Articles

Memory, Repression And Expertise: Civilly Actionable Sexual Misconduct in Texas And Individual Rights

Michael Sean Quinn*

In the last quarter-century or so, America has been told that it has a very dark side indeed. The women's movement, among others, has said that the culture is awash in various types of child abuse, including sexual. Some of it is alleged to be homosexual,[1] but most of it appears to be heterosexual and much of it is said to be within families.[2] True to American history we have taken the problem to court. Surely, our common sense moral convictions tell us, those who have been abused as children have a right to sue for damages and recover in accordance with their injuries. Tort theory, insofar as it emphasizes deterrence, supports such suits. Just as surely, however, people have some sort of right not to be falsely accused—even in civil contexts—of heinous crimes. Accusations of sexual abuse explode into people's lives.[3] Many people tend to believe most accusations of childhood sexual abuse almost reflexively. "After all," they say, "who would make such a claim if it were not true?" But maybe this knee-jerk reaction is too quick. People have not only a right not to be falsely accused, they have a right not to be accused on the basis of shoddy evidence. Perhaps some skepticism is appropriate. Then again, what is the right balance?

After some initial enthusiasm, the legal system seems to be souring somewhat on—even becoming subtly hostile to—at least a certain range of civil claims based upon predatory sexual misconduct.[4] This nuanced aversion to dealing with sex claims is puzzling, even paradoxical. After all, everyone agrees that the sexual abuse of a child is a moral outrage which causes substantial injury. Are some in the judiciary intentionally, albeit circumspectly,

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* Of Counsel, Sheinfeld, Maley & Kay (Austin). Mr. Quinn has taught at the Law School of Southern Methodist University and at The University of Texas at Austin School of Law.

1. *See generally* A. W. RICHARD SIPES, SEX, PRIESTS AND POWER (1995) (arguing that homosexual child abuse exists in the Catholic church) and PHILIP JENKINS, PEDOPHILES AND PRIESTS (1996) (stating particular cases of abuse).

2. One of the legal commentators who has reviewed the relevant material suggests that sexual abuse of children has reached nearly "epidemic proportions." Kristin E. Rodgers, *Childhood Sexual Abuse: Perceptions on Tolling the Statute of Limitations*, 8 J. CONTEMP. HEALTH L. & POL'Y 309, 334 (1992). *See* Ann Marie Hagen, Note, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355, 358 (1991) (citing sociological and psychological studies). *See also* Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1251 (1991) (discussing studies which state that "father-daughter incest is the type of intrafamilial sexual abuse most frequently reported").

3. *See* MOIRA JOHNSTON, SPECTRAL EVIDENCE 82 (1997).

4. Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 618-22 (1996).

undermining damage suits based upon predatory sexuality? If so, why is this happening? Sure, the litigation explosion has something to do with it. So-called tort "reform," two of the main purposes of which are to reduce the number of lawsuits and reduce the amounts of judgments, has something to do with it. Moreover, many simply disbelieve what social critics claim. If the sexual abuse of children is "nearly epidemic" as some commentators suggest, then it is happening right down the street, or even next door. People who regard themselves as respectable have a very difficult time accepting this idea. Surely, they say, it can't be happening in Tarrytown, Highland Park, Olmos Park or River Oaks. Surely such things can't be going on in Westlake Hills, Richardson, Castle Hills or The Woodlands. Many lawyers and some judges live in these neighborhoods or neighborhoods like them. One way to deny the existence of the phenomenon is to cut down on the number of lawsuits brought. Out of court, out of mind.

But there are other factors also hostile to civil sexual abuse cases and some of them are initially, at least, internal to the legal process. Courts are deeply disturbed by the problem of how to process and adjudicate childhood sexual abuse claims. Testimony is frequently fragmentary, filtered through—and perhaps influenced by—parents, priests, therapists, and social workers, not to mention policemen. Memories of abuse are sometimes alleged to be repressed, reconstructed and recovered. A whole new breed of witness has been sitting in the box. Commentators are worried about their kind of testimony.[5] Courts wonder whether these experts are reliable. Is their testimony scientifically based? Is it really based on objective observation and experience? Or is their testimony based on unverified theories which are, perhaps, really unverifiable

5. *See generally* DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN'S SILENCE (1995) (arguing that unreliable pseudo-scientific testimony has sent innocent people to jail).

pseudo-theories?[6] How reliable is clinical experience? How is clinical judgment related to ideology?

The purpose of this paper is to examine some judicial reactions of one type of such expert, the recovered memory psychologist. Recently the Texas Supreme Court confronted the use of such experts and posited some new rights in this area. First, it said that people have a right not to be divested of assets through a judgment based upon "junk science." Second, it said that people have a right to be protected by statutes of limitations when accused of sexual abuse. Third, the court held that recovered memory psychology did not qualify as an objective body of knowledge. Fourth, the court held that civil actions based on childhood sexual abuse get no different treatment under applicable statutes of limitations than any other tort case. This means that plaintiffs alleging sexual abuse do not have any special right to proceed. By denying them a special, advantaged status, the court affirmed the procedural equality of all tort plaintiffs; limitations period shall not be suspended—tolled—based upon "junk science" for any of them.

The term "junk science" is another word for hokum passing itself off as objective knowledge.[7] Although the matter is not crystal clear, the courts' general point is perfectly sound: *Junk science makes bad law.* The stringent critique by the Supreme Court of Texas of this form of testimony seems doubtful, however, because it has exaggerated which science is really junk and therefore should not be used. Some commentators, who have familiarity with the reality of trying sexual abuse lawsuits, unequivocally brand psychological

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6. A number of other explanatory hypotheses present themselves: (1) Almost all of the lawyers I know who have been involved in processing such claims finish them up feeling strange—"icky" even. This is also true of many lawyers who have advocated on behalf of victims. Perhaps this observation holds true also of judges. If judges are the guardians of society, and society does not wish to be cognizant of a certain problem, then over time, judges will get rid of lawsuits raising that problem. If there is as much sexually predatory conduct, especially toward children, in our society as the recent spate of popular books, government studies and lawsuits suggest, then calm, reflective, thoughtful people—including many lawyers and judges—haven't a clue what kind of society they live in. This is a deeply disturbing thought. One way to deal with anxiety is to suppress the evidence for its cause. In the case of lawsuits alleging sexual abuse, if they are dispatched from the public consciousness, then we can all pretend the problem doesn't exist. (2) Sometimes, the proofs in civil actions based upon sexual interactions end up being relatively inconclusive. Who started what? Who pursued whom? Who consented to what? How valid is a consent? Are crisp, bright-line rules for sexual interaction, such as those advocated by some therapists, really sound? Courts might unconsciously distance themselves from, and thereby suppress, a class of lawsuits with fuzzy edges and loose ends, which tear away at the social fabric. (3) Perhaps the courts feel burned by the slew of absurd and embarrassing ritual abuse cases which figured so prominently in the news during the middle 1980s. (4) Perhaps the courts believe that the civil law is ill-suited to dealing with the trauma of intra-family sexual misconduct. Perhaps they see this sort of thing as best left to the criminal courts, the penitential rites of the church, and the counselor's consulting room.

7. *See generally* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

testimony about repressed memory as "junk."[8] The line between *junk* and the merely *inexact* is not so easy to draw however. Not all science is mathematically precise. Some parts of some science at some stages of history involve craft and intuition, as well as laboratories and experiments.[9] The world simply is not divisible into perfectly reliable science and junk. There are degrees of quality in scientific activities and results. There is great science; there is good science; there is so-so science; there is junk; and there are shades in-between. So-so science should be limited by cross-examination, not excluded from evidence. Juries can be taught quickly to judge the value of simpler sciences. Moreover, some believe that interpretive social sciences are methodologically dissimilar from the non-interpretive social sciences. If so, then the canons of adequacy for one should not be applied, willy-nilly, to the other.[10]

Is exclusion really the right remedy for testimony about recovered memory? Is it not possible to limit the impact of this sort of testimony, which is unquestionably less than perfect, by cross-examination? Is it not possible to destroy a case which depends upon dubious science by cross-examining the experts carefully? There is an entire scholarship on this topic.[11] Why can this approach not be applied to recovered memory testimony? Juries do not swoon merely because a person takes the witness stand and says, "I am a scientist." Juries can judge the credibility of scientific experts if they are cross-examined clearly and cogently. Juries understand that not every opinion held by a scientist is a scientific opinion.

I. Fundamentals: Jurisprudence and Normative Social Policy

People have a right not to be subjected to predatory sexual misconduct. This is especially true of children, young teenagers and those who are under the care of someone else. This fundamental premise is a consequence of an even more general axiom which underlies the tort law: people have a right not to be treated in certain injurious ways; they have a right not to be exposed to certain risks; and it is up to society to specify the actionable modes of injurious conduct and the prohibited risks. Prima facie, at least, injurious sexual conduct invades the sort of interest which ought to be legally protected.

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8. Douglas R. Richmond, *Bad Science: Repressed & Recovered Memories of Childhood Sexual* Abuse, 44 U. KAN. L. REV. 517, 519-21 (1996). *See also* Julie M. Kosmond Murray, Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477 (1995); *cf.* Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345 (1995).

9. *See generally* KENNETH F. SCHAFFNER, DISCOVERY AND EXPLANATION IN BIOLOGY AND MEDICINE (1993).

10. Bowman & Mertz, *supra* note 4, at 629-32.

11. *See* EDWARD J. IMWINKELRIED, THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE (1982).

Where there are rights, there are duties. If I have a right not to be exposed to a certain risk from you, you have a prima facie duty, at least generally speaking, to refrain from exposing me to that risk. People have a right not to be raped. Consequently, other people have a duty not to rape them. Children have a right not to be molested by their elders. Adults, therefore, have a duty not to molest children. Patients in psychotherapy have a right not to be exposed to sexual overtures from their therapists. Indeed, the clients of mental health professionals have a right to be able to trust the therapist not to do such things, so they don't even have to worry about it. For this reason, therapists have a duty not to make sexual overtures of any sort to their patients.[12] Indeed perhaps the duties of the therapist may be even broader than that. Perhaps patients have the right to be free of sexual innuendo from their therapists.

Where legal rights have been violated, when legal duties have been breached, there should be legal remedies. This is a fundamental axiom of the common law. If *A* treats *B* tortiously, in general, *B* has a tort action against *A*. Thus, if an adult molests a child, the child has an action for battery and perhaps for intentional infliction of emotional distress against his/her molester. If the child is in the care of an institution which has negligently hired or supervised the molester, the child has an action for negligence against the institution.[13]

Legal remedies should be imposed, however, only after there has been a reliable inquiry into whether someone's rights have been violated (or, what comes to the same thing, whether somebody has breached his duties), whether the plaintiff (i.e., the person whose rights have been violated) has been injured, whether the defendant's breach of his duties to the plaintiff caused the injury, and where damages can be fixed monetarily. This kind of inquiry has traditionally been a trial. In the Anglo-American world, the plaintiff tells a story as plausibly as he can, both through himself and through supporting witnesses, and is then required to answer questions which assist the trier of fact to determine whether the plaintiff and his supporting witnesses should be believed. Thereafter the defendant tells his story, both through himself and through supporting witnesses. The plaintiff is then permitted to question the defendant and his witnesses, with a view towards assisting the trier of fact, to determine whether the plaintiff ought to be believed. As everyone knows, a party's affirmative telling of a story is called direct examination, whereas questions from the other side constitute cross-

12. "From 1976 to 1986 sexual misconduct claims against psychologists, for years the leading cause of action against psychologists, accounted for 44.8% of all defense costs and awards (totaling $7,018,165) in cases handled by the American Psychological Association's Insurance Trust program. By the end of the 1980s, the percentage had climbed to more than 50%, despite a $25,000 cap on damages in such cases added to policy language after 1986. Such cases are thought to be the second leading cause of action against private psychiatrists." (footnotes omitted) STEVEN B. BISBING ET AL., SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE vi. (1995).

13. *Id.* at 181-84.

examination. As society has become more highly science- and technology-based, many of the supporting witnesses in any sort of case are expert witnesses, and, like all other witnesses, they are subject to cross-examination.[14]

Obviously the process of cross-examination which permits leading questions, and in which lawyers are often permitted wide latitude in exploring the witnesses' beliefs, backgrounds, and attitudes, is crucial to the trial process. The adversary system encourages lawyers and clients alike to take extreme positions and then never to give an inch. Cross-examination helps juries assess the authority of the witness. If it is done well by prepared counsel, the relatively truthful witness can hardly ever get away with a substantial exaggeration. In cases which turn on science or sophisticated technology, cross-examination, in combination with closing argument, can almost always place expert witnesses in the right perspective. Thus, jury verdicts, judgments, and the imposition of damages in a moral society, presuppose a reliable process for determining the facts. Our society has the luxury to rely upon the adversary system. Cross-examination is integral to the adversary system. When cross-examination is done well, most adversarial trials are probably reliable. Hence, the imposition of legal remedies presupposes appropriate, usually extensive and often wide-open, cross-examination.

The legal remedies provided by the law should be meaningful. This is not a jurisprudential claim. It is much more an assertion about social morality, sound public policy, and ultimately political philosophy. In our society, when a pattern of tortious conduct emerges in the public consciousness, a corresponding pattern of insurance coverage also often emerges. Indeed, sometimes the insurance coverage precedes the emergence of the tort. This is, roughly speaking, what happened when American society chose to create the tort of strict liability for defective products.[15] Often governments, whether at the state or federal level, will and should encourage liability insurance where there exists a pattern of injurious rights violations. This is especially true if damage awards can be made relatively predictable and if elements of negligence are involved.

Alas, state governments have affirmatively discouraged the bringing of civil actions based upon sexual misconduct by limiting and curtailing insurance coverage. Executive branches of state governments have done this by approving the use of broad exclusionary endorsements in insurance policies which eliminate

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14. Of course, not every question in cross-examination needs to be directed towards the credibility of the witness. Often, the cross-examiner can obtain facts or opinions from a witness which supports his case in chief. Generally speaking, lawyers try to obtain all the damaging admissions they can before they limit or undermine the credibility of the witness.

15. For a general account of this development, see Michael S. Quinn & Nicole Chaput, *Tort Liability and Reinsurance Contracts*, 8 ENVTL. CLAIMS J. 67 (1995) and sources cited therein.

all coverage for predatory sexual misconduct.[16] Courts have gone out of their way to indicate that there is no insurance coverage in cases where predatory sexuality was an issue.[17] A federal court applying Texas law recently held that an exclusion to liability coverage for "abuse" *knocked out coverage* for otherwise covered defamatory remarks made by a man accused of predatory sexual conduct after a series of women complained.[18] The court said that the defamation came directly from the abuse and so was excluded. As a matter of common sense, not to mention insurance law, this holding is an absurd stretch. The defamatory remarks themselves were not an instance of abuse, even if they were made as the result of the abuse. The exclusion reached only abuse, it did not uncover otherwise covered facts and injuries stimulated by the abuse.

