HYPNOTIC MEMORIES OF CHILDHOOD SEXUAL ABUSE: AN ARGUMENT FOR LIBERAL ADMISSIBILITY IN CIVIL CASES

INTRODUCTION

The controversy surrounding repressed and recovered memories of childhood sexual abuse (CSA) has touched many lives through therapy, the media, and most recently, the courtroom. The debate began at least 100 years ago when Sigmund Freud proclaimed his ground-breaking discovery—that all of his "hysterical" female patients had been sexually abused as children.[1] Freud later recanted this belief and said that his patients had not actually been abused, but rather had fantasized about it.[2] In recent years, the debate has intensified due to research that supports, on the one hand, the possibility of remembering long-buried memories of CSA, and on the other hand, the possibility of altering memory through suggestions.[3]

Abuse survivors and their advocates, accused parents and their advocates, scientists, researchers, and therapists have all become involved in the issue. Some argue that, in general, recovered memories are valid, while others contend that, for the most part, such memories are untrustworthy.[4] The debate has been further complicated by hypnosis, which therapists sometimes use as a tool to uncover repressed memories.[5]

Hypnosis is "[a] sleeplike state . . . in which the subject may experience forgotten or suppressed memories, hallucinations, and heightened suggestibility."[6] This definition illustrates the debate surrounding hypnosis: While hypnosis can help uncover buried memories, some people are highly

---

1. D. Stephen Lindsay & J. Don Read, *"Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional, and Personal Issues*, 1 PSYCHOL. PUB. POL'Y & L. 846, 849 (1995) ("Freud . . . described 18 patients whose treatment, he argued, demonstrated that [CSA] is often the root cause of psychological problems."). In Freud's day, hysteria was the equivalent of what we today call neurosis. *See* Judith Lewis Herman, *Father-Daughter Incest, reprinted in* CASES AND MATERIALS ON FEMINIST JURISPRUDENCE 263 (Mary Becker et al. eds., 1994).

2. *See* DANIEL L. SCHACTER, SEARCHING FOR MEMORY 274 (1996); MICHAEL D. YAPKO, PH.D., SUGGESTIONS OF ABUSE 114 (1994).

3. *See infra* Part II.

4. *See* Sheila Taub, J.D., *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183, 186 (1996). Yet others believe that some recovered memories are valid and some are invalid. *See id.* at 192.

5. *See* Borawick v. Shay, 68 F.3d 597, 602 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1869 (1996); Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1210-12 (1995). Most people who recover memories of childhood traumas have not undergone hypnosis. *See* Judith L. Herman & Mary R. Harvey, *The False Memory Debate: Social Science or Social Backlash*, HARV. MED. SCH. MENTAL HEALTH LETTER (Harv. Med. Sch.), Apr. 1993, at 6; SCHACTER, *supra* note 2, at 343 n.31 (noting that former Miss America Marilyn Van Derbur Atler recovered memories of abuse while talking with a friend).

6. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 889 (3d ed. 1992).

suggestible while under hypnosis.[7] Thus, some believe that, in general, memories recovered by hypnosis are valid,[8] while others believe that memories recovered by hypnosis are more likely the result of suggestions made by the hypnotist.[9]

The legal system has become involved in the debate. In many jurisdictions, courts or legislatures have tolled their statutes of limitations to allow plaintiffs in CSA civil cases to seek redress.[10] Thus, courts will be faced with the issue of the admissibility of testimony based on hypnotic memories of CSA.[11]

There is an established body of law governing the admissibility of memories when a witness has undergone hypnosis for the purpose of testifying to specific details of the events at issue (forensic hypnosis).[12] But in 1995, in *Borawick v. Shay*, the Second Circuit became the first jurisdiction to address the admissibility of memories derived from hypnosis used for therapeutic purposes (therapeutic hypnosis).[13]

This Note argues that the court in *Borawick* placed an unfair burden on civil CSA plaintiffs who have undergone hypnosis. The court established a non-dispositive, seven-factor test for determining the reliability and admissibility of hypnotic memories of CSA. Facially, the test is neither unfair nor burdensome, but the court's application of the factors unjustly deprived the plaintiff of the chance to have a jury of her peers hear her case. Further, the court's approach in *Borawick* makes it likely that few, if any, civil CSA plaintiffs who are suing on the basis of recovered memories will get their day in court. Thus, under this approach, extended statutes of limitations for

---

7. *See Borawick*, 68 F.3d at 603.

8. *See infra* text accompanying notes 86-89.

9. *See* Jacqueline R. Kanovitz et al., *Witnesses with MPD*, 23 PEPP. L. REV. 387, 435 n.16 (1996) (noting commentators who believe that memories recovered by hypnosis are the result of therapists' suggestions).

10. To date, about half of the states, through statute or judicial decision, have tolled their statutes of limitations for CSA civil cases. *See* Taub, *supra* note 4, at 183 (listing states). Many jurisdictions follow the approach taken in Johnson v. Johnson, 701 F. Supp. 1363 (N.D. Ill. 1988). In that case, the court clarified the distinction between Type I and Type II plaintiffs. Type I plaintiffs have always remembered the abuse but were not aware that their physical, emotional, or mental problems were related to the abuse. *See id.* at 1367. Type II plaintiffs have repressed, and only recently recovered, memories of the abuse. *See id.* Today, many jurisdictions toll the statute of limitations for both types of plaintiffs. *See* Taub, *supra* note 4, at 195-96.

11. Of course, courts will also be facing questions about memories of CSA that have been recovered through means other than hypnosis. The admissibility of non-hypnotic memories is beyond the scope of this Note. However, to the extent that the general theories of recovered memories enrich the debate about hypnotic memories, this Note makes use of that literature.

12. *See Borawick*, 68 F.3d at 604-06.

13. *See id.* at 600 ("The parties have not cited, nor are we aware of, any case concerning the specific issue before us: the admissibility of testimony about memories of childhood sexual abuse that are recalled for the first time in adulthood following the use of hypnosis as part of psychotherapy.").

recovered memory lawsuits, and the policies underlying those statutes, will be rendered immaterial.

Part I of this Note addresses the prevalence and effects of CSA. Part II discusses the current state of research on memory repression and recovery. In Part III, the risks and benefits of hypnosis are laid out. Part IV discusses and analyzes *Borawick v. Shay* and concludes that the court erred in applying the test it laid out for a pre-trial determination of admissibility of hypnotic memories of CSA. Part IV argues that courts should take a liberal approach toward admissibility. Addressing concerns about the reliability of recovered memories of CSA, and particularly hypnotic memories, Part V suggests guidelines for therapists who treat CSA patients. Failure to follow these guidelines can be taken into consideration by the jury in its assessment of the plaintiff's reliability and credibility. Further, guidelines will likely serve to legitimize therapy for CSA survivors.

I. BACKGROUND

A. The Prevalence of CSA

It is impossible to accurately estimate the prevalence of CSA because the crime is secretive and many, perhaps most, instances go unreported.[14] Nonetheless, the numbers are shocking, and it is undisputed that CSA is a "widespread phenomenon."[15] According to the National Center on Child Abuse and Neglect, there were between 200,000 and 300,000 reported cases of CSA in the United States in 1993,[16] representing a dramatic rise in reported cases over a ten-year period.[17] Other studies confirm these numbers.[18] According to the National Organization for Women (NOW), twenty to fifty

---

14. *See* THIRD FORUM ON FEDERALLY FUNDED RESEARCH ON CHILD ABUSE AND NEGLECT 11 (Feb. 21, 1995) (statement of Frank Putnam, M.D.) ("[S]urveys suggest that only 6 to 12 percent of actual sexual abuse cases are reported to agencies."); *see also* YAPKO, *supra* note 2, at 169. See *infra* text accompanying notes 23-30 for a discussion of the secretive nature of CSA.

15. YAPKO, *supra* note 2, at 21. According to Yapko, "one in four women and one in six men have been sexually abused as children." *Id.* at 26.

16. *See* EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 5 (Sept. 1996) (on file with author) [hereinafter EXECUTIVE SUMMARY]. The lower number takes into account only cases in which direct evidence of harm is available (the Harm standard), while the higher number includes children accounted for in the Harm standard and adds children who are in danger of harm or for whom direct evidence of harm is not available (the Endangerment standard). *See id.* at 2-3. The study includes children who were referred to child protective service agencies and children who were seen by community professionals but were not referred to protective service agencies. *See id.* at 1.

