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Sheila F. Rock, A Claim for Third Party Standing in Malpractice Cases Involving Repressed Memory Syndrome, 37 Wm. & Mary L. Rev. 337 (1995), https://scholarship.law.wm.edu/wmlr/vol37/iss1/12

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A CLAIM FOR THIRD PARTY STANDING IN MALPRACTICE CASES INVOLVING REPRESSED MEMORY SYNDROME

In May 1994, a California jury awarded $500,000 to Gary Ramona, whose twenty-three-year-old daughter Holly had accused him of sexually molesting her as a child.1 Holly testified that from the time that she was five years old until she reached the age of eight, her father raped her repeatedly.2 She based her allegations solely on memories recovered during recent therapy for bulimia.3 Pretrial discovery revealed that Holly had not remembered any incidents of childhood sexual abuse until her therapist suggested that past abuse had caused her bulimia.4 After attending group therapy, she experienced flashbacks.5 Later, her therapists injected her with sodium amytal, commonly known as truth serum, and, while sedated, Holly accused her father of raping her when she was a child.6 Her therapists assured her that fabricating stories under sedation was impossible and actively encouraged her to confront her father.7

Mr. Ramona adamantly denied the accusations, but, as a result of the allegations, his wife divorced him, his family disintegrated, and his career collapsed.8 Mr. Ramona claimed that Holly’s therapists were responsible for the injuries to his reputation and his family because they had planted false memories in Holly’s mind,9 and he sued them for malpractice.10 Courts gen-

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3. Id.
5. Id. at 72.
6. Id.
7. Id.
8. Tamaki, supra note 2, at B1.
9. Loftus & Rosenwald, supra note 4, at 72.
10. Hansen, supra note 1, at 36.
erally find that third parties lack standing to bring malpractice suits against health care providers. In an unprecedented decision, however, a California jury apparently decided that the defendants had breached a duty of care to Mr. Ramona when they treated Holly and encouraged her belief in the validity of her recovered memories.\textsuperscript{11}

Mr. Ramona is not alone in confronting accusations of child sexual abuse based on "false memories."\textsuperscript{12} In the 1980s, a new legal phenomena developed—civil suits alleging child sexual abuse on the basis of "memories" recovered during psychotherapy.\textsuperscript{13} Only in recent years has child sexual abuse\textsuperscript{14} received


12. Loftus & Rosenwald, supra note 4, at 72. Holly exhibited all of the symptoms of "false memory syndrome." The term "false memory syndrome" describes the phenomenon in which a mental therapy patient "remembers" an event, such as childhood sexual abuse, that never occurred. HOLLIDA WAKEFIELD & RALPH UNDERWAGER, RETURN OF THE FURIES: AN INVESTIGATION INTO RECOVERED MEMORY THERAPY 96-97 (1994). The syndrome involves more than the mere inaccurate recall of an event. FALSE MEMORY SYNDROME FOUND., FREQUENTLY ASKED QUESTIONS 3 (Draft Pamphlet 1994) [hereinafter FREQUENTLY ASKED QUESTIONS]. Instead, an untrue memory becomes so deeply ingrained in the patient's mind that it affects her personality and lifestyle and, in turn, disrupts all other aspects of her behavior. Id.

much attention. As the public began to realize the prevalence of such behavior, heightened awareness led to the increased use of a dubious trend in psychotherapy—the reliance on recovered memory theory to uncover memories of past abuse.

Therapists who subscribe to recovered memory theory point to a wide variety of common problems, ranging from eating disorders to sleeplessness, as evidence of repressed memories of sexual abuse. The therapists purposely direct their treatment toward awakening these "dormant" memories to aid the patient in coming to terms with the "truth" about her past.
Advocates of recovered memory theory believe that confronting the alleged abuser is a necessary part of the patient’s healing.21 Confrontation often takes the form of a lawsuit.22 In recent years, the number of civil cases based on recovered memories of childhood sexual abuse has skyrocketed,23 even as courts undertake the difficult task of determining the validity of recovered memories. Since its establishment in 1992, the False Memory Syndrome Foundation has received 14,000 reports of sexual abuse accusations based on recovered memories.24 Of the individuals touched by these allegations, one in sixteen faces suit by his or her own child.25 Three quarters of the actions are civil, and one quarter are criminal.26

Accusations of abuse based on “uncovered memories” traumatize and damage innocent parents.27 A sexual abuser of children is the worst sort of predator; one can hardly imagine a more horrifying monster than the individual who steals a helpless child’s innocence. However, if the alleged abuser is innocent, he

millions of dollars to cover the costs of recovered memory therapy. OFSHE & WATTERS, supra note 18, at 3.

21. See infra notes 115-16 and accompanying text.


23. Hollida Wakefield & Ralph Underwager, Recovered Memories of Alleged Sexual Abuse: Lawsuits Against Parents, 10 BEHAVIORAL SCI. & L. 483, 483 (1992); see also Sharon Begley & Martha Brant, You Must Remember This, NEWSWEEK, Sept. 26, 1994, at 68, 69 (stating that recovered memories of sexual abuse have formed the basis of 700 civil and criminal cases).

24. FREQUENTLY ASKED QUESTIONS, supra note 12, at 4-7. A “group of professionals and affected families” established the foundation. Id. at 5. Respected psychiatrists, psychologists, social workers, attorneys, and educators serve on its Scientific and Professional Advisory Board. Id. at 2. The foundation’s stated purpose is to document the extent of false memory accusations, disseminate the latest scientific information on memory, and help accused families. Id. at 5.

25. Id. at 8.

26. Id. Civil suits are more prevalent because they do not require the heavy burden of proof of criminal cases. Gallagher, supra note 15, at 524 n.118. In 1994, the False Memory Syndrome Foundation was tracking more than 800 lawsuits. FREQUENTLY ASKED QUESTIONS, supra note 12, at 8.

cannot escape the negative social stigma of the accusation, and its financial and emotional repercussions remain.\textsuperscript{28} \textit{Ramona} is the first successful malpractice case brought by a third party against a repressed memory therapist in which the court found the therapist who suggested the “memories” responsible for the innocent party's ruined family, reputation, and career.\textsuperscript{29} Only one other third party malpractice case against a therapist has evaded summary judgment.\textsuperscript{30} \textit{Ramona}, therefore, raises the question of whether future innocent parties may bring third party malpractice cases against “recovered memory” therapists for encouraging false memories of abuse.

This Note will present evidence casting doubt on the validity of recovered memories. It will focus on the damage done to innocent individuals who face accusations of sexual abuse based on these “memories.” The first section will examine the nature of memory, in order to help understand why the theory of recovered memories remains questionable. The second section will discuss the memory enhancement techniques that therapists use to recover memories, in order to show not only that their methods may create convincing memories of events that never happened, but also that the therapist acts negligently and irresponsibly when he uses such suggestive methods. Section three will examine the response to recovered memory cases. Finally, the fourth section will suggest that, in light of the sudden and alarming increase in the number of civil suits based on recovered memories, courts should grant standing to innocent third parties bringing malpractice suits against negligent therapists.

This Note will argue that malpractice suits by third parties would serve as “quality control tools”\textsuperscript{31} in the field of psychotherapy, providing protection to both patients, who may still be under the influence of the negligent therapist, and the innocent third parties. The widespread and damaging effects of the false

\begin{enumerate}
\item \textsuperscript{28} See, e.g., Georgia Sargeant, Victims, Courts, Academics Debate Truth of Recovered Memories in Abuse Cases, TRIAL, May 1994, at 13, 14.
\item \textsuperscript{29} Hansen, supra note 1, at 36.
\item \textsuperscript{30} See Sullivan v. Cheshier, 846 F. Supp. 654 (N.D. Ill. 1994); infra notes 168-84 and accompanying text. The trial court has not yet reached a final decision in Sullivan.
\item \textsuperscript{31} Loftus & Rosenwald, supra note 4, at 73.
\end{enumerate}
memory allegations necessitate third party standing. If negligent therapists continue to urge legal action against innocent third parties, the courts, clogged with lawsuits against the innocent, will be unable to devote adequate attention to real victims and their abusers.32

THE NATURE OF MEMORY

Experts have described recovered memory theory as "either the most fascinating psychological discovery of the 20th century or the centerpiece of the most embarrassing mistake modern psychiatry and psychotherapy have ever made."33 Recovered memory theorists believe that individuals repress memories of traumatic events deep in the psyche. According to theorists, this repression occurs when a person consciously tries to forget the event and "eventually the mental grooves become so deep that no psychic energy is required to keep the conscious mind entirely and automatically away."34 The therapist works on the assumption that patients can accurately remember repressed memories with the help of psychotherapy.

One must understand the nature of memory in order to understand why recovered memories form a questionable basis for a lawsuit. Mental health professionals have loosely defined memory as a type of repository in which facts and information may be retained in the brain over some period of time.35 Memory is, however, imperfect.36 It does not act like a video recorder systematically storing lifetime events.37 Not only do individuals often see things inaccurately in the first place, but, even if they

32. As the number of false memory cases increases, society may begin to doubt the claims of real victims of abuse. Loftus, supra note 22, at 534.
33. Loftus & Rosenwald, supra note 4, at 71 (quoting Richard Ofshe and Margaret Singer, two of the most outspoken academic critics of recovered memory theory). If repressed memories do exist, the question arises why the present generation is the first generation to notice that people can repress all memory of trauma when humankind has endured such horrors throughout time. OFSHE & WATTERS, supra note 18, at 36.
34. Lisa Davis, Murdered Memory, HEALTH, May 1991, at 78.
35. GEOFFREY LOFTUS & ELIZABETH LOFTUS, HUMAN MEMORY 1 (1976).
36. ELIZABETH LOFTUS, MEMORY 37 (1980).
37. Id., see also JACK A. ADAMS, HUMAN MEMORY 29 (1967) (stating that "the hypothesis of permanent memory has not received serious research attention").
view events accurately, they may not necessarily store the memory perfectly. Time and interfering experiences make memories malleable and fallible.