Even though governments are subtly discouraging them, lawsuits alleging injuries resulting from predatory sexuality appear to have increased sharply in the last decade or so. Public consciousness of predatory sexuality has probably never been higher. Many would argue however, that at least sometimes, what is taken to be public *consciousness* is not what it seems to be. The term "public consciousness" implies not only that there exists a widespread belief among members of the public but also that the belief is true. Many would argue that some widespread beliefs about the prevalence of predatory sexuality are false and hence that they cannot possibly fit within the ambit of public (or any other kind of) *consciousness*. No respectable person condones predatory sexuality, of course. Seriously advocating parent-child incest or any kind of pedophilia is one sure sign of a depraved soul. A grown person's even joking about such things may be not only tasteless but suspect. One almost never hears jokes about this topic, even from the most cynical and hard-bitten humorists.

Nevertheless, empirical questions remain: how prevalent is parent-child incest, really? The question is fraught with political overtones. This essay has already suggested that what used to be called "the establishment" has a very strong preference about what the answer should be. Different political movements, action groups, interest groups, or call them what you will, also have vested interests in one or another answer to this question. Of course, the question involves overtones which are not simply empirical. The terms of the question have to be defined first. That activity is not simply empirical, and it is

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16. Michael S. Quinn & L. Kimberly Steele, *Insurance Coverage Opinions*, 36 S. TEX. L. REV. 479, 505 (1995). *See* Michael S. Quinn, *Liability Insurance: A Primer*, TEX. J. OF BUS. L. 2, at 55-57 (1997).

17. State Farm Fire and Casualty Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996) (containing Justice Hecht's remarks in dicta that *there is no coverage under liability policies for any predatory sexual misconduct*, because such conduct is intentional and therefore not within the coverage.) Similarly, Justice Gonzalez expressly criticized pleading negligence against the alleged predator in order to trigger insurance coverage. S.V. v. R.V., 933 S.W.2d 1, 26 (Tex. 1996).

18. American States Ins. Co. v. H. Barry Bailey, No. 4: 95-CV-325-A at 27 (N.D. Tex. 1996).

politically charged. Further, sociologists call some social problems which are perceived to be acute "moral panics." Acute social problems do not simply spring from the world itself. They are constructed by human beings interacting in groups. Social panics are not pure and epistemologically simple responses to injurious conduct. They have many nonfactual determinates.[19] Moral panics tend to overwhelm devotion to truth. The history of witch trials tends to prove this.[20] Is the public's consciousness of predatory sexuality involving children a social panic?

In order to answer the question "How prevalent is predatory sexuality in America?" definitively, one must be clear about the definition of "predatory sexuality." Almost everyone would agree that if a middle-aged adult male has sex with a teenager, he may be doing something predatory. But what if the teenager is nineteen? Or even seventeen? What if the man is forty? Or thirty-five? Calling such a relationship sex with a *child* seems mistaken. Perhaps, some 40 year-old men and some 19 year-old girls make sense together. Perhaps, not every such relationship is necessarily predatory. But if the man is a high school teacher and the girl his pupil, things change again.

Matters are both simpler and more complex for pedophilia. The psychiatric establishment sharply delimits pedophilia. According to the diagnostic criteria contained in *DSM-IV* Sec. 302.2, pedophilia necessarily focuses on prepubescent children, and they are said to be thirteen years old or younger.[21] So, we have a clear definition. But does this technical definition capture our common sense? What if the boy is 14 and his molester is 50? What do we call this?

Whatever the truth ultimately is about the incidence of predatory sexuality, public focus on the problem, or at least on the perceived problem, has never been higher. There has never been a time in history when more lawsuits based upon predatory sexuality have been filed. Moreover, the public seems inclined to believe that women and children subjected to predatory sexuality uniformly

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19. JENKINS, *supra* note 1, at 4-5, 153-56. ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE ix (1994). *See also* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

20. For a recent scholarly account of the Salem Witch Trials see PETER CHARLES HOFER, THE SALEM WITCHCRAFT TRIALS (1997). *See also*, WINFIELD S. NEVINS, THE WITCHES OF SALEM (Longmeadow Press 1994) (1892). *See also* ANNE LLEWELLYN BARSTOW, WITCHCRAZE (1994). *See also* ROBIN BRIGGS, WITCHES & NEIGHBORS (1996). For a short history of witchcraft and its trials, *see* JEFFERY B. RUSSELL, A HISTORY OF WITCHCRAFT (1980). For some extremely interesting parallels between the role of children in historical witch trials and their role in contemporary abuse trials, *see* HANS SEBALD, Ph.D., WITCH-CHILDREN 14-19, 215-38 (1995). For two recent discussions of children as witnesses, *see generally*, STEPHEN J. CECI & MAGGIE BUCK, JEOPARDY IN THE COURTROOM (1995) *and* LUCY S. MCCOUGH, CHILD WITNESSES (1994). The former two authors are psychologists at Cornell and McGill, respectively, while the last of the three is a law professor at Louisiana State University.

21. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDER §302.2 (4th ed. 1994) [hereinafter DSM-IV].

incur serious psychic injuries and that those injuries warrant the granting of substantial damages. At the same time, something of a backlash is setting in. It is beginning to dawn on the public that accusations of even sexual abuse—accusations which are jolting and hard to refute—may be fabricated. Plausible scenarios have been constructed in which accusations of predatory sexuality are out-and-out lies.[22] This is true even in the context of intra-family accusations.[23] Sometimes many years have passed. Sometimes there are issues of forgetting and remembrance. Almost always, the very making of such an accusation triggers an uproar. Even seasoned trial judges experience these cases equivocally.[24]

For a variety of reasons, it seems reasonable to conjecture that courts are looking for ways to restrict cases involving allegations of sexual predatory conduct. This is especially true when other important values are at stake, such as protecting the innocent from false accusations, keeping the courts free of doubtful testimony, and so forth. At the same time, children must be protected. One wonders if courts (as well as other governmental agencies) are striking the right balances.[25] As stated, the purpose of this paper is to focus on one such

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22. MICHAEL CRICHTON, DISCLOSURE (1993) (fiction followed by a popular movie dealing with false claims of sexual harassment).

23. MICHAEL D. YAPKO, SUGGESTIONS OF ABUSE: TRUE AND FALSE MEMORIES OF CHILDHOOD SEXUAL TRAUMA 21, 159 (1994) [hereinafter YAPKO, SUGGESTIONS OF ABUSE].

24. Richard Ofshe and Ethan Watters describe a case in which a daughter sued a father for alleged sexual abuse. She asked for an award of $650,000 in damages. The case was vigorously contested:

> After the closing statements the judge would comment, 'I left the courtroom without any clear feeling of the ultimate decision I would make.' Eventually, based on the 'more likely than not' standard used in civil trials, the judge awarded Jane [a fictitious name for a real person] $150,000. In his decision, he remarked that he had grave doubts about many of Jane's recollections but noted that the single memories of the two other sisters supported her contention that she had been abused. 'I want also to tell you that there are doubts in my mind,' he wrote in the decision. 'There will always be doubts in my mind.'

The two sisters experienced some pressure from Jane to have such memories. RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA 137 (1994).

25. *See, e.g.*, Susan J. Hall, *Adult Repression of Childhood Sexual Assault: From Psychology to the Media and into the Courtroom*, 22 N.C. CENT. L.J. 31 (1996); Emily E. Smith-Lee, Note, *Recovered Memories of Childhood Abuse: Should Long-Buried Memories be Admissible Testimony?*, 37 B.C. L. REV. 591 (1996); D. Stephen Lindsay & J. Don Read, *"Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional and Personal Issues*, 1 PSYCHOL. PUB. POL'Y & L. 846 (1995); Sandra Conroy, Case Comment, *The Delayed Discovery Rule and Roe v. Archdiocese*, 13 LAW & INEQ. J. 253 (1995); Rosemarie Ferrante, Note, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress*, 61 BROOK. L. REV. 199 (1995); Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185 (1992); Tina Snelling & Wayne Fisher, *Adult Survivors of Childhood Sexual Abuse: Should Texas Courts Apply the Discovery Rule?*, 33 S. TEX. L. REV. 377 (1992). *But see* Gary Hood, Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. ILL. L. REV. 417; Gary Strauss, Comment, *Child Sexual Abuse Civil Actions and the Statute of Limitations: Time is Running Out*, 1993 DET. C. L. REV. 1641; Tina M. Whitehead, *Application of the Delayed Discovery Rule: The Only Hope for Justice for Sexual Abuse Survivors*, 16 LAW & PSYCHOL. REV. 153 (1992); Norrie Clevenger, Note, *Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil*

problem. This paper asks whether the Texas Supreme Court has struck the right balance with respect to testimony regarding repressed and recovered memories. In one sense, these are technical questions of evidence law and the law surrounding limitations periods governing sexual trauma. Even those questions require some analysis of the methodological state of psychology and sociology. Viewed from a broader perspective, the technical legal question involves substantial social concerns. In particular, the question involves inquiring about the extent to which the courts should tolerate way-less-than-perfect social "scientific" evidence when there is a danger that the presentations of such evidence may be more convincing than the purely epistemic value of the evidence warrants. Then again, even if some categories are dangerous, we still have to ask how to deal with them. An exclusionary rule is one approach. Wide open and vigorous cross-examination, preceded by discovery, is another.

II. *Daughter v. Father:* Expert Testimony and the Vicissitudes of Memory

In *S.V. v. R.V.*,[26] the Texas Supreme Court held, by a vote of 8-1, that the recovery of repressed memories of sexual trauma does not trigger the discovery rule for the purposes of the tort statute of limitations. Justice Nathan Hecht wrote an elaborately reasoned and scholarly-looking opinion for the majority, which included Justice Rose Specter. Justices Raul Gonzalez and John Cornyn wrote concurring opinions.[27] Only Justice Priscilla Owen dissented. This is a particularly interesting configuration of the justices, since Justices Hecht and Owen are both conservative Republicans who are often aligned and who often find legal dialogue with each other especially instructive.

Actions Against Their Perpetrators After Attaining the Age of Majority, 30 J. FAM.. L. 447 (1991/1992); Carol W. Napier, Note, *Civil Incest Suits: Getting Beyond the Statute of Limitations*, 68 WASH. U. L.Q. 995 (1990); Rebecca L. Thomas, Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245 (1991); Ann Marie Hagen, *Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse*, 76 IOWA L. REV. 355 (1991).

26. 933 S.W.2d 1 (Tex. 1996).

27. Justice Cornyn actually wrote two concurring opinions. The first one is to be found with the report of the case in 39 Tex. Sup. Ct. J. 386 (1996). When the court overruled the motion for a hearing, Justice Cornyn withdrew that concurring opinion, and substituted another. It is reported at 40 Tex. Sup. Ct. J. 114 (1996). Justice Gonzalez also wrote a second concurring opinion. His second concurring opinion, however, is an opinion concurring in the Court's overruling of R.'s motion for a hearing. Thus, Justice Gonzalez did not withdraw his earlier concurrence. *S.V.*, 933 S.W.2d at 117.

A. The Facts of the Case: Incest and Memory

The substantive facts of *S.V.* are relatively simple. R. is the daughter of S.[28] When R. was 21 years old, she sued her father for negligence. [29]The negligence was said to be exhibited by S.'s course of conduct running from 1973 through 1988.[30] Justice Hecht speculates, correctly, that R. sued S. for negligence in order to trigger insurance coverage under S.'s homeowner's insurance.[31] R. filed her lawsuit more than two years following her eighteenth birthday, and the lawsuit alleged no injuries resulting from S.'s actionable conduct during the two years immediately preceding the filing of the lawsuit.[32] In substance, R. alleged that S. had fondled her, forced her to fondle him and had sexual intercourse with her on at least two separate occasions.[33]

A more complex and, from Justice Hecht's point of view, more problematic part of the facts concerns R.'s recovery of her repressed memories.[34] While a teenager, she "participated in an improvisational theater group for teenagers, taking part in a sketch dealing with incest."[35] During her junior year in high school, R. wrote a term paper on father-daughter incest.[36] She worked on another term paper on incest during her freshman year in college.[37] After R.'s freshman year in college, R.'s mother told her that she (the mother) had been sexually abused as a child.[38] R.'s mother also told R. that she (the mother, again) had repressed the memory and only recently recovered it.[39] Everyone agreed that R. and her mother were closer than was healthy for either of them.[40] During this period of time, R. wrote extensively about incest in her diary.[41] Shortly after her mother's disclosure, R. went to see a counselor, who also met with her mother on a continuing basis.[42] That counselor suggested to R. that she might be a victim based on her interpretation of some of R.'s stories and life-problems.[43]

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28. *S.V.*, 933 S.W.2d at 8.
29. *Id.*
30. *Id.*
31. *Id.* at 12.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 9.
36. *Id.*
37. *Id.*
38. *Id.* at 10.
39. *Id.*
40. *Id.* at 9.
41. *Id.*
42. *Id.* at 10.
43. *Id.*

In the midst of all this, S. drove R. back to college to begin her sophomore year.[44] After S. returned to Dallas, he began to call R. frequently and he even sent her cards and flowers.[45] At the time, R.'s mother and father were divorcing, and R. was extremely upset about the breakdown of her family, as well as at her in-between position in the divorce.[46] For whatever reason, R. found her father's attention disturbing; she asked him to stop, but he persisted.[47] By R.'s account, the odd conduct of her father plus the emotional strain of her parents' divorce took its toll on her studies and social life.[48]

Just before Thanksgiving of her sophomore year in college, R. had her first image of incest.[49] She reported that she was napping and had a very powerful image of a faceless man forcing himself upon a little girl.[50] R. called the counselor she had seen and described the incident to her; the counselor suggested they meet.[51] At that meeting, R. told the counselor that she believed the dream had something to do with her father.[52] The counselor had her lie on the floor, breathe deeply, and say whatever crossed her mind.[53] The counselor referred to this as "imagery work" or "free association."[54] Later that same day, R. undertook to write undirectedly in her diary.[55] She "completed" the dream she had at college before Thanksgiving. In the "completion" the faceless man was the father of the little girl, and he was forcing the little girl to touch his genitals, telling the little girl that she was loving him, and that she was making him feel good.[56] While she wrote this passage, R. realized she was the little girl and that the faceless man was her father.[57]

Within a week or so, R. disclosed this fact to the counselor, her mother and her sister.[58] The counselor was surprised by R.'s account of abuse, but she eventually believed R., as did her mother and her sister.[59] More and more memories began to return. R. did not return to college until the midterm, and eventually she dropped out of college entirely.[60]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 11.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

The counselor had more than seventy sessions with R.[61] She encouraged R. to recognize that her symptoms were based on a trauma, to re-experience the trauma, and ultimately to "own" the experience.[62] The counselor regarded herself as providing her counselee with a safe place in which to remember the trauma and "work it through."[63] The counselor did not approach R.'s recollection in a spirit of skepticism, or with the idea that R.'s memory stood in need of rigorous epistemic scrutiny.[64] The counselor engaged in a number of well-known therapeutic techniques, none of which were designed to test R.'s memory.[65] The counselor testified that she used something similar to hypnosis, something else she called "guided imagery," and a third technique which involved the interpretation of "body memories," "physical reactions to repressed experiences, such as episodes of gagging that [the counselor] considered to be indicative of forced oral sex."[66]

In the underlying action three mental health professionals testified on behalf of R.[67] These included the counselor R. first saw, the psychiatrist-psychologist she subsequently saw and with whom she worked for several years, and a highly qualified forensic clinical psychologist, who examined but did not trust her.[68] The first counselor testified that she "had never known a patient to have a false memory of childhood abuse and did not believe that it happened."[69] The other two experts testified that false memories did occasionally happen, but both of them were convinced that R.'s recollections were veridical.[70] They had several reasons.

