junk Science in the United States and the Commonwealth*, at 128.

⁷² Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 386.

⁷³ Federal Rules of Evidence §401.

⁷⁴ Federal Rules of Evidence §403.

⁷⁵ Federal Rules of Evidence §702.

⁷⁶ Bernstein, *Junk Science in the United States and the Commonwealth*, at 128.

Frye or the relevance based test set forth in §702.⁷⁷ As a result of this split, various tests focusing on the reliability aspect of scientific evidence began to emerge.⁷⁸ While these reliability tests took hold, courts began evaluating *Frye* again, reformulating it to address the reliability issue.⁷⁹ At the same time, courts applying supposedly stricter reliability tests continued allowing in questionable testimony, leading to an increased battle over “junk science.”⁸⁰ Critics of such evidence began pushing for a stricter version of *Frye* that would look behind the scenes at the methodology of the science testified to.⁸¹ Eventually, the Supreme Court answered their call, coming down with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸² which put forth a multi-prong approach to the evaluation of the reliability of expert testimony. These prongs include whether or not the technique is generally accepted in the scientific community, the rate of error for the technique used, whether the theory is falsifiable, whether the theory has been subjected to peer review and publication, and whether standards exist to evaluate the technique.⁸³ These factors are not definitive; courts can look at other factors as well. Essentially *Daubert* meant that the court must evaluate the trustworthiness of the expert and the

⁷⁷ *Id.*, at 129.

⁷⁸ *Id.*, at 129-132. *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978) - Courts should weigh probativeness, materiality, and reliability against the possibility of prejudice to determine admissibility of scientific evidence; *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984) – An extremely liberal test favoring relevancy; *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985) – Test focused on the expert’s reasoning.

⁷⁹ *Id.*, at 132.

⁸⁰ Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 392.

⁸¹ *Id.*

⁸² *Daubert v. Verrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993).

⁸³ *Id.*, at 593-594.

probativeness of the studies / data to the issues of the case.⁸⁴ In other words, *Daubert* made the *Frye* standard only one of the multiple prongs to evaluate expert testimony by establishing new guidelines to replace the general acceptance test from *Frye*.⁸⁵

The development of *Daubert* also opened the door to a stricter evaluation of less scientific or quasi-scientific evidence; a category containing syndrome evidence such as repressed memories.⁸⁶ Many *Frye* jurisdictions would not apply *Frye*'s general acceptance test to non-scientific evidence, however, once *Daubert* came along, quasi-scientific evidence could not necessarily escape stricter analysis anymore. In fact it is rare that courts do not allow *Daubert* to apply to this less scientific or quasi-scientific evidence.⁸⁷ Furthering the effect of *Daubert* on the evaluation of scientific evidence, the Supreme Court held in *General Electric Co. v. Joiner*⁸⁸ that courts may analyze not only the general methodology of the science, but also the expert's reasoning.⁸⁹ In addition, the case of *Kumho Tire Co., Ltd. V. Carmichael*⁹⁰ established that *Daubert*'s reliability test also applies to non-scientific evidence.⁹¹

Despite all this tightening by *Daubert* and subsequent cases of the standard applied to expert testimony pertaining to both scientific and unscientific evidence, many states comprising

⁸⁴ Bernstein, *Junk Science in the United States and the Commonwealth*, at 136.

⁸⁵ *Id.*, at 135.

⁸⁶ *Id.*, at 137.

⁸⁷ *Id.*, at 138.

⁸⁸ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

⁸⁹ Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 393.

⁹⁰ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

⁹¹ Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 386.

almost half of the United States population still apply a *Frye* standard.⁹² Many states that have not adopted a *Frye* standard have also not adopted *Daubert* or the subsequent rule from *Kumho Tire*.⁹³ Thus it remains unclear that *Daubert* and *Kumho Tires* actually apply in state court.⁹⁴ With most sexual abuse cases arising in state courts, this creates a less than clear idea as to the standard that should apply to repressed memory evidence.

