COMMENTS

Recovered Memories of Alleged Sexual Abuse: An Analysis of the Theory of Repressed Memories Under the Washington Rules of Evidence

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The problems began shortly after the birth of her first child: depression, crying jags brought on by little annoyances, inexplicable feelings of guilt, a feeling that she no longer belonged in her body, and periods of compulsive over-eating.[1] Jill no longer wanted her husband to touch her and was overcome with feelings of repulsion whenever he initiated intimate contact.

Determined to overcome these problems, Jill began therapy. After a number of sessions, Jill's therapist asked if she had ever been sexually

1. E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN xviii (Survivor's Checklist) (1990).

abused as a child. Jill was shocked and angered by the suggestion; she came from a "good" family. Her parents were upper middle class, college educated, and active in their community. Jill remembered family picnics, Christmas dinners, and backyard football games. Generally, she felt feelings of love and security when she recalled her childhood. Jill and her siblings had completed their college educations and were now married, with children of their own.[2]

The more Jill attempted to deny the suggestion that she had been abused, however, the more she was convinced that her therapist's suggestion might explain her inability to function properly. She read "The Courage to Heal,"[3] a book recommended by her therapist. She was profoundly struck by the following passages:

> If you are unable to remember any specific instances . . . but still have a feeling that something abusive happened to you, it probably did;[4] If you think you were abused and your life shows the symptoms, then you were;[5] If you don't remember your abuse you are not alone. Many women don't have memories, and some never get

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2. "Jill's" story is a composite taken from the results of questionnaires sent by the False Memory Syndrome Foundation (a tax-exempt institute, located at 3508 Market Street, Suite 128, Philadelphia, PA 19104), to people whose adult children have accused them of recently recovered memories of repressed childhood sexual abuse. The results were cited in a recent article. Hollida Wakefield & Ralph Underwager, *Recovered Memories of Alleged Sexual Abuse: Lawsuits Against Parents*, 10 BEHAV. SCI. & L. 483 (1992).

Wakefield and Underwager acknowledge that the individuals who responded to the questionnaires did not represent a random sample and that the information was provided by the accused parents and not the child. However, the authors note that the questionnaires represent the first data available regarding families, parents, and adult children where there are allegations of recovered memories of sexual abuse. *Id.* at 486.

The preliminary questionnaire data reflects functional, successful families with annual median family incomes of $60,000-$69,000; four-fifths of the parents are still married and judge their marriages to be happy; two-thirds of the fathers and one-half of the mothers have undergraduate or graduate degrees; the majority of the families reports having eaten dinner together as a family, going on family vacations, and being actively involved with their children while they were growing up. The accusing children are also highly educated (over one-fourth have graduate degrees, bachelor degrees or some college), ninety percent are female, and only one-third had psychological or psychiatric treatment prior to adulthood. The questionnaire results also indicate that in almost all cases (where the parents had knowledge of the therapy program), the therapists utilized a book by Ellen Bass & Laura Davis, THE COURAGE TO HEAL (1988), along with other survivor or self-help books. The therapists, approximately three-fourths of whom were female, are identified as social workers (24%), psychologists (33%), psychiatrists (8%) and counselors (33%). Over one-half of the female therapists were between the ages of 30 and 39, while the majority of male therapists were over the age of 40. Wakefield & Underwager, *supra*, at 486.

In 85% of the cases, siblings did not make allegations and in three-fourths of the cases, siblings did not believe that the allegations made by the accusing child were true. *Id.*

3. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL (1988).

4. *Id.* at 21.

5. *Id.* at 22.

> memories. This doesn't mean they weren't abused;[6] and, Of course . . . demands for proof are unreasonable. You are not responsible for proving that you were abused.[7]

Jill returned to her therapist and shortly thereafter, she began having nightmares involving a shadowy male figure. Jill would waken with a feeling of having been sexually threatened. The figure soon took on the face of her father and, with the help of her therapist, Jill began to recall a period of abuse spanning at least five years, from the time she was two years old until her seventh birthday. Her therapist encouraged her to confront her father, convincing Jill that her healing process could not begin until her father acknowledged that he had abused her.

The confrontation served only to alienate her parents and siblings, who responded to Jill's accusations with shocked disbelief. Jill's husband claimed he did not know who she was any more, and Jill contemplated suicide on more than one occasion.

Convinced that her memories were true, but with no other corroborating evidence, Jill brought a civil action against her father. She was convinced that she could put her life back together only after her father acknowledged what he had done to her and had taken responsibility for his actions.

Jill alleges that the trauma of the sexual abuse caused her to completely repress memory of the abuse and that she was unable to connect the abuse to any injury until her memory was restored through therapy. Jill is now 30 years old. Additionally, Jill alleges that her father's acts have caused her severe emotional distress and injury, including depression, anxiety, and suicidal tendencies. Jill's father has denied the allegations.

I. INTRODUCTION

One can hardly pick up a magazine or newspaper or turn on the television without reading or hearing about claims of repressed memories. A fifty-one year old man in Redwood City, California, was recently convicted of a murder that occurred over twenty years ago. The critical evidence against him was provided by his daughter who, for over twenty years, had repressed the memory of witnessing the murder.[8] In 1991, Roseanne Barr Arnold announced that her mother abused her from the time she was an infant until she was six or seven years old and that her memories had suddenly returned after having

6. *Id.* at 81.

7. *Id.* at 137.

8. Michalene Busico, *Nightmares About Daddy Won't Go Away*, TORONTO STAR, Nov. 17, 1991, at D4.

been repressed since her childhood.[9] Similarly, former Miss America Marilyn Van Derbur publicly stated that her father had sexually abused her and that she had repressed any knowledge of it until she was twenty-four years old.[10]

More recently, a thirty-four year old man claimed that Chicago's Roman Catholic Cardinal Joseph Bernardin sexually abused him when he was a seventeen year old seminary student and that he had repressed the memory of the abuse for seventeen years.[11] Paul McHugh, Director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins Medical Institution in Baltimore, receives approximately one telephone call per day from attorneys wanting to discuss a repressed-memory case. McHugh believes this issue has grown to epidemic proportions.[12]

Civil litigation by adults claiming recovered memories has increased sharply over recent years following changes in statutes of limitation, parental immunity laws, redefinition of the term "negligence," and the differentiation between "intentional infliction of injury" and "intentional act."[13]

The rise in reported sexual abuse cases has created an intense desire for scientific verification as to how people recall past sexual abuse.[14] Meanwhile, the scientific community has split into opposing camps hotly debating the validity of repressed memories. At this time, it appears that the legal community cannot rely with any certainty upon the validity of these types of claims absent agreement among the scientific community.

This Comment explores whether testimony regarding repressed memories is admissible under Washington rules of evidence. This Comment concludes that the process of repression and accurate recall of memories has not been proven to be a sufficiently reliable and trustworthy phenomenon to justify admission of evidence that abuse occurred.

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9. Roseanne Barr Arnold & Vickie Bane, *A Star Cries Incest*, PEOPLE MAGAZINE, Oct. 7, 1991, at 84-88.

10. Marilyn Van Derbur Atler & Vickie Bane, *The Darkest Secret*, PEOPLE MAGAZINE, June 10, 1991, at 88-94.

11. Patricia Edmonds, *Cardinal Combating Abuse Now Target of Charges*, USA TODAY, Nov. 15, 1993, at 3A.

12. Carol McHugh, *Suits Claiming Childhood Sex Abuse on Rise; Lawyers, Experts Question Recovered Memories*, CHICAGO DAILY L. BULL., Sept. 22, 1993, at 1.

13. J.K. Colaneri & D. R. Johnson, *Coverage for Parents' Sexual Abuse*, FOR THE DEFENSE, March, 1992, at 2-5.

14. Bruce Bower, *Sudden Recall: Adult Memories of Child Abuse Spark a Heated Debate*, SCI. NEWS, Sept. 18, 1993, at 184.

Section II of this Comment sets forth the historical and legal background of civil lawsuits claiming repressed memories of childhood sexual abuse in the State of Washington. Section III of this Comment describes the debate within the scientific community over whether memories can be completely repressed and accurately recalled. Section IV of this Comment explores the proper standard for admitting scientific evidence in the State of Washington. Section V of this Comment sets forth the two-tier inquiry engaged in by Washington courts to determine the admissibility of novel scientific evidence under Rule 702. Section VI of this Comment analyzes cases involving previous attempts by the Washington Supreme Court to determine the admissibility of new scientific theories. Section VII of this Comment explores how the Washington Supreme Court's previous *Frye* analyses may provide assistance in determining the admissibility of repressed memory evidence.

Finally, Section VIII of this Comment concludes that the scientific basis of the process of repression and accurate recall is insufficiently accepted in the scientific community to allow admission of the evidence. Anticipating a future definitive ruling by the Washington Supreme Court, this Comment frames the issue that the court should address when it is called upon to settle the question of admissibility.

For purposes of this Comment, it will be assumed that Jill's claim has survived any statute of limitations defense and is before the court, with no corroboration for her claim that her memory of the abuse was recalled in therapy other than her own testimony and that of her therapist.

II. History of Repressed Memory Claims of Childhood Sexual Abuse In Washington

Until 1988, a plaintiff's claim for childhood sexual abuse was greatly restricted and essentially barred by the statutes of limitations set forth in RCW 4.16.080[15] and 4.16.100.[16] RCW 4.16.080(2) provided that, in general, an action for personal injury must be brought within three years of the time the cause of action accrued.[17] RCW 4.16.100(1) provided that an action for assault and battery must be brought within two years.[18] If the person bringing the action was under the age of eighteen years at the time the cause of action accrued, the statute of

15. Wash. Rev. Code § 4.16.080 (1992).

16. Wash. Rev. Code § 4.16.100 (1992).

17. Tyson v. Tyson, 107 Wash. 2d 72, 74, 727 P.2d 226, 227 (1986) (5-4 decision), *superseded by* Wash Rev. Code § 4.16.190 (1988).

18. *Id.*

limitations was tolled until the person reached eighteen years of age.[19] Under these rules, the limitations period expired, at the latest, three years after the plaintiff's eighteenth birthday.[20] In 1986, a plaintiff challenged the trial court's finding that her claim was barred by the above-mentioned statutes of limitations.