First, R.'s symptoms were consistent with other people who had sustained verified childhood sexual abuse, including: "headaches, gastrointestinal problems, fatigue, nightmares, low self-esteem, depression, anxiety, body memories, gagging, distraction, fear of sexual intercourse, [and] lack of emotion in recounting memories."[71] All the experts admitted, however, that "all of R.'s symptoms could have been caused by something other than childhood abuse."[72]

Second, persons suffering sexual abuse frequently show a definite and well-proven profile to their answers to the Minnesota Multi-Phasic Inventory

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61. *Id.* at 12.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

(M.M.P.I.) test.[73] R.'s answers conformed to the pattern.[74] The presence of that pattern is not dispositive, however.[75] The pattern is consistent with borderline personality disorder.[76] One of the experts suggested that R. had some traits of a borderline personality disorder, although she did not actually suffer from that disorder.[77] The expert noted that people who suffer from borderline personality disorder are prone to distort the truth at an abnormally high rate.[78]

Third, S. took the M.M.P.I. several times as well as the Million Clinical Multi-Axial Inventory Test.[79] His results showed "traits similar to those in sexual offenders," including: "narcissistic traits, like self-centeredness, over evaluation of self, a high need for recognition, a high need for control; reality distortion; and restrictions upon his ability to express emotions, especially negative ones."[80] No one contended, however, that S.'s results entailed, or even rendered more probable than not, the conclusion that he was a sexual abuser.[81] Everyone also agreed that even if he were a sexually abusive type, that would not show that he abused R.[82] Moreover, the tests administered to S. did not speak in one voice, at least one of them showed no sexual deviancy.[83]

Fourth, R.'s account of the facts was—after many hours of counseling and therapy—vivid, detailed and consistent.[84] All of the experts were convinced that R. could not have fabricated the events she purported to recall.[85] Her psychiatrist testified that in his clinical judgment, R. was not the sort of person who was highly suggestible; in other words, in his opinion R. was not brainwashed by her first counselor.[86] It should be remembered that this psychiatrist was also a Ph.D. in experimental psychology and board certified in psychiatry.[87] The clinical forensic psychologist testified that R. would be an Oscar-level actress if she made up the story, and he doubted that that was true.[88]

Finally, R.'s counselor, her psychiatrist, and the forensic clinical psychologist all diagnosed R. as suffering from post-traumatic stress disorder

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73. *Id.*
74. *Id.*
75. *Id.*
76. "The essential feature of Borderline Personality Disorder is a pervasive pattern of instability of inter-personal relationships, self-image, and affects, and marked impulsivity that begins by early adulthood and is present in a variety of contexts." DSM-IV, *supra* note 21, at § 301.83.
77. *S.V.*, 933 S.W.2d at 12.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id*
86. *Id.*
87. *Id.*
88. *Id.*

(PTSD).[89] The symptoms of this disorder include "all-pervading fear, anxiety, depression, intruding thoughts, memories, flashbacks, mood swings, feelings of helplessness, and confusion."[90] All three of the expert witnesses, however, acknowledged that these symptoms could have been caused by something other than child abuse.[91] At the same time, there was no other obvious event serious enough to have produced post-traumatic stress disorder.[92]

B. Tolling the Statute of Limitations: The Discovery Rule

Statutes of limitations run from the time the cause of action accrues. In Texas, the statute of limitations for negligence actions is two years from the date of the legal injury, unless the statute of limitations is tolled.[93] A statute is tolled when the cause of action accrual date is deferred for some reason. According to Justice Hecht, these reasons fall into two categories: "those involving fraud and fraudulent concealment, and all others. The deferral of accrual in the latter cases is properly referred to as the discovery rule."[94] The court treated *S.V.* v. *R.V.* as a discovery rule case.[95]

1. Altai

As such, Justice Hecht took the case to be controlled by *Computer Associates, Inc. International v. Altai, Inc.*,[96] which was a high tech trade secret

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89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 3-4.
94. *Id.* at 4.
95. There are other situations in which statutes of limitations will be tolled: fraudulent concealment, physical inability and insanity on the part of the claimant. None of those situations have been particularly successful in tolling statutes of limitations in the context of sexual misconduct. *See* Petersen v. Bruen, 792 P.2d 18 (Nev. 1990) (applying the discovery rule to childhood sexual abuse case); *cf.* Travis v. Ziter, 681 So.2d 1348, 1355 (Ala. 1996) (holding that insanity is not a means of tolling the statute of limitations for actions based on alleged repressed memories); Florez v. Sargeant, 917 P.2d 250, 255 (Ariz. 1996) (holding that PTSD does not amount to "unsound mind" for the purpose of tolling the statute of limitations); Nuccio v. Nuccio, 673 A.2d 1331, 1332 (Me. 1996) (discussing that repression of incest memories does not provide basis for equitable estoppel so as to toll statute of limitations); Lemmerman v. Fealk, 534 N.W.2d 695, 703 (Mich. 1995) (stating that repression of memories does not amount to insanity to toll statute of limitations); Koenig v. Lambert, 527 N.W.2d 903, 906 (S.D. 1995) (discussing question of fraudulent concealment and statute of limitations in cases involving sexual predatory conduct); McAfee v. Cole, 637 A.2d 463, 466 (Me. 1994) (discussing that memory repression does not toll statute of limitations on the basis of insanity or fraudulent concealment); Fager v. Hundt, 610 N.E.2d 246, 251 (Ind. 1993) (fraudulent concealment creates equitable exception to statute of limitation). These issues were not taken up in *S.V.*; in theory, they have yet to be litigated in Texas.
96. 918 S.W.2d 453, 454 (Tex. 1994). The Southwest Second citation for this case dates it as a 1994 case. However, the court delivered its first opinion on July 8, 1995. That opinion was withdrawn and replaced by a subsequent opinion. Justice Owen concurred in *Altai* and her concurring opinion is

case. A man who worked on developing computer software was employed by Computer Associates for approximately six years.[97] He signed an employment agreement prohibiting him from retaining or divulging his employer's trade secrets.[98] When he left Computer Associates to accept employment with Altai, he stated in an exit interview that he was retaining no proprietary information.[99] Contrary to his representation, he took copies of the computer source code for two versions of one of Computer Associates' software products.[100] Upon arriving at Altai, he used approximately thirty percent of the misappropriated code to write a program for Altai.[101] No one else at Altai knew that this misappropriation was occurring. The misappropriation occurred in early 1984; the program created with the misappropriated code was used in the market from 1985 until 1988.[102]

In 1988, Computer Associates discovered that Altai had copied and used some of its source code in several of its computer programs.[103] Almost immediately, Computer Associates sued Altai for misappropriation of trade secrets and copyright infringement.[104] A federal district court in New York concluded that the trade secrets case was controlled by Texas law, that the discovery rule exception did not apply, and that Computer Associates' action for misappropriation was barred by § 16.003(a) of the Texas Civil Practice and Remedies Code.[105] Computer Associates appealed, and the United States Court of Appeals for the Second Circuit certified questions to the Texas Supreme Court.[106] By the time the case reached the Texas Supreme Court, the facts were fixed: Altai first used the source code of Computer Associates in 1985; it was not until 1988 that Computer Associates found out about this use and filed suit.

The normative axiom behind virtually all discussions of statutes of limitations is this simple proposition: *those who inflict injury wrongfully should compensate those who suffer injury.* Stated more broadly, one of the moral foundations of the tort law is the idea that *for every wrong there is a remedy.* Against these powerful propositions are several countervailing ideas. The most important one is equally simple and equally profound: *memories fade.* Here is

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dated March 14, 1996. Both the majority and the minority referred to *S.V. v. R.V.* in their *Altai* opinions. The bottom line is that *Altai* was handed down shortly before *S.V.* It is difficult to resist the conclusion that the cases were decided in tandem. Only Justice Abbott joined in Justice Owen's concurring opinion in *Altai*.

97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 454-55.
103. *Id.* at 455.
104. *Id.*
105. *Id.*
106. *Id.*

another: *pieces of paper tend to get lost over time.* The end result of lawsuits which defendants lose is the transfer of wealth to plaintiffs. Society has an interest in seeing that disputes are either resolved or extinguished within a reasonable time, because uncertainty and insecurity surrounding unresolved claims hinder the flow of commerce.[107] In general, it is the proper purpose of statutes of limitations to require that claims be brought during the period of time when "evidence is fresh in the minds of the parties and witnesses."[108]

Consequently, the discovery rule is a "very limited exception to statutes of limitations";[109] it is to be used only "in certain limited circumstances."[110] Justice Enoch, who wrote the majority opinion in *Altai*, does not review the Texas discovery rule cases at length. He articulates, however, a "unifying principle" for balancing and weighing competing factors in determining whether to apply the discovery rule.[111] "Generally," according to Justice Enoch, "application [of the discovery rule] has been permitted in those cases where [1] the nature of the injury incurred is inherently undiscoverable and [2] the evidence of injury is objectively verifiable."[112] This is a conjunctive principle containing two necessary elements, both of which must be obtained before the discovery rule applies. Both of the conjuncts focus upon the plaintiff's *injuries*. It is the injury which must be undiscoverable, and it is the injury which must be objectively verifiable. The principle does not say that the misconduct of the plaintiff must be inherently undiscoverable. Generally speaking, when there are undiscoverable injuries, there is also conduct which cannot be readily evaluated by the plaintiff. This correlation is not an iron-clad equation, however. Paradigm cases of undiscovered injuries are these: physicians leave surgical equipment inside the plaintiff; an attorney fouls up an assignment and years later the client has to pay a tax assessment; a man undergoes a vasectomy, but later becomes fertile and impregnates his wife (or worse, somebody else). Less paradigmatic, but closely related, is the case in which the company issues a defamatory credit report, but the person in question does not discover it for several years.

In all these cases, it is difficult to discover the negligent act or omission, and it is difficult to discover the injury. The rule in *Altai* does not by its express terms concern conduct, however. Causation is almost never an issue in these cases and therefore the rule in *Altai* does not concern causation. If a patient has a sponge in his belly and has undergone only one surgery, then it is completely certain from any practical point of view, how the sponge got there. Other examples are more or less the same. Nevertheless, the enunciated, black-letter

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107. *Id.*; Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 545 (Tex. 1986).
108. *Altai*, 918 S.W.2d at 455.
109. *Id.*
110. *Id.* at 456.
111. *Id.*
112. *Id.*

principle in *Altai* is quite clear. It is the fact of *injury* which must be inherently undiscoverable, and it is the *fact* of the injury which must be inherently undiscoverable.

It is also somewhat uncertain just *how* undiscoverable the injury must be. The criterion employed by the court technically says that the injury must be *inherently* undiscoverable. Use of that phrase would tend to suggest that it must *be impossible* to discover the injury. On the other hand, the court cites a case in which the discovery rule was used where it was only *quite difficult* to discover the negligent act or omission.[113] Probably the idea of *inherent undiscoverability* does not mean only that the injury is of a sort that even a careful person should not be expected to find it. The *Altai* court made it very clear that inherent undiscoverability includes the idea that "the existence of the injury is not ordinarily discoverable, even though due diligence has been used."[114] At the same time it means more than this. Non-negligence in not discovering the injury is not a sufficient condition for triggering the discovery rule. The court does not, however, provide a general theory of what more is required.

In the context of trade secrets, however, the court elaborates a little. It indicates that these are "jealously guarded commodit[ies]."[115] It goes on to point out that one generally relied upon source identifies only 43 out of a reported 6000 trade secret cases—substantially less than one percent—which implicate the statute of limitations. The court concludes from this fact that trade secret misappropriations are not inherently undiscoverable.[116] The court points out that Computer Associates could have detected the theft of their trade secrets if they had used relatively common practices among high-tech companies which depend upon trade secrets. Since we live in a world in which both employees and information are highly mobile, companies should expect, as a statistical matter, that some former employees that go to work for competitors will take secrets with them. Indeed, Computer Associates had a confidentiality agreement with the departing employee. Consequently, special vigilance in the area of trade secrets is required. Companies should be suspicious when a competitor who now employs one of its former employees suddenly markets a product substantially similar to a product sold by the injured former employer.[117]

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113. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (citing Kelly v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976)).

114. *Altai*, 918 S.W.2d at 456.

115. *Id.*

116. Is this a good argument? No. It would be only if the 6000 cases were relevantly similar. Computer software cases cannot be compared to customer list cases, etc.

117. Finally, the Supreme Court observed that although the Uniform Trade Secrets Act provides a discovery rule for the statute of limitations governing the misappropriation of trade secrets, and although a substantial majority of jurisdictions have adopted this Act, Texas has not adopted it, and no state which relies on the common law of trade secrets has ever grafted the discovery rule onto the statute of limitations governing the misappropriation of trade secrets.

On the basis of these considerations, the Texas Supreme Court held that the discovery rule exception to the two-year statute of limitations did not defer the time at which the cause of action for trade secret misappropriation belonging to Computer Associates accrued. The court's answer to the question certified to it by the Second Circuit is extremely interesting. That court asked the following question: "Does the discovery rule exception to § 16.003(a) apply to claims from misappropriation of trade secrets?"[118] The Texas court responded: "A discovery rule exception to section 16.003(a) of the Texas Civil Practice Remedies Code does not exist for claims for misappropriation of trade secrets[.]"[119] The Supreme Court's answer to the question posed by the Second Circuit was obviously much broader than it needed to be given the facts of the case. If the court's answer to the question is regarded as the holding of the case, rather than the narrower pronouncement to the effect that the discovery rule did not apply to the controversy between Computer Associates and Altai, then we have ended up with quite a broad rule indeed—and a rather stringent one.