The split among *Frye* jurisdictions as to whether the general acceptance test should apply to the general methodologies or the conclusions of the expert further muddies the waters.⁹⁵ Instead of focusing on one or the other of these approaches, many *Frye* jurisdictions have instead chosen to focus on the reasoning behind the expert's conclusions; a nod towards *Joiner*.⁹⁶ Evaluation of the expert's reasoning leans toward applying *Frye* tests beyond just scientific evidence, but many *Frye* jurisdictions still claim that it does not apply to non-scientific evidence, such as testimony based on knowledge or experience, or social science evidence. Syndrome evidence, however, largely remains the exception to the rule that *Frye* does not apply to social science evidence.⁹⁷ Typically the rationale for not applying *Frye* to social science evidence stems from the belief that unlike other scientific evidence, social science evidence will not

⁹² *Id.*, at 386-387 n. 7-23. The states include Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, Pennsylvania, and Washington.

⁹³ Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 387-388.

⁹⁴ Conte, at 113.

⁹⁵ Bernstein, *Frye, Frye Again: The Past, Present, and Future of the General Acceptance Test*, at 396-398.

⁹⁶ *Id.*, at 398-399, n. 107, n. 110, n. 112, n. 115, n. 118 .

⁹⁷ *Id.*, at 402.

necessarily appear infallible to jurors.⁹⁸ The fact that syndrome evidence remains the exception to the rule seems to indicate an underlying assumption or belief that jurors will not necessarily assume fallibility of all social science evidence.

b. Admissibility of Repressed Memory Evidence

Unfortunately very little guidance by state courts exists regarding standards applied specifically to admissibility of repressed memory evidence in civil cases. That is, states apply a variety of standards without any real consensus as to what the best standard should be. Some courts apply a “per se excludable test”⁹⁹ out of concern over suggestibility and reliability of repressed memory evidence. Application of this test requires looking to the *Frye* standard.¹⁰⁰ As previously discussed, this requires looking at only one of the prongs of *Daubert*; whether or not the theory has gained general acceptance in the scientific community. Opponents who argue for a *Daubert* standard suggest that repressed memory fails multiple prongs of the test set forth in *Daubert*. They suggest that memory repression cannot be tested, and that without independent corroboration it can be easily falsified. In addition, these opponents feel that the anecdotal information available on repressed memories has not been subject to peer review. These opponents continue on to argue that regardless, Federal Rule of Evidence 403 would exclude such evidence due to its unfairly prejudicial nature.¹⁰¹ Such arguments under a *Daubert* approach fall short under a *Frye*-based approach because *Frye* does not require analyzing these things. The “per se excludable test” also falls flat, however, because *Daubert* did overrule *Frye*

⁹⁸ *Id.*

⁹⁹ Foster, E. A., Comment, *Repressed Memory Syndrome: Preventing Invalid Sexual Abuse Cases in Illinois*, 21 S. ILL. U. L. J. 169, 176 (Fall 1996).

¹⁰⁰ *Id.*

¹⁰¹ Richmond, at 565.

and it is not clear which standard will apply to expert testimony. As such, since the “per se excludable test” rests on application of a *Frye* standard, it rests on shaky ground.¹⁰²

Another approach allows all repressed memory into evidence. This “total admissibility” approach allows the jury to evaluate and weigh the credibility of the recovered memory evidence. Proponents of this approach argue that the jury will be able to properly assess the credibility via cross-examination.¹⁰³ This argument seems to show a belief by proponents of the “total admissibility” approach that recovered memory testimony is no different in terms of reliability than any other testimony.