A. Tyson v. Tyson

Nancy Louise Tyson was twenty-six years old when she sought damages from her father for multiple acts of sexual abuse that allegedly occurred when she was between the ages of three and eleven. She claimed that the sexual abuse had been blocked from her conscious memory until recovered during psychological therapy less than one year before she initiated the action.[21] The United States District Court for the Western District of Washington certified the following question of state law to the Washington Supreme Court:

> Does the discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered a cause of action, apply to intentional torts where the victim has blocked the incident from her conscious memory during the entire time of the statute of limitations?[22]

In urging the court to apply the discovery rule[23] to her cause of action, Ms. Tyson claimed that the alleged acts of sexual abuse had caused her such emotional trauma that she had repressed her memory of the events entirely.[24] Only years after the statute of limitations had expired did therapy trigger her knowledge of the abuse and her recognition that the abuse had caused her the emotional problems she was experiencing as an adult.[25] She argued that it would be unfair to pre-

19. WASH. REV. CODE § 4.16.190 (1988).

20. *Tyson*, 107 Wash. 2d at 75, 727 P.2d at 227.

21. *Id.* at 73, 727 P.2d at 227.

22. *Id.* at 73-74, 727 P.2d at 226-27.

23. The discovery rule provides that a statute of limitations will not begin to run until the plaintiff using reasonable diligence would have discovered the cause of action. U.S. Oil & Ref. Co. v. Department of Ecology, 96 Wash. 2d 85, 92, 633 P.2d 1329, 1333 (1981). The discovery rule was first adopted in Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969), in which the Washington Supreme Court held that, where an injured party may not know or be expected to know he has been injured, it would be unfair to automatically foreclose his cause of action because the statute of limitations had run. *Id.* at 665, 453 P.2d at 634-35. The court adopted a fundamental fairness test, balancing the "harm of being deprived of a remedy versus the harm of being sued." *Id.*; Mark D. Kamitomo, Note, *Discovery Rule Application in Child Abuse Actions*, 23 GONZ. L. REV. 223, 226 (1988).

24. *Tyson*, 107 Wash. 2d at 75, 727 P.2d at 227.

25. *Id.*

clude her claim because she was unable to discover her cause of action during the applicable limitations period.[26]

While recognizing that child sexual abuse has a devastating impact on the victim, the court refused to apply the discovery rule after seriously considering the potential effects on Washington's system of justice.[27] The potential adverse effects noted by the court included: (1) evidentiary problems arising from stale claims (including the trustworthiness of memory); (2) lack of empirical evidence of the occurrence of the alleged act and resulting harm; (3) lack of subjective methods of investigation and findings based upon physically observable evidence (rather than potential distortion of the truth through the psychoanalytic process); (4) great potential for spurious claims; (5) unreasonably low probability of a court being able to determine the truth; and, (6) the existence of a reasonable opportunity (three years beyond the age of majority) for the plaintiff to have asserted a claim.[28]

In 1988, two years after the *Tyson* decision, the Washington State Legislature applied the discovery rule to childhood sexual abuse cases by enacting RCW 4.16.340,[29] which expressly overruled the Supreme Court's decision in *Tyson*.

B. RCW 4.16.340. Actions Based on Childhood Sexual Abuse

RCW 4.16.340 provides, in part, as follows:

> (1) All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within the later of the following periods:
>
> (a) Within three years of the act alleged to have caused the injury or condition;
>
> (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
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> (c) Within three years of the time the victim discovered that the act caused the injury for which the claim is brought. . . ;[30]

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26. *Id.*

27. *Id.*

28. *Id.* at 75-80, 727 P.2d at 227-30.

29. WASH. REV. CODE § 4.16.340 (1988).

30. WASH. REV. CODE § 4.16.340 (1992). The statute was enacted by E.S.S.B. 6305 Sec. 1, 50th Leg., Reg. Sess., 1988 Wash. Laws 559, amended by S.B. 5950 Sec. 2, 51st Leg., Reg. Sess., 1989 Wash. Laws. 1578, and further amended by E.S.H.B. 2058 Sec. 2, 52nd Leg., Reg. Sess., 1991 Wash. Laws 1084.

The remaining text of the statute provides as follows:

> Provided, That the time limit for commencement of an action under this section is tolled for a child until the child reaches the age of eighteen years.

The statute, as originally enacted in 1988, provided for a cause of action within either (1) three years of the act alleged or (2) three years from the time of discovery. The 1989 amendment included the proviso that any action is tolled until a child reaches the age of eighteen years. Most importantly, however, the 1991 amendment added subdivision (c), which provides that a cause of action may be brought upon discovery "that the act caused the injury for which the claim is brought."[31]

The Legislature also supplied its reasons for applying the more liberal application of the statute of limitations:

> The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run. The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs. Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.[32]

Although a victim may have experienced some trauma, such as stomachaches, the trauma may not have been severe enough to prompt suit within three years of the victim's eighteenth birthday. Therefore,

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(2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

(3) The knowledge of a custodial parent or guardian shall not be imputed to a person under the age of eighteen years.

(4) For purposes of this section, "child" means a person under the age of eighteen years.

(5) As used in this section, "childhood sexual abuse" means any act committed by the defendant against a complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 9A.44 RCW or RCW 9.68A.040 or prior laws of similar effect at the time the act was committed.

31. WASH. REV. CODE § 4.16.340(1)(c). In the bill proposing the 1991 amendment the Legislature explained inclusion of this language:

> It is still the legislature's intention that Tyson v. Tyson, 107 Wash. 2d 72, 727 P.2d 226 (1986) be reversed, as well as the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations. The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.

E.S.H.B. 2058 § 1, 52nd Leg., Reg. Sess., 1991 Wash. Laws 1085.

32. E.S.H.B. 2058, 1991 Wash. Laws 1084. A summary of the bill in the Washington Legislative Report provides additional explanation:

> In addition to the cases in which a victim may suffer injuries, but does not know that the sexual abuse caused the injury due to suppressed memory of the sexual abuse, a victim may remember the sexual abuse but may have a delayed reaction to the abuse. The victim may experience significant suffering from the abuse later in life.

E.S.H.B. 2058, 1990-92 Wash. Leg. Rep. 149.

when more severe injuries develop later in life, such as suicidal tendencies or depression, the victim will not be foreclosed from suing for those more severe injuries.[33]

While the question of *when* a plaintiff may bring an action for alleged childhood sexual abuse has been answered by the legislature, the question of whether the Washington rules of evidence will allow repressed memories into evidence still remains to be answered.[34] As noted by the Supreme Court of New Hampshire after it affirmed application of the discovery rule to the applicable statute of limitations for childhood sexual abuse, the plaintiff still carries the burden of substantiating allegations of abuse and, if challenged, validating the phenomenon of memory repression and the admissibility of evidence in the form of recalled memories.[35]

III. The Debate Within the Scientific Community

It appears that proponents and opponents of the theory of repressed memories agree that childhood sexual abuse is a tragically common occurrence, and they generally agree that the human mind is capable of repressing certain memories. There appears to be no agreement, however, on how the human mind actually represses memories, or on whether the human mind is capable of repressing memories for long periods of time and then accurately recalling them. The essential debate within the scientific community is whether a distinction between true and false memories can be made.

A. The Memories are Accurate

> Many experts believe that victims of sexual abuse often develop some degree of amnesia and that in cases of delayed recall, memories generally prove accurate.[36]

Judith Lewis Herman, noted author and psychiatrist at Harvard Medical School, regards the new emphasis on adult memories of early sexual abuse as a "healthy antidote to decades of legal and psychiatric neglect suffered by abused individuals."[37]

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33. *See* E.S.H.B. 2058, 1991 Wash. Laws 1084.

34. The legislature's detailed treatment of Wash. Rev. Code § 4.16.340 raises an interesting question of whether the legislature examined and is impliedly endorsing the scientific principle of repression and accurate recall of memories.

35. Jill McCollum v. George and Elizabeth D'Arcy, 638 A.2d 797, 799 (1994).

36. Bower, *supra* note 14, at 185 (quoting Judith Lewis Herman, psychiatrist at Harvard Medical School in Boston and author of Trauma and Recovery (1992)).

37. *Id.* at 184.

"Self-help" books based upon the premise that memories of childhood sexual abuse are real offer check lists to help readers identify whether they were victims of childhood abuse.[38] Signs of past abuse may include feeling bad or ashamed, feeling powerless, having low self-esteem, lacking motivation, suffering from phobias, experiencing problems with sex and relationships, developing arthritis, and desiring to change one's name.[39]

Lucy Berliner, a social worker at Harborview Sexual Assault Center in Seattle, notes that symptom checklists cannot establish that someone was sexually abused. However, she is not persuaded that therapists "commonly diagnose sexual abuse with check lists or engage in a wholesale tendency to talk people into recalling childhood abuse."[40]

Similarly, Ms. Herman believes that therapists rarely wield enough power over patients to impose false memories on them. She acknowledges that when hypnosis is used to explore childhood memories, there may be a heightened tendency to create memories in order to please a therapist. Ms. Herman states, however, that of the more than two hundred cases seen in her trauma program in the past year, only one person based a claim of sexual abuse solely on memories recovered while under hypnosis.[41]

In two recent articles, Bruce Bower noted that many researchers assert that psychological problems rise significantly in conjunction with the frequency of childhood sexual abuse.[42] These problems may include borderline personality disorders, multiple personality disorders, substance abuse, eating disorders, and somatoform disorders (such as pseudoseizures, pelvic pain, and gastrointestinal disturbances with no known physical cause).[43] Some investigators also argue that severe, repeated sexual assaults often produce Post-Traumatic Stress Disorder (PTSD), a cluster of symptoms including persistent sadness, feelings of unreality, social isolation, and either amnesia for or constant reliving of traumatic events.[44] However, Bower also notes that there is no consensus regarding how childhood sexual abuse might induce bulimia in one

38. BASS & DAVIS, *supra* note 3; Blume, *supra* note 1.

39. *See, e.g.*, *supra* note 1.

40. Bruce Bower, *The Survivor Syndrome: Childhood Sexual Abuse Leaves a Controversial Trail of Aftereffects*, SCI. NEWS, Sept. 25, 1993, at 202 (quoting Lucy Berliner).

41. Bower, *supra* note 14, at 185.

42. *See* Bower, *supra* note 40, at 202.

43. *Id.*

44. *Id.*

person, multiple personalities in another, and cocaine addiction in a third.[45]

A helpful explanation of why some therapists believe post traumatic stress disorder may be produced by childhood sexual abuse was reviewed by a United States District Court in *Nicolette v. Carey*.[46] There, the court reviewed the affidavit of a certified social worker submitted in support of plaintiff's response to a summary judgment motion asserting that her claim was time barred.