17. *See id.* at 4-5. The measurement taken under the Harm standard reflects an 83% increase in CSA in the last 10 years, while the measurement taken under the Endangerment standard reflects a 125% increase in the same time period. *See id.*

18. *See* Sylvia Rubin, *Sharing an Awful Secret*, S.F. CHRONICLE., Oct. 9, 1991, at B3.

percent of American women have been victims of CSA.[19] And, according to the American Coalition for Abuse Awareness, one-third to one-fourth of American girls and one-fifth to one-seventh of American boys are sexually abused before the age of eighteen.[20] In an oft-cited 1985 *Los Angeles Times* poll of 2,627 adults, twenty-seven percent of female respondents and sixteen percent of male respondents reported having been victims of CSA.[21] The vast majority of these cases involve father-daughter or stepfather-stepdaughter incest.[22]

B. The Nature and Effects of CSA

CSA is a crime shrouded in secrecy.[23] Sexually abused children are often warned, implicitly or explicitly, not to tell anyone about the abuse.[24] Children may be threatened with abandonment,[25] told that no one will believe them, or warned that they or other family members will be killed.[26] One survivor noted that her father would sexually abuse her and tell her she "was wonderful and beautiful," but warn her not to tell her mother because her mother "wouldn't understand these special things girls do for their fathers."[27] Because perpetrators often represent the abuse as an expression of love, sexually abused children often have trouble distinguishing between "what is natural,

---

19. *See Child Abuse Accountability Act: Hearings on H.R. 3694 Before the Subcomm. on Compensation and Employment Benefits of the House Comm. on Post Office and Civil Serv.*, 103d Cong. 56 (1994) [hereinafter *Hearings*] (statement of NOW Legal Defense and Education Fund).

20. *See Hearings*, *supra* note 19, at 52 (statement of the American Coalition for Abuse Awareness (ACAA)).

21. *See* Irene Wielawski, *Unlocking the Secrets of Memory*, L.A. TIMES, Oct. 3, 1991, at A1. According to studies conducted by the National Center on Child Abuse and Neglect, girls are three times more likely than boys to be the victims of sexual abuse. *See* EXECUTIVE SUMMARY, *supra* note 16, at 6. Thus, this Note will use the feminine pronoun when referring to survivors of CSA.

22. *See Hearings*, *supra* note 19, at 56 (statement of NOW); *see also* Spencer A. Overton, *Constitutional Challenges to Statutes of Limitations for Civil Child Sexual Abuse Suits*, 8 AM. J. FAM. L. 97, 98 (1994) (stating that "[a]s many as one million women have been victimized by their fathers"). *But see* EXECUTIVE SUMMARY, *supra* note 16, at 12 (stating that "[n]early one-half of the sexually abused children were sexually abused by someone other than a parent").

23. *See Hearings*, *supra* note 19, at 52 (statement of ACAA); *see also* SCHACTER, *supra* note 2, at 265; YAPKO, *supra* note 2, at 169; Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 593 (1996).

24. *See Hearings*, *supra* note 19, at 53 (statement of ACAA); *see also* Minouche Kandel & Eric Kandel, *Flights of Memory*, DISCOVER, May 1994, at 38 (noting the "threats made to children to prevent them from telling others").

25. *See* YAPKO, *supra* note 2, at 169.

26. *See* Bowman & Mertz, *supra* note 23, at 593; *see also Hearings*, *supra* note 19, at 53 (statement of ACAA); YAPKO, *supra* note 2, at 169.

27. Marcia Yudkin, *The Nightmare of Childhood Sexual Abuse: Survivors Speak Out*, COSMOPOLITAN, May 1992, at 247.

normal, and loving and what is morally reprehensible."[28] Many children blame themselves for the abuse, feeling as though they must have done something to bring it on.[29] Thus, whether out of fear, confusion or guilt, most children never tell anyone about the abuse.[30]

Children who are sexually abused are prone to low self-esteem, hopelessness, and helplessness;[31] shame, guilt, and confusion;[32] poor concentration, fear, disrupted sleep patterns, nightmares, aggression, moodiness, and depression.[33] They often develop severe psychological problems that carry over into adulthood.[34]

Children cannot physically escape sexual abuse, so they must learn to escape emotionally.[35] One way to emotionally escape is to repress the experience. Repression occurs when an individual is faced with a situation that is too overwhelming to be integrated on a conscious level.[36] The reality gets pushed into the depths of the unconscious, where it continues to affect the individual.[37]

---

28. Kanovitz, *supra* note 5, at 1200.

29. *See* Mary Sykes Wylie, *The Shadow of a Doubt*, THE FAMILY THERAPY NETWORKER, Sept.-Oct., 1993, at 27; *see also* YAPKO, *supra* note 2, at 170; Kanovitz, *supra* note 5, at 1200.

30. *See Hearings*, *supra* note 19, at 53 (statement of ACAA); *see also* YAPKO, *supra* note 2, at 169. Because of this secrecy, there is rarely corroborating evidence of CSA. Thus, in cases brought years later, plaintiffs will be severely handicapped. *See infra* text accompanying notes 149-155.

31. *See* Kanovitz, *supra* note 5, at 1200.

32. *See* Wylie, *supra* note 29, at 26 (noting that trauma causes "intense shame and self-hatred"); *see also* Overton, *supra* note 22, at 98.

33. *See* Overton, *supra* note 22, at 98. Despite all of this, many children (and adult survivors) feel affection for their abuser. *See id.*

34. *See id.*; *see also* American Psychiatric Association Board of Trustees, STATEMENT ON MEMORIES OF SEXUAL ABUSE 1 (1993) [hereinafter STATEMENT ON MEMORIES] ("Sexual abuse of children and adolescents leads to severe negative consequences. Child sexual abuse is a risk factor for many classes of psychiatric disorders . . . .").

Adult survivors of CSA may suffer from any number of disorders, the most common of which are depression, anorexia or bulimia, obesity, drug and alcohol abuse, suicidal behavior, sleep disturbances, phobias, anxiety, sexual dysfunctions, and inability to form healthy relationships. *See* Petersen v. Bruen, 792 P.2d 18, 22 n.4 (Nev. 1990).

35. *See* Kanovitz, *supra* note 5, at 1199.

36. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1582 (16th ed. 1989) ("Psychoanalysis seeks to discover and to release repression.").

37. *See id.*; *see also* Robert Sadoff, M.D., *Child Abuse and Repressed Memory Testimony*, 1 QUINNIPIAC HEALTH L.J. 79 (1996) ("Repressed memories are memories that have been pushed into a person's unconscious mind, making them more difficult for the conscious mind to access . . . . Psychotherapy can be useful in bringing repressed memories to the surface, making them accessible to the conscious mind and, therefore, treatable."). Some question the validity of memory repression. Schacter, for example, argues that there are other, more scientifically viable explanations for loss of memories. *See* SCHACTER, *supra* note 2, at 252-62.

While most survivors always remain aware of some, if not all, of the abuse,[38] many repress the trauma—partially or completely.[39] Repressed memories may resurface when a survivor's children reach an age or developmental stage that reminds the survivor of her own childhood;[40] when a survivor hears of abuse suffered by other family members;[41] when a survivor hears media accounts of abuse;[42] or through therapy, which may involve the use of hypnosis.[43]

Another mechanism for emotional escape is dissociation. Like repression, dissociation protects individuals from consciously experiencing trauma.[44] Dissociation, however, involves a split in consciousness. The traumatic experience is partially or fully "separated from [ordinary] consciousness and . . . processed outside awareness."[45] When partial dissociation is involved, emotions, thoughts or sensations that normally accompany an experience are inaccessible. When full dissociation is involved, the entire experience is inaccessible, and the individual experiences a limited form of amnesia.[46]

Dissociation often occurs in people who are highly hypnotizable.[47] High hypnotizables are a small, readily identifiable group of people[48] who "process information in a way that makes it difficult to distinguish between an actual memory and a fantasy."[49] Thus, in the case of high hypnotizables, absent corroborating evidence, it will be extremely difficult to tell whether adults who dissociated from abuse as children were actually sexually abused or whether they have fantasized about the abuse or incorporated it through

---

38. *See* YAPKO, *supra* note 2, at 157 (stating that "repression is evident in only a minority of cases of genuine trauma").