2. *S.V. Again*

Although Justice Hecht discussed a substantial number of Supreme Court decisions involving the tolling of statutes of limitations, he bases his decision on *S.V. v. R.V.*[120] He assumes that the *inherent undiscoverability* requirement is met: S. was R.'s father and therefore stood in a fiduciary relationship with her at least so long as she was a minor.[121] Justice Hecht notes that the Supreme Court has "twice held [a] fiduciary's misconduct to be inherently undiscoverable."[122] Fiduciary relationships involve an extraordinarily high degree of trust. Children should be able to trust their parents. They ought not to have to be vigilant in determining whether their parents have treated them well or badly. In this regard, *S.V.* is strikingly different than *Altai* where it was determined the business must be vigilant about its trade secrets. Interestingly, Justice Hecht does not take up the question as to whether a parent is automatically a fiduciary of a non-minor child.

In any case, Justice Hecht assumes that R. can satisfy the inherent undiscoverability element.[123] He therefore focuses on the second element, that

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118. *Altai*, 918 S.W.2d at 462.

119. *Id.* at 458-59.

120. 933 S.W.2d at 6.

121. *Id.* at 8.

122. *Id.* Justice Hecht also characterizes the relationship between a parent and minor child as involving a "special relationship." *Id.* Not every "special relationship" is a fiduciary one, although every "special relationship" seems to suggest that more trust is legally authorized than would be authorized in a purely arms-length transaction. *See* Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

123. *S.V.*, 933 S.W.2d at 8.

of objective verifiability. "The question [before the court] is whether there can be enough *objective verification* of wrong and injury in childhood sexual abuse cases to warrant application of the discovery rule."[124] Notice that Justice Hecht has changed the rule in *Altai*, even as that rule was quoted in *S. V.*[125] The rule in *Altai* applied to injuries; it did not apply to the acts which caused the injury (and did not apply to causation, either). Now, in order to satisfy the new requirement for objective verifiability, two states of affairs must be objectively verifiable: (1) that a legally actionable course of conduct was performed, and (2) that an injury was inflicted. (Curiously, Justice Hecht still does not explicitly require that causation be objectively verifiable. Perhaps, his assumption is that in childhood sexual abuse cases, if the wrong can be proved, and the injury can be proved, then proving causation is a virtual cinch.) Still, there is some discussion in *S. V.* to the effect that there was no knock-down, drag-out proof that R.'s PTSD was caused by sexually predatory conduct.[126]

In any case, Justice Hecht finds that there is no unequivocal physical evidence supporting the claim that S. abused R.[127] The physical evidence available, according to Justice Hecht, falls into two categories. First, there are R.'s physical symptoms, and second, there is R.'s behavior.[128] The trouble is, according to Justice Hecht, that even R.'s experts do not testify that the only possible interpretation of this evidence is that R. was abused and that she was abused by S.[129] In the absence of unequivocal physical evidence, the discovery rule will not apply unless there is other very reliable evidence constituting objective verification of wrongful act and injury.[130] Such evidence might include (although is not necessarily restricted to): a confession by the abuser, the criminal conviction of the abuser, contemporaneous records of whatever admissible kind (including medical records), contemporaneous written statements by the abuser, photographs of the abuse, recordings of the abuse, or objective eyewitness accounts.[131] Justice Hecht even concedes that if the appropriate community of expertise reaches a consensus as to how to interpret the psychological evidence, then there might be objective verifiability.[132] Justice Hecht is quick to point out, however, that there is nothing approaching a consensus in the relevant community of expertise.[133] R.'s own mental health

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124. *Id.* (emphasis added).
125. *Id.* at 6.
126. *Id.* at 12.
127. *Id.* at 15.
128. *Id.*
129. *Id.* at 12.
130. *Id.* at 15.
131. *Id.*
132. *Id.*
133. *Id.*

experts were equivocal in their testimony,[134] and, as we shall discuss presently, there is nothing approaching a consensus in the psychiatric-psychological-social work community.

Justice Hecht virtually holds that two evidentiary patterns can never constitute objective verification.[135] First, the testimony of a plaintiff that she has come to remember a wrong and the injury which she for a time forgot is insufficient, even if she testifies that she now remembers having sustained physical injuries at the time. A plaintiff's recovered memory alone is never enough to trigger the discovery rule. Second, under present historical circumstances, expert testimony by itself (or in conjunction with the plaintiff's recovered memory) is insufficient to trigger the discovery rule. This conclusion is especially true when there is a swearing match among experts,[136] and it is most especially true against a background where there is no consensus among the members of the relevant community of expertise.

Because no expert appeared on behalf of *S. V.*, because no expert testified that S. did not abuse R., Justice Hecht focused on the fact that mental health professionals in general, the relevant community of expertise, do not agree among themselves about the reliability of recovered memories. "[S]cience has simply not evolved to the point that it can give definite guidance in determining whether childhood sexual abuse has occurred in a particular instance."[137] Significantly, Justice Hecht does not say that science could not progress further. If science did evolve and a proper consensus emerged, perhaps it could establish the existence of childhood sexual abuse.

3. Memory and its Vicissitudes

The particular part of science which interests Justice Hecht for the purposes of this case is the study of memory. Obviously, this is a phenomenon taken up by many branches of science: neurophysiology, psychology, medicine, psychiatry and more, as well as by philosophy. The core question for Justice Hecht is whether science can distinguish between recovered memories which are true and recovered memories which are false. If science cannot provide a criteria for separating the true recovered memories from the false ones, then no recovered memory can be objectively verified solely on the basis of scientific opinion. "Memory," according to Justice Hecht, "is a multifarious, complex, usually reconstructive process."[138] Memory does not work the way a video

134. *Id.* at 15-16.
135. *Id.* at 15.
136. *Id.*
137. *Id.* at 16.
138. *Id.*

camera or a computer works. Memory's retrieval is not mechanical. A person's false assertion that he remembers something can be the result of an initial misperception, but it can also be a result of the processes of memory itself. "A variety of social, psychological and developmental factors commonly cause distortions at each stage of the [memory] process[139] . . . [A] real possibility of such distortions cannot be overlooked or minimized in determining what relation recalled [memory bears] to what really happened."[140] Everyone is familiar with the fact that not every claim to have remembered something is true. Everyone knows that people misremember five years later what they once remembered quite clearly. Everyone knows that memories fade, that memory plays tricks, that memory is sometimes the servant of self-interest, that memory occasionally follows the dictates of the vengeful heart, and so forth. These facts are some of the reasons we have statutes of limitations.

The phenomenon of repression complicates this matter. According to Justice Hecht, "[t]here is [an] overwhelming consensus that repression exists."[141] Repression is not the same thing as mere forgetting. Although there is substantial disagreement as to what repression is and how it works, the relevant community of expertise tends to agree that if a memory is repressed, the person whose memory it is does not, during the interval of repression, remember the event, and that this person does not have at-will access to memories of the event in question. Many psychiatrists and psychologists, especially those who are clinicians and who provide psychotherapy, are inclined to conceive of the human mind consisting of a conscious component, an unconscious component, and a series of gateways between the two. Repression occurs, in this sort of model, when the unconscious, as it were, sucks a memory out of the conscious and into the unconscious. The repressed memory then influences the behavior, thought patterns, attitudes and emotions of the person whose memory it is, but the person has no voluntary access to the memory itself. From the point of view of psychopathology, repressed memories become and stay repressed because consciousness of them causes intolerable pain. Repression is therefore a rational way to deal with overwhelmingly painful memories. It is purposive, teleological, even functional. Yet repressed memories cause dysfunctional affective states such as unhelpful emotions or the lack of helpful emotions, distorted cognitive states, and irrational conduct.

The central clinical problem in dealing with repressed memory is to recover the memory and to recover it in such a way that conscious recollection

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139. *Id.* at 16 (citing AMERICAN PSYCHIATRIC ASS'N, STATEMENT ON MEMORIES OF SEXUAL ABUSE (1993)).

140. *Id.* (citing Richard J. Ofshe & Margaret T. Singer, *Recovered-Memory Therapy and Robust Repression: Influence and Pseudomemories*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 391, 397-98, 404-05 (1994)).

141. *Id.* at 17.

no longer produces unacceptable affective states (debilitating anxiety, rage, fear, and so forth) and in such a way that the now-conscious recollections do not produce irrational behavior. It is not clear whether this clinical enterprise requires that the formerly repressed memory be recovered with perfect accuracy.

Moreover, there is no litmus test for distinguishing recovered memories from mental states which have the phenomenology of being memories (i.e., the feel of being "dredged up," the feel of being pictures of the past, the feel of being true, the mindset "I was there," and so forth), but which are in fact fantasies—what Justice Hecht calls "confabulat[ions]."[142] There is no consensus, reports Justice Hecht, on the truth or falsity of recovered memories.[143] "While virtually all would agree that memories are malleable and not necessarily fully accurate, there is no consensus about the extent or sources of this malleability."[144] Justice Hecht is quoting from a document of signal importance: a report of the American Medical Association on recovered memories of childhood abuse.[145]

According to Justice Hecht, in addition to the lack of consensus which results from the indeterminate state of psychological science, there are six additional reasons for having doubts about reports of recovered memories. First, such reports frequently occur after the person claiming to have the recovered memory has undergone some sort of therapy with a person who believes that recovered memories of sexual abuse are veridical. "Therapists who expect to find abuse often do," as Justice Hecht remarks, and, he implies, no proposition can be regarded as objectively verifiable when it is asserted by investigators who are not properly skeptical towards their own hypothesis, i.e., when it is asserted by investigators who have a "confirmatory bias."[146]

Second, therapists who believe the truthfulness of recovered memories are frequently "true believers." They frequently try hard to cause or induce their patients to recover memories. It is unclear, and there is substantial empirical doubt, whether *having a recovered memory* is identical to *recovering a memory*. Having a recovered memory is having a mental state which introspectively presents itself as a memory. The fact that a mental state presents itself as a memory does not imply that the person having that mental state is remembering anything. If a person remembers something, then that something happened. In

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142. *Id.* This term occurs several times in *S.V.* One sees it as elsewhere as well. For a dictionary definition of the term see note 150, *infra*.

143. *Id.*

144. *Id.*

145. *Id.* (citing AMERICAN MEDICAL ASS'N, COUNCIL ON SCIENTIFIC AFFAIRS, REPORT ON MEMORIES OF CHILDHOOD ABUSE 3:43-54 (1994) *reprinted in* 43 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 114, 116 (1995)).

146. *Id.* at 18. Some theories of scientific methodology require not only skepticism, but also a will to disconfirmation. According to Sir Karl Popper, for example, the driving source for science is disconfirmation, not its opposite. KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

contrast, one can believe that one is having a memory and be wrong. *I remember* is an achievement-verb, rather like *I know*, as opposed to *I believe*.[147] Thus, the fact that someone claims to remember something does not entail that they actually do remember it. This is true even if the claimant is not lying. There is evidence to suggest that if someone tries to induce a person to have a recovered memory they can sometimes succeed. Ostensibly, therapeutic activities may produce mental states which have the phenomenology of memories, but are not.

Third, therapists who believe firmly that patient/client claims of remembering sexual abuse are never wrong "may jump to conclusions and may fail to explore other causes for the (purported) memories of abuse."[148] True believers, implies Justice Hecht, do not have the skeptical frame of mind required for genuine scientific inquiry. The conclusions of such people, even within the realms of their expertise, cannot qualify as objectively verified. It would be tempting to say that any opinion reached by an acknowledged expert within the area of his expertise qualified as having some objective verification, simply because the opinion was an opinion held by the right kind of expert. Justice Hecht implies that this move is unavailable to the proponents of a given methodology when those people are without scientific skepticism.

Fourth, Justice Hecht suggests that the reasoning of the proponents of recovered memory therapy is faulty. He suggests that when they are asked to list the symptoms other than the recovered memory which form the basis on which they infer that a person has experienced childhood sexual abuse, they list symptoms which are so general that they might easily be caused by ills other than long-forgotten sexual abuse.[149] When one reads the list of symptoms from which it is said that sexual abuse may be reliably inferred, one sees oneself on a bad day, as well as everyone else one knows. Almost everyone who has read the sexual abuse literature has had this same reaction. Some moderate observers acknowledge this point and suggest that the symptoms are merely a way of corroborating a memory. Other, more radical observers, stick to their guns and claim that sexual abuse is much more widespread than anyone realizes.

Fifth, Justice Hecht submits that none of the available strategies for recovering memories of sexual abuse exclude "the possibility of confabulation."[150] He points out that there is no foolproof, scientific or even plausible criteria for distinguishing the truth or falsity of "recovered" memories, at least at present.

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147. *See* GILBERT RYLE, THE CONCEPT OF THE MIND 130-31 (1949) (a philosophic classic).

148. *S.V.*, 933 S.W.2d at 18.

149. *Id.*

150. *Id.* According to WEBSTER'S THIRD DICTIONARY the term "confabulation" is ambiguous. Its first meaning is "a familiar talk" or "conversation." Its second meaning is "conference" or "discussion." Its third and relevant meaning is "a filling in of gaps in memory in free fabrication (as in Korsakoff's syndrome)."

Justice Hecht appears to be implying that, at least for forensic purposes, if a psychological theory of recovered memories cannot—with a high degree of probability which can be recognized at once by common sense—distinguish between true and false recovered memories, then the theory is unacceptable for forensic purposes.

Sixth, and finally, Justice Hecht criticizes as circular the use of the diagnosis of post-traumatic stress disorder in the context of trying to determine whether a memory image is actually recovered or merely created. Those who advocate that recovered memories are veridical point to the fact that those who have them often suffer from PTSD. This was certainly true in the case of R.; all of the mental health experts who testified stated that R. suffered from post-traumatic stress disorder.[151] The argument from PTSD to sexual abuse goes like this: According to *DSM-IV,* a person can suffer from PTSD only if that person has experienced an event "outside the range of usual human experience or [that] would be markedly distressing to almost anyone."[152] Thus, if a person suffers from PTSD there must have been in the person's past a very unusual, traumatic event. If a patient/client presents herself with genuine PTSD, then a rational investigator is entitled to go looking for the traumatic event. If a person believes he remembers having been subjected to a particular kind of traumatic event and does not remember any other kinds of traumatic events, then it is reasonable to infer that the traumatic event which is purportedly remembered is the cause of the PTSD. But, so the argument goes, that is exactly what happens in cases of recovered memory. There comes a time when the patient/client remembers having been subjected to sexual abuse and does not remember any other form of unusual childhood trauma.