An alternative to both the “per se excludable” and “total admissibility” approaches includes assessing procedural safeguards followed during the recovery process as part of the evaluation of the totality of circumstances.¹⁰⁴ Under this approach the court will focus on the procedure involved in obtaining the evidence before the trial begins to determine admissibility.¹⁰⁵ Proponents of requiring certain procedural safeguards argue that these safeguards serve a dual purpose. That is, they help bolster a victim’s claims of sexual abuse while minimizing the risk that defendants will have to face false charges.¹⁰⁶

Most of the procedures focus on hypnotically induced memory recovery, requiring a licensed therapist to conduct the hypnosis independent from any police or lawyers, with only the therapist and victim present. The therapist must record the recollection of the victim both before

¹⁰² Eisenberg, at 261.

¹⁰³ In *Harding v. State*, 246 A.2d 302, 306 (Md. Ct. Spec. App. 1968), the court held that hypnotic testimony was admissible because the jury could weigh the credibility of the victim to determine the reliability of the testimony.

¹⁰⁴ Eisenberg, at 262.

¹⁰⁵ Foster, at 177.

¹⁰⁶ Richmond, at 550.

and during the hypnosis, preferably via videotape.¹⁰⁷ Additional procedural safeguards might include recording the recollections without adding anything to the descriptions of the victim, having an impartial therapist conduct the session, limiting the amount of information the subject receives from the hypnotist, recording the session, and limiting the session to involving only the subject and the hypnotist.¹⁰⁸ Other procedural safeguards take a stricter approach, requiring that the memory prior to hypnosis be the same as after hypnosis. Proponents of this requirement argue that without it the memory recovered via hypnosis can be considered tainted.¹⁰⁹ An additional stricter approach focuses on corroboration of the hypnotically recovered memory, requiring that the recovered memory must be corroborated independently from the hypnosis procedure.¹¹⁰ Corroboration occurs when a fact is presented that “confirms or supports the allegation.”¹¹¹ Regardless of the specific procedural safeguards required, evaluating the totality of circumstances and requiring such safeguards represents a middle ground between the exclusion per se and total admissibility approaches.¹¹²

This aforementioned variety of approaches exists for both forensically recovered memories and clinically recovered memories. Forensically recovered memories are typically used in criminal prosecutions, while clinically recovered memories are used in the civil tort

¹⁰⁷ *State v. Hurd*, 432 A.2d 86, 97 (N.J. 1980); *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995).

¹⁰⁸ *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1123 (8th Cir. 1985).

¹⁰⁹ *Richmond*, at 526.

¹¹⁰ *Borawick*, at 609. The court said the test requiring so many safeguards was inflexible but that her allegations were not credible because she made “far-fetched, uncorroborated accusations” of sexual abuse against many others aside from only the defendants; some people whom she knew and others she did not know.

¹¹¹ Definition given in California under *Cal. Civ. Proc. Code* 340.1(k)(1).

¹¹² *Eisenberg*, at 268.

context.¹¹³ Compared to forensically recovered memories, however, there is much less consensus from the courts as to which approach to use for clinically recovered memories.¹¹⁴ For forensically recovered memories, the United States Supreme Court suggests a middle ground totality of the circumstances standard for evaluation of such evidence.¹¹⁵

Following suit from the approach typically used for forensically recovered memories, the United States Supreme Court does seem at least to advise against an approach that would exclude all clinically recovered memories per se.¹¹⁶ Some courts lean towards applying the middle ground approach involving evaluation of the totality of circumstances.¹¹⁷ Applying the aforementioned procedural safeguards becomes more difficult with clinically recovered memories as opposed to forensically recovered memories. That is, many people recover memory or abuse during therapy irrespective of whether or not any type of litigation will later ensue. Thus requiring the recording of hypnosis sessions would prove infeasible a great deal of the time. As such, it has been suggested that instead of passing judgment on recovered memory testimony, such evidence will be admitted under the evidentiary rules pertaining to expert testimony in general. The jury can then evaluate the reliability of the evidence under those standards.¹¹⁸

c. Presentation of Repressed Memory Evidence

If repressed memory evidence meets whichever admissibility standard the court decides to apply, further restrictions exist regarding presentation of the evidence to the jury. For

¹¹³ *Id.*, at 250.