39. *See* Martha L. Rogers, *Factors to Consider in Assessing Adult Litigants' Complaints of Childhood Sexual Abuse*, 12 BEHAV. SCI. & L. 279, 280 (1994).

40. *See* Jacqueline Hough, Note, *Recovered Memories of Childhood Sexual Abuse*, 69 S. CAL. L. REV. 856 n.3; Rogers, *supra* note 39, at 284.

41. *See* Borawick v. Shay, 842 F. Supp 1501, 1502-03 (D. Conn. 1994), *aff'd* 68 F.3d 597 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1869 (1996).

42. *See* Kanovitz, *supra* note 5, at 1193 n.22.

43. *See* Borawick v. Shay, 68 F.3d 597, 602 (2d Cir.), *cert denied* 116 S. Ct. at 1869 (1995) ("Hypnosis has been credited with restoring lost memories that include repressed memories of painful experiences.") (citations omitted); *see also* Kanovitz, *supra* note 5, at 1212.

44. *See* Kanovitz et al., *supra* note 9, at 401.

45. *Id.* Multiple personality disorder is a form of dissociation. *See id.* at 399.

46. *See id.* at 399-401.

47. *See id.* at 402.

48. *See* Kanovitz, *supra* note 5, at 1238.

49. Daniel Brown, *Sources of Suggestion and Their Applicability to Psychotherapy*, *in* SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE 87 (Judith L. Alpert ed., 1996) [hereinafter SEXUAL ABUSE RECALLED].

suggestions.[50] However, hypnotizability is a trait that can be easily measured.[51]

II. MEMORY RESEARCH

Whether memories can be lost and accurately recovered is currently the subject of debate in the clinical and scientific communities.[52] The American Psychiatric Association (APA) has stated that "[t]here is currently no method for establishing with certainty the accuracy of . . . retrieved memories in the absence of corroborative evidence."[53] There are, however, studies that show the possibility of losing, and later accurately recovering, memories of CSA. Conversely, there are studies that show the possibility of remembering events that never occurred.

In one well-publicized case, Ross Cheit, a professor at Brown University, recovered memories of sexual abuse that had taken place over two decades earlier.[54] His memories were confirmed by other victims, as well as by people who had witnessed the abuse.[55] And in 1989, Frank Fitzpatrick recovered memories of having been abused in the 1960s by James Porter, a priest.[56] Fitzpatrick's memories were later confirmed by other survivors, by Porter's admission, and by evidence found upon investigation.[57]

Recently, researchers interviewed 129 women about their histories of sexual abuse.[58] All had been brought to a hospital emergency room seventeen years earlier for injuries related to sexual abuse.[59] Detailed medical reports documented the abuse.[60] Thirty-eight percent of the women interviewed had completely forgotten the abuse, and about sixteen percent had forgotten the

---

50. Ironically, however, CSA can lead to high hypnotizability. *See* Kanovitz, *supra* note 5, at 1240 ("Clinical studies confirm that severe abuse in early childhood and high hypnotizability often go hand-in-hand. The abused child's need for psychological escape can lead to overreliance on fantasy formation and to the development of hypnotic talent.").

51. *See id.* at 1221-23.

52. *See generally* Emily E. Smith-Lee, Note, *Recovered Memories of Child Abuse: Should Long-Buried Memories be Admissible Testimony?*, 37 B.C. L. REV. 591, 612 (1996); Rosemary Ferrante, Note, *The Discovery Rule*, 61 BROOK. L. REV. 199, 210 (1995).

53. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (4th ed. 1994).

54. *See* Bowman & Mertz, *supra* note 23, at 610-11 n.335.

55. *See id.*

56. *See id.* at 610.

57. *See id.* at 610 n.334.

58. *See id.* at 610.

59. *See id.* at 604.

60. *See id.*

abuse for some period of time.[61] A later study confirmed that the latter group's recovered memories were generally accurate.[62]

Results of another study show that forty percent of people who had been sexually abused as children reported having forgotten the abuse for some period of time.[63] Just under half of those found corroborating evidence.[64] One study of fifty-three women in therapy for sexual abuse found that sixty-four percent forgot all or part of the abuse for a period of time.[65] Of the fifty-three subjects, seventy-four percent found strong corroborating evidence.[66]

Some researchers, however, argue that memory is generally unreliable. For example, in one study, forty-four students noted where they were and what they were doing when they learned about the explosion of the space shuttle Challenger.[67] Three years later, the same students were asked to recall the same information.[68] Of the forty-four, only three students correctly recalled their whereabouts, and eleven recalled only incorrect information.[69] Further, many researchers contend that individuals can be made to believe in events that never happened or details that did not exist. In one study, a boy was made to believe that he had once been lost in a shopping mall.[70] In another study, after repeated suggestions, a young boy was made to believe that he had been taken to a hospital after getting his hand caught in a mousetrap—an event that never occurred.[71] Separately, many individuals who were shown a re-enactment of a car accident incorrectly remembered seeing a barn in the scene after repeated questioning about the barn.[72]

These studies have been criticized because they generally involve any of the following: common occurrences that most people can relate to (being lost in a shopping mall); non-traumatic, non-invasive experiences (no study, for obvious ethical reasons, can replicate CSA); or peripheral, inconsequential details (seeing a barn in a car accident scene). Thus, these studies say little about creating memories of truly traumatic events, such as CSA.[73] Further, in

---

61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.* at 605.
66. *See id.*
67. *See id.*
68. *See id.*
69. *See* Julie M. Kosmond-Murray, Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 499-500 (1995).
70. *See* Hough, *supra* note 40, at 867.
71. *See* Taub, *supra* note 4, at 190.
72. *See* Brown, *supra* note 49, at 67 (citations omitted).
73. *See* Smith-Lee, *supra* note 52, at 611.

the shopping mall experiment, the researchers used only five subjects and no control subjects.[74] All five were "friends and relatives" of the research group.[75] Thus, this experiment says more about "the persuasive influence of a credible source" than it does about the possibility of implanting false memories.[76] Finally, research has shown that subjects do not generally accept inconceivable data; the "misinformation ha[s] to be plausible."[77] Misinformation regarding sexual abuse is unlikely to be seen as plausible—and is, therefore, unlikely to be readily accepted—by those who have not suffered sexual abuse.

Many who question the validity of recovered memories point to the cases of people who have recanted allegations of CSA.[78] Those who recant generally claim that memories of CSA were implanted by their therapists.[79] While there are undoubtedly some people who have had their memories shaped by therapy,[80] there are also bound to be some who have changed their stories because of familial or societal pressure.[81] Thus, the fact that people do recant stories of sexual abuse does not undermine the validity of recovered memories.[82] Given the enormous numbers of victims of CSA, "a (probably) small percentage of accusations are made against innocent people in response to undue influences."[83] Furthermore, it is inevitable that some of those who claim innocence are suffering from faulty memories themselves. Indeed, "abusers can confabulate a history of nothing but good deeds and a loving demeanor just as readily as accusers can confabulate a history of abuse. It *definitely* works both ways."[84] False accusations of CSA can and should be

---

74. *See* Brown, *supra* note 49, at 80.

75. *Id.*

76. *Id.*

77. *Id.* at 68 (citation omitted).

78. *See* Taub, *supra* note 4, at 208-09.

79. *See id.*

80. For example, highly hypnotizable people tend to have trouble distinguishing between fantasy and reality. *See supra* text accompanying notes 48-51.

81. *See* Brown, *supra* note 49, at 88 (arguing that suggestible people are as vulnerable to the "quite substantial interrogatory pressure of a disapproving family" as they are to the therapists' suggestions).

82. The following demonstrates the irony associated with some false memories:

> *Abusers* cause their *victims* to develop *false memories* of *nonabuse*. They do so as a direct result of the utilization of such techniques as direct suggestion, guided visualization, interpretation, and threats. An example would be the perpetrator-father telling the child he was abusing to go back to sleep and that it was all a dream.