Justice Hecht criticizes this argument on the grounds that "a PTSD diagnosis cannot establish the existence of a trauma that it presupposes."[153] This critique misses the mark. In fact, if PTSD is a reliable diagnostic category, then the occurrence of PTSD does tend to establish the occurrence of some trauma. On the basis of the existence of PTSD, assuming it is a reliable diagnostic category, investigators are entitled to infer the previous occurrence of an unusual trauma. What the rational investigator is not entitled to do is to infer the exact nature of the trauma. The mere occurrence of PTSD does not establish what kind of trauma the patient/client has experienced. PTSD may be caused by a variety of traumatic events. Justice Hecht observes, "(e)ven if a diagnosis of PTSD were some indication that a trauma occurred, it could not indicate what kind of trauma occurred, and more importantly, who caused it."[154] Of course, if

151. *S.V.*, 933 S.W.2d at 12.
152. DSM-IV, *supra* note 21, at § 309.81.
153. *S.V.*, 933 S.W.2d at 19.
154. *Id.*

the rule in *Altai* were actually applied in *S. V.* rather than the transformed rule, and if PTSD is a reliable diagnostic category, then a diagnosis of PTSD would constitute objective verification of some injury and the statute of limitations would be tolled.

In any case, Justice Hecht's argument from circularity is unsuccessful. Perhaps he is hinting at a somewhat different argument. The existence of PTSD is sufficient to establish the existence of some unusual trauma. Obviously, that inference does not establish that the trauma suffered was of a sexually abusive nature. What establishes that the trauma was of a sexually abusive nature, if anything does, is that the patient at some point comes to remember something about the trauma and does not remember any other trauma. That inference is defeated, however, if the phenomenon of repression is taken to be pervasive, powerful, and devious. Why should it not be true that the unconscious mind is presenting the conscious mind with a false recovered "memory" in the service of keeping hidden an even more traumatic memory? Hence, if the phenomenon of repression is taken seriously, the mere fact that a patient remembers one form of trauma and not another does not tend to show that remembered trauma is the true cause. This observation is especially powerful if one sees psychotherapy as a battle between the unconscious and the therapist.

More significantly, according to Justice Hecht, PTSD has a "paradoxical symptomatology," and one must be very careful of PTSD diagnoses in forensic contexts. In Justice Hecht's view, the paradox surrounding PTSD precludes it from providing objective verification of any ancient trauma. The paradox is this: a person suffering from PTSD will engage in opposite behaviors. At the same time, a person will avoid the type of stimuli which caused the PTSD and will also re-experience the stimuli over and over again. The former happens through deliberate effort, the latter happens involuntarily. "Thus," says Justice Hecht, "the PTSD diagnosis of itself indicates that a patient could suffer from both too much and not enough memory of a trauma."[155] His point is not exactly clear. Perhaps it is this: according to the *DSM-IV*, PTSD patients commonly have "recurrent and intrusive recollections of the event [which caused the PTSD] or recurrent distressing dreams during which the event is replayed."[156] This is true, according to the *DSM-IV*, even though PTSD patients persistently avoid stimuli associated with the original trauma and even though the person who suffers from PTSD "commonly makes deliberate efforts to avoid thoughts, feelings, or conversations about the traumatic event . . . and to avoid activities, situations, or people who arouse recollections of it."[157] But if a person re-experiences a trauma through intrusive recollections, then that trauma is not inherently

155. *Id.*
156. DSM-IV, *supra* note 21, at § 309.81.
157. *Id.*

undiscoverable. Indeed, the person will be "on notice" as to the existence of the trauma. That notice will be full-blooded for forensic purposes, surely, no later than the moment the victim understands a PTSD diagnosis and pairs it with his intrusive memories. Of course, Justice Hecht stated that he was assuming the inherent undiscoverability of childhood abuse long-repressed. Nevertheless, his critique of R.'*s* reliance upon PTSD appears to suggest otherwise.

Justice Hecht may also be calling attention to another paradoxical feature inherent in the description of PTSD. The *DSM-IV* states, on the one hand, that recurrent and intrusive recollections are characteristic of PTSD. At the same time, it says that PTSD-causing stimuli are persistently avoided. One mode of avoidance is amnesia with respect to important aspects of the traumatic event. A deliberate avoidance of some untoward event—deliberately not thinking about some traumatic event—will not toll the statute of limitations. The word "amnesia" has the connotation of involuntariness. In contrast, a significant amount of the relevant language to be found in the *DSM-IV* has a flavor of voluntariness about it. Perhaps Justice Hecht is suggesting that if the "bible" of psychiatry and abnormal psychology is ambiguous as to whether the non-remembrance of abusive events is involuntary or voluntary, then it may not be used in an argument to toll the statute of limitations when the statute of limitations could be tolled only if non-remembrance is strictly involuntary.

It bears repeating that Justice Hecht's point is by no means clear. What is clear, as Justice Hecht recognizes, is that the *DSM-IV* itself suggests that PTSD should be used in forensic contexts only with caution. Perhaps, without saying so, Justice Hecht is concerned about relying upon the category of PTSD. This is a topic to which we shall return. Justice Hecht summarizes his conclusions as follows:

> [T]he literature on repression and recovered memory syndrome establishes that fundamental theoretical and practical issues remain to be resolved. These issues include the extent to which experimental psychological theories of amnesia apply to psychotherapy, the effect of repression on memory, the effect of screening devices in recall, the effect of suggestibility, the difference between forensic and therapeutic truth, and the extent to which memory restoration techniques lead to credible memories or confabulations. Opinions in this area simply cannot meet the "objective verifiability" element for extending the discovery rule.[158]

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158. *S.V.*, 933 S.W.2d at 19-20. The scientific status of the DSM series of diagnostic categories and "PTSD" has been subject to vigorous critique. HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY—DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 53, 117, 123-35 (1997).

Although this is a marvelously clear summary in most ways, it is difficult to guess what Justice Hecht might have in mind when he suggests there is a difference between forensic and therapeutic truth. Truth is truth. A proposition is true if it describes the world. Of course, this commonsensical observation creates a mountain of metaphysical problems when one tries to seriously unpack the idea of description—what philosophers call "correspondence."[159] The life of the law is not metaphysics, however. Ontology can take care of itself. The life of the law is regulating the practical world. In the practical world, everyone understands that a proposition is true if it describes the world and not otherwise. Consequently, there cannot possibly be any difference between truth as it arises in the context of legal disputes, scientific truth, and truth as it arises in the context of psychotherapy. The sentences "My truth is not your truth," and "What is true about the world for me may not be true for you," really are nonsense. Of course, matters are different when it comes to evidence. Psychiatrists and psychologists may be able profitably to utilize evidence (such as hearsay, dreams, slips, and ambiguous behavior) which would not be admissible in law courts. Not all legally acceptable evidence has the best scientific pedigree. Not all evidence which is useful in forming and refining hypotheses in therapy is admissible in a law court.

C. Expert Testimony

Justice Hecht tries to restrict his critique of the "science" of recovered memory to narrow issues. He tries to restrict the implications of his discussion to no more than whether the statute of limitations for tort claims can be tolled. He explicitly argues that his critique of recovered memory psychology does not render testimony about lost, then found, memories inadmissible under recent cases such as *Robinson*,[160] and its parents *Daubert*[161] and *Kelly*[162] which have restricted the admissibility of some purportedly scientific evidence.[163] In order to understand Justice Hecht's claim, these cases must be laid out in detail with some care. The issue is important. Two concurring justices argue that Justice Hecht's opinion is really about the admissibility of expert testimony and not just about the statute of limitations. Justice Hecht's characterization of his opinion as not about admissibility, but about the statute of limitations only, is given in the

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159. The literature is voluminous. For a recent introduction *see* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 199-226 (1995).

160. E.I. duPont deNemours and Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

161. *See generally* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

162. *See also* Kelly v. State, 824 S.W.2d. 568 (Tex. Crim. App. 1992).

163. On July 9, 1997, the Texas Supreme Court issued a further opinion on this subject. *See generally* Merrell Dow Pharmaceuticals v. Havner, No. 95-1036, 1997 WL 378060 (Tex. July 9, 1997) (petition for rehearing filed July 24, 1997).

context of trying to refute the concurring justices. His characterization of what he is doing is ultimately erroneous. The logic of Justice Hecht's argument suggests that his is a full-fledged attack on admissibility and not merely an application of the discovery rule, even though the admissibility is not the bottom-line issue in *S. V.* Thus, the conclusion of Justice Hecht's discussion is not a *holding* about admissibility but about limitations. One cannot accept Justice Hecht's critique of recovered memory in silence, however, and argue that such testimony should be admissible under *Robinson* and *Daubert*.[164]

1. Background

Before turning to the precise terms of this debate, we should have in mind the rule of evidence that structures the debate. It is Rule 702 of the Texas Rules of Civil Evidence, Rule 702 of the Texas Rules of Criminal Evidence and Rule 702 of the Federal Rules of Evidence. All three rules are worded in exactly the same way: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine effect in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

According to the Rule 703 found in all three systems, the expert may rely upon inadmissible evidence (e.g., hearsay) if that evidence is the sort of data upon which members of the relevant community of expertise normally rely. According to the Rule 704, also common to the three systems, an expert may testify upon an ultimate issue to be decided by the trier of fact.

For many years, the admissibility of scientific evidence was structured by the *Frye* case.[165] The rule in that case has come to be known as the "general acceptance" test, according to which a court should not receive scientific evidence, unless the law, principle, or generalization at issue is generally accepted by the relevant community of expertise.[166] The *Frye* test has been subject to criticism for many years. In general, there have been two issues. First, is *general acceptance* an appropriate criterion for governing the admissibility of scientific evidence? After all, it seems to exclude evidence on

164. Some commentators have already argued that "repressed memories of childhood sexual abuse retrieved through therapy are not scientifically valid evidence under the test promulgated in [*Daubert*]." Cynthia V. McAlister, Comment, *The Repressed Memory Phenomenon: Are Recovered Memories Scientifically Valid Evidence Under Daubert?* 22 N.C. CENT. L.J. 56, 57 (1996).

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

166. *Id.* at 1014. "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.*

the cutting edge. Such evidence would not even have to be controversial. It would only have to be too new to have achieved general allegiance. Second, scholars and courts alike wondered whether the *Frye* test survived the adoption of the Federal Rules of Evidence. After all, the language of the *Frye* case is not a language of those rules.[167]

2. Daubert: The Supreme Court and Scientific Experts

Technically, the *Daubert* case pertains to the second question only. In reality, it also deals with the first question. In short, the Supreme Court of the United States held that the *Frye* test did not survive the adoption of the Federal Rules of Evidence, but the court went on to indicate that the Federal Rules placed definite "limits on the admissibility of purportedly scientific evidence."[168]

The presenting issue in *Daubert* was whether Bendectin caused birth defects when taken by pregnant women as an anti-morning sickness drug. The manufacturer moved for summary judgment on the basis of the affidavit of a physician and epidemiologist who stated that he had reviewed the entire literature on Bendectin and human birth defects, that this body of literature included more than thirty published studies involving over one hundred and thirty thousand patients, that none of these studies had found Bendectin to be a substance capable of causing malformation in a human fetus, and, hence that the use of Bendectin by women during the first trimester of pregnancy has not been shown to be a potentially causative factor for birth defects. The plaintiffs opposed summary judgment on the basis of a series of their own affidavits from eight experts, "each of whom also possessed impressive credentials."[169] The conclusions of these experts were based upon test tube experiments, animal studies, studies of the chemical structure of Bendectin which arguably showed similarities between that substance and substances which were known to cause birth defects, and reanalyses of the published studies upon which the manufacturer's expert relied.[170]

The district court granted summary judgment to the manufacturer, and the Ninth Circuit affirmed on the basis of *Frye*. The district court and the court of appeals were both concerned about the reanalyses. The district court found that

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167. For an interesting elaboration upon the logical structure of expert testimony see Edward J. Imwinkelried, *The 'Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988).

168. *Daubert*, 509 U.S. at 589. Justice Blackmun, who delivered the opinion of the Court, described *Daubert* as a case in which the court was "called upon to determine the standard for admitting expert scientific testimony in a federal trial." *Id.* at 582.

169. *Id.* at 583.

170. For a discussion of this evidence see MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS (1996).

these conclusions were inadmissible because they had been neither published nor subjected to peer review. The Court of Appeals emphasized this point and noted that the original studies had been admitted to review by the scientific community. The Court of Appeals acknowledged that reanalyses are accepted by the scientific community, but noted that this is true only when they are made fully available for scientific discussion and critique.[171]

The Supreme Court held that the general acceptance test of *Frye* is inconsistent with the spirit of the Federal Rules of Evidence, which were designed to eliminate rigid barriers to the introduction of opinion evidence. Nevertheless, according to Justice Blackmun, who wrote for the majority, Rule 702 contains principles for regulating the introduction of evidence of purportedly scientific testimony. First, the rule appears to presuppose that only "knowledge" will be introduced in the form of opinion testimony. Second, the type of knowledge which is at issue in *Daubert* is scientific knowledge. According to Justice Blackmun, these two words together imply principles for regulating the admission of purportedly scientific testimony.

First, the testimony must constitute, or at least rest upon, *knowledge*. Of course, acknowledges Justice Blackmun, science is not an encyclopedic body of known truths about the universe. Science changes its mind, whereas truth always remains the same. Science is a process for proposing and refining theories, not simply a list of truths. Thus, a proposition can be part of scientific knowledge at a given time, even if it is not ultimately true. Thus, according to Justice Blackmun, there are received methods for judging what belongs within the realm of the scientific and what does not. Even though something may constitute scientific "knowledge" for now, and later be rejected, a proposition can count as scientific "knowledge" for now, only if it has been justified or "evidenced" in certain established ways. These canons are called "the scientific method." Hence, a proposition can count as part of scientific knowledge if, but only if, it has been subjected to the processes known as the scientific method.

Second, a proposition can count as *scientific* knowledge, as opposed to technical knowledge, specialized knowledge, or some other kind of knowledge, only if it has been tested by scientific means. "Proposed testimony must be supported by appropriate validation—*i.e.*, 'good grounds' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."[172]

Rule 702 contains an additional requirement. Rule 702 states that if a witness is presented to testify based upon scientific knowledge, if that scientific knowledge will assist the trier of fact either to understand the evidence or to

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171. Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1131 (9th Cir. 1991), *rev'd* 509 U.S. 579 (1993).

172. *Daubert*, 509 U.S. at 590.

determine facts at issue, and if the witness is actually acquainted with the scientific knowledge about which he intends to testify, then the witness may testify. Thus, proffered evidence must also *assist the trier of fact* in certain ways. Obviously, proffered expert testimony must be relevant. There must be a "fit" between the testimony being offered and the issues before the trier of fact. Issues of fitness are not always obvious. A scientific theory, law or conclusion may be relevant to one inquiry and not to another one. But there is more. "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[173] Thus, Rule 702 involves a higher standard than does Rule 402, which merely sets minimum conditions upon relevance. For the purposes of Rule 702, the connection between the testimony and the issues at stake must be scientifically valid and not just minimally relevant.