Although the accounts of recovered memories of childhood sexual abuse are compelling, little scientific evidence supports the theory that complete repression of memory can occur. For instance, in 1974, David S. Holmes published a study in which he concluded that no reliable evidence for repression exists. In 1990, Holmes stated that he had not found any new research to change his mind. He noted that despite over sixty years of research involving numerous approaches by many investigators, no controlled laboratory evidence supports the concept of complete repression.

Scientific research demonstrating that individuals usually remember traumatic experiences undermines the notion of repression. In studies of children who experienced traumatic events, researchers found that some children distorted the memory, but none forgot. Of the twenty-six children kidnapped and buried alive in Chowchilla, California, in 1976, all remembered the traumatic event years later. When individuals fail

38. Loftus, supra note 36, at 37.
39. Id. An additional biological factor may explain the source of false memories. Most people are able to distinguish memories of events from memories of dreams through the working of the brain's frontal lobes. Begley & Brant, supra note 23, at 68. Damage to the frontal lobes renders a person unable to distinguish where a memory originated, thus bits of memories of dreams may become interspersed with a real memory. Id.
42. Id.
43. Id. at 99.
44. Wakefield & Underwager, supra note 23, at 495; see also Wendy Kaminer, I'm Dysfunctional, You're Dysfunctional. THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS 81-85 (1992) (relating the stories of Cambodian women who vividly remembered soldiers of the Khmer Rouge viciously raping them and murdering their husbands).
45. OFSHE & WATTERS, supra note 18, at 265.
to store a memory, the failure usually involves an incident that
happened only once and is not repeated. The trauma of the
event does not merely suppress the memory, but prevents the
memory from ever being stored. The individual therefore has
nothing to retrieve at a later date.

The fact that memory functions differently in children than in
adults is further reason to question recovered memories of child-
hood sexual abuse. Data on infant amnesia demonstrates that it
is highly unlikely that individuals will accurately recall events
reported to have occurred before the age of three or four.
Studies indicate that events that individuals remember may be
a blend of memory and fantasy. For example, an analysis of 133
school children attending school when a sniper fired shots onto
the school playground showed substantial changes in their mem-
ories within a short time. Children who were not even outside
at the time vividly remembered standing close to the playground
when their schoolmates were injured. Such studies do not
suggest that all childhood memories later remembered are false
and unreliable, but they do suggest that therapists and courts
should not necessarily take these memories at face value and
should require corroborative evidence.

One famous example of a false "recovered" memory involves
Jean Piaget, the father of developmental psychology. Piaget
remembered in rich detail a man attempting to kidnap him
when he was a child. He recalled seeing his nurse fight brave-

47. Loftus, supra note 36, at 82. High anxiety hinders memory because it causes
individuals to ignore visual cues in their environment. Id.
48. Wakefield & Underwager, supra note 23, at 501; see also Encyclopedia of
Learning and Memory 26-29 (Larry R. Squire ed., 1992) (stating that adults do not
recall specific events that occurred before the age of two). Nevertheless, numerous
recovered memory patients allege memories of abuse that occurred when they were
(noting that the plaintiff claimed that sexual abuse occurred from infancy through
age five), review dismissed, 800 P.2d 859 (Cal. 1990). In data collected by the False
Memory Syndrome Foundation, 26% of repressed memory patients remembered abuse
prior to age two, 50% remembered abuse prior to age four, and 66% remembered
abuse prior to age six. FREQUENTLY ASKED QUESTIONS, supra note 12, at 7
49. Ofshe & Watters, supra note 18, at 41.
50. Id.
51. Loftus & Ketcham, supra note 19, at 76.
ly with the man and even recalled the scratches that she received on her face. When Piaget was fifteen, his former nurse wrote to his parents to confess that she had fabricated the entire story. Piaget then realized that a memory, seemingly clearly remembered, may be untrue. He theorized that he must have heard the account and "projected [it] into the past in the form of a visual memory." The memory does not act as a bank vault, storing all past experiences in accurate detail. Recovered memories depend on the initial storage process and on the cues used to aid recall. The "cues" used by the therapist provide an explanation for the origin of false memories.

**Suggestive Therapy Techniques Used To Uncover Repressed Memories**

An examination of the psychoanalytic techniques used to reconstruct memories supports the argument that the origin of many memories is in the therapist's and not the patient's mind. Use of the suggestive techniques may be evidence of a therapist's unethical behavior. For example, in *Mateu v. Hagen*, a Washington court accepted the defendant's argument that unconventional therapy techniques could have shaped the plaintiff's memories. The use of unconventional techniques was also the basis of an action brought by three patients in Missouri, who sued a clinic for the negligent supervision of a therapist who inaccurately persuaded them that they had been molested.

52. Id.
53. Id. at 76-77.
54. Id. at 77.
55. LOFTUS, supra note 36, at 100.
56. WAKEFIELD & UNDERWAGER, supra note 12, at 230. In 1994, the Minnesota Board of Medical Practice suspended a psychiatrist's license for encouraging her patients to remember false memories. Id. The Board received numerous complaints from former patients, who stated that her practice resembled a cult. Id.
59. Id. at 14 (citing two unreported cases, Jester v. Matrix, No. CV89-029236 (Mo.
Therapists themselves disagree about the validity of recovered memories. Some claim that an individual not trained and educated in psychopathology could not possibly simulate a disorder successfully. The most damning criticism of recovered memories, however, comes from within the medical community. In the summer of 1993, the American Medical Association (AMA) passed a resolution warning of the dangers of misapplying memory enhancement techniques used by therapists. In June 1994, the AMA agreed with the American Psychiatric Association that "there is no completely accurate way of determining the validity of reports [based on recovered memories] in the absence of corroborating information." Nevertheless, few courts have denied the existence of recovered memories, though courts have recognized that psychiatry and psychology are not exact sciences.

The Initial Consultation. A Preordained Diagnosis

Repressed memory patients initially consult a therapist for a wide variety of common problems, including eating disorders and depression. Confronted with a patient who reveals no ap-

60. Thompson, supra note 40, at B1.
61. 1 JAY ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 430 (3d ed. 1981).
62. FREQUENTLY ASKED QUESTIONS, supra note 12, at 6.
63. Id. (emphasis omitted).
64. Gallagher, supra note 15, at 532. But see Ault v. Jasko, 637 N.E.2d 870, 874-75 (Ohio 1994) (Moyer, C.J., dissenting) ("There probably will be a day when courts can be given reliable, competent information on the issue of repressed memory. That day is not here.").
65. Lmdabury v. Lmdabury, 552 So. 2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (quoting Nesbitt v. Community Health, 467 So. 2d 711, 717 (Fla. Dist. Ct. App. 1985) (Jorgenson, J., concurring in part and dissenting in part)) (upholding a summary judgment for the defendant with even the dissent recognizing that the psychiatric profession represents the "penultimate gray area"), aff'd, 560 So. 2d 233 (Fla. 1990); see also Addington v. Texas, 441 U.S. 418, 430 (1979) (holding that, even in civil commitment proceedings, "the subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations").
66. LOFTUS & KETCHUM, supra note 19, at 20; see also Aaron H. Esman, "Sexual Abuse," Pathogenesis, and Enlightened Skepticism, 151 AM. J. PSYCHIATRY 1101, 1101 (1994) (stating that childhood sexual abuse is increasingly invoked as the cause of a
parent reason for her troubles, the therapist who subscribes to repressed memory theory will conclude that the patient must be suffering from the aftermath of repressed sexual abuse.67 The Courage To Heal, commonly prescribed reading for both therapists and victims of repressed memory,68 advises therapists to recognize the symptoms of early sexual abuse: "If sexual abuse isn’t the presenting [sic] problem but your client has eating disorders, an addiction to drugs or alcohol, suicidal feelings, or sexual problems, these may be symptoms of sexual abuse."69

Advocates assert that the symptoms of repressed memories include a startling array of common problems, but evidence gathered in recent studies directly contradicts the link between eating disorders and repressed memories. One study of women who had a lifetime history of eating disorders revealed that women with bulimia were no more likely than women in other patient groups to have suffered sexual abuse as children.70 Another study of 202 women found that childhood sexual abuse was "neither necessary nor sufficient for the later development

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67. See, e.g., Sandra G. Boodman, At 28, Kathy O’Connor of Arlington Says She Remembered That Her Father Raped Her, WASH. POST, Apr. 12, 1994, at 12 (telling the story of a woman who, after therapy, decided that the “primary cause of her failed 11-month marriage, her drinking and drug use, the chronic nightmares and panic attacks and, especially, of the simmering rage that imperiled jobs and relationships” was her repressed memories of abuse); see also William Pincus, The Problem of Gaugin’s Therapist: Language, Madness and Therapy 49-50 (1994) (discussing how therapists conclude that a patient suffered abuse when there is no apparent reason for the patient’s health problems).

68. Loftus & Ketcham, supra note 19, at 20-21; Wakefield & Underwager, supra note 22, at 484-85; see also Pincus, supra note 67, at 60 (stating that therapists “frequently recommend that new patients read books which may perpetuate the advertising trick of creating illness through horoscopic suggestion”).

69. Ellen Bass & Laura Davis, The Courage To Heal 349 (1988). The authors admit in the preface that they have received criticism for their lack of academic credentials. Id. at 14.