Judith L. Alpert, *Professional Practice, Psychological Science, and the Delayed Memory Debate*, *in* SEXUAL ABUSE RECALLED, *supra* note 49, at 13.

83. YAPKO, *supra* note 2, at 179.

84. *Id.* at 182. "Elderly subjects are prone to report their earlier lives as having been happier as they age." Rogers, *supra* note 39, at 292 (citation omitted). "[P]eople '[t]end to rewrite history more in line with what they think they ought to have done than with what they actually did.'" Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 246 (1995)

handled by the legal system in the same manner as false accusations of any other type: through the adversarial process.[85]

III. HYPNOSIS

A. Benefits

For nearly forty years, the American Medical Association and the American Psychological Association have recognized hypnosis as a legitimate form of treatment.[86] Today, hypnosis is used by dentists, doctors, nurses, psychologists, psychiatrists, and social workers to treat psychological problems and to help alleviate pain.[87] In 1982, a random survey of six hundred members of the American Psychological Association revealed that forty-seven percent were trained in hypnosis, and over twenty-seven percent used hypnosis regularly in their counseling and psychotherapy practices.[88] Many therapists use hypnosis because it is an effective tool to bring long-buried memories to the surface.[89] Others believe that hypnosis is too often misused, and thus elicited memories are presumptively unreliable.[90]

However, many researchers, scientists, and therapists believe concerns about hypnosis are overstated.[91] For example, in a study often referred to by those who argue that hypnosis taints memory, researchers attempted to implant a hypnotic memory that the subjects had been awakened in the middle of the night by a loud noise.[92] The subjects were chosen because they were highly hypnotizable.[93] While twenty-two percent accepted that they had been awakened, twenty-seven percent were merely left confused, and the memories of a full fifty-one percent were unaffected by the researchers' efforts.[94] When this study was replicated on groups of people who had normal levels of

---

(citation omitted).

85. *See infra* text accompanying note 110. Part V *infra* suggests ways that the legal system can handle false accusations of CSA.

86. *See* Kanovitz, *supra* note 5, at 1210; Borawick v. Shay, 68 F.3d 597, 602 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1869 (1996). This recognition resulted from the successful treatment of World War II soldiers who were suffering from war-related stress neuroses. *See id.*

87. *See* Kanovitz, *supra* note 5, at 1210-11.

88. *See id.*

89. *See id.* at 1212.

90. *See, e.g.*, D. Corydon Hammond, *Hypnosis, False Memories, and Guidelines for Using Hypnosis with Potential Victims of Abuse*, *in* SEXUAL ABUSE RECALLED, *supra* note 49, at 105 (noting academics who believe that hypnosis elicits "more inaccurate information than accurate information").

91. *See, e.g., id.* at 112; Brown, *supra* note 49, at 84.

92. *See* Kanovitz, *supra* note 5, at 1236 (citation omitted).

93. *See id.* For a discussion of hypnotizability, see *supra* notes 48-51.

94. *See* Kanovitz, *supra* note 5, at 1236.

hypnotizability, it proved unsuccessful.[95] Thus, the most this experiment establishes is that it is possible to create false memories in a small subset of highly hypnotizable people.[96] The issue can be explored at trial because hypnotizability is an easily measured trait that belongs to a small, identifiable segment of the population.[97]

B. Problems

Courts addressing the admissibility of memories refreshed by forensic hypnosis consistently cite three concerns: (1) the witness is open to suggestion from, and may be driven by a desire to please, the hypnotist (suggestibility); (2) the witness may fill in memory gaps in order to make the story more coherent (confabulation); and (3) the witness may become so confident in her memories that cross-examination is rendered more difficult (memory hardening).[98]

The United States Supreme Court addressed these concerns in *Rock v. Arkansas*.[99] In *Rock*, the defendant killed her husband, allegedly in self-defense.[100] However, she could not remember the details surrounding the crime, so she underwent hypnosis.[101] The Supreme Court of Arkansas excluded the testimony, holding that hypnotically refreshed memory is unreliable and thus per se inadmissible.[102] The United States Supreme Court held that, as applied to criminal defendants, the Arkansas per se rule impermissibly infringed upon the constitutional right to testify in one's own defense.[103] The Court noted the problems of suggestibility, confabulation, and memory hardening, but expressed its faith in the adversarial system to expose these problems: "Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury

---

95. *See id.*; *see also* Brown, *supra* note 49, at 83-84, 87. Successfully implanting memories is "rare in low-hypnotizables." Hammond, *supra* note 90, at 108-09.

96. *See* Kanovitz, *supra* note 5, at 1236.

97. *See supra* text accompanying notes 48-49.

98. *See* Rock v. Arkansas, 483 U.S. 44, 59-60 (1987); *Borawick*, 68 F.3d at 602-03; State v. Hurd, 432 A.2d 86, 93 (N.J. 1981). These courts apply one of four tests to determine the admissibility of memories refreshed by forensic hypnosis: a per se inadmissibility test; a per se admissibility test; a "safeguards" approach, under which courts lay out four or five factors that must be met; and a case-by-case, totality-of-the-circumstances approach, which incorporates the safeguards approach and adds the element of judicial discretion. *See Borawick*, 68 F.3d at 604-06.

99. *Rock*, 483 U.S. at 44.

100. *See id.* at 46.

101. *See id.*

102. *See id.* at 48-49.

103. *See id.* at 61.

can be educated to the risks of hypnosis through expert testimony and cautionary instructions."[104]

The circumstances in *Rock* were unusual. In the vast majority of cases involving the admissibility of hypnotic memories, the witness is either a victim or an eyewitness, not the defendant.[105] In *Rock*, the defendant's constitutional right to testify outweighed concerns about the unreliability of hypnosis. Although in the majority of cases the Constitution is not a factor, in all cases, the Court's faith in the adversarial system is applicable.

Furthermore, there are fundamental differences between forensic hypnosis and therapeutic hypnosis. In cases involving forensic hypnosis, the witness is usually aware of the prosecutor's theory of the case prior to undergoing hypnosis. Thus, the witness has some idea of what he or she needs to remember to make the prosecution's case stronger.[106] However, when therapeutic hypnosis is involved, patients are presumably not seeking therapy to bolster a legal cause of action. Rather, they are seeking help with psychological problems and consequently "may be less inclined to confabulate."[107]

Finally, whenever a witness' memory is involved, concerns of suggestibility, confabulation, and memory hardening arise. "Rehearsing testimony, discussing the case with the prosecutor, reviewing documents, and listening to other testimony are all inherently suggestive procedures. Even the mere passage of time between the events at issue and trial inevitably cause erosion of memory and increase the natural tendency to confabulate."[108] As

---

104. *Id.* at 61.

105. *See, e.g., Borawick*, 68 F.3d at 598; State v. Brown, 337 N.W.2d 138, 138 (N.D. 1983); *Hurd*, 432 A.2d at 88.

106. *See, e.g., Hurd*, 432 A.2d at 98 (noting that during hypnosis the witness was asked, "Is it Paul?" and further, that pressure was exerted on the witness "to cooperate").

107. *Borawick*, 68 F.3d at 608.

108. CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, 27 FEDERAL PRACTICE AND PROCEDURE § 6011, at 153 (3d ed. 1990) (citation omitted); *see also* FED. R. EVID. 611 advisory committee's note ("[T]he rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 24 (3d ed. 1996) (noting that aggressive questioning may "invoke in [a] witness a false memory of the events, [or] induce him to . . . acquiesce . . . in the examiner's suggested version"); WRIGHT & GOLD, *supra*, at 174 (noting that "suggestion and confabulation may be produced by the witness simply by discussing the case with her lawyer") (citation omitted); Bowman & Mertz, *supra* note 23, at 612 ("the potentially powerful effects of coercive interviewing and interrogation are well known to lawyers. The existence of highly suggestible people who will confess to crimes that they did not commit or who will testify to events that they did not see is hardly news to legal professionals . . . ."); Brown, *supra* note 49, at 73-80 (discussing high levels of suggestibility in police and other forensic interrogations); Smith-Lee, *supra* note 52, at 629 (noting that an individual is not "any more likely to become convinced of the veracity of his or her story through the process of retrieving a long-buried memory than a witness with nonrepressed memories who thinks he or she remembers things a certain way and becomes convinced that the memory is correct").

one court noted, "If we were to apply to all witnesses the concern with suggestibility and difficulty of cross-examination, . . . 'we would not allow a lawyer to talk to his witnesses before trial, we would exclude most identification testimony, and relatives and friends of a party could be excluded as witnesses.'"[109] Thus, it makes little sense for courts to use the unreliability of hypnosis as a justification for excluding evidence when eyewitness testimony is similarly unreliable. Accurate or not, eyewitness testimony is often the basis for convicting defendants in criminal trials.[110]

IV. *BORAWICK V. SHAY*: THE SECOND CIRCUIT ADDRESSES HYPNOTIC MEMORIES OF CSA

A. Development of a Legal Doctrine

In 1985, suffering from chronic illnesses, twenty-eight-year-old Joan Borawick began consulting doctors and therapists.[111] In 1987, upon recommendation of her treating physician, Borawick began hypnotic treatments at Pacific Medical Center with Mr. Valerian St. Regis.[112] Over the course of a year, she received about fourteen treatments.[113] Soon after the last treatment, Borawick began remembering specific incidents of CSA committed by her father.[114] A few days later Kathy, Borawick's sister, told Borawick that she had been abused by their aunt, Christine Shay. Borawick immediately experienced a flashback, and began recovering decades-old memories of sexual abuse by her aunt and uncle, Christine and Morrie Shay.[115]

---

109. *Brown*, 337 N.W.2d at 151 (citation omitted). "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." United States v. Wade, 388 U.S. 218, 228 (1967).

110. *See Hurd*, 432 A.2d at 94-95. "Many cases turn wholly on [eyewitness testimony], without any corroboration." Hallisey, *supra* note 84, at 237. In some criminal cases, eyewitness testimony has resulted in wrongful convictions. *See Hurd*, 432 A.2d at 241; *see also Wade*, 388 U.S. at 235 (noting the "dangers inherent in eyewitness identification").

Here, questions about the applicability of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), might arise. In *Daubert*, the Supreme Court set forth a test for determining the reliability and admissibility of expert scientific testimony. *See Daubert*, 509 U.S. at 582. However, *Daubert* should not be applied to the question of whether a plaintiff's hypnotic memory testimony is admissible, for *Daubert* does not apply to the testimony of lay witnesses. In cases of recovered memories, the primary issue is the "testimony of the plaintiff, not the testimony of the hypnotist." G. Michael Fenner, *The Daubert Handbook*, 29 CREIGHTON L. REV. 939, 979 (1996).

111. *See* Borawick v. Shay, 68 F.3d 597, 602 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1869 (1996).

112. *See id.*

113. *See id.*

114. *See id.* at 599. She had not remembered being sexually abused by her father prior to the hypnosis. *See id.*

115. *See* Borawick v. Shay, 842 F. Supp. 1501, 1502 (D. Conn.), *aff'd* 68 F.3d 597 (2d Cir. 1995),

Borawick filed a civil suit, seeking compensatory and punitive damages from the Shays.[116] The defendants filed a motion in limine to exclude all of Borawick's hypnotic memories.[117] The district court ruled that before testimony based on hypnotic memories would be admitted, the plaintiff would have to prove that four safeguards were met: (1) the hypnotist was appropriately qualified; (2) the hypnotist did not add anything to the patient's memories; (3) there was a permanent record of the hypnotic sessions; and (4) there was corroborating evidence of the abuse.[118] Finding that St. Regis was not appropriately qualified, the court granted the defendants' motion holding that Borawick's hypnotic memories were inadmissible.[119]

Borawick appealed to the Second Circuit. Emphasizing that the district court's test was too "rigid and restrictive," the appellate court adopted what it believed to be a more flexible analysis: a case-by-case or "'totality-of-the-circumstances' approach."[120] The court set forth a "non-exclusive list of factors" for a pre-trial determination of the reliability and admissibility of testimony based on hypnotic memories.[121]

First, the purpose of hypnosis should be determined.[122] Memories refreshed by forensic hypnosis might be more suspect because "the subject may feel pressured to remember details, to aid the criminal investigation."[123] On the other hand, if the witness has undergone therapeutic hypnosis, "she may be less inclined to confabulate."[124] Second, the court should consider whether anyone made suggestions to the plaintiff before or during hypnosis "such as a theory of the cause of the subject's ailments."[125] Third, there should be a record of the hypnotic sessions so the court can determine whether the hypnotist used suggestive procedures.[126] Fourth, the hypnotist should be trained in psychology or psychiatry.[127] Fifth, the court should take into consideration any corroborating evidence.[128] Sixth, the court should consider

---

cert. denied, 116 S. Ct. at 1869 (1996).

116. *See id.*

117. *See id.*

118. *See Borawick*, 68 F.3d at 600-01.

119. *See id.* at 601.

120. *Id.* at 607 (citation omitted). While the Second Circuit's test for admissibility may have been more flexible than the one adopted by the district court, the Second Circuit's application of that test was far from flexible. *See infra* Part IV.B.

121. *Borawick*, 68 F.3d at 608.

122. *See id.*

123. *Id.*

124. *Id.* at 608-09.

125. *Id.* at 608.

126. *See id.*

127. *See id.*

128. *See id.*

the level of hypnotizability of the witness.[129] Seventh, the parties may offer expert testimony in order to evaluate the particular hypnotic session(s).[130] Finally, the court "should weigh the factors in favor and against the reliability of the hypnosis procedure in the exercise of its discretion whether to admit the post-hypnotic testimony."[131]

In applying the factors, the court focused primarily on the fourth, the qualifications of the hypnotist.[132] The court noted that St. Regis' "formal education ended with a high school diploma; he had no formal training in psychiatry or psychotherapy; his hypnotic technique used an experimental cranial electronic stimulator; he did not read the professional literature; and his work experience prior to being a hypnotist at Pacific Medical Center was intermittent."[133] Thus, the court determined that "it is beyond question that St. Regis lacked adequate professional qualifications as a hypnotist."[134]

As for the other factors, the court noted that "[t]here was . . . no permanent record of the procedures that St. Regis used; no videotapes, audiotapes, or even contemporaneously-drafted medical reports existed."[135] Addressing the fifth factor, the court noted that "Borawick's corroborating evidence was simply too weak to overcome the very strong evidence against admissibility."[136] Further, the court noted that St. Regis had read parts of Borawick's deposition prior to having given his own.[137] Finally, the court remarked on "the inherent incredibility of Borawick's allegations":

---

129. *See id.* "A highly hypnotizable subject may be more prone to confabulate and more susceptible to suggestion." *Id.* at 608. See *supra* text accompanying notes 48-51 for a discussion of hypnotizability.

130. *See Borawick*, 68 F.3d at 608.

131. *Id.* The court determined that *Daubert* was inapplicable to the admissibility of Borawick's lay testimony because *Daubert* "concerns the admissibility of data derived from scientific techniques or expert opinions." *Id.* at 610.

132. *See id.* at 609.

133. *Id.*

134. *Id.*

135. *Id.* (citing *Borawick*, 842 F. Supp. at 1507). Actually, medical reports did exist; they were not available because Pacific Medical Center had closed. *See Borawick*, 842 F. Supp. at 1507. However, the appellate court went on to reason that, because it had no records of the sessions in front of it, there was "no basis on which to evaluate the actual procedures St. Regis used." *Borawick*, 68 F.3d at 609. Nonetheless, it seems unfair to hold this against the plaintiff. Neither Borawick nor St. Regis had any control over the fact that the records were unavailable.