¹¹⁴ *Id.*, at 268.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Montoya, at 189.

example, some courts hold that experts can testify as to their beliefs in the theory of memory repression and whether or not a victim's behavior is "consistent with someone who suffers from repressed memories." These experts cannot, however, testify as to their opinion of whether or not the alleged abuse actually occurred.¹¹⁹

In addition, courts might apply different standards of proof to recovered memory evidence. Often a preponderance of the evidence standard applies to tort claims.¹²⁰ This requires a showing that it is more likely than not that the abuse occurred. Some courts, however, focus on procedural safeguards, namely corroboration, when deciding whether or not to allow the presentation of recovered memory testimony. This corroboration requirement suggests showing clear and convincing evidence of the abuse, a higher standard of proof than preponderance of the evidence, requiring evidence that demonstrates a high probability of truth. Such corroborative evidence might include proof that a defendant has sexually abused others or physical proof of abuse to the current claimant.¹²¹

States might also require a higher standard of proof for cases that have involve "crime-like torts" because these kinds of torts have a much more serious nature than most civil cases.¹²² That is, sexual abuse claims produce serious consequences, including severe financial loss and damage to the reputation of accused defendants. In addition, judgments against those accused of sexual abuse often result after the presentation of questionable and unsubstantiated evidence. It

¹¹⁹ *Isely v. Capuchin Province*, 877 F. Supp. 1055, 1067 (E.D. Mich. 1995).

¹²⁰ *Montoya*, at 197.

¹²¹ *Id.*, at 203.

¹²² *Id.*, at 198.

has been suggested that sexual abuse claims fall into the category of “crime-like torts” and as such should require a heightened standard of proof.¹²³

VI. PROPOSALS FOR STATUTORY ADJUSTMENTS REGARDING TREATMENT OF REPRESSED MEMORY EVIDENCE

a. Introduction

States vary a great deal regarding their statutory approach to the issues discussed so far; many taking a far from adequate approach. On one end of the spectrum sits a state such as New York, which does not have an extended statute of limitations for sexual abuse claims. New York addresses statutes of limitations in §§214-215 of the New York Civil Practice Law and Rules. On the civil side, these two sections essentially distinguish between claims based on intentional torts and claims based in negligence, providing a one year statute of limitations for the former¹²⁴ and a three year statute of limitations for the latter¹²⁵. In addition to this very basic approach the statute of limitations for claims based on intentional torts will only toll if the perpetrator has been charged with a crime¹²⁶. Insanity or infancy can also occasionally toll the applicable statute of

¹²³ *Id.*, at 199.

¹²⁴ *New York Civil Practice Law and Rules* §215: “The following actions shall be commenced within one year:...(3) an action to recover damages for assault, battery, false imprisonment...”

¹²⁵ *New York Civil Practice Law and Rules* §214: “The following actions must be commenced within three years: ... (5) an action to recover damages for a personal injury...”

¹²⁶ *New York Civil Practice Law and Rules* §215(8): “Whenever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises, the plaintiff shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedure law in which to commence the civil action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining.”

limitations¹²⁷. Other than these very limited examples¹²⁸, New York does not, either statutorily or through case law, allow any other mechanisms to toll statutes of limitations. This includes declining to apply discovery rules to sexual abuse cases involving repressed memory.

On the other end of the spectrum sits a state such as California, which has a much more comprehensive and victim sensitive approach, as seen in California Civil Code of Procedure §340.1. Sections (a) through (d) of this statute deal with the application of California's statute of limitations. Plaintiffs' can sue for childhood sexual abuse up until the age of 26 or within three years of discovering the causal connection between the abuse and the injuries.¹²⁹ The statute differentiates, however, between allegations against perpetrators and allegations against other entities. If a plaintiff sues a defendant other than the alleged perpetrator under a negligence or

¹²⁷ *New York Civil Practice Law and Rules* §208: "If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability."