70. Marcia Rorty et al., Childhood Sexual, Physical, and Psychological Abuse in Bulimia Nervosa, 151 AM. J. PSYCHIATRY 1122, 1122 (1994). One hundred twenty women participated in the study, 40 of whom had been recovering from an eating disorder for a year, 40 of whom were currently suffering from an eating disorder, and 40 of whom had never had an eating disorder. Id. The researchers favored placing eating disorders “in the context of a more comprehensive, multidimensional risk factor model” rather than simply viewing them in an “if child abuse, then eating disorder” model. Id. at 1126.
of an eating disorder.\textsuperscript{71}

The most compelling evidence that memories may be suggested by the therapist is the composite profile of the type of patient who discovers repressed memories. The similarity in social and educational background appears to be indicative of a preconceived diagnosis. Recovered memory patients tend to be females\textsuperscript{72} between the ages of thirty-one and fifty\textsuperscript{73} A large percentage, thirty-one percent, have pursued education beyond college.\textsuperscript{74} The profiles of the accused are also striking similar. Almost seventy-five percent of the accused parents have never been divorced, twenty-two percent are in their seventies or eighties, and eighteen percent have been accused of participating in satanic rituals.\textsuperscript{75} Seventy-one percent of the patients' siblings do not believe the accusations.\textsuperscript{76} In sum, a typical repressed memory patient is a young to middle-aged, well-educated woman from an affluent family whose siblings have not reported similar abuse.\textsuperscript{77}

\textit{The Techniques Used To Uncover Memories}

After deciding that the patient’s symptoms, whether they be sleeplessness, depression, or alcoholism, are clear signs of prior sexual abuse,\textsuperscript{78} the therapist uses a number of techniques to
"uncover" the memories.79 One of the most controversial techniques is the use of hypnosis. Hypnosis is defined as "a temporary condition of altered attention in the subject."80 Skepticism about the validity of statements made by a hypnotized person has existed as long as the technique.81 In 1958, the AMA warned that hypnosis poses the risk of alternating consciousness and memory, as well as increasing susceptibility to suggestion.82 The AMA reiterated the warning in 1985, stating, "at best hypnosis may aid in the production of memories, but these memories will not necessarily be accurate."83

Critics have identified several characteristics of the hypnotic state as possible reasons for the creation of pseudomemories, including: "an increased state of suggestibility , a possible desire to please the hypnotist , the possibility that the subject will fill in gaps in his actual recollection with fantasy , and the subject's heightened certitude about the accuracy of his recollections."84 The danger is that a previously hypnotized patient will lose her sense of critical judgment about the memory, instead believing that the memory discovered by hypnosis is true.85 Hence, cross-examination of the patient may be futile and counterproductive.86 Although courts have long recognized...
the dangers of hypnosis, the Supreme Court, in *Rock v. Arkansas*, held that a state may not have a per se rule excluding hypnotic evidence at trial. Even the Court in *Rock* recognized that the "most common response to hypnosis, however, appears to be an increase in both correct and incorrect recollections."

Group therapy is another often utilized treatment. The inherent problem in group therapy is the tendency to go along with the crowd. Patients searching for answers to similar problems and the dynamics of the group foster the belief in "memories" of abuse as the group continuously encourages individual patients to let go of their denial. As one might expect, after one patient reveals a buried memory, others in the group "suddenly" remember their own memories of abuse. Patients are warned that "outsiders" will question the memories, and the group becomes a safe haven, a place of comfort and acceptance.

Other therapy techniques are equally suggestive, including dream interpretation, massage, sodium amytal therapy, and

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(stating that hypnosis adds to a witness's confidence and alters her demeanor). See generally SCHEFLIN & SHAPIRO, supra note 82, at 108-09 (stating that hypnosis is a two-edged sword that is potentially useful in uncovering memories but also potentially dangerous in creating them).

88. Id. at 61-62 (stating that courts can verify hypnotically refreshed testimony by corroborating evidence and other means of assessing accuracy). However, *Rock* addressed only the use of hypnotic evidence by a criminal defendant. Id. at 45.
89. Id. at 58 (emphasis added).
90. BASS & DAVIS, supra note 69, at 462.
92. LOFTUS & KETCHAM, supra note 19, at 23. The authors note that simply belonging to a therapy group tends to "speed up" the recovery of memories as patients verify and validate their feelings with each other. Id.
93. See id. at 24.
94. See IRVIN D. YALOM, THE THEORY AND PRACTICE OF GROUP PSYCHOTHERAPY (1970) (discussing group therapy). The author lists curative factors of group therapy, including universality, imitative behavior, and group cohesiveness. Id. at 5. After one such group session, a woman turned to other members of her support group and asked, "Do you think I really could have been abused? Maybe I was just acting." BASS & DAVIS, supra note 69, at 87. Another group member assured her that no one could act out an experience as vividly as she had unless it were true. Id.
95. BASS & DAVIS, supra note 69, at 87
"visualization."\textsuperscript{96} In a procedure called "trance work," a therapist tells the patient to "shut her eyes, [to] imagine what might have happened back in her past, and then [to] write down in her journal 'whatever pops into your head.'\textsuperscript{97} One author and therapist advises that if the "survivor" is resistant, the therapist must more strongly direct the guided imagery.\textsuperscript{98} The therapist might use a prepared story that closely resembles the alleged abuse incidents, in order to help her "remember."\textsuperscript{99} When the "survivor" experiences confusing and conflicting emotions, the therapist should reassure her that the feelings are normal, and that the "survivor" should "just let them happen."\textsuperscript{100} Total dependency on the therapist is fostered by a technique called "reparenting," in which therapists encourage "regressed" adults to suck baby bottles and wear diapers.\textsuperscript{101} Memories are "recovered" by putting the patients "in an infant state of mind and mak[ing] them believe they are experiencing earlier events."\textsuperscript{102}

The danger in all of these techniques is that the therapist validates the "memories" by encouraging their creation and rewarding the patient with positive feedback when she "remembers" anything.\textsuperscript{103} The False Memory Syndrome Foundation discovered that among 300 women who "remembered" memories, only to later retract them, many said that they were told that any discovered memory must be true.\textsuperscript{104} Therapists never told the women that their memories could be wrong.\textsuperscript{105}

"The therapist's responsibility is to uncover emotions and help the patient see them."\textsuperscript{106} Although this goal is laudable,
the underlying assumption, that "no one fantasizes abuse,"\textsuperscript{107} is incorrect and unsupported by science. With the use of the aforementioned techniques, the therapist, ignoring even the patient's own denial of abuse, "implants" the memories through repeated suggestions and questions. Critics have documented direct evidence of the suggestiveness of the various techniques from therapists' own accounts, patients' statements, and videotaped sessions.\textsuperscript{108} Additional evidence lies in the recommendation provided by the authors of \textit{The Courage To Heal}. Bass and Davis advise therapists that if a patient "says she wasn't abused but you suspect that she was, ask again later. Children often repress memories of sexual abuse, and your questions may be the trigger that reveals those memories, either now or later."\textsuperscript{109} According to the authors, the therapist must persist in the questioning: "Be creative. If the survivor can't say she was abused in words, be innovative and patient."\textsuperscript{110} Constant badgering by the therapist seems to be the key to "unlocking" the memories.\textsuperscript{111} Instead of "recovering" memories, the therapist communicates her own conclusions about the true origin of the patient's problems to the patient through the repeated use of suggestive questioning.\textsuperscript{112} Happy memories of childhood are reinterpreted as fronts that cover up years of abuse by parents who conspire to portray their family as healthy and normal.\textsuperscript{113}

\textsuperscript{107} \textsc{Bass & Davis}, \textit{supra} note 69, at 347.

\textsuperscript{108} See \textsc{Loftus}, \textit{supra} note 22, at 526-30 (discussing direct evidence of suggestiveness of therapy techniques).

\textsuperscript{109} \textsc{Bass & Davis}, \textit{supra} note 69, at 350 (emphasis omitted).

\textsuperscript{110} \textit{Id.} at 351 (emphasis omitted).

\textsuperscript{111} Bass and Davis advise therapists that "[your] client needs you to stay steady in the belief that she was abused. Joining a client in doubt would be like joining a suicidal client in her belief that suicide is the best way out." \textit{Id.} at 347.

\textsuperscript{112} See, e.g., \textsc{Loftus & Ketcham}, \textit{supra} note 19, at 25 (quoting a therapy patient, who stated, "My therapists encouraged and pushed me to "remember" more and more, even though I was starting to show signs of psychosis during the treatment sessions").

\textsuperscript{113} \textsc{Ofshe & Watters}, \textit{supra} note 18, at 6-7
The Initial Reaction

Many repressed memory cases are brought to court because the therapist urged the patient to sue the abuser as a step towards recovery. According to Bass and Davis, "[t]hey get strong by suing. They step out of the fantasy that it didn't really happen or that their parents really loved and cared for them in a healthy way." Courts have recognized the possibility that repressed memories exist and may be recovered years later by therapy. For example, in Archibald v. Archibald, a woman sued her father for assault and battery, incestuous abuse, intentional infliction of emotional distress, breach of the parental duty, and invasion of privacy, among other claims. Although the plaintiff was allegedly abused for seven years, from 1965 to 1972, she repressed her memories for almost twenty years because she had developed "severe psychological mechanisms, including denial, repression, accommodation, and dissociation by which she"

114. BASS & DAVIS, supra note 69, at 128. The authors state that "[t]here are non-violent means of retribution you can seek, Suing your abuser or turning him in to the authorities are just two of the avenues open." Id.