136. *Borawick*, 68 F.3d at 609. The corroborating evidence included letters that Borawick received from her younger sister, Kathy, in 1989. *See id.* at 600. In both letters, Kathy mentioned having been sexually abused, and one letter "expressly identified the defendants as the perpetrators." *Id.* However, the defendants had a letter, purportedly written by Kathy, recanting the allegations set forth in her earlier letters. *See id.*

137. *See id.* at 609. "[T]his circumstance further undermines the value, if any, of his testimony." *Id.*

> Borawick has leveled fanciful accusations of sexual abuse against numerous persons other than the defendants in this matter . . . . That Borawick has made these far-fetched, uncorroborated accusations against others, . . . erodes our confidence in the allegations against Morrie and Christine Shay and properly weighs against the admissibility of her hypnotically-induced memories.[138]

Thus, the Second Circuit affirmed the district court's exclusion of Borawick's hypnotic memories.[139]

B. Where the Court Went Wrong

The seven factors set out by the court are highly relevant to determining the reliability of memories derived from therapeutic hypnosis. The court, however, erred in applying these factors. In its discussion of St. Regis' qualifications, the court simply failed to mention that he had "been a hypnotherapist off and on [for] 50 years";[140] had done a five-year apprenticeship with a retired psychiatrist;[141] was hired by two doctors to practice at the Pacific Medical Center, where he saw at least 100 clients, including Borawick;[142] was a member of several professional organizations, including the American Hypnotherapy Association and the Association of Professional Hypnotherapists;[143] "had attended, and given, numerous lectures on the topic";[144] and, lastly, had developed a cranial electronic stimulator, which, he testified, received FDA approval.[145] Thus, while the court thought the issue of St. Regis' qualifications was "beyond question,"[146] reasonable minds might well have reached a different conclusion.

Not only was the court's characterization of St. Regis' qualifications one-sided, but its reliance on those qualifications was misplaced. There was no evidence in the record to suggest that a hypnotist's qualifications bear on the reliability of the client's memories. More importantly, however, the focus should be on whether the hypnotist used suggestive procedures on the witness, not on whether the hypnotist had a master's degree in psychology.[147]

---

138. *Id.*
139. *See id.*
140. *Borawick*, 842 F. Supp. at 1507.
141. *See id.*
142. *See id.*
143. *See id.*
144. *Id.*
145. *See id.*
146. *Borawick*, 68 F.3d at 609.
147. For a list of procedures designed to minimize the threat of therapist suggestion, see *infra* text accompanying notes 191-201.

Moreover, it is unfair to preclude a plaintiff from testifying because of the therapist's actions or qualifications. "It is likely that many people who seek psychotherapy are unfamiliar with the meaning of the various formal degrees, titles, and certifications for providers of mental health care and hence cannot select between qualified and unqualified caregivers."[148] People seeking therapy are probably more focused on choosing a therapist with whom they feel comfortable (both psychologically and financially), and not on whether the therapist's qualifications will stand up in court. Finally, most people probably do not expect to recover memories of sexual abuse, let alone expect to sue their alleged abusers. Thus, they would have no way, no need, and certainly no responsibility, to ensure that the therapist's qualifications would be deemed adequate by a court.

Next, the court in *Borawick* too easily dismissed the plaintiff's corroborating evidence.[149] Unlike many survivors of CSA, Borawick was *lucky* enough to have had corroborating evidence. The court was either unaware of, or unsympathetic to, the fact that corroborating evidence is likely to be nonexistent in most cases.[150] Witnesses and medical records will probably be unavailable because the abused generally do not report the abuse,[151] and because recovered-memory lawsuits are not filed until decades after the abuse has occurred.[152] If there were any witnesses, they may have relocated or died.[153] Further, any physical wounds will have healed by the time the lawsuit is filed.[154] Additionally, "[d]enial of any wrongdoing from the offender is typical. Denial from family members is also typical."[155]

Finally, the court's finding that Borawick's allegations of sexual abuse were inherently incredulous invaded the province of the jury. Essentially, three judges' idea of what is believable was substituted for the common sense of twelve of Borawick's peers.[156]

---

148. Lindsay & Read, *supra* note 1, at 876.

149. See *supra* note 136 for a discussion of Borawick's corroborating evidence.

150. *See* Hough, *supra* note 40, at 863; *see also* Kandel & Kandel, *supra* note 24, at 38.

151. *See supra* notes 23-30 and accompanying text.

152. *See* SCHACTER, *supra* note 2, at 265 (noting that because the nature of abuse is secretive, it is "difficult to find witnesses or other corroborating evidence").

153. *See* Rogers, *supra* note 39, at 279; *see also* Hough, *supra* note 40, at 863.

154. *See* Hough, *supra* note 40, at 863.

155. YAPKO, *supra* note 2, at 170; *see also* SCHACTER, *supra* note 2, at 265 (stating that "perpetrators typically deny abuse when it has occurred").

156. "The credibility and reliability of witnesses have traditionally been considered exclusively within the province of the jurors." Cynthia V. McAlister, Comment, *Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under Daubert?*, 22 N.C. CENT. L.J. 56, 71 (1996) (citation omitted). One commentator notes the dangers of judicial discretion explaining that "discretionary decisions on admissibility . . . perpetuate gendered assumptions." Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 143 (1996). And another explains that "[m]en have defined their point of view as objective truth, so that women's assertions of a

A per se admissible approach to hypnotic memories of CSA would solve many of the problems with the Second Circuit's application of the seven-factor test. Yet, courts do have a duty to ensure that evidence is reliable. A case-by-case approach, such as the one used by the court in *Borawick*, is an acceptable balance of the competing interests that gives CSA plaintiffs their day in court and ensures that the cases are based on reliable evidence. However, given the nature of CSA, the policy behind extending statutes of limitations in CSA civil cases, the importance of the jury to our system of justice, and the adversarial system's ability to expose weaknesses in a case, courts should favor admissibility in hypnotic memory cases.[157] In light of these factors, the court in *Borawick* should have favored admissibility.

V. WAYS TO ENSURE (AND TEST) THE RELIABILITY OF RECOVERED MEMORIES

Concerns about unfairness to defendants are valid when considering the admissibility of hypnotic memories of CSA. However, judges should keep in mind that a jury can be fully apprised, through cross-examination and expert testimony, of the risks associated with hypnosis and the flaws of particular hypnotic procedures.[158] Furthermore, counsel can explore at trial many factors relevant to both the credibility of the plaintiff and the reliability of her memories. These include: the nature, strength, and clarity of the plaintiff's memories;[159] whether the memories returned on their own or as a

---

contrary experience are labeled incredible, or are rendered completely invisible." Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352, 355 (1988).

157. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98, 116 (1977) ("We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.").

158. *See* WRIGHT & GOLD, *supra* note 108, at 146-47.

> The failure of the witness to remember certain facts prior to hypnosis, as well as the lack of corroborating evidence or the presence of conflicting evidence, all diminish credibility and can be proven to the jury. . . . Given the . . . importance of the jury to our system of justice, it . . . seems inappropriate to simply assume the jury will fail in this instance.

Id.

159. *See* YAPKO, *supra* note 2, at 211. This would include consideration of whether the memories were "deduced from confusing symptoms." *Id.*; *see also* Lindsay & Read, *supra* note 1, at 874 (suggesting that "more credence [be] given to detailed recollections than to vague feelings, beliefs, dream images, or 'body memories'"). According to Rogers, "high clarity should be associated with good details and stronger emotional reactions, while those memories reported to be vague should lack many details or pronounced feelings." Rogers, *supra* note 39, at 286 (citations omitted). However, she cautions, "Children who have been chronically abused may have trouble in accurately placing the age frame in which abuse began, and often do not recall the onset . . . . It can be presumed that adults later recalling such early childhood events

result of suggestion;[160] "the plausibility of the alleged events being forgotten"[161] and "the plausibility of recovering the memories";[162] the reasons the plaintiff sought therapy;[163] the reasons for the plaintiff's decision to sue;[164] whether memories from a certain age correspond to the perspective of a child of that age;[165] the integrity of the memory over time;[166] whether the plaintiff is able to distinguish actual memories from dreams, fantasies, and the experiences and influences of others;[167] the perspective of the therapist;[168] and any evidence that contradicts the plaintiff's allegations.[169] Further, the age and mental capacity of the defendant may be relevant.[170]

Guidelines for therapists should be developed to legitimize recovered memory therapy, and to ensure that the techniques used in therapy are valid

---

may also have some difficulty in doing so . . . ." *Id.* at 287 (citations omitted).

160. *See* YAPKO, *supra* note 2, at 211; *see also* Lindsay & Read, *supra* note 1, at 874 ("[T]he more evidence of a prolonged, multifaceted, socially influenced search for memories, the greater the degree of skepticism . . . .").