By way of explaining the plaintiff's inability to previously recall the sexual abuse, the social worker stated that the plaintiff had repressed and disassociated most of the abuse committed by her father:

> Repression occurs when a person puts into their [sic] unconscious mind any memory that is too painful to think about. . . . During the time the incidents of sexual abuse were repressed, they were not in plaintiff's consciousness, and therefore plaintiff was unaware of most of the sexual acts that had been committed upon her.
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> Disassociation is an extension of repression . . . disassociation occurs when an event is so traumatic that, although a person is physically there at the time the event occurs, they enter into an altered state of consciousness in an effort to avoid the event. The trauma itself is experienced in an altered state of consciousness. When an event has been disassociated, a person represses it not because they do not want to remember it, but because they cannot remember it. They are unable to bring it to their conscious mind at will.
>
> One level of disassociation is called PTSD (Post Traumatic Stress Disorder). At this level, the time period itself is not disassociated—only the memories of the specific events. A person at this level blocks the traumatic event itself, but not the period of time in which it occurred. This level of disassociation is reached by a series of chronic events. Normally, severe, recurring and sustained trauma brings about this level.[47]

Lenore C. Terr, a psychiatrist at the University of California, San Francisco, has evaluated or treated more than 150 children exposed to a variety of extreme traumas. Terr believes that children who experience repeated and brutal sexual abuse may forget large portions of their childhood, not just specific assaults.[48] Although memories of such abuse may be fabricated through the suggestions or persuasion of others, Terr states that children who have genuinely blocked out pro-

45. *Id.*

46. 751 F. Supp. 695 (W.D. Mich. 1990).

47. *Id.* at 697-99.

48. Lenore C. Terr, *Childhood Traumas: An Outline and Overview*, 148 AM. J. PSYCHIATRY 10, 16 (1991).

longed abuse display telltale signs and symptoms including an indifference to pain, a lack of empathy, an inability to define or acknowledge feelings, and an abhorrence of emotional intimacy.[49] Moreover, as these children grow up, they tend to both fear and to symbolically reenact, through behaviors or physical symptoms, the specific sexual acts they were forced to perform.[50]

This pattern, Herman notes, may be broken and spur delayed recall of sexual abuse when there are changes in intimate relationships, such as becoming sexually involved or giving birth to a child.[51]

Although ample scientific authority supports the view that recall of repressed memories is scientifically reliable, there is also ample authority to the contrary.

B. The Memories Are False

> While our awareness of childhood sexual abuse has increased enormously in the last decade and the horrors of its consequences should never be minimized, there is another side to this debate. Many scientists believe that therapists may, albeit with the best intentions, contribute to false allegations and subsequent family suffering.[52]

Recovered-memory therapy may often result in shattered family units, destroyed reputations, divorce, and custody battles.[53]

Because claims of recovered memories are often presented with little or no corroborating evidence, juries are left to weigh the credibility of the victim and of the accused, and are asked to rely exclusively on revelations from psychotherapy. However, "because psychotherapy is a healing technique and not a search for truth, it may not be a reliable source of facts."[54]

In a recent article addressing recovered memories of alleged sexual abuse, Hollida Wakefield, M.A., and Ralph Underwager, Ph.D., concluded that claims of repressed memories recovered in the course of therapy are not likely to be supported by empirical data.[55] After reviewing popular and scientific literature in the field, Wakefield and Underwager stated that the area "seems dominated by believing therapists who simply repeat clinical anecdotes, state subjective specula-

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49. *Id.*

50. *Id.*

51. Bower, *supra* note 14, at 185.

52. False Memory Syndrome Foundation Flyer (quoting Harold Lief, M.D.) (on file with *Seattle University Law Review*).

53. Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, 79 A.B.A. J., Nov. 1993, at 71.

54. *Id.*

55. Wakefield & Underwager, *supra* note 2, at 487.

tion, and make unsupported assertions about repressed abuse."[56] Studies reviewed by Wakefield and Underwager led them to conclude that the actual purpose of therapy is to uncover memories of sexual abuse and to help the patient become convinced of the historical reality of the abuse, even if the abuse cannot be verified and the patient doubts that the memory is real.[57] Additionally, Wakefield and Underwager concluded that claims of recovered repressed memories are based upon assumptions, speculations, inferred internal states, and mental processes for which there is, at best, very limited credible support— "[t]o believe in the reality of these memories often requires suspension of critical reasoning and a leap of blind faith."[58]

Elizabeth F. Loftus, professor of psychology, adjunct professor of law at the University of Washington, and co-author of *Witness for the Defense*,[59] suggests the existence of two important sources "that could potentially feed into the construction of false memories."[60] These are popular writings and therapists' suggestions.[61] Popular writings, or self-help books, such as *The Courage to Heal*[62] and *Secret Survivors*,[63] suggest to readers that even if there are no memories of abuse, they were likely abused, and that repression of those memories is undoubtedly causing their troubles. These books provide check lists and exercises to help the reader remember incidents of abuse. While noting that the suggestions outlined in self-help books might lift the lid off a repressed memory, Professor Loftus believes another equally viable hypothesis exists. That is that the suggestions outlined may actually influence the creation of memories or, at the very least, may ultimately direct the reader to a search through memory.[64]

Professor Loftus maintains that some therapists enthusiastically engage in persistent and intrusive probing to uncover early traumatic memories:

> Whatever the good intentions of therapists, the documented examples of rampant suggestion should force us to at least ponder whether the therapists might be suggesting illusory memories to their clients rather than unlocking distant memories that are authentic. Or, . . .

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56. *Id.*

57. *Id.* at 484.

58. *Id.* at 503.

59. ELIZABETH F. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE (1991).

60. ELIZABETH F. LOFTUS, THE REALITY OF REPRESSED MEMORIES 18 (expanded version of address to the Psi Chi/Frederick Howell Lewis Distinguished Lecture, presented at the centennial meeting of the American Psychological Association, Washington D.C., August, 1992).

61. *Id.*

62. BASS & DAVIS, *supra* note 3.

63. BLUME, *supra* note 1.

64. LOFTUS, *supra* note 60, at 19.

> what is considered to be present in the client's unconscious mind, might actually be present solely in the therapist's conscious mind.[65]

Intrusive techniques employed by some therapists may include direct questioning, hypnosis, reading books, attending survivor's groups, age regression, and dream analysis.[66] For example, in Lundberg-Love's treatment program at the University of Texas, the first goal of treatment is to retrieve memories. After memories are retrieved and a woman can talk about the abuse, she is encouraged to express her rage by writing angry letters to her abuser and by throwing darts at his picture.[67]

In support of their claims that therapists may inadvertently plant false memories through suggestive questioning and/or drug therapy, opponents of the theory of repressed memories can now point to an increasing number of cases where patients are bringing medical malpractice actions against their therapists. In a landmark case, a California court recently allowed an accused father to bring suit against his daughter's therapists for implanting false memories of sexual abuse.[68] The jury found that the daughter's therapists had negligently planted the false memories and awarded the father $500,000 for lost wages and future losses.[69]

Richard Ofshe, Professor of Sociology at the University of California at Berkeley, is unequivocal in his assertion that there is no evidence to support the theory of recovered memories:

> Sixty years of experiments that would demonstrate the phenomenon [of recovered memories] have failed to produce any evidence of its existence. The notion of repression has never been more than an unsubstantiated speculation tied to other Freudian concepts and speculative mechanisms. The only support repression has ever had is anecdotal and contributed by psychoanalysts who *presume the existence of a repression mechanism.*[70]

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65. LOFTUS, *supra* note 60, at 20, 28.

66. Wakefield & Underwager, *supra* note 2, at 484.

67. *Id.*

68. Ramona v. Ramona, No. 61898 (Napa County Super. Ct., July 11, 1994); Maria L. La Ganga, *Implanted-Memory Verdict Could Change Therapists' Role*, THE NEWS TRIB. (TACOMA), May 15, 1994, at A12.

69. *Ramona*, No. 61898 (Napa County Super. Ct., July 11, 1994); *see also* Loftus & Rosenwald, *supra* note 53. Loftus and Rosenwald review the increase in negligence actions against therapists and increased skepticism of sex abuse claims based on recovered memories. Therapists may employ techniques such as age regression, bioenergetics, psychodrama, trance work, visualization, and guided imaging. *Id.* at 73.

70. Loftus & Rosenwald, *supra* note 53, at 71 (emphasis added).

The continuing debate within the scientific community illustrates that complete repression and accurate recall of repressed memories is neither fully understood nor accepted. Those claiming that the memories are accurate point to clinical studies where people in therapy recall memories of previous sexual abuse. Those claiming that the memories are not accurate reject the clinical studies as unconfirmed speculations and note that over sixty years of research has failed to uncover any controlled laboratory experiment to support the theory of repression. Because the theory of repressed memories is not sufficiently accepted in the scientific community, the admissibility of repressed memory evidence in Washington is highly questionable.

IV. THE APPLICABLE STANDARD OF ADMISSIBILITY: *FRYE* OR *DAUBERT*?

Before an analysis of the admissibility of repressed memory evidence can be undertaken, it should be noted that the proper standard for admitting expert scientific testimony in the State of Washington may be in question.

A. The Frye *Analysis*

Washington courts have long adhered to the standard announced over seventy years ago in *Frye v. United States*.[71] In *Frye*, the court ruled that novel evidence derived from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.[72] The *Frye* court held that lie detector results were inadmissible, stating:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*.[73]

In Washington, this standard has frequently been applied to determine the admissibility of scientific evidence.[74]

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71. 293 F. 1013 (D.C. Cir. 1923).

72. *Frye*, 293 F. at 1014.

73. *Id.* (emphasis added).

74. *See generally* State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984) (battered woman syndrome evidence admissible); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984) (hypnosis evidence inadmissible); State v. Woo, 84 Wash. 2d 472, 527 P.2d 271 (1974) (polygraph

In applying the test, it is not a court's purpose to second-guess the scientific community. Rather, the inquiry turns on the level of recognition accorded to the scientific principle involved; the court must look for general acceptance in the appropriate scientific community.[75] A trial court's decision to admit novel scientific evidence will be reviewed *de novo*.[76]

Both before and after the adoption of Washington's Rules of Evidence, courts have required trustworthiness and reliability in the factual, informational, or scientific basis of an expert opinion (including the principles or procedures through which the expert's conclusions are reached).[77] The elements of trustworthiness and reliability remove the dangers of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.[78] Courts have looked to literature on the particular subject and opinions of other jurisdictions for guidance.[79]

B. Daubert v. Merrell Dow Pharmaceuticals

Despite the *Frye* test's wide acceptance, the United States Supreme Court recently rejected the *Frye* standard in *Daubert v. Merrell Dow Pharmaceuticals*,[80] holding that the proper standard for admitting expert scientific testimony in a federal trial is contained in the Federal

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evidence inadmissible in the absence of stipulation by both parties); State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987) (rape trauma syndrome evidence inadmissible); *Janes*, 121 Wash. 2d at 220, 850 P.2d at 495 (1993) (battered child syndrome evidence admissible); *Cauthron*, 120 Wash. 2d at 879, 846 P.2d at 502 (1993) (evidence utilizing restricted fragment length polymorphism method of DNA typing admissible).