115. Id. at 310 (quoting attorney Mary Williams). Litigation is viewed as a source of empowerment. Id. Bass and Davis include a list of lawyers who are willing to take on repressed memory cases. Id. at 311. The authors even suggest that patients try to recover monetary damages from their parents' homeowners' or car insurance policy. Id. at 309 (quoting attorney Mary Williams). A standard homeowner's policy may provide for damages that a homeowner may cause by his own negligence, but it does not provide for injuries intentionally inflicted by the insured. The suggestion that sexual abuse may be characterized as unintentional seems ridiculous, but plaintiffs have nevertheless tried to get around the exclusion by arguing that, although the insured intentionally engaged in abuse, he did not intend to inflict harm. Janet K. Colaneri & Delinda R. Johnson, Coverage for Parents' Sexual Abuse, FOR DEF., Mar. 1992, at 2, 4. Courts have not accepted the idea. See, e.g., State Farm Fire & Casualty Co. v. Smith, 907 F.2d 900, 902 (9th Cir. 1990) (stating that one cannot intend an act of sexual molestation without intending harm); State Farm Fire & Casualty Co. v. Watters, 644 N.E.2d 492, 496 (Ill. App. Ct. 1994) (agreeing with the "majority view" that specific intent to harm would be inferred as a matter of law).
separated herself from the acts being done to her body.\footnote{119} The fact that she had maintained a seemingly loving relationship with her father over the years supposedly caused her to repress her memories further.\footnote{120}

At one time, parental immunity prohibited children from bringing personal injury lawsuits against a parent.\footnote{121} The policy considerations given to justify the immunity included the preservation of domestic harmony, the necessity of parental discipline and control, the danger of fraud and collusion, and the possibility of the depletion of family resources.\footnote{122} Most states have abrogated the doctrine, however, or have carved out exceptions to the total bar.\footnote{123} For example, although Texas has retained the parental immunity doctrine, children may sue their parents for "wilful, malicious, wanton, or intentional wrongdoing."\footnote{124}

The recent increase in the number of repressed memory civil cases has resulted from changes in the statutes of limitations that enlarge the time period in which a plaintiff may bring such a suit.\footnote{125} For most civil suits, the statutory limitations period is one to three years after the cause of action accrues, and the date of accrual is generally the date on which the injury happens.\footnote{126} Statutes provide for tolling or suspension of the limitations period under certain circumstances. If, for example, the person injured is a minor, the statute may be tolled until the

\footnote{119. Id. at 27-28.}
\footnote{120. See id. at 28 (discussing the parties' relationship and the plaintiff's contention that the close relationship was "intended" to "perpetuate her repression").}
\footnote{121. Colaneri & Johnson, supra note 115, at 2.}
\footnote{122. Id., see, e.g., Hill v. Giordano, 447 So. 2d 164, 165 (Ala. 1984) (listing the policy reasons for the doctrine before overruling it).}
\footnote{123. See Hill, 447 So. 2d at 165.}
\footnote{124. Colaneri & Johnson, supra note 116, at 3 (quoting Aboussie v. Aboussie, 270 S.W.2d 636, 639 (Tex. Civ. App. 1954) (requiring more than "ordinary negligence" and citing the lack of "wilful, malicious, wanton or intentional wrongdoing.").}
\footnote{126. 1 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 5:27 (1983).}
person reaches the age of eighteen, or if the victim is operating under a disability, it may be tolled until the disability is removed. The discovery rule allows the tolling of the statutory period until the injured party knows or reasonably should know of the injury.

Until recently, rigid application of statutes of limitations prevented adults with recovered memories from filing civil suits twenty years after they were sexually abused, and courts refused to toll the statutes of limitations on account of repressed memories. In the landmark case of Tyson v. Tyson, the Supreme Court of Washington first considered whether the discovery rule applied. A twenty-six-year-old woman sued her father after she "remembered" that he had sexually abused her between the ages of three and eleven. The statute of limitations expired when the woman was twenty-one. The court refused to apply the discovery rule, stating that "psychology and psychiatry are imprecise disciplines. The fact that plaintiff asserts she discovered the wrongful acts through psychological therapy does not validate their occurrence." The court doubted the veracity of the memories, explaining that "while psychoanalysis is certainly of great assistance in treating an individual's emotional problems, the trier of fact in legal proceedings cannot assume that it will produce an accurate account of events in the individual's past." The court stated perceptively that the purpose of therapy is not to uncover and determine historical facts, but rather to treat and cure the patient.

127. Id. § 5:31.
131. Id. at 226-29 (holding that the statute of limitations would not be tolled because the plaintiff did not have objective, verifiable evidence of the original act).
132. Id. at 227.
133. The statute stated that the time limit expired three years after the age of majority or three years after 18 years of age. Id.
134. Id. at 229.
135. Id.
136. Id. The court further declared, "We cannot expect these professions to answer
Tipping the Balance in Favor of Repressed Memory Plaintiffs

Since Tyson, advocates of repressed memory theory have argued that statutes of limitations deny victims their Fourteenth Amendment right to equal protection of the laws. In contrast, defendants have argued, to no avail, that the changes in the statutes of limitations have violated their right to due process. A substantial majority of courts that have addressed the issue have chosen to toll the statute of limitations when the plaintiff had completely repressed memories of sexual abuse and had not remembered until after the statute of limitations expired. A number of states have formally extended their statutes of limitations in repressed memory cases to allow a legal remedy to alleged victims, and most of these new statutes apply the discovery rule. For example, in 1990, California amended its statute of limitations to within three years of the discovery of questions which they are not intended to address." Id. The District of Columbia Court of Appeals voiced this same skepticism eight years later: "Expert testimony might prove the existence of the plaintiff's subjective beliefs as to the cause of their distress, but it can give no assurance that those beliefs are grounded in reality. Evidence to that effect is of doubtful reliability." Farris v. Compton, 652 A.2d 49, 53 (D.C. 1994) (quoting Farris v. Compton, 802 F Supp. 487, 490 (D.D.C. 1992)).

See Sargeant, supra note 28, at 12.

137 See Sargeant, supra note 28, at 12.
138. Id. at 12-13.
139. See, e.g., Johnson v. Johnson, 701 F. Supp. 1363, 1369-70 (N.D. Ill. 1988); Evans v Eckelman, 265 Cal. Rptr. 605, 610 (Cal. Ct. App. 1990); Lemmnerman v. Fealk, 507 N.W.2d 226, 229 (Mich. Ct. App. 1993); Olsen v. Hooley, 865 P.2d 1345, 1349 (Utah 1993); Hammer v. Hammer, 418 N.W.2d 23, 26 (Wis. Ct. App. 1987). But see Baily v. Lewis, 763 F. Supp. 802, 810 (E.D. Pa.) (holding that, under Pennsylvania law, the statute of limitations will not be tolled), aff'd, 950 F.2d 721 (3d Cir. 1991); Marsha V v. Gardner, 281 Cal. Rptr. 473, 476-77 (Cal. Ct. App. 1991) (holding that the statute of limitations was not suspended because the plaintiff did not forget the abuse and only failed to connect the abuse to her emotional distress); Lundabury v. Lundabury, 552 So. 2d 1117, 1117-18 (Fla. Dist. Ct. App. 1989) (stating that because the clock began to run when either the last incidence of abuse occurred or the plaintiff reached the age of majority, the plaintiff was barred from bringing suit). For an in-depth discussion of the discovery rule in sexual abuse cases, see Carolyn B. Handler, Note, Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle, 15 FORDHAM URB. L.J. 709 (1987).

abuse or the point at which a person should have discovered that a psychological injury occurring after the age of majority was the result of sexual abuse, whichever occurred later.\textsuperscript{141}

Repressed memory cases thus receive a special status under many states' statutes of limitations. In essence, tolling the statute of limitations in these cases effectively eliminates the statute,\textsuperscript{142} which contradicts the public policies motivating the development of statutes of limitations.\textsuperscript{143} The statutes exist for three reasons. First, they provide reasonable notice to defendants of a claim against them, thereby enabling the defendants to preserve evidence.\textsuperscript{144} Stale claims present enormous evidentiary problems, and by precluding them, statutes of limitations increase the chance that factual issues are resolved accurately.\textsuperscript{145} Second, statutes of limitations prevent plaintiffs from "sleeping on their rights" by forcing them to bring actions within a reasonable period of time.\textsuperscript{146} Finally, the statutes give peace of mind to potential tort suit defendants who will not have to fear forever that a lawsuit may be brought against them.\textsuperscript{147}

Some courts have found that there are legal protections for potential defendants despite the changes in the statutes of limitations. The court in \textit{Ernstes v. Warner}\textsuperscript{148} found that the discovery rule provides an objective prong to the subjectivity of recovered memories by limiting the rule to when a reasonable person should have discovered the injury.\textsuperscript{149} In \textit{Petersen v.}  

\begin{itemize}
  \item \textsuperscript{141} Schwestka v. Hocevar, No. C93-2686 SBA, 1994 U.S. Dist. LEXIS 6730, at *3 (N.D. Cal. May 16, 1994) (discussing California's statute of limitations for childhood sexual abuse). Lapsed claims, however, are not revived by the amendment. \textit{Id.} at *4.
  \item \textsuperscript{144} SPEISER, \textit{supra} note 126, § 5:29.
  \item \textsuperscript{145} See \textit{Farrs v. Compton}, 652 A.2d 49, 58 (D.C. 1994).
  \item \textsuperscript{146} Hood, \textit{supra} note 128, at 425.
  \item \textsuperscript{147} See \textit{Order of R.R. Telegraphers v. Railway Express Agency}, 321 U.S. 342, 349 (1944) (stating that "the right to be free of stale claims in time comes to prevail over the right to prosecute them").
  \item \textsuperscript{148} 860 F Supp. 1338 (S.D. Ind. 1994).
  \item \textsuperscript{149} \textit{Id.} at 1341. \textit{Ernstes} claimed that his high school science teacher molested him from the ages of thirteen to sixteen. \textit{Id.} at 1339. He claimed to have repressed the memories for nearly twenty years until he received counselling for depression. \textit{Id.}
the Supreme Court of Nevada held that the traditional three-year statute of limitations for civil suits does not apply only in those cases in which a plaintiff can show by clear and convincing evidence that she was sexually abused as a child. The Supreme Court of Utah has required plaintiffs who allege repressed memories as a basis for tolling the statute of limitations to first produce corroborating evidence, such as evidence of similar acts or evidence of contemporaneous physical manifestations of the abuse, in support of their allegations.


The changes in the statutes of limitations are alarming. A short time period to bring a cause of action may be unfair for a plaintiff who represses memories of abuse, but it is also unfair to force a defendant to confront an allegation of abuse that allegedly occurred decades ago. Witnesses die or become unavailable, memories fade, and tangible evidence disappears over an extended period of time. A defendant may have lost access to a credible witness who could have provided an alibi or attested to observing the parties during the time period of the

The court held that because of the nature of the acts and his advanced age at the time the acts were committed, Ernstes knew or should have known at the time of the abuse that he was injured. Id. at 1341. The statute of limitations therefore had not tolled. Id. at 1342.