According to Justice Blackmun, when faced with an offer of expert scientific testimony, a judge must engage in a preliminary determination as to whether the proffered testimony is (or, at least, is rationally based upon) scientific knowledge, whether the application of that knowledge to the facts of the case is scientific and hence whether testimony is through and through within the canons of the scientific method. Only then, according to Justice Blackmun, should the judge permit a purportedly scientific witness the wider latitude given him under Rule 702 to express opinions, including opinions not based upon first hand knowledge.

This approach mandates that trial judges shall review proffered scientific testimony for "scientific-ness" before sending it to the jury. The Supreme Court does not think that there are any definitive checklists or litmus tests for determining scientific-ness, but it lists a number of significant questions: Is the reportedly scientific theory testable? (If not, then it is not scientific, even in principle.) Has the theory been tested? (If not, although it may be scientific in principle, it is not yet actually established scientifically, although it might later be. It should not be used now.) Has the theory been scrutinized by other scientists? (If not, it should not be admitted.) If it has been, what do the other scientists say about it? (If they universally condemn it, then the theory should not be admitted.) Has the material been published? If so, where? (Publication, of course, is a good way to move towards public scrutiny of a scientific theory, but it is not the only way.) Has the theory established for itself a rate of error? (If not, why not? If so, what is it?)

The requirement of peer review shades off into the discarded requirement of general acceptance. If the theory has been subjected to peer review and it is roundly rejected, then, presumably, it will not be admitted in evidence. In

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173. *Id.* at 591-92.

contrast, if a theory has been subjected to peer review and it is generally accepted, then it will be admitted in evidence. The court does not talk about what should be done with controversial theories which are recognized by some and rejected by others. Justice Blackmun does not see the rule in *Daubert* as creating a free-for-all in which "befuddled juries are confounded by absurd and irrational pseudoscientific assertions."[174] He is of the opinion that vigorous cross-examination will further help separate the scientific wheat from the pseudo-scientific chaff, at least well enough for the purposes of the civil justice system. This observation suggests that if a theory has not achieved general acceptance, but many of the indicia are scientific, it should be admitted and subjected to wide-open cross-examination. Obviously, in this area admissibility falls within the sound discretion of the trial judge; exercises of that discretion will vary from case to case at least to some degree. (It is worth remembering that, in theory, at least, these questions are also raised by Rule 403, which calls for the exclusion of evidence where its inflammatory potential outweighs its probative value.[175])

3. Daubert *Again: Ninth Circuit Decision on Remand*

The Ninth Circuit took up *Daubert* again in 1995.[176] The lawyers appearing before the court were an all-star cast. For example, Charles Fried, a Harvard law professor, former Solicitor General of the United States and now a justice on the Supreme Court of Massachusetts, appeared for Merrell Dow. Alex Kozinski, a well respected, breathtakingly intelligent, and fiercely independent Circuit Judge wrote for the panel. He employed a brilliant strategy in applying *Daubert*.

Judge Kozinski indicated several times in his opinion that he was unsure that federal judges should be judging the quality of science. He said that the task was "complex and daunting."[177] He said that part of the necessary decision-making under *Daubert* "puts federal judges in an uncomfortable position."[178] Clearly, he approaches his task with a good deal of apprehension:

> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-

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174. *Id.* at 595-96.

175. Justice Rehnquist, with whom Justice Stevens joined, concurred in part and dissented in part. He thought that the rule in *Frye* did not survive the adoption of the Federal Rules of Evidence. On the other hand, Justice Rehnquist was concerned that the opinion of the majority required trial judges to become "amateur scientists" in order to perform their gate keeper function. Justice Blackmun thought that this was a bad idea.

176. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995).

177. *Id.* at 1315.

178. *Id.*

> credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.[179]

Obviously, Judge Kozinski approaches judging the quality of science with a good deal of humility and self-skepticism.

The brilliant maneuver in his decision is to devise a way for judges to evaluate science without getting into scientific technicalities. What Judge Kozinski does is to provide a way for judges to rely upon themes in the sociology of science, rather than on science itself, to judge admissibility. Of course, that is exactly what the *Frye* test did. Naturally, Judge Kozinski does not suggest that we return to *Frye*. That test conditioned admissibility upon general acceptance in the right scientific community. Judge Kozinski suggests different sociological principles, but he keeps the general approach. He does not lay down principles which will be necessary and sufficient for admissibility. Rather, he indicates that appropriate principles will vary from case to case.

Under the first prong of the Supreme Court's test: *Is the scientific methodology employed minimally acceptable?* Judge Kozinski suggests that under the circumstances of the Bendectin cases, there were two sociological indicators of reliability which were not satisfied. First, none of the experts appearing for the plaintiffs had undertaken their research in a context independent of litigation. Academic and similar scientific research implies, at least prima facie, certain indicators of reliability. After all, the people doing the research are scientists. If they undertake research in their professional lives, it is likely to be scientific. Moreover, their research proposals will have to be reviewed by institutions which support their research, and frequently, the scientists will be proposing research grants to others, who will review their proposals, their methodology, their performance and their results. None of the Bendectin research relied upon by the plaintiffs was done independently of litigation.

Moreover, one of the key factors of the scientific world is open and free-wheeling debate. Under the circumstances of the twentieth century, this is generally done by means of publication. Publishing scientific articles involves a guarantee of objectivity all its own. Scientific journals are peer-reviewed. They are not published unless scientists, functioning as journal referees, pass on the minimal adequacy of the scientific methodology. Judge Kozinski regards it

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179. *Id.* at 1316.

as significant that, although the experts for the plaintiffs had formulated and put their views forth for nearly a decade, none of them had published their observations and conclusions in any scientific journals.

Even more significantly, no expert whose testimony was admissible was willing to testify that it was more probable than not that Bendectin caused birth defects in human beings. In the absence of such testimony, the plaintiff's case would fail as a matter of law. Allegedly, the form of birth defect caused by Bendectin was limb reduction. But in every one thousand births, there will be a limb reduction. Therefore, at a minimum, in order for statistical evidence to be probative of the proposition *Bendectin causes limb reductions to a probability which is more likely than not,* scientific, epidemiological research must establish that in the population of women who took Bendectin there were two limb reduction birth defects out of every one thousand births. As stated, no expert whose testimony was admissible was willing to say this. Consequently, the testimony was irrelevant because it did not "fit" and was not "helpful."

One of the odd features of this opinion is that the decisive factor which led the Ninth Circuit to affirm the trial court's grant of summary judgment was the fact that the testimony was unhelpful because it was not probative of the issue of causation. That would have been true even under the *Frye* test. Had the district court, years before, made this point clear and had the district court rejected the expert testimony on this basis, the last two appellate decisions could have been avoided.

Another feature of this opinion which seems important for the resolution of the case, as well as to the future of science-based litigation, is the following remark:

> The opinions proffered by plaintiffs' experts do not, to understate the point, reflect the consensus within the scientific community. The FDA—an agency not known for its promiscuity in approving drugs—continues to approve Bendectin for use by pregnant women because "available data do not demonstrate an association between birth defects and Bendectin." Every published study here and abroad—and there have been many—concludes that Bendectin is not a teratogen [i.e., a substance which causes birth defects]. In fact, apart from the small but determined group of scientists testifying on behalf of the Bendectin plaintiffs in this and many other cases, there doesn't appear to be a single scientist who has concluded that Bendectin causes limb reduction defects.[180]

180. *Id.* at 1314 (internal citations omitted).

In other words, the scientists employed by the plaintiff constitute a tiny minority, who appear to have voices crying out in the wilderness. Many millions of dollars should not change hands based upon views of a tiny minority of the scientific community. The judiciary should sanction transfers of huge wealth only if the key testimony has at least a modicum of respectability.

4. Kelly

The issue in *Kelly v. State*[181] was the admissibility of DNA evidence. The trial court had admitted it, the Fort Worth Court of Appeals had affirmed the trial court, and the Court of Criminal Appeals affirmed the lower courts. Kelly, who was convicted of murder and assessed a punishment of life imprisonment, invoked *Frye* and contended that DNA identification evidence was not generally accepted by the relevant scientific community.

In the trial court, the defendant moved to suppress the DNA evidence. At the suppression hearing, the state presented five witnesses. Three of the five witnesses had Ph.D. degrees in obviously appropriate subjects. One of the witnesses was a genetics professor at TCU, and one was a prestigiously educated lab technician. The expert witnesses presented by the state testified, in various combinations, that there is general agreement among microbiologists that a person's DNA is unique and does not change. They also testified that there is general agreement as to the existence of a reliable method for attaining DNA samples from accused persons and then comparing them to DNA found elsewhere. Moreover, these experts testified that the lab hired by the state to conduct this "experiment" in the *Kelly* case employed scientifically reliable and generally accepted techniques. The defendant's expert, who was educated at a less prestigious university than the state's experts and who did not have a Ph.D. degree or university appointment, testified that the methodology for retrieving DNA samples was not generally accepted in the scientific community. He also questioned the laboratory practices of the firm hired by the State of Texas to perform the DNA matching.

The trial court found that the DNA testing procedure was generally accepted in the relevant scientific community. For this and other reasons, the district court denied the motion to suppress, and the experts testified to the jury. Two of them testified that they calculated that one person out of approximately thirteen million would possess DNA with the same molecular characteristics shared by Kelly's DNA and the DNA extracted from the semen sample found at the victim's home. (Apparently, two people out of every thirteen million will have virtually indistinguishable DNA.) On this basis, the expert testified that

181. 824 S.W.2d 568 (Tex. Crim. App. 1992).

although the state's DNA matching experiment "did not positively identify [Kelly] as the source of the semen . . . , the test did place [Kelly] within the almost infinitesimal class of males who could have been the source."[182] The Court of Appeals felt that the trial court did not abuse its discretion in admitting the expert testimony. It observed that the DNA evidence was reliable, and because it was reliable, it was admissible. Expert testimony is admissible, according to the Court of Appeals, when it establishes that an underlying scientific principle is valid, that there is a valid technique for applying the principle, and that the technique was validly applied to the facts of a given case.[183]

Thus, the trial court utilized the *Frye* test and admitted the evidence, whereas the Court of Appeals utilized a reliability test without reference to *Frye*. The Texas Court of Criminal Appeals, which is the court of last resort in Texas where criminal matters are concerned, noted that it had never adopted the *Frye* case. It acknowledged, however, that it had used a general acceptance test on several occasions when reviewing decisions of lower courts regarding the admissibility of scientific evidence. It noted that all of the cases preceded the adoption of the Texas Rules of Criminal Evidence in 1986. After the adoption of Rule 702, the court said the fundamental threshold determination for a trial court regarding expert testimony which is said to be based upon science is whether the testimony will "help the trier of fact understand the evidence or determine a fact in issue."[184] Scientific evidence cannot be helpful if it is unreliable. If a trial judge decides that proffered scientific expert testimony is reliable, and hence probative and relevant, then the trial judge must determine whether other facts about the testimony render it unhelpful.

When scientific evidence has been admitted into testimony over and over again, the proponent of the testimony may not have a heavy burden. In contrast, when the scientific evidence is novel, the proponent of the evidence must expressly prove that it is reliable. According to the court, three criteria must always be satisfied. First, the underlying scientific theory must be valid. Second, there must be a valid technique for applying the theory to the world. And, third, that technique must have been properly employed in the case at hand. The proponent of novel scientific evidence must prove all three of these criteria outside the presence of the jury. There is no necessary methodology for proving these three propositions, although, according to the *Kelly* court, the following are frequently relevant:

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182. *Id.* at 571.

183. Kelly v. State, 792 S.W.2d. 579, 585 (Tex. App.—Fort Worth 1990), *aff'd* 824 S.W.2d 568 (1992).

184. *Kelly*, 824 S.W.2d at 572.

(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained;
(2) the qualifications of the expert(s) testifying;
(3) the existence of literature supporting or rejecting the underlying scientific theory and technique;
(4) the potential rate of error of the technique;
(5) the availability of other experts to test and evaluate the technique;
(6) the clarity with which the underlying scientific theory and technique can be explained to the court; and
(7) the experience and skill of the person(s) who applied the technique on the occasion in question.[185]

Although worded differently than the factors set forth in *Daubert,* (1)-(7) are substantially equivalent to what is found in *Daubert.*

Daubert does not lay down the quantum of proof required before expert testimony is admissible. In contrast, *Kelly* does lay down a rule. A trial court will abuse its discretion if it admits novel scientific evidence unless the proponent of that evidence has proven by other evidence which is clear and convincing that the theory and the technique are trustworthy. This standard for judging the burden of persuasion for evidentiary admission is several orders of magnitude higher than the standard for proving relevance, and it is substantially higher than the requirement that trustworthiness be proved by a preponderance of the evidence.[186] These two standards, more-likely-than-not and clear-and-convincing, are usually standards governing jury verdicts, not the admission of evidence.

5. Robinson*: The Texas Supreme Court Adopts* Daubert

In 1995, by a vote of 5 to 4, the Texas Supreme Court adopted the holding and reasoning in *Daubert.*[187] In doing so, the Texas Supreme Court, the court of last resort in Texas for civil cases, was explicitly mindful of *Kelly*, and it

185. *Id.* at 573.
186. Three concurring justices are substantially more sympathetic to a *Frye*-like test.
187. *Robinson*, 923 S.W.2d at 556. See Merrell Dow, Inc. Pharmaceuticals v. Hanner, 953 S.W.2d 706 (Tex. 1997) and Maritime Overseas Corp. v. Ellis, 40 Tex. Sup. Ct. J. 110 (Tex. 1996) (applying *Robinson* and *Kelly* to epidemiological evidence and statistical evidence in the realm of science generally).

invoked the support of specifically Texan legal scholars.[188] Because *Robinson* adopts the reasoning and holding in *Daubert,* the case turns closely on its facts. It was also a close case. Consequently, it is extremely important to remember the standard of review which was at stake. Appellate courts review the evidentiary ruling of trial judges for an abuse of discretion. Unless there is an abuse of discretion—unless there is unprincipled conduct in the trial court—the actions of the trial judge will not be disturbed. Thus, it is quite possible in a close case that the trial court's conduct will not be disturbed whatever it does.