75. *Cauthron*, 120 Wash. 2d at 887, 846 P.2d at 505.

76. *Id.*

77. State v. Maule, 35 Wash. App. 287, 294, 667 P.2d 96, 99 (1983).

78. *Id.*

79. *Black*, 109 Wash. 2d at 342, 745 P.2d at 16 (discussing the scientific literature pertaining to rape trauma syndrome); *Martin*, 101 Wash. 2d at 721-22, 684 P.2d at 655 (examining the literature on hypnosis).

80. 113 S. Ct. 2786 (1993), *on remand*, No. 90-55397, 1995 WL 1736 (9th Cir. Jan. 4, 1995). Daubert was a civil case where two minor children and their parents alleged that the childrens' serious birth defects had been caused by the mothers' prenatal ingestion of Benedectin, a prescription drug marketed by the respondent. The scientific evidence in question was that offered by the plaintiffs' experts on the issue of causation, and included opinions based on animal studies and chemical analyses (not employing epidemiological methodology), and recalculations of previously published epidemiological data. *Id.* at 2791-92. Based on the *Frye* standard, the District Court and Ninth Circuit Court of Appeals each noted that the only generally accepted methodology concerning the effect of Benedectin on pregnancy was epidemiological testing. Therefore, the plaintiffs' non-epidemiological methodology (animal studies and chemical analyses) was not generally accepted nor shown to be a reliable technique. *Id.* at 2792. Additionally, the recalculations of epidemiological data were rejected because the expert's reanalysis had not been subjected to verification and scrutiny by others in the scientific field. *Id.*

Rules of Evidence.[81] The Court noted that the rules place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.[82]

Following the decision in *Daubert*, the Washington Supreme Court, without comment on the *Daubert* case, applied the *Frye* standard in *Personal Restraint of Young*.[83] More recently, in March of 1994, the Washington Supreme Court recognized the U.S. Supreme Court's rejection of the *Frye* standard, but stated its intention to adhere to it:[84]

> We recognize that the United States Supreme Court has recently held that the *Frye* standard is not applicable under the Federal Rules of Evidence. Nevertheless, in this state, we continue to adhere to the view that the *Frye* analysis is a threshold inquiry to be considered in determining the admissibility of evidence under ER 702.[85]

The court did find, however, that many of the "general observations" made by Justice Blackmun in the majority opinion of *Daubert* may be of use to trial judges in making the threshold *Frye* determination.[86] Additionally, the court specifically cited to *Daubert* for the proposition that "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[87] Moreover, the court stated that even if it were to adopt the *Daubert* analysis, the testimony at issue in the case before it would be inadmissible.[88]

The question of whether the State of Washington should continue to adhere to the *Frye* standard or adopt the *Daubert* standard is a question that only the Supreme Court of Washington can resolve.[89]

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81. *Id.* at 2792-99.

82. *Id.*

83. 122 Wash. 2d 1, 55-56, 857 P.2d 989, 1016 (1993).

84. State v. Riker, 123 Wash. 2d 351, 360 n.1, 869 P.2d 43, 48 n.1. (1994).

85. *Id.* (citations omitted).

86. *Id.*

87. *Id.* at 360, 869 P.2d at 48 (quoting *Daubert*, 113 S. Ct. at 2796).

88. *Riker*, 123 Wash. 2d at 360 n.1., 869 P.2d at 48 n.1.

89. *Daubert* is, of course, not binding on Washington courts, and the *Frye* rule will continue to apply in Washington until the state supreme court says otherwise. Nevertheless, *Daubert* is bound to generate a heated debate about whether *Frye* should continue to be followed in Washington, and an eventual challenge to *Frye* at the state level seems inevitable. 5C K. TEGLAND, WASHINGTON PRACTICE, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE 243 (1994).

C. *Division I's Refusal To Follow the Washington Supreme Court's Lead:* Reese v. Stroh

Despite the Washington Supreme Court's stance on the application of the *Daubert* analysis, in the recent Washington Court of Appeals decision, *Reese v. Stroh*, Division I rejected the *Frye* standard and adopted the approach taken in *Daubert*.[90] In *Reese*, the plaintiffs brought their medical malpractice action against a physician for failing to treat Mr. Reese's emphysema condition with a protein replacement therapy called Prolastin.[91]

The plaintiff's expert was expected to testify as to the Food and Drug Administration's approval of Prolastin, the preliminary salutary results from its use, and his own clinical experience in treating patients with Prolastin.[92] After hearing plaintiff's offer of proof, the trial court ruled that the expert's testimony lacked the necessary scientific foundation and was, therefore, inadmissible.[93] Before deciding whether there was an adequate foundation for the expert's opinion, Division I held that the *Frye* standard does not apply to expert testimony in civil cases.[94]

Division I based its rejection of the *Frye* standard, in part, on its conclusion that (1) with one exception, the courts of Washington have neither discussed nor applied *Frye* in the context of a civil case; (2) in the one civil case applying the *Frye* standard, the court did not discuss why it was importing the *Frye* standard into the civil arena; and (3) the Washington Supreme Court has never adopted the *Frye* standard in civil cases, and has intimated that a *Frye* analysis is appropriate only in criminal and quasi-criminal cases.[95] Division I's rationale for rejecting the *Frye* standard is flawed. Each of Division I's stated rationale for rejecting the *Frye* standard is examined below.

1. Contrary to Division I's assertion, the courts of Washington have discussed and applied the *Frye* standard in more than one civil case

The one exception referred to by Division I in *Reese* is the case of *Burkett v. Northern*.[96] In *Burkett*, an action to recover damages result-

90. 74 Wash. App. 550, 874 P.2d 200, *review granted*, 124 Wash. 2d 1018, 881 P.2d 253 (1994).

91. *Id.* at 552, 874 P.2d at 201-02.

92. *Id.* at 553-55, 874 P.2d at 202-03.

93. *Id.* at 555, 874 P.2d at 203.

94. *Id.* at 555-56, 874 P.2d at 203-04.

95. *Id.* at 556-57, 874 P.2d at 204.

96. 43 Wash App. 143, 715 P.2d 1159, *review denied*, 106 Wash. 2d 1008 (1986).

ing from an automobile accident, Division III applied the *Frye* standard and excluded expert medical testimony regarding thermography.[97]

In addition to the *Burkett* decision, the Washington Supreme Court has more recently applied the *Frye* standard in an attorney disciplinary proceeding.[98] Although Division I acknowledged the *Peterson* decision, it stated that the Washington Supreme Court had only suggested a "*Frye*-type" rule and did not cite to *Frye* nor discuss its application in the civil context.[99]

However, the *Peterson* court specifically stated that experts must meet the requirements of Rule of Evidence 702, including (1) that the witness qualify as an expert, (2) *that the opinion be based on an explanatory theory generally accepted in the scientific community*; and (3) that the testimony be helpful to the trier of fact.[100]

In addition to quoting the *Frye* standard almost verbatim, the *Peterson* court footnoted its statement with a citation to *State v. Ciskie*.[101] The *Ciskie* court examined the acceptance of the battered woman syndrome in the scientific community.[102] In concluding that the battered woman syndrome was reliable, the court relied on several cases where the Washington Supreme Court had analyzed the general acceptance of the syndrome in the scientific community.[103]

In another civil case, Division I recently reviewed the admissibility of expert evidence that was attacked on the basis that the experts' theory of causation was too novel.[104] In *Intalco Aluminum Corp. v. Department of Labor and Industries*,[105] worker's compensation benefits for occupational disease had been awarded to three workers who claimed they became disabled as a result of long term exposure to toxic subtonics at the plaintiff's plant.[106] Intalco attacked the workers' medical evidence because no other studies of neurologic disease and aluminum plant workers existed to substantiate the medical experts' theory that aluminum was the causative agent involved in the claimants' disease.[107]

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97. *Id.* at 144-47, 715 P.2d at 1160-61. A recent development in the medical field at the time of the court's decision in *Burkett*, thermography is a technique of recording in photographic form heat energy emission patterns radiating from the human body. *Id.* at 144, 715 P.2d at 1160.

98. *In re* Peterson, 120 Wash. 2d 833, 869, 846 P.2d 1330, 1353 (1993).

99. 74 Wash. App. at 557 n.5, 874 P.2d at 204 n.5.

100. *Peterson*, 120 Wash. 2d at 869, 846 P.2d at 1353 (emphasis added).

101. 110 Wash. 2d 263, 751 P.2d 1165 (1988).

102. *Id.* at 271, 751 P.2d at 1170.

103. *Id.* at 271, 751 P.2d at 1169 (*citing* State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984); State v. Kelly, 102 Wash. 2d 188, 685 P.2d 564 (1984)).

104. Intalco Aluminum Corp. v. Department of Labor and Indus., 66 Wash. App. 644, 833 P.2d 390 (1992), *review denied*, 120 Wash. 2d 1031 (1993).

105. *Id.* at 648, 833 P.2d at 392.

106. *Id.*

107. *Id.* at 659, 833 P.2d at 398.

Although Intalco conceded that the methods used by the experts were methods of clinical examination and laboratory testing "generally accepted in the scientific community", the workers viewed Intalco's argument as a challenge to admissibility of the medical testimony based on lack of foundation under ER 702 and 703. Because Intalco recognized that the foundation for the evidence was proper, the court did not address the workers' argument on that ground.[108]

In addressing the causation issue, however, Division I confirmed the validity of the *Frye* standard, noting that the requirement that medical expert testimony be based on methods "generally accepted in the scientific community" pertains to methods used by scientists and not the conclusions they reach.[109] Thus, an expert physician's opinion on causation need not be generally accepted in the scientific community; it is the methods upon which the expert relies in forming his or her opinion that must be generally accepted.[110]

2. Contrary to Division I's assertion, the Washington Supreme Court has adequately supported its application of the *Frye* standard in civil cases

In *Burkett*, the "one exception" referred to by Division I, it was specifically noted that the Washington Supreme Court had adopted the *Frye* standard.[111] The *Burkett* court stated that the appropriate test was whether the scientific principles from which the deductions are made are sufficiently established to have general acceptance in the relevant scientific community as being reliable and accurate.[112] In addition to several Washington Supreme Court decisions applying the *Frye* standard in criminal cases, the *Burkett* court also cited to ER 702 for the proposition that the *Frye* standard was the appropriate standard:

> ER 702 follows this standard by permitting the trial court, in determining the admissibility of an expert opinion offered, in a novel field, to assess the reliability of the theory, methodology, procedure or principle propounded by the expert and the probative value of his testimony.[113]

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108. *Id.* at 659 n.8, 833 P.2d at 399 n.8.