151. Id. at 24-25; see also OKLA. STAT. ANN. tit. 12, § 95 (West Supp. 1995) (allowing plaintiffs to bring causes of action within two years of the time that they discover or reasonably should discover the abuse, but requiring that actions must be based on “objective verifiable evidence” such as proof that the plaintiff repressed the memory and corroboration that the abuse occurred).
153. The Supreme Court has recognized that “statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose” United States v. Kubrick, 444 U.S. 111, 125 (1979).
154. See Messina v Bonner, 813 F Supp. 346, 349 (E.D. Pa. 1993) (“precisely because cases like this present such serious issues, the fact finder should have the freshest and most reliable evidence from the maximum number of possible witnesses”); see also Farris v. Compton, 652 A.2d 49, 52 (D.C. 1994) (stating that “it is not easy to defend against allegations of events said to have taken place a great many years ago”). But see Ann M. Boland, Comment, Civil Remedies for Victims of Childhood Sexual Abuse, 13 OHIO N.U. L. REV. 223, 234 (1986) (arguing that “sexually abused victims should not be barred from pursuing their abusers out of fairness to the offender”); Hood, supra note 128, at 419 (finding that “the better approach is to legislatively abolish the statute of limitations as a defense to [child sexual abuse] civil suits”).
alleged abuse.\textsuperscript{155}

\textbf{A Basis for Third Party Suits Against Therapists}

The alarming increase in recovered memory cases guarantees that there will be a backlash against therapists who use suggestive therapeutic techniques.\textsuperscript{156} Innocent defenders, like Mr. Ramona,\textsuperscript{157} will not tolerate horrible accusations without seeking legal recourse to stop therapists' irresponsible behavior, and, in light of the success of Ramona, they may seek third party standing to file malpractice actions against the therapists. A malpractice action by an injured third party would be the best course of action from a policy standpoint because it would serve as a quality control device in the field of psychotherapy Therapists would not be subject to unlimited liability because courts would judge them by the standard of care that applies to other mental health professionals.

\textit{Ramona} was unusual because, traditionally, only a patient could sue for malpractice based on an injury caused by the negligent acts of a therapist.\textsuperscript{158} Courts have generally not allowed third party cases on the ground that a health care provider has no duty of care to a third party.\textsuperscript{159} In a medical malpractice action, a patient must show by a preponderance of the evidence that (1) a relationship existed between the plaintiff and the defendant therapist in which the therapist undertook the obligation to treat the plaintiff in a nonnegligent manner, (2) a duty of care was breached, (3) a harm resulted from the breach, and (4) the breach of duty was the cause in fact and the proximate cause of the injury suffered by the plaintiff. PAUL S. APPELBAUM & THOMAS G. GUTHIEL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 141-43 (2d ed. 1991). The False Memory Syndrome Foundation states that between 60% and 70% of the patients contacting the Foundation who have retracted their allegations have filed lawsuits against their therapists. FREQUENTLY ASKED QUESTIONS, supra note 12, at 8.

\textsuperscript{155} \textit{Farris}, 652 A.2d at 58.
\textsuperscript{156} See Hansen, \textit{supra} note 1, at 36.
\textsuperscript{157} See supra text accompanying notes 1-12.
\textsuperscript{158} See, e.g., Joyce-Couch v. DeSilva, 602 N.E.2d 286 (Ohio Ct. App. 1991) (describing a situation in which a patient treated with sodium pentothal for four years in order to encourage the recovery of repressed memories could sue her therapist for malpractice). In a malpractice action, a patient must show by a preponderance of the evidence that (1) a relationship existed between the plaintiff and the defendant therapist in which the therapist undertook the obligation to treat the plaintiff in a nonnegligent manner, (2) a duty of care was breached, (3) a harm resulted from the breach, and (4) the breach of duty was the cause in fact and the proximate cause of the injury suffered by the plaintiff. PAUL S. APPELBAUM & THOMAS G. GUTHIEL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 141-43 (2d ed. 1991). The False Memory Syndrome Foundation states that between 60% and 70% of the patients contacting the Foundation who have retracted their allegations have filed lawsuits against their therapists. FREQUENTLY ASKED QUESTIONS, supra note 12, at 8.
\textsuperscript{159} JOEL I. KLEIN ET AL., LEGAL ISSUES IN THE PRIVATE PRACTICE OF PSYCHIATRY 3 (1984); see, e.g., Smith v. Pust, 23 Cal. Rptr. 2d 364, 370 (Cal. Ct. App. 1993) (holding that the husband of a woman whose therapist had sex with her while she was undergoing therapy for repressed memories could not bring a malpractice action against the therapist because the therapist had no duty of care to the husband),
case, the plaintiff must prove the establishment of a “relationship in which the clinician undertook [an obligation or duty] to treat him in a nonnegligent way,” and typically, only direct patients are found to have such a relationship.

Both Ramona and another recent case, Sullivan v. Cheshier, suggest that courts may find third party standing in malpractice cases involving repressed memories more easily in the future. As noted previously, in an unprecedented decision, the jury in Ramona decided that the therapists of a repressed memory patient owed a duty of care to the patient’s father, whom she had accused of sexual abuse. The jury awarded the father $500,000 for his malpractice claim.

In Sullivan v. Cheshier, a district judge refused to grant a therapist a motion for summary judgment on a malpractice claim brought against him by the parents of one of his patients. Kathleen Sullivan “remembered” during hypnosis that an older sibling sexually abused her when she was young. Upon her therapist’s suggestion “not to discuss her memories with anyone who did not accept them,” Kathleen abruptly broke off all contact with her family. Her sibling not only denied the allegation, but the family uncovered no evidence from their other children, their household staff, or the children’s doctors to corroborate Kathleen’s accusations. The Sullivans contended that Dr. Cheshier suggested the “memories”

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modified, No. G012429, 1993 Cal. App. LEXIS 1356 (Cal. Ct. App. Oct. 29, 1993) (clarifying earlier opinion as unaffected any legal rights of the woman). The court dismissed the defendant’s action in spite of the fact that he attended therapy sessions with his wife and subjectively believed that he was the therapist’s patient. Id. at 370. The court found no relationship, in part because the plaintiff did not fill out a patient questionnaire and did not sign a contract. Id.

160. APPELBAUM & GUTHEIL, supra note 158, at 141.
161. See supra text accompanying notes 1-12.
163. Hansen, supra note 1, at 36.
164. See supra text accompanying notes 1-12.
165. Sullivan, 846 F Supp. at 661-62. Sullivan is only the second reported case of a third party malpractice action against a therapist for suggesting false repressed memories.
166. Id. at 657
167. Id.
168. Id.
169. Id. at 657 n.2.
of the abuse and prevented the family from asking their daughter about the allegations of abuse.\textsuperscript{170} The Sullivans sued the therapist for malpractice based on the injury to their family relationship.\textsuperscript{171}

The court in \textit{Sullivan} analyzed whether a parent may bring a malpractice case based on damage to the parent-child relationship.\textsuperscript{172} In Illinois, parents may bring such cases when their child dies on account of a health care provider’s negligence, but Illinois law is less clear whether a cause of action will lie when the child survives.\textsuperscript{173} In \textit{Dralle v. Ruder},\textsuperscript{174} the Supreme Court of Illinois had previously held that a parent cannot sue for loss of filial society that occurs as a consequence of malpractice.\textsuperscript{175} The court in \textit{Dralle} did not decide whether this rule applies to acts that intentionally and directly interfere with the parent-child relationship.\textsuperscript{176} In a later case, however, \textit{Alber v. Illinois Department of Mental Health \& Developmental Disabilities},\textsuperscript{177} the court seemingly resolved the issue when it concluded that intentional interference was not actionable.\textsuperscript{178}

In \textit{Sullivan}, the court noted that other states that prevent recovery for negligent damage to family ties do permit recovery for intentional acts.\textsuperscript{179} Furthermore, the court found that the reasons given by Judge Shadur in \textit{Dralle} for why courts deny recovery in cases of intentional interference, i.e., “the availability of a tort remedy to the injured child, the possible multiplication of claims and the difficulty of determining damages,”\textsuperscript{180}

\begin{itemize}
  \item \textsuperscript{170} \textit{Id.} at 657, 662.
  \item \textsuperscript{171} \textit{Id.} at 658. The Sullivans also based their action on “the loss of their daughter’s society [and] the intentional and reckless infliction of emotional distress.” \textit{Id.}
  \item \textsuperscript{172} \textit{Id.} at 660-61.
  \item \textsuperscript{173} \textit{Id.} at 660.
  \item \textsuperscript{174} 529 N.E.2d 209 (Ill. 1988).
  \item \textsuperscript{175} \textit{Id.} at 214-15.
  \item \textsuperscript{176} \textit{Id.} at 214.
  \item \textsuperscript{177} 786 F Supp. 1340 (N.D. Ill. 1992), \textit{dismissed}, 816 F Supp. 1298 (N.D. Ill. 1993).
  \item \textsuperscript{178} \textit{Id.} at 1364-66.
  \item \textsuperscript{180} \textit{Sullivan}, 846 F. Supp. at 660 (quoting \textit{Dralle}, 529 N.E.2d 209, 213 (Ill. 1988)).
\end{itemize}
were not present in all intentional interference cases and were not present in the case at bar.\textsuperscript{181} The judge concluded that Illinois law did not preclude intentional interference tort claims by parents and that a trier of fact could reasonably decide that there was a genuine issue as to whether Dr. Cheshier was to blame for destroying the family relationship and implanting Kathleen's "memories."\textsuperscript{182} The court also noted that the Sullivans did not need to prove complete severance of all contact with the child in order to prove destruction of the family.\textsuperscript{183}

Both \textit{Ramona} and \textit{Sullivan} suggest that courts may be open to third party cases against therapists, but neither case has yet undergone appellate review. A sound basis for third party standing in a repressed memory malpractice case must therefore be established. Past case law suggests that this may be done by expanding the number of parties to whom a therapist owes a duty of care.\textsuperscript{184} The following discussion will rely on two lines of cases to show how courts have expanded a therapist's duty of care in the past. First, courts have increased the number of parties to whom doctors owe a duty when a patient threatens bodily harm to another person.\textsuperscript{185} Second, courts have allowed malpractice cases against therapists who misdiagnose children as having been abused by the parent. The policy choices made in these cases may also be applied to repressed memory suits, for in all three categories of cases the therapist has the ability to foresee the degree of harm to the third party.\textsuperscript{186}

\begin{footnotes}
\item[181.] Id. at 660-61.
\item[182.] Id. at 661-62.
\item[183.] Id. at 661 n.8.
\item[184.] KEETON ET AL., supra note 143, § 53. The author states that the argument in favor of denying liability because the defendant bears no duty to the plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Id. § 53.
\item[185.] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (en banc).
\end{footnotes}
Policy Considerations and the Concept of Duty

A brief overview of the notion of duty reveals a flexible concept that has developed in response to social need. In feudal society, a person "bore responsibility for any damage he inflicted without regard to whether he was at fault." A person thus owed a duty to all around him. During the Industrial Revolution, this notion of strict liability changed; since then, the common law has only imposed liability upon the defendant if the defendant had a specific relationship to the victim. The idea of "foreseeability" of harm developed to limit the group of people with whom one had a special relationship. Over the years, however, courts have increased the number of cases in which they impose affirmative duties by expanding the list of special relationships giving rise to a duty.