The issue in *Robinson* pertained to whether Benlate 50 DF, a fungicide manufactured by DuPont, damaged the plaintiff's pecan orchard.[189] Apparently, there was no disagreement as to whether uncontaminated Benlate would injure a pecan orchard.[190] Apparently everyone agreed it would not. The question, therefore, was whether the Benlate used on the Robinsons' pecan orchard had been contaminated.[191] The Robinsons offered testimony from Dr. Carl Whitcomb, who holds masters and doctorate degrees from Iowa State in horticulture, plant ecology, and agronomy.[192] From 1972 until 1985, Dr. Whitcomb held an academic post at Oklahoma State.[193] Since then, he had engaged in consulting for "nurseries, greenhouses and corporations."[194] Dr. Whitcomb was an author of a number of books on horticulture, he was on the review board of scholarly journals,[195] and he had been an expert witness in the past.[196]

The fullest account of Dr. Whitcomb's activities is to be found in the dissenting opinion written by Justice Cornyn, although there is apparently no disagreement with Justice Cornyn's rendition of Dr. Whitcomb's activities. Dr. Whitcomb inspected the Robinsons' pecan orchards in 1992 when he made a number of first-hand observations.[197] He observed that a good number of leaves on the pecan trees "had an unusual coloration or were deformed in shape."[198] However, these patterns were "inconsistent with frost damage, insect infestation,

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188. The court invoked as authority the work of Steven Goode, John F. Sutton, Jr., and former Justice Jack Pope. STEVEN GOODE ET AL., GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL (Tex. Practice, 2d ed. 1993); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony in Texas Rules of Evidence Handbook,* 30 HOUS. L. REV. 797, 842 (2nd ed. 1993). (This was an issue of the Houston Law Review which has become a free standing book entitled TEXAS RULES OF EVIDENCE HANDBOOK.) Jack Pope, *The Presentation of Scientific Evidence,* 31 TEX. L. REV. 794 (1953).

189. *Robinson,* 923 S.W.2d at 551.

190. *Id.* at 552.

191. *Id.* at 551.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 551, 562.

198. *Id.* at 562.

or nutrient deficiencies."[199] Many nuts were deformed.[200] However, their deformities were not consistent with "nutrient deficiencies or drought."[201] Dr. Whitcomb observed that some roots under the Robinsons' trees had not developed normally.[202] The abnormalities he observed, however, were "inconsistent with freeze damage, drought, or root rot[.]"[203] "[N]ew growths in the limbs of the trees had failed to develop normally or had experienced die-back[.]"[204] Soil conditions were acceptable, as were draining patterns.[205] There was no indication of the injurious presence of insects.[206] (As Justice Cornyn observes, this testimony is not discussed by the majority.[207] According to him, Dr. Whitcomb's first-hand observations were sufficient to render his opinions admissible.[208] It is unclear whether the majority disagrees with this proposition, or whether it was the fact that Dr. Whitcomb based his opinion on other factors as well which made his opinion inadmissible.)[209]

Dr. Whitcomb also based his testimony upon a series of other considerations. He compared the damage to the Robinsons' orchard and damage which occurred to other plants also treated with allegedly contaminated Benlate.[210] The majority calls this method "comparative symptomatology" and describes it this way: "Because the Robinsons' pecan trees exhibited symptoms common to other plants treated with allegedly contaminated Benlate under dissimilar growing conditions, Benlate, the only common factor among all the plants, caused the damage."[211] Another basis for Dr. Whitcomb's opinion was a controlled experiment he performed in another forensic context.[212] Dr. Whitcomb concluded that the experiment tended to confirm the hypothesis that contaminated Benlate caused the kind of injuries to pecan trees he saw in the Robinsons' orchard.[213] Dr. Whitcomb had this study reviewed by a Ph.D.

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199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. Justice Cornyn reasoned as follows: "Dr. Whitcomb's testimony based on his personal observations is roughly analogous to that which may be offered by a physician, who may testify based on nothing more than a personal examination, the patient's history and correspondence with other physicians. To the extent that Dr. Whitcomb was simply applying his extensive knowledge of horticultural phenomenon to observable conditions in the Robinsons' orchard his testimony was unquestionably admissible." *Id.* at 562. (citations omitted.)
210. *Id.* at 551.
211. *Id.*
212. *Id.*
213. *Id.*

professor of statistics at Oklahoma State.[214] That review "concluded that the probability of Dr. Whitcomb's results being correct was 99%."[215]

Dr. Whitcomb compared the injuries he found at the Robinsons' pecan orchard and injuries reported in "over five-hundred pages worth of articles about herbicides in peer-review journals and in other authoritative reports."[216] Dr. Whitcomb concluded that the injuries to the Robinsons' orchard were likely caused by contaminated herbicides.[217] Moreover, Dr. Whitcomb reviewed a number of DuPont memoranda reporting allegations of plant damage following the application of Benlate.[218] DuPont had apparently recalled several batches of Benlate because of contamination by a different herbicide.[219]

Dr. Whitcomb also chemically analyzed ten boxes of Benlate.[220] His analysis revealed eighteen identifiable foreign compounds, with only five common to all of the boxes.[221] Dr. Whitcomb believed that "Dupont contaminated Benlate during its manufacturing process with many things, including sulfonylurea (SU) herbicides, and that the application of contaminated Benlate damaged the Robinsons' pecan trees."[222] No SU was found in this analysis,[223] however, this still tended to show that Benlate frequently got contaminated.

According to Justice Gonzalez, writing for the majority, Dr. Whitcomb did not conduct soil tests at the Robinsons' orchard; he did not conduct tissue tests on the roots of the Robinsons' trees; he did not research relevant weather conditions; and he "did not test any of the Benlate used by the Robinsons, even though they had one opened box of the fungicide remaining."[224] Moreover, Justice Gonzalez observed that Dr. Whitcomb had not visited other orchards to investigate for Benlate damage; he had not actually found any of the relevant contaminant in any of the Benlate which he analyzed;[225] he admitted that "if free of contamination, Benlate was a good product";[226] and he conceded that each of the symptoms and many of the groups of symptoms he observed could be caused by factors other than contaminated Benlate.[227]

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214. *Id.*
215. *Id.* at 551, 564.
216. *Id.* at 563.
217. *Id.*
218. *Id.* at 552.
219. *Id.*
220. *Id.* at 551.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 552.
227. *Id.* at 562.

Procedurally, the trial court had ruled Dr. Whitcomb's testimony inadmissible upon a variety of grounds. According to the trial court, Dr. Whitcomb's testimony

(1) was not grounded upon careful scientific methods and procedures;
(2) was not shown to be derived by scientific methods or supported by appropriate validation;
(3) was not shown to be based on scientifically valid reasoning and methodology;
(4) was not shown to have a reliable basis in the knowledge and experience of his discipline (horticulture);
(5) was not based on theories and techniques that had been subjected to peer review and publication;
(6) was essentially subjective belief and unsupported speculation;
(7) was not based on theories and techniques that the relevant scientific community had generally accepted; and
(8) was not based on a procedure reasonably relied upon by experts in the field.[228]

The court concluded that Dr. Whitcomb's testimony was not reliable and, based upon Rule 702, would not fairly assist the trier of fact in understanding the issues in the case.[229]

The parties agreed to try the case to the court and stipulated that, if the case were reversed, then the case would be tried to a jury.[230] During the trial before the court, the Robinsons again tried to introduce Dr. Whitcomb's testimony.[231] It was excluded.[232] They provided the trial court with a bill of exception which contained Dr. Whitcomb's entire testimony.[233] The trial court granted DuPont a directed verdict at the end of the plaintiffs' case.[234] The Court of Appeals reversed and remanded for a new trial.[235] The Court of Appeals ruled that the trial court had abused its discretion by excluding Dr. Whitcomb's testimony.[236] It observed that DuPont had not contested Dr. Whitcomb's qualifications, but only the methodologies upon which Dr. Whitcomb's research

228. *Id.* at 552.
229. *Id.*
230. Robinson v. E.I. duPont deNemours Co., 888 S.W.2d 490, 491 (Tex. App.—Fort Worth 1994), *rev'd* 923 S.W.2d 549 (Tex. 1995).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Robinson*, 923 S.W.2d at 552 (Tex. 1995).
236. *Robinson*, 888 S.W.2d at 491.

and opinions were based.[237] The Court of Appeals held that these were issues of credibility, not issues of admissibility.[238]

Justice Gonzalez, writing for himself and Chief Justice Philips, as well as Justices Hecht, Enoch, and Owen, begins this discussion of junk science by discussing the use of what lawyers call "whores" as expert witnesses.[239] He finds this corrupting to the judicial process, partly because it is corrupt on its face, and partly because the juries tend to be overly impressed by people who are described as experts.[240] It is as though Justice Gonzalez acknowledges that we have a cultural bias towards people in "white coats," and this is an especially difficult problem when the evidence, such as scientific evidence, is inherently difficult to evaluate. "Because expert evidence can be hard to evaluate, it can be both powerful and misleading."[241] So-called "junk science" and pseudo-science which is nothing more than "kitchen chemistry" should be kept out of law courts.[242] Therefore, trial judges must "scrutinize proffered evidence for scientific reliability when it is based upon novel scientific theories."[243] This is especially true in light of the fact that expert witnesses are being used in increasing numbers and that their impact may be highly prejudicial.[244] "[T]rial judges have a heightened responsibility to ensure that expert testimony show[s] some indicia of reliability."[245]

In the light of this sociology of litigation, Justice Gonzalez holds that the Court of Appeals erred when it interpreted Rule 702 of the Texas Rules of Civil

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237. *Id.*

238. *Robinson*, 888 S.W.2d at 492-93 (Tex. 1995). There are several unusual facts revealed in Whitcomb's deposition which go to credibility at least. (Deposition of Whitcomb, on file with author.) First, Whitcomb appeared reluctant about permitting defense lawyers to investigate his background. Second, he concluded that if Benlate is injurious to cucumbers, then it is injurious to pecan trees. This is a gigantic inferential leap. Third, Whitcomb was critical of how the State of Texas tested the Robinsons' Benlate. He questioned the skills of the operator, even though he had no idea who the operator was. Fourth, Dr. Whitcomb asserted that he could tell whether a plant had been adversely affected by Benlate simply by looking at it. When DuPont lawyers produced six potted pecan trees at Whitcomb's deposition, he declined to make any diagnosis concerning exposure to Benlate. Finally, Whitcomb told DuPont lawyers under oath, several times, that plants spoke to him. Outside the deposition, there is another very unusual fact about Whitcomb which conceivably had some influence on some members of the court. On September 5, 1995, Whitcomb attempted to file an *amicus* brief in support of motions for rehearing with the court. It is a single-spaced, seven and one-half page long review of his activities and the literature. It is clearly the document of a man who believes he is 100% right. "To date I have testified in 11 trials involving the contaminated Benlate, including Judge Elliot's Court. In addition, I have been deposed by lawyers 30 times involving the Benlate fiasco, for a total of 48 days." Is this the work of a dispassionate, objective, detached scientist, or the work of a "True Believer"?

239. Justice Gonzalez, delicately, does not use this term, but its use among lawyers in conversation is common.

240. *Robinson*, 923 S.W.2d at 553.

241. *Id.*

242. *Id.* at 554.

243. *Id.*

244. *Id.* at 552.

245. *Id.* at 553.

Procedure to require no more than that the proffered expert be qualified and that his opinion be within the area of his qualifications.[246] He holds "that in addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation."[247]

Justice Gonzalez states that he adopts the reasoning in *Daubert* and the reasoning in *Kelly*.[248] It should be remembered that the reasoning in those two cases was slightly different. In *Daubert*, Justice Blackmun emphasized two features of Federal Rule 702. He emphasized the requirement that the knowledge be scientific, and he emphasized the requirement that it assist the trier of fact.[249] In contrast, *Kelly* emphasized only the *helpfulness* feature of the rule. The reasoning of Justice Gonzalez is more attuned to the reasoning in *Kelly* than it is to the reasoning in *Daubert*. Justice Gonzalez contends that in order for scientific evidence to be admissible, it must be relevant in two senses: a weak sense and a strong sense. The weak sense of relevance is captured by Rules 401 and 402 of the Texas Rules of Civil Evidence. They authorize the admission of any evidence which tends to increase or decrease the probability of an ultimate fact at issue in the case.[250] Scientific evidence must be relevant in this weak sense if it is to be admitted. In addition, it must be relevant in a stronger sense if it is to survive the "helpfulness" requirement of Rule 702.[251] Purportedly scientific evidence which is unreliable is of no assistance to the trier of fact, and should, therefore, be held inadmissible under Rule 702.[252] Possibly, Justice Gonzalez implies, the strong sense of relevance collapses into the weak sense. Purportedly scientific evidence which is not grounded upon scientific method is really no more than subjective belief and unsupported speculation.[253] Speculations, of course, are not relevant even in the weak sense of Rule 402.

Whatever the logic of reliability determinations turns out to be, there are many factors which a trial judge may use to make required threshold determinations of admissibility under Rule 702. It is impossible to give a complete list, and no one factor is dispositive according to Justice Gonzalez, but some of the factors pertaining to reliability are as follows:

(1) the extent to which the theory has been or can be tested;

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246. *Id.* at 551.
247. *Id.* at 556.
248. *Id.*
249. *Id.* at 555.
250. Of course, admission is also governed by the balancing tests mandated by Rule 403.
251. *Robinson*, 923 S.W.2d at 556.
252. *Id.* at 557.
253. *Id.*

(2) the extent to which the technique relies upon the subjective interpretation of the expert;
(3) whether the theory has been subjected to peer review and/or publication;
(4) the technique's potential rate of error;
(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
(6) the non-judicial uses which have been made of the theory or technique.[254]

Obviously, this list of six factors is very similar to the factors Justice Blackmun set forth in *Daubert*. Although Justice Gonzalez recites the list of seven factors set forth in *Kelly*, and states that he agrees with the reasoning in *Kelly*, he gives no indication as to the relationship between his list of six factors and *Kelly's* list of seven factors. Prima facie at least, the *Kelly* factors appear to be more oriented towards whether the theory is generally accepted than are the *Robinson* factors. There is no hint in *Robinson* that each of the factors set forth is a necessary condition of admissibility.