109. *Id.* at 622.

110. *Id.* at 662, 833 P.2d at 399 (citing Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); WASH. R. EVID. 703; *see also* Osborn v. Anchor Lab., Inc., 825 F.2d 908, 914-15 (5th Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988).

111. *Burkett*, 43 Wash. App. at 144, 715 P.2d at 1160.

112. *Id.* at 144-45, 715 P.2d at 1160.

113. *Id.* at 145, 715 P.2d at 1160.

3. Contrary to Division I's assertion, the Washington Supreme Court has never drawn a distinction between criminal and civil cases in determining the admissibility of novel scientific evidence

In support of its assertion that the Washington Supreme Court has drawn a distinction between criminal and civil cases, Division I relies upon the Supreme Court's reaffirmation of the *Frye* standard in *State v. Canaday*.[114] In *Canaday*, the Washington Supreme Court noted that the *Frye* standard had been implicitly adopted by it in *State v. Woo*.[115] Recognizing that at least nine other states had also adopted the *Frye* standard, the court stated: "It [the *Frye* standard] is therefore the prevailing rule and no court to our knowledge has rejected it with regard to the admissibility of testimony based on scientific procedures at a criminal trial."[116]

As noted by Division I, the foregoing statement was an affirmation by the Washington Supreme Court that the *Frye* standard was the appropriate standard to be applied in criminal matters. However, there is nothing in the *Canaday* opinion to support Division I's assertion that the Washington Supreme Court was "intimating" that the *Frye* standard was appropriate *only* in criminal cases.

Division I also notes that the *Frye* standard was not applied in *In Re Johnston*, a prison disciplinary proceeding.[117] In *Johnston*, prison inmates brought personal restraint petitions arising out of discipline imposed on them for marijuana use.[118] The issue before the court was whether a positive result of a urinalysis test, conducted to detect the presence of marijuana, constituted sufficient evidence of marijuana use to uphold a prison disciplinary decision that revoked a prisoner's good time credits or imposed mandatory segregation time.[119]

The prison inmates' statutory permission to earn good time credits is a constitutionally protected liberty interest.[120] As such, inmates may not be deprived of good time credits without minimum due process.[121] However, the inmates' liberty interest "must be accommodated in the distinctive setting of a prison, where disciplinary proceedings 'take place in a closed, tightly controlled environment peopled by those who

114. 90 Wash. 2d 808, 813, 585 P.2d 1185, 1188 (1978).

115. 84 Wash. 2d 472, 527 P.2d 271 (1974).

116. *Canaday*, 90 Wash. 2d at 813, 585 P.2d at 1188.

117. *Reese*, 74 Wash. App. at 556-57, 874 P.2d at 204, (citing *In Re* Johnston, 109 Wash. 2d 493, 498, 745 P.2d 864, 867 (1987)).

118. *Id.* at 493, 745 P.2d at 864.

119. *Id.* at 494, 745 P.2d at 865.

120. *Id.* at 497.

121. *Id.* at 497, 745 P.2d at 866 (citing Superintendent v. Hill, 472 U.S. 445, 453 (1985)).

have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.' "[122] The evidentiary requirements of due process are satisfied if there is "some evidence" in the record to support a prison disciplinary decision revoking good time credits.[123] As emphasized by the United States Supreme Court in *Hill:*

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement.[124]

While recognizing that expert opinion on the reliability of the urinalysis tests was not unanimous, the Washington Supreme Court found any discrepancies immaterial "in light of the lesser evidentiary standards applicable in prison disciplinary hearings."[125]

Rather than an intimation that the *Frye* standard was only appropriate in criminal or quasi-criminal cases, the *Johnston* court was simply recognizing that the evidentiary standard in a prison disciplinary decision differs from that in a criminal trial.[126]

The Washington Supreme Court has unequivocally stated its intention to adhere to the *Frye* standard.[127] At no time has the Court stated that any distinction should be drawn between civil and criminal cases in determining the admissibility of evidence. Significantly, *Daubert* was a civil case. If the Washington Supreme Court had desired to draw a distinction between criminal and civil cases, its decision in *Riker* (a criminal case) afforded it an excellent opportunity to do so. Instead, the Court announced its continued adherence to the *Frye* standard as a threshold inquiry in determining the admissibility of evidence under ER 702.[128]

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122. *Id.* (quoting *Hill*, 472 U.S. at 454.).

123. *Hill*, 474 U.S. at 455-56.

124. *Id.*

125. *Johnston*, 109 Wash. 2d at 500, 745 P.2d at 868.

126. *Id.*

127. State v. Riker, 123 Wash. 2d 351, 360 n.1, 869 P.2d 43, 48 n.1 (1994).

128. The Daubert decision does raise an interesting question of whether the rule enunciated therein will apply in diversity cases. *See* Alan K. Steinbrecher & John A. Makarewich, *Will the Rule of 'Daubert' Apply in Diversity Cases?*, WASH. J., June 13, 1994, at 6 (noting that the question is whether state laws on the admission of expert scientific testimony involve substantive rights, and providing a survey of those states within the Ninth Circuit that continue to adhere to the *Frye* standard).

D. The Daubert Criteria Have Not Altered the Analysis of the Admissibility of Scientific Evidence

Although the Washington Supreme Court found that the "general observations" made by Justice Blackmun in the majority opinion of *Daubert* may be used by trial judges in making the threshold *Frye* determination,[129] the *Daubert* criteria have done little or nothing to alter the analysis of the admissibility of scientific evidence.

According to *Daubert*, the criteria a trial court should consider in assessing whether scientific evidence is valid and will assist the trier of fact include:

(1) whether the theory or technique can be or has been tested;

(2) whether the theory or technique has been subjected to peer review and publication (although not dispositive, "submission to the scrutiny of the scientific community is a component of good science");

(3) whether there is a known or potential rate of error and whether there are standards controlling the technique's operation; and

(4) whether the theory or technique is "generally accepted" in the scientific community (a known technique that has been able to attract only minimal support within the community may properly be viewed with skepticism).[130]

Additionally, the focus of the court's assessment is to be on principles of methodology, and not on the expert's conclusions.[131]

Similarly, the core concern of *Frye* is whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory.[132] In examining the *Frye* question, a Washington trial court must consider the following criteria:

(1) whether the underlying theory is generally accepted in the scientific community; and

(2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community.[133]

The first criterion mandated by *Frye* is identical to the fourth criterion announced in *Daubert*. And, the second criterion mandated by *Frye* contains the remaining three criteria announced in *Daubert*. The

129. *Riker*, 123 Wash. 2d at 360 n.1, 869 P.2d at 48 n.1.

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

131. *Id.*

132. *Riker*, 123 Wash.2d at 359-60, 869 P.2d at 48 (citing *Cauthron*, 120 Wash. 2d at 889, 846 P.2d at 507).

133. *Riker*, 123 Wash. 2d at 359, 869 P.2d at 47-48 (citing *Cauthron*, 120 Wash. 2d. at 888-89, 846 P.2d at 506-07).

"techniques, experiments or studies utilizing a scientific theory which are capable of producing reliable results," are arguably no more than a method to determine whether a theory (1) has or can be tested; (2) has been subjected to peer review and publication; and (3) has a known or potential rate of error.

Citing *Daubert* once again, the Washington Supreme Court noted that "scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?)."[134] Similarly, the gatekeeping function of *Frye* requires both an accepted theory and a reliable method of applying that theory to the facts of the case.[135]

As illustrated by the cases analyzed later in this Comment, the Washington Supreme Court has always based its determination of whether scientific evidence is admissible upon a review of available scientific literature, studies, publication, peer review, other literature, and cases involving the scientific evidence or related theories of the scientific evidence being considered. The *Daubert* analysis contributes little to this established examination.[136]

V. Admissibility Under Washington Rule of Evidence 703

Washington courts engage in a two-tier inquiry to determine the admissibility of novel scientific evidence. First, the proposed testimony must satisfy the *Frye*[137] standard for admissibility of novel

134. *Riker*, 123 Wash. 2d at 363, 869 P.2d at 50 (quoting *Daubert*, 113 S. Ct. at 2795 n.9).

135. *Id.* at 363, 869 P.2d at 50.

136. The Ninth Circuit's opinion in Daubert on remand illustrates the difficulty in applying the Supreme Court's newly proclaimed two-pronged analysis in determining the admissibility of scientific evidence under Rule 702. *Daubert*, 113 S. Ct. 2786 (1993), *on remand*, No. 90-55397, 1995 WL 1736 (9th Cir. January 4, 1995). In deciding the admissibility of expert testimony on the effect of bendectin on the plaintiffs' injuries, the Ninth Circuit noted how the Supreme Court's new analysis placed federal judges in an uncomfortable position. *Id.* at 3. The Ninth Circuit noted that it was largely untrained in science and certainly no match for any of the expert witnesses whose testimony it was reviewing. *Id.* Yet, it found itself in the position of having to determine whether that expert's proposed testimony amounted to scientific knowledge, constituted good science, and was derived by scientific method. *Id.* The court went on to state that when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability, the task before it becomes even more daunting. *Id.* at 4. As it reads the Supreme Court's opinion, the Ninth Circuit believes its task now is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise. Mindful of its position in the hierarchy of the federal judiciary, the Ninth Circuit took a "deep breath," proceeded with this "heady task," and affirmed the district court's grant of summary judgment. *Id.* at 9.

The plaintiffs' claim failed primarily on the second requirement of Rule 702 as announced by the Supreme Court in *Daubert*, i.e. the importance of a "fit" between the testimony and an issue in the case (a valid scientific connection to the pertinent inquiry as a precondition to admissibility). *Id.* at 7 (citing *Daubert*, 113 S. Ct. at 2796). In other words, causation.