The concept of duty is primarily a policy decision. William Prosser has defined duty as an "obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." Prosser also argues that: "[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." A
change in social conditions may thus precipitate a recognition of new duties. If policy determines duty, then a public policy decision to curb overzealous therapists who use radical therapies that cause severe injury would clearly justify the expansion of the class of parties to whom a therapist owes a duty to include third parties.

The Tarasoff Cases and the Expansion of Duty

In the past, courts have balanced policy considerations and expanded the concept of duty in order to increase the number of relationships in which a therapist owes a duty. A number of previous cases are analogous to repressed memory cases because the injury received by a third party arose from a therapist’s negligence. In Tarasoff v. Regents of the University of California and the cases that followed its precedent, the courts focused on the foreseeability of harm to a third party.

Prosenjit Poddar murdered Tatiana Tarasoff two months after Poddar confided to a psychologist that he intended to kill Tatiana. Tatiana’s parents brought suit against the therapist, claiming that he should have warned Tatiana of Poddar’s threats. The Supreme Court of California agreed with Tatiana’s parents and decided that a clinician has a duty to take reasonable measures to protect a third party when he or she knows that a patient represents a danger to that party.

The court listed a number of factors that it relied upon in

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ordinary care and skill to avoid such danger.

Heaven v Pender, 11 Q.B. 503, 509 (1883).
196. KEETON ET AL., supra note 143, § 54.
197. Dillon v Legg, 441 P.2d 912, 916 (Cal. 1968) (en banc).
198. In an analysis of duty, one commentator concludes that no better general definition of duty can be made “than that the courts will find duty where, in general, reasonable men would recognize it and agree that it exists.” KEETON ET AL., supra note 143, § 54; see also Lambert v. Brewster, 125 S.E. 244, 249 (W Va. 1924) (arguing that “[a]s for public policy, the strongest policy which appeals to us is the fundamental theory of the common law that for every wrong there should be a remedy”).
199. Tarasoff v Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (en banc).
200. Id. at 339.
201. Id. at 340.
202. Id.
reaching its decision to expand the concept of a therapist's duty, including:

the foreseeability of the harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved. 203

Although the court considered all the factors, it found foreseeability to be the most important policy factor. 204

In McIntosh v. Milano, 205 a New Jersey court further expanded the reach of a therapist's duty and held that when a patient made threats to injure his victim, a therapist had a general obligation to the community to take action. 206 The court found a special relationship in the “broadly based obligation a practitioner may have to protect the welfare of the community.” 207 The court analogized the therapist's duty to a health care practitioner's duty to warn third persons of contagious diseases. 208 The foreseeability of grave injury to third parties was the deciding factor in the court's decision. 209

In 1980, a federal district court, applying Nebraska law, agreed with the New Jersey decision expanding the concept of duty In Lipari v. Sears, Roebuck & Co., 210 a mental patient receiving treatment at a veteran's hospital withdrew himself from the hospital's care against his doctor's wishes. 211 A month later, he entered a nightclub and opened fire with a shotgun into

203. Id. at 342 (citing Merrill v. Buck, 375 P.2d 304, 310 (Cal. 1962) (en banc)).
204. Id.
206. Id. at 511-12.
207. Id. at 512.
208. Id.
209. Id.
211. Id. at 187.
the crowded room.\textsuperscript{212} The court held that the therapist could be found liable, although he had no knowledge of a specific threat.\textsuperscript{213} Rather, a duty existed if the psychiatrist could foresee that the patient's violent nature posed a risk of harm to either a person or a class of persons.\textsuperscript{214} By focusing upon the foreseeability of a serious injury, the court expanded the number of persons to whom a therapist owes a duty. Likewise, in \textit{Bradley Center, Inc. v. Wessner},\textsuperscript{215} a court held a private mental hospital civilly liable for the murder of a woman by her husband, a patient to whom the hospital had granted a day pass.\textsuperscript{216}

One need not list all the cases following the \textit{Tarasoff} precedent. The pattern evident in even this small sampling of the cases following \textit{Tarasoff}'s precedent reveals that courts have found that a therapist has a duty to prevent foreseeable injury to a foreseeable third party. The cases on which the following section will focus use the arguments from \textit{Tarasoff} to find therapists liable when they misdiagnose a child as sexually abused. The reasons for finding therapists liable to accused parties when a young child is misdiagnosed are equally applicable to the misdiagnosis of adult children because of the similarity and gravity of the injury.

\textit{Malpractice Cases by Third Parties Based on Misdiagnosis of Sexual Abuse in Young Children}

In malpractice cases against therapists for their misdiagnosis of sexual abuse in young children, courts have granted standing to parents and foreseeable third parties, allowing them to sue the therapists in spite of the fact that the parties did not participate in the therapy relationship. Repressed memory cases may be analogized to the misdiagnosis cases because both types of cases involve serious legal allegations encouraged by the

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} at 195. \textit{But see} Brady v. Hopper, 751 F.2d 329, 331-32 (10th Cir. 1984) (holding that the therapist who treated John Hinckley, Jr. was not liable for injuries suffered by the plaintiff, because Hinckley made no specific threats).
\textsuperscript{214} \textit{Lipari}, 497 F Supp. at 194-95.
\textsuperscript{215} 296 S.E.2d 693 (Ga. 1982).
\textsuperscript{216} \textit{Id.} at 694.
therapist, and the consequences of such allegations are equally foreseeable, traumatic, and harmful.

In 1988, the Colorado Court of Appeals, in *Montoya v. Bebensee*, 217 reinstated a father's claim against his daughter's therapist. 218 The court faced the question of whether a mental health provider owed a duty to refrain from taking actions that would foreseeably result in injury to another. 219 With no physical evidence of sexual abuse, a therapist, after two perfunctory visits with the daughter, concluded that the daughter had been sexually abused. Moreover, without ever meeting with the father, the therapist concluded that the father was the abuser. 220 In contrast to the therapist's flippant diagnosis, a social worker told the mother that she was uncertain whether the events described by the daughter had ever happened. 221 Another therapist advised the mother that he also entertained serious doubts about the veracity of the daughter's story. 222 Finally, a court-ordered therapist, who observed the family members both as a group and individually, did not find the allegations credible. 223

As in *Tarasoff*, the court balanced many policy considerations before it reached its conclusion that the therapist owed a duty to the father. The court took into account the great social utility of requiring therapists to make reports of suspected child abuse, but recognized the need to weigh the "significant risk of substantial injury that may occur to one who is falsely accused of being a child abuser." 224 The great harm done to one falsely accused was clearly a foreseeable and unreasonable injury 225 By extending the duty of the therapist "to any person, who is the subject of any public report or other adverse recommendation by that provider," no greater burden was placed upon the therapist than that placed on any other professional. 226

218. Id.
219. Id. at 288.
220. Id. at 287.
221. Id.
222. Id.
223. Id.
224. Id. at 288.
225. Id. at 288-89.
226. Id. at 289 (emphasis added). Statutory immunity is generally granted to thera-
As *Ramona* illustrates, the California courts have also been willing to extend a therapist’s duty of care to include the patient’s parents. In *James W v. Superior Court*, the court found a therapist guilty of malpractice for pressuring an eight-year-old girl to accuse her father of sexual abuse. For over a year, the little girl, Alicia, repeatedly denied that her father had abused her and stated that a strange man had come through her bedroom window and attacked her. The girl was removed from her parent’s home, and the therapist told her that she would feel a lot better if she admitted that her father raped her. Tragically, Alicia was separated from her mother for one year and her father for two years. She was almost adopted by her foster family before the court took steps to reunite her with her family. DNA testing eliminated her father as a suspect, and the family initiated a suit against the therapist.

The facts of *James W* may be distinguished from *Montoya* for two reasons. First, actual medical evidence proved that Alicia had been raped and sodomized. Second, the defendant therapist later counselled Alicia, her mother, and her brother, thereby making one parent a patient. Despite these differences, the court came to an important conclusion about therapeutic relationships in which the family takes part. The court stated: “The law recognizes that, where counselors abuse a therapeutic relationship with family members, causing injury to the children, emotional distress to the parent, and disrupting the parent-child relationship, they breach their duties of care to the parent as

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227. *Id.* at 289-90.
228. *Id.* at 177-78.
229. *Id.* at 171. The family later discovered that, in the same month, a man living across the street had abducted a four-year-old girl and attempted to rape her. *Id.*
230. *Id.*
231. *Id.* at 172.
232. *Id.*
233. *Id.*
234. *Id.* at 170.
235. *Id.* at 172. The mother was so devastated by the accusations of the therapist that she attempted suicide and was committed to a psychiatric ward. *Id.*
According to James W., the parent may sue the therapist for malpractice because an implied duty to third parties arises when the therapist uses the parents as active instruments in the patient's treatment. Involving parents in a patient's therapy is not a new idea. Those therapists who take a family or systems approach to therapy consider the family to be as much a focus of the sessions as the primary patient. Courts may find a special relationship in repressed memory cases because the parents are considered part of the therapeutic relationship. Therapists often urge patients to confront their parents in order to begin the process of healing and consider the confrontation process a critical step of the therapy.