¹²⁸ *Steo v. Cucuzza*, 213 A.D.2d 624 The court held that her emotional and psychological injuries did not fit within the insanity exception because "the record shows that the plaintiff was a productive member of the workforce and was a successful wife and mother and fails to support the plaintiff's assertion that she suffered from an 'overall inability to function in society.'"

¹²⁹ *California Code of Civil Procedure* §340.1(a): "In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later..."

intentional tort theory, it must be established that the defendant “knew or had reason to know” of the abuse and failed to take reasonable precautionary measures to prevent it.¹³⁰ If these two standards are not met, a plaintiff cannot sue non-perpetrator defendants past the age of 26. In 2003 the California state legislature actually opened up the statute for the entire year, allowing plaintiffs to bring claims otherwise limited by the three year discovery rule.¹³¹

Section (f) of this statute goes on to discuss the applicable standards of proof once a claimant successfully survives the statute of limitation. This section refers to §115 of the Code of Evidence,¹³² which states, “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”¹³³

b. Discovery Rules and Statutes of Limitations

States such as New York represent a prime example of society’s lax attitude towards helping victims of sexual abuse. If state legislatures, such as that in New York, continue to

¹³⁰ *California Code of Civil Procedure* §340.1(b)(2): “This subdivision does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person...”

¹³¹ *California Code of Civil Procedure* §340.1(c): “Notwithstanding any other provision of law, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003.”

¹³² *California Code of Civil Procedure* §340.1(f): “Nothing in this section shall be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.”

¹³³ *California Code of Evidence*, §115.

remain silent and ignorant to the issues involved in sexual abuse, society will never make progress in adequately addressing the needs of victims. California, on the other hand, has demonstrated a much more open mind to the needs of victims. Most states do not adequately address the backward-minded attitude society continues to have regarding sexual abuse. As such, the aforementioned California statute represents a great model for other legislatures to follow when developing their own statutory schemes.

When developing a statutory scheme for treatment of sexual abuse lawsuits, legislatures should keep in mind the interests of both plaintiffs and defendants. Plaintiffs have a strong interest in having their day in court, while defendants have an interest in preventing false claims of abuse. Legislators must acknowledge the valid interests that defendants have in order to maintain credibility. Distinguishing between therapeutically and spontaneously recovered memories accomplish this aim. California's statute does not make such a distinction, demonstrating that it is merely a starting point for other legislatures.

Instead of simply laying out time limits for when the clock should start ticking for statute of limitation purposes, statutes should include clear definitions of "discovery," based on the method of memory recovery. Limited definitions of "discovery" should apply to claimants who recover memory spontaneously. These types of claimants have been unaware of the abuse through no fault of their own, and as such should not suffer more by getting locked out of court. Such a modification to California's statute would include a provision stating, "For victims who recover memory of sexual abuse spontaneously, discovery occurs only after the claimant has a clear understanding that the abuse occurred, as well as a clear understanding of the causal connection between the abuse and psychological injuries." Requiring knowledge of both the abuse and causation will create a longer window of time for claimants to file suit.

This more limited definition of “discovery” should only apply in cases of sexual abuse. Opponents worry that allowing claimants who understand that the abuse occurred, but do not file suit in time because they do not make the causal connection, to extend the statute of limitations will render many statutes of limitations ineffective for a wide variety of other tortuous acts. That is, opponents have concern that if an extended statute of limitations is allowed merely because a person’s “developmental limitations impaired or precluded their capacity to discover that an injury resulted from another person's tortuous act” such a standard would allow statutes of limitations to stay open regardless of whether the tort involved a negligent car accident or something much more serious.¹³⁴ Limiting these definitions of “discovery” to cases involving sexual abuse acknowledges that extended statutes of limitations in some cases would create inequities for defendants, while also acknowledging the egregious nature of sexual abuse and that “the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.”¹³⁵

On the other hand, claimants who recover memory of abuse via therapeutic techniques should have to abide by a broader definition of “discovery.” Such a provision might state, “For victims who recover memory of sexual abuse via therapeutic techniques, including but not limited to hypnosis and guided imagery, discovery occurs after the claimant has a clear understanding that the abuse occurred.” Such a definition will clearly make the triggering of “discovery” easier for these types of claimants. This distinction between methods of recovery serves to acknowledge the concerns related to false claims while still giving all claimants a fair

¹³⁴ Carro, Jorge L. & Hatala, Joseph V., *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239 (1996).