137. 293 F. 1013 (D.C. Cir. 1923).

scientific evidence. Second, the expert testimony must be properly admissible under ER 702.[138] The admissibility of expert testimony is determined under ER 702 as follows:

> 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.[139]

Determining whether expert testimony is admissible is within a trial court's discretion.[140] The two-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact.[141]

A. Qualifications of Expert

No expert opinion is admissible unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion.[142] While a witness need not possess the academic credentials of an expert, the court may require specialized knowledge in a case if the nature of the claims or defenses are complex.[143] For example, in a prosecution for statutory rape, the trial court properly refused to allow a defense psychologist to testify as to a three year old's lack of memory and to the fact that a child's responses may be shaped by the adult interviewer. The testimony was properly refused in part because the psychologist lacked the necessary medical training.[144]

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138. State v. Janes, 121 Wash. 2d 220, 232, 850 P.2d 495, 501 (1993); State v. Cauthron, 120 Wash. 2d 879, 885, 846 P.2d 502, 504 (1993). Once the Washington Supreme Court has made a determination that the *Frye* test has been met as to a specific novel scientific theory or principle, trial courts can generally rely upon that determination for admissibility of that theory in future cases. However, trial courts must still undertake the *Frye* analysis if one party produces new evidence that seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community. *Cauthron*, 120 Wash. 2d at 888 n.3, 846 P.2d at 506 n.3.

139. WASH. R. EVID. 702.

140. *Cauthron*, 120 Wash. 2d at 890, 846 P.2d at 507.

141. *Id.*

142. Sehlin v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 38 Wash. App. 125, 133, 686 P.2d 492, 498, *review denied*, 102 Wash. 2d 1022 (1984).

143. 5 K. TEGLAND, WASHINGTON PRACTICE, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE 204-05 (1992-93) [hereinafter TEGLAND].

144. *Id.*

B. *Expert Testimony is Helpful to the Trier of Fact*

Under ER 702, expert testimony, opinion or otherwise, is allowed when such testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."[145] The court may properly consider whether the testimony is relevant to an issue in the case and whether the subject matter is beyond common understanding.[146] If no special skill, experience, knowledge, or education is required, and the matter may be judged by people of ordinary experience or knowledge, admitting the expert testimony may invade the jury's role in judging the credibility of witnesses.[147] For example, in a prosecution for statutory rape, a caseworker was allowed to testify that based upon her own experience and training, common behavioral symptoms generally exist in sexually abused children. However, she was not allowed to testify that the children in the case at bar fit the profile.[148]

The Washington Supreme Court's application of the *Frye* analysis and ER 702 to the theories of battered wife syndrome, battered child syndrome, rape trauma syndrome, and hypnotically aided testimony provides helpful generalizations for a future analysis of the theory of repressed memories.

VI. Examples of the *Frye* Analysis Employed by the Washington Supreme Court in Determining The Admissibility of Other "Syndromes"

For purposes of this analysis, four cases have been selected in which the Washington Supreme Court has applied the *Frye* analysis to determine the admissibility of evidence derived from the application of a scientific theory or principle. In two cases examining battered woman syndrome and battered child syndrome, the court found the syndromes to be sufficiently accepted in the relevant scientific community to admit expert testimony on the syndrome.[149] In the cases examining rape trauma syndrome and hypnotically aided testimony, however, the court found the evidence inadmissible because the theory or principle had not been generally accepted as reliable and accurate in the relevant scientific community.[150] Although there are obvious dif-

145. Wash. R. Evid. 702.

146. Tegland, *supra* note 143, at 205.

147. *Id.*

148. State v. Stevens, 58 Wash. App. 478, 497, 794 P.2d. 38, 48, *review denied*, 115 Wash. 2d 1025, 802 P.2d 128 (1990).

149. State v. Allery, 101 Wash. 2d 591, 682 P.2d 312 (1984) (battered woman syndrome); State v. Janes, 121 Wash. 2d 220, 850 P.2d 495 (1993) (battered child syndrome).

150. State v. Black, 109 Wash. 2d 336, 745 P.2d 12 (1987) (rape trauma syndrome); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984) (hypnotically aided testimony).

ferences between these cases and the theory of repressed memories, the court's *Frye* analyses are instructive in analyzing the admissibility of repressed memory evidence.

A. Battered Woman Syndrome

In *State v. Allery*,[151] the defendant appealed her conviction for the second degree murder of her husband, assigning error to the trial court's exclusion of expert testimony on the battered woman syndrome.[152] The court looked to the expert testimony offered at trial, law review articles, and decisions in other jurisdictions, and concluded that scientific understanding of the battered woman syndrome was sufficiently developed to admit expert testimony on the syndrome.[153]

Defendant's expert was the founder of the sexual assault unit at Harborview Hospital in Seattle who had done extensive research in the areas of sexual assault and battered women.[154] The witness was called to professionally analyze the behavior and emotional patterns of women suffering from repeated physical abuse by their husbands and lovers. She would also have testified that the defendant in this case displayed the behavioral and emotional characteristics of a battered woman.[155] The defense outlined that the purpose for the testimony was to (1) explain the mentality and behavior of battered women generally, (2) provide a basis from which the jury could understand why the defendant perceived herself in imminent danger at the time of the shooting, and (3) explain why battered women remain in relationships that are both psychologically and physically dangerous.[156]

According to the defendant's expert, the battered woman syndrome is a recognized phenomenon in the psychiatric profession and is defined as a technical term of art in professional diagnostic textbooks. Additionally, she stated that the syndrome is comprised of three distinct phases, including the phenomenon known as "learned helplessness."[157]

The court noted with approval opinions from other jurisdictions admitting expert testimony on the battered woman syndrome.[158]

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151. 101 Wash. 2d 591, 682 P.2d 312 (1984).

152. *Id.* at 592, 682 P.2d at 313.

153. *Id.* at 596-98, 682 P.2d at 315-16.

154. *Id.* at 595-97, 682 P.2d at 315-16.

155. *Id.* at 595, 682 P.2d at 315.

156. *Id.* at 596, 682 P.2d at 315.

157. *Id.* at 596-97, 682 P.2d at 315. Psychologists describe the phenomenon of "learned helplessness" as a condition in which a woman is psychologically locked into an abusive relationship with a man because of her economic dependence on him, her abiding attachment to him, and the failure of the legal system to adequately respond to the problem. *Id.*

158. *Id.* at 597, 682 P.2d at 315.

Therefore, the court held that expert testimony that explains why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within an ordinary lay person's competence.[159] Where the psychologist is qualified to testify about the battered woman syndrome and the defendant establishes her identity as a battered woman, the testimony may have a substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense.[160]

When it subsequently reviewed the admissibility of testimony regarding the battered child syndrome, the Washington Supreme Court found the syndrome so closely related to the battered woman syndrome, that the same reasons for admissibility applied.

B. Battered Child Syndrome

In *State v. Janes*,[161] a 17 year old boy was charged with first degree murder for shooting and killing his stepfather and with two counts of second degree assault for shooting at police officers and a bystander. The defendant offered expert testimony regarding the battered child syndrome to aid in proving his assertion of self-defense.[162] In determining the admissibility of expert testimony of the battered child syndrome, the court reviewed law review articles, a book published on the syndrome, and its previous decision in *State v. Allery* (discussed above) in which the court ruled that evidence of the battered woman syndrome was admissible.[163]

The court noted that the battered child syndrome describes both the physiological and psychological effects of a prolonged pattern of physical, emotional, and sexual abuse, and that victims of chronic abuse often suffer from a general psychological disorder known as post-traumatic stress disorder.[164]

Another key characteristic of the syndrome is known as "learned helplessness," a characteristic also found in the battered woman syndrome.[165] Both the battered woman and battered child syndromes find their basis in abuse-induced, post-traumatic stress disorder and elicit

159. *Id.*
160. *Id.* at 597, 682 P.2d at 316.
161. 121 Wash. 2d 220, 850 P.2d 495 (1993).
162. *Id.* at 226, 850 P.2d at 498.
163. *Id.* at 232-35, 850 P.2d at 501-02.
164. *Id.* at 233, 850 P.2d at 501.
165. *Allery*, 101 Wash. 2d at 597, 682 P.2d at 315.

similar responses.[166] Given the close relationship between the two syndromes, the court noted that the same reasons that justified admission of expert testimony in one, also justified admission in the other.[167]

In reviewing the admissibility of evidence regarding rape trauma syndrome, however, the court did not find sufficient justification to allow admission of expert testimony.

C. Rape Trauma Syndrome

In *State v. Black*,[168] the defendant was charged with the second degree rape of his sixteen year old neighbor. The State offered expert testimony on rape trauma syndrome to prove that the alleged victim did not consent to sex with her alleged assailant.[169] The supreme court reversed the trial court judgment, holding that the State had not laid a sufficient foundation for the rape trauma syndrome testimony because the testimony lacked scientific reliability and would unfairly prejudice the defendant.[170]

The testimony at issue was given by a counselor for the Lutheran Social Services Rape Crisis Network in Spokane, Washington. The counselor held a master's degree in social work and had four years' experience working with 150 to 200 victims of rape and sexual assault. The counselor testified that there was "a specific profile for rape victims" and that the victim in this case fit that profile.[171]

For guidance in determining the admissibility of the evidence, the court turned to both the literature on the subject and opinions from other jurisdictions.[172] The court reviewed studies conducted by a number of authors asserting that victims of rape may display a wide-ranging variety of symptoms.[173]

However, the court noted that the one overriding theme permeating the literature is that there is no "typical" response to rape.[174] As one commentator observed, "each rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of her rape, her specific personality style, and the responses of those from whom she seeks support."[175]

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166. *Janes*, 121 Wash. 2d at 233, 850 P.2d at 501.
167. *Id.* at 234-35, 850 P.2d at 502.
168. 109 Wash. 2d 336, 745 P.2d 12 (1987).
169. *Id.* at 337, 745 P.2d at 13.
170. *Id.* at 338, 745 P.2d at 13.
171. *Id.* at 338-39, 745 P.2d at 13-14.
172. *Id.* at 342, 745 P.2d at 15.
173. *Id.* at 343, 745 P.2d at 16.
174. *Id.*
175. *Id.* at 344, 745 P.2d at 16.