In a case of first impression, a New York court, in Caryl S. v. Child & Adolescent Treatment Services, Inc., extended a therapist's duty to include individuals not considered to be involved in the therapy relationship. The plaintiff, Caryl S., was accused by her granddaughter's therapist of sexually abusing the child. On account of the misdiagnosis, the therapist recommended that the court limit the paternal grandparents'...

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236. Id. at 177. The court did not grant the therapist statutory immunity because she repeatedly coerced Alicia to confess even after any “emergency” had passed and the authorities had been actively involved in investigating the case. Id.
238. APPELBAUM & GUTHEIL, supra note 158, at 7. The authors go so far as to state that even in matters of patient confidentiality, “[f]amily members are not usually viewed as third parties by most therapists” but are considered part of the therapy process and should be allowed access to confidential information. Id., see JAY HALEY, REFLECTIONS ON THERAPY, AND OTHER ESSAYS 95-96 (1981) (analyzing psychopathology in terms of habitual patterns of response between family members and other intimates).
239. One author and therapist advises that “the partner, parent or significant other in the survivor's life must be peripherally involved in the treatment.” PRENDERGAST, supra note 74, at 86.
240. See supra notes 21-22, 115 and accompanying text.
242. Id. at 667.
243. Id. at 663.
visitation rights.\textsuperscript{244}

After returning from a visit with her grandmother, Amanda, age five, told her mother that Caryl had put a stick in her vagina.\textsuperscript{245} A physician at a local hospital found no physical evidence of abuse, but Amanda’s mother, who was divorced from Amanda’s father, filed a petition to preclude contact between Amanda and her grandmother.\textsuperscript{246} The family court granted the petition, which the grandparents contested.\textsuperscript{247} At trial, the court granted the grandparents unrestricted daytime visits.\textsuperscript{248} The judge did not expressly rule whether, based upon a preponderance of the evidence presented at the hearing, Amanda had been abused by her grandmother\textsuperscript{249} He did find that the evidence was not sufficient for the hospital to consider filing a report to the Child Abuse and Maltreatment Hotline as required by law or for the police to bring criminal charges.\textsuperscript{260}

For the next two years, Amanda underwent counselling with the defendant therapist, Jones.\textsuperscript{251} Jones concluded from her interviews with Amanda that the child had been abused.\textsuperscript{252} The therapist gave the information to several individuals and recommended to Amanda’s family court guardian that she have only supervised visits with her grandmother until Caryl “exhibit[s] some responsibility for her actions and obtain[s] some counselling for whatever emotional problems she may have.”\textsuperscript{253}

Caryl and her husband Wallace petitioned the court to recover damages for injuries suffered by them as a result of the defendants’ acts.\textsuperscript{254} They based their claim on three causes of action. First, the plaintiffs contended that the defendants “negligently, carelessly and recklessly reached the false conclusion

\begin{itemize}
\item \textsuperscript{244} Id.
\item \textsuperscript{245} Id. at 662.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id. at 662-63.
\item \textsuperscript{250} Id. at 663.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. Jones stated that Caryl’s portrayal of events was not credible and that she had no reason to doubt Amanda. Id.
\item \textsuperscript{254} Id. at 662. Both Jones and her employer were named as defendants. Id. at 661.
\end{itemize}
that C[aryl] sexually abused A[manda]," and took action based on the misdiagnosis. 255 Second, they alleged that the defendants were not competent to investigate the action. 256 Finally, in a derivative claim, Amanda's paternal grandfather alleged that the defendants' negligence resulted in loss of consortium and high medical expenses to treat his wife. 257

The court began its inquiry by examining whether the defendants owed a duty to the plaintiffs. 258 It noted that in recent years, society had made much progress in exposing child abuse, but that, at the same time, good faith, but overzealous, efforts to root out sexual abuse had caused the suffering of many innocent parents. 259 "[I]t requires little imagination to see the harm [to the child and the parent] that might result from a negligently and erroneously formed conclusion with subsequent treatment based on that 'misdiagnosis.'" 260

For the first time, the court had to decide if a therapist owed a duty to someone, other than a parent, who was outside the therapy relationship. It concluded that a therapist owes a duty to one accused, even if outside the therapy relationship, when the therapist makes a determination of child sexual abuse and pursues a course of action aimed at shaping the conduct of both the child and the accused. 261 "A suspected abuser . . . has the right to a reasonable expectation that such a determination, touching him or her so profoundly will be carefully made and will not be reached in a negligent manner." 262 In refusing to grant the defendant's motion to dismiss, the court also noted that the duty was limited to specifically foreseeable parties. 263

255. Id. at 663.
256. Id.
257. Id.
258. Id. at 664. The court noted that policy plays an important role in the decision. Id. (citing De Angelis v. Lutheran Medical Ctr., 449 N.E.2d 406, 407 (N.Y. 1983)).
259. Id. at 665.
260. Id. at 666. The court declared that the label of abuser is "one of the most loathsome labels in society" with severe emotional, financial, and physical ramifications. Id. (quoting Rossignol v. Silvernail, 586 N.Y.S.2d 343, 345 (N.Y. App. Div 1992) (plaintiff brought defamation action based on statements accusing him of sexually abusing a child)).
261. Id. at 667.
262. Id. at 666.
263. Id. at 667.
Conversely, the Texas Supreme Court has rejected the idea that a therapist might owe a duty of care to a third party. In *W.C.W v. Bird*,264 the Texas Court of Appeals held that the harm to a parent from a misdiagnosis that the child was sexually abused by that parent was a foreseeable injury for which damages could be awarded.265 *Bird* involved a young boy's allegations that "daddy" had sexually abused him.266 The boy was in the custody of his father after his parents divorced, but when the father moved to Florida to seek employment, he temporarily left his son with his former mother-in-law.267 The child later moved in with his mother and her common-law husband.268 When the court arranged for the child to join his father in Florida, the mother, claiming her son had reported that "daddy" had sexually abused him, sought counseling for her son.269 The therapist concluded that the father had abused the son, but based her conclusions on a ten-minute interview with the child.270 The child also told the therapist that "daddy" had abused him, but the therapist later admitted that she did not know if "daddy" was the child's biological father or his mother's common-law husband.271 A week after the interview with the boy, the therapist, in spite of her doubts, signed an affidavit stating that the child had been abused by his biological father.272 A court-appointed therapist concluded after lengthier interviews that the boy had not actually been abused by his biological father.273

The father sued the first therapist, who had signed the affidavit and caused the charges of sexual abuse to be filed, for malpractice, charging that she had failed to investigate properly the allegations of abuse.274 The appellate court found that the at-

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265. Id. at 55.
266. Id. at 51.
267. Id.
268. Id.
269. Id.
270. Id. at 52.
271. Id.
272. Id.
273. Id.
274. Id.
tempted termination of the father’s custody rights and the institution of a criminal action against the father were reasonably foreseeable consequences of the misdiagnosis, for which the therapist was liable.275

The Texas Supreme Court reversed the appellate decision, holding that in the case of child sexual abuse, a mental health professional should be allowed to exercise professional judgment in diagnosing abuse without the “judicial imposition of a countervailing duty to third parties.”276 The court explained that, although the risk of injury from misdiagnosis is almost certain to occur, there is great social utility in encouraging mental health professionals to diagnose sexual abuse.277 It reasoned that the quality of information that therapists receive is likely to be poor because young children often have difficulty communicating information about abuse.278 Therapists, therefore, would have a difficult time judging the quality of the information.279 The existence of criminal sanctions against one who knowingly reports false information in a custody proceeding would lessen the risk of an erroneous determination.280

The Texas Supreme Court’s decision ignored entirely the fact that the defendant therapist based her diagnosis on a ten-minute interview. The therapist neither asked the child specific questions nor tested him,281 and she made the allegation while she still entertained doubts about the identity of “daddy.”282 The criminal sanction is only applicable to those who knowingly report false information, not to those who do so negligently. While great social utility arises from allowing therapists to diagnose sexual abuse, no social utility can be derived from shielding therapists who make cavalier judgments that have enormous

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275. Id. at 55-56. In a deposition, even the therapist’s employer admitted that a misdiagnosis can cause “the accused parent emotional trauma, the loss of relationships, and problems with the parent’s employment.” Id. at 56. 276. Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994). 277. Id. at 769-70. 278. Id. at 769. 279. Id. 280. Id. 281. W.C.W. v. Bird, 840 S.W.2d 50, 52 (Tex. Ct. App. 1992), rev’d, 868 S.W.2d 767 (Tex. 1994). 282. Id.
detrimental effects on the lives of the accused and his family. Therapists will continue to make such negligent diagnoses while they are protected by court decisions such as Bird.

The Bird decision failed to consider the nature of the therapist's diagnosis, and instead applied a blanket protection from liability because it focused on the utility of diagnosing sexual abuse. The courts in Montoya, James W., and Wallace followed the better approach, because they considered the great social benefit of uncovering sexual abuse while, at the same time, realizing that therapists should not be allowed to "discover" abuse by jumping to conclusions. These cases demonstrate the willingness of the courts to expand a therapist's duty to include those parties foreseeably harmed by a therapist's actions upon a misdiagnosis of sexual abuse. The same arguments may be applied convincingly to repressed memory cases in which the danger of misdiagnosis is even greater. Not only are the accusations based on suggestive techniques, but the memories "retrieved" are tarnished by the passage of time.