161. Lindsay & Read, *supra* note 1, at 874. "[R]esearch indicates that people are particularly unlikely to forget repeated [sexual abuse] extending into late childhood or teenage years . . . ." *Id.*

162. *Id.* "[R]esearch shows that claims of recovering recollections of events before age 2 years should be treated with great skepticism." *Id.*

163. *See* Rogers, *supra* note 39, at 281 ("One would not expect to see the *bona fide* patient . . . [attempt] to find a therapist who will serve as expert witness, or to find a therapist who is perceived as most likely to accept uncritically a view that abuse has occurred.").

164. The allegations may be more suspect if the therapist encouraged the plaintiff to sue. *See id.*

165. *See id.* at 285. This refers to whether the dresser, for example, is relatively large in the memory (as a child would picture it), or whether it is as an adult observer would picture it. *See id.* "[P]erspectives going beyond what would be expected for a child of the age when the alleged abuse occurred may . . . suggest . . . confabulation." *Id.*

166. *See id.* at 287. "If core aspects of the memory are altered, then credibility may be questioned." *Id.*

167. *See id.* at 286.

168. *See id.* at 290 (stating that a therapist "should not evidence unusually skewed patterns of diagnosis associated with overendorsement of . . . repressed memories") (citations omitted).

169. *See id.* at 292. "[T]estimony from disinterested parties is considered more reliable and valid." *Id.* Rogers explains that if the testimony seems to be

> motivated by recently renewed alliances against the accused . . . [it] should be considered cautiously. Witnesses friendly to the plaintiff who deny awareness of any abuse or witnesses friendly to the defendant who have knowledge of the abuse may be particularly relevant. There is also a need to consider whether there is significant alibi evidence and whether the accused had an adequate 'window of opportunity' and motivation to commit the offenses. Evidence of any previous episodes of malingering or factitious disorder [on] the part of the plaintiff should, of course, lead to careful review of the current claims.

Id. Also, "[d]iary documentation begun a substantial period of time prior to the allegations being made may suggest difficulties consistent with the later claim. Diary documentation which does not begin until the plaintiff has begun to suspect she may have been sexually abused is generally less valuable." *Id.*

170. *See id.* "When elderly parents are questioned about events transpiring many years earlier, their memory functioning and age should be taken into account before concluding that they have lied or are 'in denial.'" *Id.* (citation omitted).

and not overly suggestive.[171] Failure to follow those guidelines can be taken into consideration by the court or jury as evidence that the therapeutic process was inadequate or overly suggestive.[172] However, in setting out guidelines, a delicate balance must be achieved. Adults who were abused as children may find it difficult to talk about the abuse.[173] Consequently, therapists may need to "employ methods that might be regarded as overly suggestive in other contexts."[174] Further, it is important to respect and encourage flexibility in therapeutic approaches so that each client is treated individually.[175] In fact, one of the complaints of many who doubt the efficacy of recovered memories of CSA is that too many therapists use a checklist of symptoms (i.e., if you have the following symptoms, you must have been sexually abused as a child).[176]

There are a number of important guidelines for therapists treating adult survivors of CSA. First, the therapist should not rush to the conclusion that the client has been sexually abused just because certain symptoms are

---

171. *See id.* at 280; *see also* Bowman & Mertz, *supra* note 23, at 591-92 ("[R]egulation by the judiciary is inefficient and . . . self-regulation allows those who practice a profession, who know the most about it, and who have a direct stake in its reputation, to have more input into developing guidelines to govern their conduct. A central role of professional organizations like the American Psychiatric Association and American Psychological Association is to develop guidelines that will promote competent therapy and best serve the client's interests."); Ferrante, *supra* note 52, at 212 ("Because opponents of the doctrine of repressed memory focus most of their objections on inadequate therapeutic techniques, the American Psychological Association should set up guidelines regarding techniques used in therapy."); Hough, *supra* note 40, at 866 ("Rather than denouncing all recovered memories as false because of some therapists who cross the line, a better approach might be to have a standard for therapists of appropriate treatment techniques.").

Lindsay and Read further suggest both that educational programs for therapists could be changed in order to "reflect the increased awareness of CSA," and that "graduate programs in clinical psychology should . . . strive to help students develop a degree of skepticism regarding the accuracy of their clinical judgments and observations." Lindsay & Read, *supra* note 1, at 877.

172. *See, e.g.*, Rogers, *supra* note 39, at 288 (stating that "[f]ailure to keep adequate records reflects substandard practice"). Further, failure to follow the guidelines should lead to sanctions by the relevant professional board. *See* Hough, *supra* note 40, at 866 (suggesting that therapists who use poor techniques be subject to "some sort of professional discipline or perhaps a criminal penalty"); *see also* Bowman & Mertz, *supra* note 23, at 613 (suggesting that failure of therapists to follow guidelines should allow for clients to sue); David J. Schaibley, *Legal and Scientific Discord: Supporting a Cause of Action Based Upon Repressed Memories*, 17 HAMLINE J. PUB. L. & POL'Y 151, 182-83 (suggesting that jury instructions "as to the validity and background of the memory theory at issue" will allow jurors "to focus their attention on their perception of the accuracy of the reliability of the witness, rather than on the validity of a complex psychological phenomenon").

173. *See* Bowman & Mertz, *supra* note 23, at 613 n.344.

174. *Id.* at 592-93. "It would clearly be unproductive for a psychotherapist to interview a client using only questions appropriate to a direct examination in court." *Id.* at 593.

175. *See id.* at 627 n.414, 625-29 (discussing various forms of therapy currently used to treat survivors of CSA); *see also* Hammond, *supra* note 90, at 113.

176. *See* YAPKO, *supra* note 2, at 107.

present;[177] nor should the therapist assume that the client is in denial just because the client does not believe she was sexually abused.[178] Second, the therapist should consider explanations other than sexual abuse.[179] Third, the therapist should keep comprehensive records, including documentation of the therapeutic approaches taken, the memories that returned,[180] and how they returned.[181] Fourth, the therapist should analyze what the client is saying in connection with her actions and attitudes; for example, are her behaviors consistent with what would be expected of a trauma survivor?[182] Fifth, the therapist should look to whether the client's memories are solely of abuse or

---

177. *See id.* at 163 ("[I]t is best for therapists to admit that they do *not* know what happened, thereby reducing or eliminating the pressure on their clients to 'pass a test' or to conform to the therapist's beliefs.").

> [W]e must be open to the possibility that even when a patient does not believe there are repressed memories in his/her background, this could potentially be altered if a therapist confidently expressed the hypothesis that repressed sexual abuse likely accounted for his/her symptoms. Thus, therapists should be cautious about sharing such hypotheses that could potentially alter a patient's expectancies.

Hammond, *supra* note 90, at 116-17. Further, it has been suggested that therapists should focus on "enhancement of functioning and diminution of the post-traumatic effects of abuse rather than the uncovering of abuse memories per se." Steven N. Gold et. al, *Degrees of Repression of Sexual Abuse Memories*, AM. PSYCHOLOGIST, May 1994, at 441.

178. *See* Lindsay & Read, *supra* note 1, at 879-80; *see also* YAPKO, *supra* note 2, at 163 ("It is equally important that clients be allowed to say 'I don't know' without their answer being interpreted as 'resistance,' 'denial,' or some such undesirable label.").

179. *See* Rogers, *supra* note 39, at 282 ("The [client] should not unduly attribute her symptoms to past events when concurrent present events are viable competing hypotheses."); *see also id.* at 288 (arguing that the therapist should not "focus too narrowly on the issue of sexual abuse, to the neglect of other significant developmental, relational, or transference issues") (citations omitted); Hammond, *supra* note 90, at 117 (discussing the importance of exploring alternatives, such as "whether the patient is unconsciously identifying with someone else or is punishing herself by having a symptom, before even inquiring about the possibility of a past event being associated with a problem"); *id.* at 121 ("Therapists ourselves must remain open, and we must encourage patient openness, to considering any other explanations for 'memories.'").