Because the symptoms associated with rape trauma syndrome embrace such a broad spectrum of human behavior, the syndrome provides a highly questionable means of identifying victims of rape. Indeed, as noted by the American Psychiatric Association, the stress and trauma associated with rape is "merely one type of a larger phenomenon known as 'post-traumatic stress disorder.' "[176]

The court noted that the issue is not whether rape victims display certain symptoms, but rather whether the presence of various symptoms, denominated together as rape trauma syndrome, is a scientifically reliable method admissible in evidence and probative of the issue of whether an alleged victim was raped.[177] A California Supreme Court opinion, cited by the court in *Black*, explains how rape trauma syndrome differs significantly from other seemingly similar methods of proof:

> There is, however, a fundamental difference between rape trauma syndrome and both the battered child syndrome and other scientific methods of proof that have in the past been evaluated against the *Frye* standard of reliability. Unlike fingerprints, blood tests, lie detector tests, voiceprints or the battered child syndrome, rape trauma syndrome was not devised to determine the "truth" or "accuracy" of a particular past event—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients.[178]

Additionally, the court was concerned with criticism of the methodology and reliability of the studies conducted to determine symptoms of rape. Among the shortcomings cited were: (1) differences in definitions and criteria for "rape"; (2) unrepresentative, biased, or inadequate sampling of victims; (3) inadequate means of eliciting information about victims; (4) lack of long-term assessments of victims; and (5) lack of a control group (i.e., a group of nonraped women) against which to compare the symptoms observed in rape victims.[179]

> Thus, as a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are

176. *Id.*

177. *Id.* at 346-47, 745 P.2d at 18.

178. People v. Bledsoe, 681 P.2d 291, 300 (Cal. 1984).

179. *Black*, 109 Wash. 2d at 345, 745 P.2d at 17.

> experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital in their task.[180]

The syndrome, at best, might identify persons who had been subjected to a traumatic experience, perhaps even a stressful sexual experience. However, the syndrome is insufficient to reliably indicate that a rape has occurred. Therefore, the court concluded that expert testimony on rape trauma syndrome is not a scientifically reliable means of proving lack of consent in a rape case.[181] Additionally, the court noted that expert testimony on rape trauma syndrome is unfairly prejudicial because it constitutes an opinion as to the guilt of the defendant, thereby invading the exclusive province of the trier of fact.[182] While evidence of emotional or psychological trauma suffered by a complainant after an alleged rape may be offered through lay testimony, the State may not introduce expert testimony that purports "to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome."[183]

The court concluded by stating that, because the scientific evaluation of rape trauma syndrome has not reached the level of reliability that would surpass common sense evaluations by a jury, admission of such evidence would "inevitably lead to a battle of experts that would invade the jury's province of fact-finding and add confusion rather than clarity."[184]

Similarly, this lack of scientific reliability led the court in an earlier decision to exclude hypnotically aided testimony.

D. Hypnotically Aided Testimony

In *State v. Martin*,[185] a ten-year-old girl was hypnotized because she could not remember anything about an alleged incident of first-degree statutory rape. The court, in accord with recent persuasive case law and the overwhelming consensus of expert opinion, concluded that testimony by a witness as to facts that become available after hypnosis is inadmissible in criminal cases.[186] The court looked to judicial opin-

180. *Id.* at 347, 745 P.2d at 18 (citing *Bledsoe*, 681 P.2d at 300).

181. *Black*, 109 Wash. 2d at 348, 745 P.2d at 18.

182. *Id.*

183. *Id.* at 349, 745 P.2d at 19.

184. *Id.* at 350, 745 P.2d at 19.

185. 101 Wash. 2d 713, 684 P.2d 651 (1984).

186. *Id.* at 714, 684 P.2d at 652. The use of hypnotically enhanced testimony in civil cases has not been addressed by the Washington Supreme Court. In the criminal context, the United States Supreme Court has held that a per se rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on her own behalf. Rock v. Arkansas, 483 U.S. 44 (1987).

ions applying the *Frye* test in determining the admissibility of hypnotically aided testimony and views of experts in the field, including law review articles.[187]

In applying the *Frye* test, the court noted that it was not so concerned with whether the process was scientific, but rather, with whether a jury could realistically evaluate the effect of hypnosis. Absent general scientific acceptance of hypnosis as a reliable means of refreshing recollection, the court noted that the dangers and possibilities of prejudice should preclude evidence based on the hypnosis.[188] The court refused to adopt a procedure that would allow parties to offer expert testimony on the effects of hypnosis in each particular case.[189]

After examining views of experts in the field, the court found that hypnotically induced testimony was an unreliable means of enhancing recall and that the hypnotic state produces "hypersuggestibility and hypercompliance in the subject, making the subject prone to sheer fantasy, willful lies, or a mixture of fact with gaps filled in by fantasy."[190] Additionally, the hypnotized subject is "particularly prone to indulge in confabulation, the filling in of gaps in memory to please the hypnotist."[191]

The *Martin* court listed the particular dangers involved in allowing hypnotically induced testimony at trial:

> After hypnosis, neither subject nor expert observer is able to distinguish between confabulations and accurate recall in any given case, absent corroborating evidence.[192] The subjective conviction in the truth of the memory after hypnosis eliminates the fear of perjury as a factor ensuring reliable testimony. Additionally, effective cross examination is seriously impeded, as the witness cannot distinguish between facts known prior to hypnotism, facts confabulated during hypnosis to produce pseudomemories, and facts learned after hypnosis. Finally, jury observation may be adversely affected, as the witness, as a result of the hypnosis, will have absolute subjective conviction about a particular set of events, whether or not his perceptions are objectively accurate.[193] It is this tendency toward immunization from meaningful cross examination in particular that leads us to conclude that a person, once hypnotized, should be barred from testifying concerning information recalled while under

187. *Id.* at 720-22, 684 P.2d at 654-56.
188. *Id.* at 719-20, 684 P.2d at 654.
189. *Id.* at 719-21, 684 P.2d at 654.
190. *Id.* at 721, 684 P.2d at 655.
191. *Id.*
192. *See* James Beaver, *Memory Restored or Confabulated by Hypnosis—Is It Competent?*, 6 U. PUGET SOUND L. REV. 155, 199 (1983).
193. *Id.* at 200-01.

> hypnosis. Hypnosis in its current state simply does not meet the *Frye* standards of reliability and accuracy.[194]

Significantly, the *Martin* court was not analyzing the admissibility of expert testimony. Rather, the court was analyzing the competency of posthypnotic witness testimony. The dissenters in *Martin* asserted that the *Frye* test was therefore inapplicable.[195] In his concurring opinion, Justice Brachtenbach stated that the dissenters' approach ignored the basic theory underlying the *Frye* test; that is, until a novel process is proven reliable, it has no place in court: "The reason experts are not allowed to testify about the results of the scientific process is because the process itself is not reliable."[196]

The process of hypnosis is being used to "enhance" a person's memory. That enhanced memory is presented to the jury as factually *reliable* memory. The direct result of that process is the factually reliable memory, which cannot be disassociated from the hypnosis process itself.[197]

Application of the *Frye* analysis and ER 702 by the Washington Supreme Court in the foregoing cases may provide helpful generalizations for a future analysis of the theory of repressed memories.

VII. How the Washington Supreme Court's Previous *Frye* Analyses May Help to Determine the Admissibility of "Repressed Memory" Evidence

The cases analyzed above are not sufficiently identical to the theory of repressed memories to provide a *definitive* analysis of how a Washington court should rule on the theory's admissibility. With the exception of hypnotically enhanced testimony, the claimants in these cases did not forget or repress facts of the events.[198] However, in the absence of opinions from other jurisdictions, we are limited to analogous cases within this jurisdiction and a review of scientific literature in determining the admissibility of repressed memory evidence. In this respect, we can extract helpful guidelines from the selected cases to determine the admissibility of repressed memories such as those claimed by Jill in the hypothetical at the beginning of this Comment.

194. *Martin*, 101 Wash. 2d at 722, 684 P.2d at 656.

195. *Id.* at 736, 742, 684 P.2d at 666-67.

196. *Id.* at 726, 684 P.2d at 658.

197. *Id.* at 726, 684 P.2d at 658.

198. In addition, the cases analyzed are all criminal cases, whereas the hypothetical poses a question of the evidence's admissibility in a civil context. As noted in Section IV of this Comment, however, a *Frye* analysis is appropriate and applicable in either context.

A. *Recognized Phenomenon or Questionable Means of Identifying Victims?*

Is the theory of repressed memories a recognized phenomenon in the psychiatric profession? Or, do the symptoms associated with repressed memories embrace such a broad spectrum of human behavior that the syndrome becomes a questionable means of identifying victims?

The battered woman and battered child syndromes were recognized phenomena in the psychiatric profession and described similar physiological and psychological effects. Conversely, the rape trauma syndrome failed in the *Frye* analysis because there was no "typical response" to rape and the symptoms associated with the syndrome embraced a broad spectrum of human behavior.

As with symptoms associated with the rape trauma syndrome, checklists identifying symptoms of childhood sexual abuse embrace a broad spectrum of human behavior. In the hypothetical, Jill suffers a variety of symptoms, including depression, guilt, compulsive eating, and aversion to sexual contact.

Even researchers and clinicians who support the validity of repressed memories state that the checklists cannot establish that someone was sexually abused. Additionally, there is no consensus in the scientific community at this time regarding how childhood sexual abuse might induce a particular symptom in one person and a different symptom in another.

B. *Explanation of Phenomenon Helpful to the Trier of Fact?*

Is an explanation of why an individual would completely suppress a memory of childhood sexual abuse and not recall such abuse until after therapeutic treatment helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person consistent with ER 702?

In *Allery*, the court found that an explanation of why a woman suffering from the battered woman syndrome would not leave her mate, or inform police or friends, would be helpful to a jury in understanding a phenomenon not within an ordinary lay person's competence.[199] Similarly, an explanation of why a child suffering from the battered child syndrome would kill rather than leave the parent or seek help from others would be helpful to the jury because it too involves a phenomenon not within an ordinary lay person's competence.[200]

199. *Allery*, 101 Wash. 2d at 597, 682 P.2d at 315.
200. *Id.*

Assuming the scientific validity of the theory of repressed memories is confirmed, an explanation of why and how Jill could completely repress memories of childhood sexual abuse and accurately recall them would be very helpful to a jury in understanding a phenomenon outside of an ordinary lay person's competence.

However, testimony that Jill herself repressed the memory and correctly recalled it may very well be outside the scope of helpful testimony, infringing on the province of the jury. This distinction was illustrated in the *Stevens* case where a caseworker was allowed to testify that based upon her own experience and training, common behavioral symptoms generally exist in sexually abused children.[201] The caseworker was not, however, allowed to testify that the children in the case at bar fit the profile.[202]

C. *Therapeutic Device Only or Corroborated Recall?*

Is the theory of repressed memories a therapeutic tool to help identify, predict, and treat emotional problems rather than a tool to determine the truth or accuracy of a particular past event? Or, do therapists conduct independent investigations to determine whether other evidence corroborates or contradicts the historical accuracy of an individual's recollections of repressed memories?