¹³⁵ *Id* at 1258.

chance at having their day in court. As long as state legislatures acknowledge valid concerns of defendants, they can succeed in applying delayed discovery rules in cases of sexual abuse because they will have greater credibility.

Judges should only determine whether a claimant has discovered the abuse and or the causation required to trigger “discovery.” Factors to evaluate in determining when the victim understood that abuse actually occurred should include the age of the victim, the number of years that have passed since the alleged abuse, and the time at which the victim first shared the abuse with anyone. Factors to evaluate in determining when the victim understood the causal connection between the abuse and the psychological effects should include whether and when the victim sought therapy, as well as whether and when the victim told anyone else about any psychological effects. In the case of a victim who never told anyone about the abuse and who never sought therapy, realization of the abuse and causal connection should be deemed to have occurred when the victim sought legal advice.

Unlike Jorge L. Carro and Joseph V. Hatala who advocate an elimination of statutes of limitation for all cases of sexual abuse,¹³⁶ an approach to application of discovery rules that distinguishes between types of recovery better balances the competing interests of victims and defendants. Carro and Hatala suggest that complete elimination of all statutes of limitation would increase the quality of evidence presented at trials because victims would have more time to gather corroborative evidence. They also suggest that it would decrease the number of unsubstantiated claims of sexual abuse because plaintiffs would not be racing the clock anymore. Their approach does nothing to alleviate concerns that opponents of recovered memory have because it does nothing to distinguish between how victims might recover their memories.

¹³⁶ *Id* at 1271.

Sexual abuse cases will not often involve eye witnesses or other solid evidence, but will instead often rest on evidence such as recovered memories. Carro and Hatala seem to suggest that eliminating the statute of limitations will allow plaintiffs more time to gather proof to substantiate and corroborate their claims. However, a recovered memory is a recovered memory; it will not become more reliable just because the plaintiff has no time limit within which to file suit.

Others have presented different victim-friendly approaches to application of discovery rules. For example, Gregory Gordon suggests enacting legislation that focuses entirely on discovery of all the elements of abuse, rather than making distinctions between victims who remember or repress memories of abuse.¹³⁷ Where this suggestion does certainly favor victims by saying that “discovery” only occurs after the victim has recovered memory of all the elements of the abuse, it allows for too much argument by opponents. Gordon’s approach does not distinguish between methods of recovery. Under his approach the statute of limitations would toll equally for victims who recovered memory of abuse through hypnosis and those who recovered memory of the abuse spontaneously. As such, it takes into account none of the concerns regarding hypnotically induced memories of abuse.

Application based on the type of recovery method in play, on the other hand, creates a much better compromise of the competing interests because it makes an attempt to weed out less credible claims without making it impossible for victims to have their day in court. As such, opponents of recovered memories lose some of their ammunition against this type of evidence.

¹³⁷ Gordon, Gregory G., Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359 (May 1993).

In addition, such an approach adds greater predictability for claimants trying to determine whether or not they survived the applicable statute of limitations.

c. Admissibility

Evaluating whether discovery has been triggered should mark the last role judges plays in sexual abuse cases. That is, once past the statute of limitations hurdle, victims should have the freedom to present all recovered memory evidence to the jury. Distinguishing between spontaneous and therapeutically recovered memories during the “discovery” phase has already served to weed out less credible claims of sexual abuse. As such, victims should receive more of a break from an evidentiary perspective once they make it into the courtroom. Codification of total admissibility will provide consistency for sexual abuse cases while also acknowledging that sexual abuse claims do not typically involve direct evidence of abuse. These claims typically come down to a “he-said-she-said” situation. If a victim has buried the memories of abuse, he or she will have no other way to fight the legal battle if he or she cannot testify to the repressed memories.