180. *See* Lindsay & Read, *supra* note 1, at 880; *see also* Rogers, *supra* note 39, at 288 (pointing out that documenting how the memories returned can show what, if any, influences there were upon the client's memory); Hammond, *supra* note 90, at 122 (encouraging careful documentation).

181. *See* Hammond, *supra* note 90, at 116 (advising therapists to look at whether the client's belief that she was sexually abused came from suggestions by others, or from "reading, television, or participation in a twelve-step group or class"). Regarding potential suggestions, Hammond states that "none of these things necessarily invalidates a memory, since they may have simply provided a contextual cue that elicited a genuine memory." *Id.*

182. *See* Rogers, *supra* note 39, at 283. For example, does the client express "reluctance to be with the alleged perpetrator, negative generalizations, expectations, or behaviors in relationships?" *Id.* Further, "[c]laims of pervasive problems should cross several areas of functioning, and be consistent with external investigation of the individual's life." *Id.* Rogers warns that care must be taken because a patient's reported symptoms may be inconsistent with interviews and test results. *See id.* at 282. Further, "[r]eported symptoms should be consistent with overall adaptive functioning level." *Id.* However, inconsistencies may actually be symptomatic of abuse. *See id.* at 282-83.

whether other, more positive, experiences are included.[183] Sixth, the therapist should allow the client to play an active role in her recovery.[184] Seventh, the therapist should keep abreast of the latest ideas in child development and child psychology.[185] Eighth, the therapist should develop a comprehensive treatment plan informed by the client's history, symptoms, and performance on various psychological tests.[186] Ninth, the therapist should be cautious in recommending that clients confront their alleged perpetrators.[187] Tenth, therapists who are survivors of abuse should "carefully evaluate their own expectations and the possibility of biased counter-transferential responses."[188] Finally, therapists who treat adult survivors should consult with others to ensure a more balanced position.[189]

The specific guidelines intended for therapists who use hypnosis should include a number of essential elements.[190] First, therapists should receive appropriate training and certification, as determined by the American Society of Clinical Hypnosis (or some other governing body).[191] Second, therapists should stay abreast of the literature on hypnosis and memory.[192] Third, therapists should educate clients about hypnosis, stressing that memories recovered while under hypnosis do not necessarily represent the truth.[193] Fourth, therapists should inform clients that questions posed by the

---

183. Recovered memories may be more suspect if they are solely memories of sexual abuse. *See id.* at 285.

184. This would include obtaining the client's informed consent prior to using hypnosis. *See* Hammond, *supra* note 90, at 114; *see also* Rogers, *supra* note 39, at 289. Also, therapists should "allow clients to approach memories of sexual abuse at their own pace." Gold et al., *supra* note 177, at 441. For suggestions about how to further empower clients, see *infra* text accompanying notes 197-201.

185. *See* Rogers, *supra* note 39, at 288 (explaining that without a "knowledge of children's developmental, cognitive, memory and testimonial capabilities, a professional therapist . . . will have difficulty in assessing adult accounts of events purported to have occurred in childhood").

186. *See id.*

187. *See* Lindsay & Read, *supra* note 1, at 880; *see also* Hammond, *supra* note 90, at 121-22 ("In the absence of corroboration, therapists should not encourage patient confrontation or litigation. In fact, therapists are well advised to assist patients to realize the many negative consequences that may accrue from the confrontation of alleged perpetrators."). The American Psychiatric Association has stated that "[t]he psychiatrist should help the patient assess the likely impact (including emotional) of such decisions, given the patient's overall clinical and social situation." STATEMENT ON MEMORIES, *supra* note 34, at 4.

188. Hammond, *supra* note 90, at 114. In fact, "one role of the therapist is to guard against his or her biases." Kevin R. Byrd, *The Narrative Reconstruction of Incest Survivors*, AM. PSYCHOLOGIST, May 1994, at 439.

189. *See* Lindsay & Read, *supra* note 1, at 879.

190. The American Society of Clinical Hypnosis has set forth recommendations for therapists who use hypnosis. *See* Hammond, *supra* note 90, at 113.

191. *See id.* Further, "[c]linicians using hypnosis should . . . only use hypnosis within their areas of expertise." *Id.* at 113-14.

192. *See id.* at 113.

193. *See id.* at 115. Furthermore, the therapist should "create neutral expectations in the patient before hypnotic exploration." *Id.* at 117. However, a therapist must walk a fine line. Because survivors

therapist while the client is under hypnosis are *not* suggestions, "and that 'I don't know' is a satisfactory response."[194] Fifth, therapists should test clients for their level of hypnotizability because people who are more hypnotizable are more easily influenced by suggestion.[195] Sixth, therapists should keep in mind that memories elicited via hypnosis are "simply data to be critically evaluated in therapy along with what is already consciously known."[196]

Another way to ensure the reliability of therapeutic procedures is to encourage clients to reject therapists who utilize poor techniques.[197] Clients should consider the following: whether the therapist is more certain than the client that abuse occurred;[198] whether the therapist is insistent that the key to the client's healing is accepting the fact of abuse;[199] whether the therapist is pressuring the client into confronting her alleged abuser;[200] or whether the therapist is resisting exploring alternative explanations for the client's psychological problems.[201]

In assessing the validity of the client's memories, failure to follow these guidelines should not be dispositive. Rather, it should be a factor for the court or jury to consider in its determination of the strength and credibility of the plaintiff's case.

CONCLUSION

CSA "is a huge problem growing to ever more sickening proportions."[202] Through provisions tolling the statute of limitations for civil cases based on recovered memories of CSA, many states have acknowledged the prevalence and seriousness of CSA. This implies a faith in recovered

---

of sexual abuse "have too often suffered when other people disbelieve them." *Id.* at 120. Therefore, therapists are encouraged to "be supportive and empathic of the patient, while at the same time assisting the patient . . . to critically evaluate hypnotically elicited material." *Id.* at 121. As the American Psychiatric Association has noted, "Many individuals who have experienced sexual abuse have a history of not being believed by their parents, or others in whom they have put their trust. Expression of disbelief is likely to cause the patient further pain . . . ." STATEMENT ON MEMORIES, *supra* note 34, at 4.

194. Hammond, *supra* note 90, at 117.

195. *See id.* at 118 (noting that a highly hypnotizable client may also be "highly responsive to social influence in general"). Thus, therapists are admonished to "work extra cautiously with such a patient." *Id.* See *supra* text accompanying notes 48-51 for a discussion of hypnotizability.

196. Hammond, *supra* note 90, at 115.

197. *See* YAPKO, *supra* note 2, at 212 (noting that poor therapy can be a "potentially destructive situation"). "Indeed, therapists treating incest survivors repeatedly stress the importance of returning agency, authority, and decisionmaking power to the client." Bowman & Mertz, *supra* note 23, at 627.

198. *See* YAPKO, *supra* note 2, at 211. Yapko further cautions that the therapist should not express the condescending attitude that "when you are ready, you'll come to accept it." *Id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *Id.* at 22.

memories. Anything other than liberal admissibility in CSA cases would undermine a strong public policy adopted by the vast majority of states, and "recreate the precise problem that [extended statutes of limitations] were designed to remedy."[203] Indeed, without the plaintiff's testimony based on hypnotic memories in civil CSA cases, it is unlikely that there will be enough evidence to get the case to the jury. Furthermore, the Supreme Court has weighed in on the issue, expressing its faith in the ability of the adversarial system to expose weaknesses in hypnotic memories.[204] The emphasis in civil CSA cases should be on the testifying witness' credibility, as it is in so many other areas of the law. As part of its credibility determination, the jury can take into account the hypnotist's qualifications and the techniques used. But those factors should not end the inquiry. Victims of CSA should not be discouraged from seeking redress for their harms. As one commentator has recently noted, "[t]his is a story with many voices . . . . All of them need to be heard."[205]

Lori B. Lustberg

---

203. Smith-Lee, *supra* note 52, at 629.

204. *See supra* text accompanying notes 99-104; *see also* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and approrpiate means of attacking shaky but admissible evidence.").

205. Mike Stanton, *U-Turn on Memory Lane*, COLUM. JOURNALISM REV., July-Aug. 1997, at 49. Yet another commentator argues that survivors of CSA have a constitutional right to have their cases heard. *See generally* Overton, *supra* note 22.