Rape trauma syndrome was found to be an unreliable scientific method in part because the task of rape trauma therapists did not include determining the historical accuracy of their clients' descriptions of the traumatizing events. Rather than conduct independent investigations to determine whether corroborating or contradicting evidence exists, rape trauma syndrome was developed by professional rape counselors as a therapeutic tool to help identify, predict, and treat emotional problems.

The court's analysis in *Black* is directly analogous to the use of therapy in cases of repressed memories and, indeed, forms an essential element in the heated debate within the scientific community. Those who dispute the validity of repressed memories complain that therapists assume the validity of their clients' memories and that this assumption has no scientific basis. Therapists who assist in memory retrieval stress the importance of the retrieval in the healing process, but not the veracity of the memory retrieved.

There is no evidence that Jill's therapist has taken steps to verify whether Jill's memories are accurate. Instead, the therapist encouraged Jill to confront her father to facilitate the healing process.

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201. *Stevens*, 58 Wash. App. at 497, 794 P.2d at 48.

202. *Id.*

D. Opinion of Guilt?

Does expert testimony purporting to scientifically prove that repression exists constitute an opinion as to the guilt/liability of the alleged abuser and, therefore, invade the exclusive province of the trier of fact?

Because rape trauma syndrome was found to be scientifically unreliable, the court in *Black* stated that expert testimony purporting to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome will be inadmissible.[203] Moreover, the court stated that such expert testimony is unfairly prejudicial because it constitutes an opinion as to the defendant's guilt, an inadmissible invasion upon the exclusive province of the jury.[204]

Arguably, testimony about the scientific viability of the theory of repressed memories will constitute an opinion as to a defendant's guilt or liability. If a jury hears expert testimony that memories can be accurately recalled, and Jill testifies to a retrieved memory involving her father, a conclusion as to her father's guilt or liability logically follows. Of course, a jury or fact finder may very well disbelieve the accuracy of Jill's retrieved memory, but this possibility was insufficient to overcome the court's fears in *Black*.[205]

In the case of rape, one might assume that in addition to expert testimony that the victim is suffering from rape trauma syndrome, there might be other corroborating evidence such as the alleged victim's identification of the defendant and never forgotten facts of the rape itself. In Jill's case, there is no corroborating evidence and her memory was allegedly repressed for approximately twenty-one years. Arguably, there is a real danger here that expert testimony may constitute an opinion as to her father's liability.

E. Sufficiently Reliable Means of Enhancing Recall or Susceptible to Influence and Distortion?

Is the method of recovering repressed memories a sufficiently reliable means of enhancing recall to allow presentation of such enhanced memory as a factually reliable memory? Or, is the method of recovering repressed memories particularly susceptible to influence and/or distortion by the therapist's own pre-disposition, expectations, or intention to use the memories to explain why an individual is experiencing problems?

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203. *Black*, 109 Wash. 2d at 348, 745 P.2d at 19.

204. *Id.*

205. *Id.* at 350, 745 P.2d at 19.

These questions were of great concern to the *Martin* court where it examined the views of experts in the field of hypnosis, leading it to conclude that hypnotically induced testimony was an unreliable means of enhancing recall and that the hypnotic state produced "hypersuggestibility and hypercompliance in the subject."[206] Additionally, the court noted that the hypnotized subject was particularly prone to indulge in confabulation, or the filling in of gaps in memory to please the hypnotist. Therefore, in any given case absent corroborating evidence, neither the subject nor expert observer would be able to distinguish between confabulations and accurate recall.[207]

The court was also concerned that this result would eliminate the fear of perjury as a factor ensuring reliable testimony because of the subject's subjective conviction in the truth of the memory after hypnosis.[208]

Similarly, Jill's conviction in the truth of her recovered memories, absent corroboration, raises the same dangers that concerned the *Martin* court. The scientific literature suggests the therapeutic methods employed by Jill's therapist may have involved suggestive or intrusive techniques. However, because therapeutic methods may differ, there may be sufficient safeguards to overcome some of the fears enunciated by the *Martin* court.

Extensive pre-trial discovery and cross-examination at trial into the nature and origin of Jill's memory retrieval, the nature of Jill's therapy, the nature of therapeutic techniques employed, and the training and background of Jill's therapist, may provide sufficient information to bolster the credibility of testimony offered by Jill and her therapist.

Other jurisdictions examining hypnotically enhanced testimony will allow each party to offer expert testimony on the effects of the hypnosis in the particular case if certain procedural guidelines have been met.[209] The guidelines may include that (1) the hypnotic session is conducted by a licensed, independent psychiatrist or psychologist trained in the use of hypnosis; (2) all contacts between the hypnotist and subject are recorded; and (3) written information detailing facts known prior to hypnosis is obtained from law enforcement officials and the subject to ensure that the therapist does not add new facts during the hypnosis session.[210]

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206. *Martin*, 101 Wash. 2d at 720, 684 P.2d at 655.

207. *Id.* at 722, 684 P.2d at 656.

208. *Id.*

209. *See, e.g.*, State v. Hurd, 432 A.2d 86, 89-90 (1981), *cited in Martin*, 101 Wash. 2d at 720, 684 P.2d at 655.

210. *Hurd*, 432 A.2d at 89-90; *Martin*, 101 Wash. 2d at 720, 684 P.2d at 655.

Martin provides conclusive precedent that hypnotically enhanced testimony is not admissible in this state. However, where a memory of sexual abuse is not recalled under hypnosis, and assuming that the process of repression and accurate recall is proven reliable, allowing discovery of the therapeutic methods employed may be sufficient to overcome a presumption that the memory has been "tainted" by therapeutic suggestions.

F. Victims Incompetent to Testify?

If the method of recovering repressed memories is not a sufficiently reliable means of enhancing recall, should a court determine that not only experts, but also alleged victims are incompetent to testify?

Although the *Frye* test applies to the admissibility of expert testimony, the *Martin* court held that the alleged victim was incompetent to testify. In his concurrence, Justice Brachtenbach explained that when experts are not allowed to testify about the results of the scientific process, it is because the process itself is not reliable. Therefore, if the unreliable process is used to enhance a memory, the enhanced memory cannot be presented to a jury as a factually reliable memory.[211]

Similarly, if the process of repression and accurate recall is proven unreliable, the *Martin* decision suggests that in addition to precluding her therapist's testimony, Jill may also be precluded from testifying about her memories.

G. Battle of Experts?

If the scientific evaluation of the theory of repressed memories has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations, will admission of such evidence lead to a "battle of experts," invading the jury's province of fact-finding, adding confusion instead of clarity?

This concern, articulated by the court in *Black*, is also of concern in regard to the theory of repressed memories. The literature examined illustrates that the theory is the subject of intense debate with little agreement on either side. Certainly, we can assume that Jill's father will present expert testimony that retrieval of long-repressed memories is not supported by any scientific evidence. This can only lead to a "battle of experts," leaving the jury to grapple with questions that the scientific community itself has been unable to resolve.

211. *Martin*, 101 Wash. 2d at 726, 684 P.2d at 658.

Rather than providing testimony helpful to the trier of fact, the testimony of experts may merely result in highlighting the dichotomy of opinion in the scientific community.

VIII. Conclusion

The foregoing analysis indicates a lack of trustworthiness and reliability in the testimony of repressed memories. Therefore, Jill's claim must fail. The scientific basis of expert opinion on this matter, including the principle or procedures through which the expert's conclusions are reached, are insufficiently accepted in the scientific community to remove the danger of speculation and conjecture and to provide assistance to the trier of fact. This lack of acceptance in the scientific community puts at risk any proposed expert testimony and, perhaps, the proposed testimony of a claimant as well.

A summary of the seven guidelines noted above highlights the dangers of admitting this type of evidence. With the exception of being helpful to a jury in understanding a scientific phenomenon not within the jury's competence, the remaining guidelines support exclusion of the evidence:

1. The syndrome embraces such a broad spectrum of human behavior that it becomes a questionable means of identifying victims.
2. Many therapists assume the validity of a repressed memory and stress the importance of retrieval and healing without conducting independent investigations to determine whether corroborating or contradictory evidence exists.
3. Without corroborating evidence, a danger exists that evidence of repressed memory syndrome may constitute an opinion as to the guilt or liability of a defendant.
4. Methods employed to recover memories may involve suggestive or intrusive techniques, distorting the reliability of the memories.
5. If an unreliable method is utilized to recover a memory, a plaintiff's testimony about a memory may be similarly unreliable.
6. Intense debate in the scientific community regarding the theory of repressed memories will only lead to a battle of experts.

As noted above, there are a number of safeguards upon which a trial court may insist in order to enhance the reliability and trustworthiness of repressed memory evidence:

1. that the claimant has verified the nature and origin of the memory retrieval including the nature of the claimant's therapy, the techniques employed, and the training and background of the therapist;

2. that the claimant's therapist has recorded all contacts between the therapist and the claimant to ensure that the claimant's memory has not been "tainted" by therapeutic suggestion;

3. that the claimant has made good faith efforts to obtain corroborating evidence such as school and medical records, testimony of treating physicians, schoolteachers, friends, and family members; and

4. that the jury is instructed to limit its use of repressed memory evidence for help in understanding the phenomenon, and not for determining the guilt or liability of a defendant.

These safeguards, however, are only viable if a trial court can safely assume that the process of repression and accurate recall is reliable. Absent verification that the process of memory repression and recall is possible, however, these safeguards alone cannot support admission of repressed memory evidence, because they do not adequately address the underlying validity of memory repression.

Until the scientific community is able to say that the *process* of repression and accurate recall of memories is a reliable and trustworthy phenomenon, experts can only be expected to inform the trier of fact that repression *may or may not* occur, or that the recovered memory *may or may not* be accurate. A judge or jury is then left to determine whether the recovered memory is indeed accurate. However, neither judge nor jury can be expected to determine whether the *process* of repression and accurate recall is reliable when experts in the field have not yet been able to do so.[212]

A rule precluding evidence of repressed memories may be reexamined, however, if new evidence that seriously questions the lack of acceptance of the theory of repressed memories within the relevant scientific community is produced. In this regard, this author hopes that the Washington Supreme Court will be given an opportunity to address this issue in the near future, and will provide a definitive assessment of whether the evidence is admissible under the Washington Rules of Evidence. The issue before the court should be whether recall of a repressed memory of childhood sexual abuse is a reliable method of retrieving factual information. Therefore, the process itself—repression and recall—must be evaluated before the product of the process—the fact of the abuse—is presented at trial.[213]

212. *See id.* at 726, 684 P.2d at 660 (Brachtenbach, J., concurring).

213. *Id.*