Admitting all recovered memory evidence will not result in inequities to defendants because the jury still has to evaluate this evidence according to applicable standards of proof. In order to make progress in addressing the true horror of sexual abuse, courts and society must take some risk. That is, society must have confidence in the jury system to catch any false claims. Juries do not lack guidance when they evaluate evidence. Cross-examinations conducted by defense attorneys help the jury evaluate the credibility of the victim as well as any testimony or evidence offered on behalf of the victim.

d. Standard of Proof

As stated previously, some have suggested that courts should adopt a higher standard of proof because of the “crime-like” nature of sexual abuse tort claims; particularly those involving recovered memories.¹³⁸ This approach requires making a distinction based on the criminal nature of between various types of torts. Unfortunately, such a distinction will create a fuzzy and unfair line because some torts may have both non-criminal and criminal similarities. In addition, such an approach completely disregards the differentiation in facts that can exist from one repressed memory case to the next. For instance, while one case might involve spontaneous memory recovery, another might involve therapy-induced memory recovery. When a victim spontaneously recovers memory of abuse it seems unfair to inflict a harsher than normal standard of proof because arguably fewer reliability issues exist as compared to the victim who recovers memory via therapeutic techniques. Thus, clumping all recovered memory cases into one category would not treat all claimants fairly.

Instead, as previously mentioned in Section VI (b) of this paper, state legislatures should apply different standards of proof based on whether the claim involves spontaneous or therapeutically induced memory recovery. Such an approach would serve to weed out less credible claims of sexual abuse while not denying claimants their day in court. Distinctions based on the type of memory recovery involved at the beginning of the process with statutes of limitations and discovery rules, combined with the same approach at the end with standards of proof, nicely book-ends the more relaxed total admissibility standard.

Such an approach in the standard of proof setting might include applying a higher standard to claimants who recover memories of abuse via therapeutic techniques while applying a regular preponderance of evidence standard to those who recover memories spontaneously.

¹³⁸ Montoya, at 198.

This kind of split acknowledges that victims of sexual abuse will sometimes bury memories of abuse while also acknowledging that not all recovered memories have equal reliability.

Claimants who recover memories of sexual abuse via therapeutic techniques should have to show independent corroboration. Sufficient independent corroboration should include proof that the alleged perpetrator has abused others in the past or testimony from actual eye-witnesses to the abuse. Other supplemental factors that should come in include journals kept by the victim before and after recovery of the memories of abuse, and extreme difficulty with gynecological or physical exams. Obviously these two factors would not suffice alone to prove abuse, however, the jury should here all of it so as to adequately evaluate the totality of the situation. Regardless of the standard of proof applied, cross-examination serves to assess credibility of all witnesses. Thus, a relatively low preponderance of evidence standard does not stand alone as a checkpoint on recovered memory evidence of the spontaneous nature.

VII. CONCLUSION

Sexual abuse claims involve a myriad of controversial issues; repressed memory evidence certainly involving no less controversy than other issues. In order to adequately address the needs of both victims and those accused of abuse, state legislatures need to step in and get more involved. Legislatures should enact statutes that better deal with the lack of predictability and consistency that exists with current statutes of limitations, discovery rules, and standard of proof rules. This paper does not suggest swaying all rules and statutes towards victims; rather it suggests designing legislation that adequately addresses the lack-luster attitude society continues to display towards this crime.

Such legislation should acknowledge concerns opponents have so as to erode the footing of opponents of repressed memory. One way to accomplish these goals involves distinguishing

cases based on the method of memory recovery, giving greater leeway to those who recovery memory spontaneously.