PREVENTING UNLIMITED THERAPIST LIABILITY

Therapists' Concerns

Expanding the duty of a repressed memory therapist to include a foreseeable injured third party does not translate into unlimited liability for all therapists. After the jury decision in Ramona, mental health professionals expressed concern that the expansion of a therapist's duty to include third parties would become unlimited in scope and would have a chilling effect on the profession. The Executive Director of the California Association of Marriage and Family Therapists remarked that if therapists "have to satisfy every member of the extended family or risk being sued, it kind of opens a hornet's nest" of unlimited liability. Therapists expressed similar concerns after the court's decision in Tarasoff. As the court in Dillon v.

283. Hansen, supra note 1, at 36.
285. See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 358 (Cal.
Legg argued when it chose to expand the circle of foreseeable victims of emotional distress, history has previously exposed the fallacy that unlimited liability would result from any expansion of the concept of duty.

Repressed memory therapists might argue that they cannot reasonably fulfill a duty of care to a third party. Again, therapists raised similar concerns after Tarasoff, arguing that they were unable to predict accurately the future dangerousness of a patient and thus could not reasonably fulfill the duty. In addition, the harm from the duty to protect outweighed any benefit because patients who know that a therapist may reveal a confidence may avoid seeking help.

Limiting Factors

The aforementioned concerns, though important, had little impact on the California court in Tarasoff. The court argued that the duty is reasonable in light of the fact that the standard of care is limited to that of other mental health professionals. Therapists are not held to an impossible standard, and only those who rely on radical and bizarre therapies would be liable for injuries resulting from their methods.

The standard of mental health professionals is not exact and may vary with the school of thought. Many techniques of psycho-

1976) (en banc) (Clark, J., dissenting) (arguing that "[o]verwhelming policy considerations weigh against imposing a duty on psychotherapists to warn a potential victim against harm"); Alan A. Stone, The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society, 90 HARV. L. REV. 358 (1976) (asserting that the negative effects outweigh the benefits).

Id. at 922 (holding that a mother who witnessed her daughter being run over by a car could recover damages for emotional distress).

One academic has retorted that therapists may not have the ability to predict dangerousness or even to diagnose psychiatric ailments in general, but they have acted as if they are able to do so, and therein lies the root of a therapist's negligence. Howard Gurevitz, Tarasoff: Protective Privilege Versus Public Peril, 134 AM. J. PSYCHOTHERAPY 289, 291 (1977).

APPELBAUM & GUTHEIL, supra note 158, at 149. One academic has retorted that therapists may not have the ability to predict dangerousness or even to diagnose psychiatric ailments in general, but they have acted as if they are able to do so, and therein lies the root of a therapist's negligence. Howard Gurevitz, Tarasoff: Protective Privilege Versus Public Peril, 134 AM. J. PSYCHOTHERAPY 289, 291 (1977).

APPELBAUM & GUTHEIL, supra note 158, at 149.

Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (en banc); see also White v. United States, 780 F.2d 97, 101 (D.C. Cir. 1986) (inquiring whether "[the defendant's] handling of [the therapy] was consistent with the standards of her profession").
therapy exist, and they have diverged far from the original analytically oriented model. Professional consensus about what constitutes an adequate standard of care is difficult to obtain because of the numerous methods and theories. Courts may therefore define "customary practice" to mean a generally accepted standard, or they may choose to lower the standard to mean that a sufficient "respectable minority" supports the use of the theory under the same circumstances. If the therapy is extremely unconventional and experimental, like many repressed memory techniques, it may even fall outside the practice of a "respectable minority." Parties may introduce expert testimony to attest to the standard of care and whether the techniques to retrieve repressed memories are deemed radical or reliable and generally accepted by the psychiatric community.

The approval of the mental health community would lend legitimacy to a technique and would bolster an argument that the recovered memories were not suggested by the therapist, although the converse is also true. Another way to judge the reliability of a repressed memory technique and hence, the liability of the therapist, is for a court to apply the standards formulated by the Court in Daubert v. Merrill Dow Pharmaceuticals, Inc. In Ault v. Jasko, Judge Wright analogized repressed memory techniques to polygraphy and argued that courts should treat both with the same skepticism and critical examination because both place enormous responsibility on the questioner to remain objective. He suggested that the criteria that the Su-

291. See Appelbaum & Gutheil, supra note 158, at 146.
292. See id.
293. Id. at 146-47.
294. Warnings by both the AMA and the American Psychiatric Association suggest that repressed memory theory is unconventional and dangerous. See supra notes 62-63 and accompanying text.
295. See generally Joyce H. Vesper & Gregory W Brock, Ethics, Legalities, and Professional Practice Issues in Marriage and Family Therapy 94-98 (1991) (providing a checklist for a therapist to follow in order to avoid being sued for malpractice and warn therapists not to practice beyond their level of expertise).
297 637 N.E.2d 870 (Ohio 1994).
298. Id. at 877 (Wright, J., dissenting).
Supreme Court established in Daubert might provide a standard to judge reliability of the techniques. In Daubert, the Supreme Court established criteria that scientific evidence must meet in order to be admissible in federal court. A court must look at (1) the falsifiability of the data from the technique, (2) whether the technique has been published and undergone peer review, (3) the error rate of the technique, and (4) the general acceptance of the technique. The focus of the test is both on the principles espoused by the technique and the methodology used to support those principles.

The Daubert criteria, in combination with generally accepted standards of mental health care, would establish reasonable guidelines for a court to analyze the reliability of repressed memory techniques. The use of a method that generally fits the Daubert guidelines could make it more probable than not that the recovered memory was true because the ability of the therapist to suggest or implant memories would be reduced by the use of a more standardized and scientifically established technique.

Courts also require guidelines in the field of forensic hypnosis, which, like polygraphy and repressed memory therapy, provides many opportunities for the questioner to suggest unconsciously to a subject a "correct" answer. Questioners now follow strict guidelines in order to ensure that the questioner has not suggested the responses of the hypnotized subject. The guidelines require a questioner to keep complete and accurate records of the sessions, beginning with the initial meeting; to inform the subject of the ramifications of the therapy and to require them to sign a consent form; and to keep a history of the session by videotaping or audiotaping the sessions for later referral in order to determine any basis for suggestion. These guidelines

299. Id.
300. Daubert, 113 S. Ct. at 2796-97.
301. Id.
302. Id. at 2796.
303. Schefflin & Shapiro, supra note 82, at 5. The introduction of hypnotism into the courtroom has forced judges to answer questions such as: who may practice hypnotism, who may qualify as an expert, and whether a previously hypnotized witness may testify in court. Id.
304. Id. at 15-16.
could also be employed in repressed memory therapy to establish a baseline for the appropriate standard of care.

Evidence of injury is another limit to liability. In malpractice actions brought by patients against therapists, evidence of an actual injury is sometimes difficult to establish because the injury may not be physical or tangible. Pinpointing a therapist’s actions as the cause of that injury may be even more difficult. The directive therapy of repressed memory techniques, in which the therapists urge patients to take specific actions, makes the injury and the proximate cause connection easier to find, however. The injury to the family that results from the therapist’s directions is clearly evident both in the cessation of the child/patient’s contact with the family and the economic, reputational, and emotional harm to the innocent defendant. Even if the case is dismissed, the injury to the innocent defendant’s reputation may well linger. The court in Messina v. Bonner, which granted the defendant’s motion to dismiss, still questioned the father’s denial of the abuse and asked whether his refutation was the result of age or psychological denial.

CONCLUSION

The trend in psychotherapy to uncover repressed memories of sexual abuse is a “widespread and damaging” fad. Overzealous therapists who focus on recovering memories have ignored reliable research that such memories are most likely false and have, instead, encouraged, either directly or indi-

305. See RONALD J. COHEN & WILLIAM E. MARIANO, LEGAL GUIDEBOOK IN MENTAL HEALTH 208 (1982).
307. Id. § 8.02, at 444.
308. See supra notes 1-12, 156-71 and accompanying text.
310. OFSHE & WATERS, supra note 18, at 5. A lawyer and psychologist who represents former patients in cases against their therapists characterized the technique of recovering memories as the latest of “bizarre pseudo-psychotherapeutic fads.” Hansen, supra note 1, at 36.
311. OFSHE & WATERS, supra note 18, at 10; see supra text accompanying notes 1-113. Women’s rights organizations have argued that the suggestion that recovered
rectly, their patients to file lawsuits against the alleged abusers. States and courts have reacted by tolling or increasing the statutes of limitations to allow alleged victims their day in court should the memories be true. Courts should check the rapid increase in the number of repressed memory civil cases by expanding the duty of a therapist to include foreseeable injured third parties. The threat of a malpractice case by an innocent third party would then act as a quality control device in the field of psychotherapy. Recovered memory therapists would be deterred from issuing cavalier diagnoses of prior sexual abuse and encouraging patients to act on memories that, if incorrect, could have severely damaging and potentially irreversible consequences.\textsuperscript{312}

\textit{Sheila F. Rock}

memories of abuse are false is evidence of a backlash against female victims of sexual abuse who have finally spoken out against their abusers. Loftus & Rosenwald, \textit{supra} note 4, at 73. Judith Herman, who has written extensively about incest, argues that questioning the validity of the memories reflects "19th century Freudian notions of women as so suggestible and unreliable that they concoct fantasies of abuse". Sandra G. Boodman, \textit{The Professional Debate over an Emotional Issue, WASH. POST, Apr. 12, 1994, at Z13}. These arguments fail to recognize that by ignoring the fact that recovered memories tend to be false, society only further victimizes women. Outrage should be focused instead on the therapists who take advantage of a female patient's vulnerability. \textit{See generally JANE M. USSHER, WOMEN'S MADNESS: MISOGyny OR MENTAL ILLNESS?} (1991) (arguing that some forms of therapy are mind rape). Some commentators have described therapists who practice recovered memory techniques as a new class of sexual predator that encourages female patients to relive the alleged abuse. OP\textsc{She} & W\textsc{aters}, \textit{supra} note 18, at 7.

\textsuperscript{312} \textit{See generally VESPER \& BROCK, supra} note 295, at 98 (warning that "[t]herapy is no longer just talk"); Reich, \textit{supra} note 78, at 82 (providing a discussion of the difficulty and danger of psychiatric diagnosis).