Justice Gonzalez characterizes the threshold determination of the trial court as a limited one. It is not to determine the truth or falsity of the expert's opinion.[255] It is not to determine, with any finality, the "scientific-ness" of the expert's opinion. It is not to determine the credibility of the expert's opinion. It is not to determine the credibility of the expert. The trial court's role is only to make an initial determination as to the *relevance* of the expert's opinion and to determine the reliability of the methods and the research upon which the expert's opinion is based.[256] "There is a difference between the reliability of the underlying theory or technique and the credibility of the witness who proposes to testify about it."[257] An expert witness may be very believable, very credible, but he may also be a snake-oil salesman. The purportedly scientific expert may testify only if his conclusions are based upon scientifically reliable methodology. If someone wants to testify that the world is flat, he should not be permitted to do so even if he has a Ph.D. in geography. If someone wants to testify that the moon is made out of green cheese, she should not be permitted to do so, even if she has spent her life observing the moon and making green cheese.[258] This would be true even if she had a Ph.D. in lunar astronomy. Similarly, no one,

254. *Id.* (citation omitted).
255. *Id.* at 558.
256. *Id.*
257. *Id.*
258. *Id.*

no matter what his education, should be permitted to testify that the Earth is the center of the solar system.[259]

Justice Gonzalez's reasoning concerning relevance, reliability and credibility is unclear in two respects. First, he states that the trial court's sole responsibility is to determine the relevance of the expert's opinion and to determine the reliability of his methods.[260] It is not clear whether these are separate or interrelated activities. *Daubert* seemed to imply that an expert's opinion could not be relevant unless its methodology were reliable. If this is the correct analysis of the logic of Justice Gonzalez's *Robinson* opinion, then the opinion has a radical component which is nowhere discussed. Rule 401 of the Texas Rules of Civil Evidence contains a definition of the phrase "relevant evidence." The rule reads this way:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[261]

If methodological reliability constitutes one of the components of the relevance under Rule 402, then the concept of relevance has changed dramatically. As a criteria of relevance, the opinion of the Fort Worth Court of Appeals, rejected in *Kelly*, seems more appropriate. Under that rule, if a witness is demonstrably an expert in a given area and if the witness has a certain belief clearly within the area of expertise, then it is relevant. But perhaps Justice Gonzalez is not attempting to analyze relevance in terms of reliability. Perhaps he is suggesting that there are two factors. His opinion is simply not clear. The other unclarity to be found in the same argument pertains to the concept of credibility. There is a difference between whether a witness is credible in the sense that the jury does believe him, and whether he's credible in the sense that it's rational for the jury to believe him. In the law of evidence, witness credibility is usually understood in terms of whether a jury ought to believe a witness from a rational point of view as opposed to whether a jury does believe a witness as a matter of psychological effect. Thus, Justice Gonzalez claims that evaluations of scientific methodology and devaluations of witness credibility are distinct. That proposition is true only if credibility is viewed strictly in terms of whether a witness *will* be believed and not in terms of whether a witness is *worthy of* being believed.

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259. *Id.*
260. *Id.*
261. Tex. R. Civ. Evid. 401.

Justice Gonzalez could not conclude that the trial court abused its discretion by excluding Dr. Whitcomb's testimony when it applied its newly enunciated principles. Dr. Whitcomb conducted no tests to exclude other possible causes of the damage he observed at the Robinsons' pecan orchard. Justice Gonzalez took this to be especially damning of his methodology since he "admitted in his deposition that many of the symptoms [he observed at the Robinsons' pecan orchard] could be caused by something other than contaminated Benlate."[262] In his deposition Dr. Whitcomb stated, for example, that root rot could have caused the yellowing of the leaves he observed on the Robinsons' trees.[263] Justice Gonzalez is particularly critical of Dr. Whitcomb in this respect: "An expert who is trying to find a cause of something should carefully consider alternative causes. Dr. Whitcomb's failure to rule out other causes of the damage renders his opinion little more than speculation."[264]

Secondly, Justice Gonzalez submits that Dr. Whitcomb came to a firm conclusion first and then did research to support his firm conclusion. Justice Gonzalez suggested that this was the very antithesis of the scientific method. In particular, Dr. Whitcomb had no proof that the Benlate utilized by the Robinsons was contaminated, and he had no knowledge as to what amount or concentration of the contamination would damage pecan trees. Nevertheless, because the Robinsons applied Benlate to their trees, Dr. Whitcomb concluded that the trees must have been exposed to contaminated Benlate and, hence, that the Robinsons' Benlate must have been contaminated. Justice Gonzalez's second criticism of Dr. Whitcomb's methodology really boils down to the first one. Justice Gonzalez's first critique was that Dr. Whitcomb failed to conduct testing to exclude other possible causes. Justice Gonzalez's second critique comes to the same thing: Dr. Whitcomb did not exclude other causes.

A third criticism Justice Gonzalez levels at Dr. Whitcomb was that his research and opinions were formulated for the purposes of litigation. Justice Gonzalez concedes that "[t]he fact that an opinion was formed solely for the purposes of litigation does not automatically render it unreliable."[265] Nevertheless, he says, if an expert has reported his findings before being hired as a witness then such a public statement will limit the degree to which he can tailor his testimony to serve the interests of the party employing him.[266] "On the other hand, opinions formed solely for the purpose of testifying are more likely to be biased towards a particular result."[267]

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262. *Robinson*, 923 S.W.2d at 559.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*

Fourth, Justice Gonzalez observes that no evidence was offered to support the Robinsons' claim that "comparative symptomatology is an appropriate and reliable method to determine chemical contamination."[268] Justice Gonzalez discounted the fact that Dr. Whitcomb testified that his methodology was generally accepted and reasonably relied upon by other experts in the field[.][269] He observed that such statements were "self-serving" and therefore "not sufficient to establish the reliability of the technique and the theory underlying his opinion."[270]

Fifth, Justice Gonzalez also criticized Dr. Whitcomb's use of comparative symptomatology in the Robinson case.[271] In particular, he was critical of the statistical test applied to Dr. Whitcomb's results. That test found that there was a ninety-nine percent probability that Dr. Whitcomb's *conclusion* that Benlate damaged the plants in Dr. Whitcomb's study was correct.[272] However, the approach the court adopted today inquired as to whether the particular technique or methodology has been subjected to a rate of error analysis.[273]

The dissenting justices rejected the reasoning of the majority on several grounds. Dr. Whitcomb observed the pecan orchard. He was a trained horticulturist and had observed other pecan orchards under similar circumstances. He performed control tests and chemical analyses in orthodox ways.[274] He reviewed the literature which he deemed authoritative, and he did not rely upon any innovative, or otherwise strange, scientific methods.[275] "Instead, Dr. Whitcomb employed traditional scientific methods: observation, comparison, experimentation with control groups and deductive reasoning to form his opinions."[276] It might also be pointed out that Dr. Whitcomb employed inductive reasoning. Justice Cornyn, writing for the minority, shared Chief Justice Rehnquist's concern that the *Daubert* approach converted judges into amateur scientists.[277] According to Justice Cornyn, judges will now have to evaluate the reliability of experiments, the applicability of scientific laws, whether experimental technique has been at least minimally acceptable and so forth.[278] According to Justice Cornyn, judges are really not fit to do this.[279]

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268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 564.
275. *Id.*
276. *Id.*
277. *Id.* at 565.
278. *Id.*
279. *Id.*

In the context of Dr. Whitcomb's researches, the dissenting justices have the better reasoned argument. Consider for example, Justice Gonzalez's own example. He submits that Dr. Whitcomb failed to eliminate root rot as the cause of the yellowing of the Robinsons' trees.[280] But according to Justice Cornyn's uncontradicted account of Dr. Whitcomb's first-hand observations, Dr. Whitcomb observed that the roots of the trees had failed to develop normally but that their development was inconsistent with root rot.[281] First-hand observation by an expert horticulturist is a reasonable way to determine whether pecan trees suffer from root rot. It is the sort of thing which experienced and knowledgeable persons believe they can see. Hence, Dr. Whitcomb had undertaken reasonable conduct to eliminate the root rot option. If so, then Justice Gonzalez's first criticism fails.

Justice Gonzalez also criticizes Dr. Whitcomb for failing to eliminate all other causes.[282] Instead, he suggests that Dr. Whitcomb jumped to the conclusion that contaminated Benlate must be the cause and implies that he did so because he was receiving fees from the plaintiffs' lawyer.[283] In fact, Dr. Whitcomb had, on the basis of first-hand observation, eliminated most other possible causes in the context of Robinsons' case.[284] Dr. Whitcomb is familiar with the ins and outs of commercial pecan growing all over the country. No one disputes this. As a result, he has substantial general knowledge of how things work in the orchard. Because of his personal observations and because of his substantial knowledge of pecan growing, Dr. Whitcomb was able to eliminate a variety of other causes *in the context of the Robinsons' case.* In his deposition Dr. Whitcomb admitted that various other factors might cause the kinds of problems at issue in the Robinsons' case, at least under some circumstances.[285] But in general, he denied that other factors caused the Robinsons' problems, in the case at hand. In effect, Dr. Whitcomb testified that he did not see any of the other kinds of factors present.[286]

In effect, Dr. Whitcomb's reasoning worked as follows:

(1) I [Dr. Whitcomb] observed pecan tree damage.
(2) In general, pecan tree damage of the sort I have observed may be caused by states of affairs *S1*, *S2*, or *S3*.
(3) Based on my observation, *S1* and *S2* were probably not present.
(4) Therefore, probably, the damage I observed was caused by *S3*.

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280. *Id.* at 559.
281. *Id.* at 562.
282. *Id.* at 559.
283. *Id.*
284. *Id.* at 562.
285. *Id.* at 558.
286. *Id.* at 564.

(5) I did not see overt, affirmative evidence of *S3*. Nevertheless, in all probability, *S3* must be present, because only *S1*, *S2*, or *S3* cause what I saw.
(6) *S3* is made more probable by the fact that the manufacturer's procedures were so sloppy that it permitted many different contaminants to infect the substance applied to the trees. (I say this because I examined a number of batches of the stuff, and I found many different contaminants in the different batches.)
(7) I therefore conclude that *S3* caused the loss.

As non-mathematical inductive reasoning goes, the foregoing is pretty good. As Justice Cornyn points out, it is at least as good as most of the medical testimony that is admitted routinely into law courts.[287] This is a terribly important point.

The real issue is whether Dr. Whitcomb could really get relatively probable closure on how many different kinds of states of affairs could cause the injuries he observed in Robinsons' trees. If Dr. Whitcomb could not state, to some threshold degree of probability, that he had canvassed all of the probable causal antecedents for the damage he saw and ruled out all but one, then his testimony would be in trouble, and Justice Gonzalez would be right. If Dr. Whitcomb did canvas all the known causes and gave reasonable scientific arguments why others were to be rejected, then Justice Gonzalez would be wrong.

It is perfectly clear that Justice Gonzalez and the majority are much more interested in getting judicial control over expert testimony than they are in the particularities of the *Robinson* case. Significantly, Justice Gonzalez devotes an entire subsection of the key section of his opinion to discussing the problems expert witnesses are creating for the legal system.[288] Moreover, two of the criticisms the majority levels at Dr. Whitcomb are quite clearly wide of the mark. Justice Gonzalez suggests that Dr. Whitcomb's testimony should not be admissible because it hadn't been published.[289] There is nothing in *Daubert, Kelly,* or elsewhere in *Robinson* which suggests that the publication of particular results on a relatively narrow issue is a precondition for the admissibility of testimony. Dr. Whitcomb was a substantially published horticulturist and former university professor of plant biology.[290] The mere fact that he had not published on the relationship between contaminated Benlate and pecan orchards is not a

287. *Id.* at 562.
288. *Id.* at 552-54.
289. *Id.* at 559.
290. *Id.* at 551.

sufficient condition for the inadmissibility of his testimony. This is true even on Justice Gonzalez's own account of the matter.

Moreover, Justice Gonzalez discounts the fact that one of Dr. Whitcomb's experiments had been subjected to a statistical test.[291] Justice Gonzalez states that the statistical test pertained only to Dr. Whitcomb's conclusion and not to his methodology.[292] There are several problems with Justice Gonzalez's critique. For one thing, the statistical test deployed upon Dr. Whitcomb's experiment *did* review the methodology of that experiment. Of course, the statistical test was not designed to guarantee that the results of that experiment were applicable to the Robinsons' orchard. Dr. Whitcomb's experiment was designed only to show that under controlled circumstances contaminated Benlate would cause a certain range of injuries to pecan plants.[293] The statistical test performed on his experiment established that the hypothesis that contaminated Benlate could cause these results under controlled circumstances was highly probable.[294] The question, of course, was whether the results of that experiment could be extrapolated to the Robinsons' orchard. That extrapolation was not subjected to any kind of rate of error analysis.[295] On the other hand, there is nothing in the opinions of the majority or the minority which suggests that such an extrapolation is prima facie unreasonable.

Justice Gonzalez suggests that no scientific law, principle, technique, or methodology can be admitted in evidence unless it has been subjected to a rate of error analysis.[296] Elsewhere in his opinion, however, he expressly says that knowledge as to a scientific technique's potential rate of error is *not* a necessary condition for admissibility but only a factor for judging reliability.[297] There is a real problem lurking here. In case after case, physicians testify that plaintiffs have (or don't have) some medical condition. Psychiatrists testify that accused criminals are schizophrenic, or delusionally paranoid, yet they do not rely upon laws with rates of error experimentally assigned to them. If Justice Gonzalez's rule were taken seriously, most medical testimony, at least as it has been presented up to now, would be excluded.

The real problem which rendered Dr. Whitcomb's testimony suspect was the fact that he was predicting that a substance which he never saw contained a contaminant which he had never found in any batch of the substance, and that contaminant was there in a sufficient amount to do harm.[298] Dr. Whitcomb's

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291. *Id.* at 559.
292. *Id.*
293. *Id.* at 551.
294. *Id.*
295. *Id.* at 559.
296. *Id.*
297. *Id.* at 557.
298. *Id.* at 551-52.

testimony was that *it just had to be that way*. From a scientific point of view, there is nothing necessarily wrong with testimony of this general type. In Dr. Whitcomb's case, the fundamental intuition of the majority was that there were simply too many loose ends. Perhaps this was a problem as to how the case was presented. Perhaps, in other words, it was a problem created by poor lawyering. For example, Justice Gonzalez is critical of Dr. Whitcomb stating baldly that his methodology was reasonable, reliable, and generally accepted in the relevant scientific community.[299] The lawyer should have presented Dr. Whitcomb's testimony differently. He should have had Dr. Whitcomb fill in the enormous number of details. This is especially true since Dr. Whitcomb's testimony was presented as a bill of exceptions.[300] Two or three hours of oral testimony should have been devoted to demonstrating the relevance, reliability and general acceptance of his overall approach.[301]

The court's treatment of comparative symptomatology epitomizes this problem. Justice Gonzalez describes this "method" as follows: "because the Robinsons' pecan trees exhibited symptoms common to other plants treated with allegedly contaminated Benlate under dissimilar growing conditions, Benlate, the only common factor among all the plants, caused the damage."[302] If the dissimilarity in growing conditions, and any other salient dissimilarities can be discounted, then comparative symptomatology is nothing more than an instance of inductive reasoning.[303] Much of scientific reasoning is inductive. Some of it is more sophisticated than others. This is a fairly straightforward, although rough-and-ready application, of inductive reasoning to causation. It has been recognized since the time of John Stuart Mill that this is what scientists do.[304] Interestingly, the Texas Supreme Court has approved this kind of reasoning. In *Redman Homes Inc.* v. *Ivy*,[305] for example, the court considered liability issues arising out of a mobile home fire. The plaintiffs alleged that the fire resulted from faulty electric wiring.[306] The plaintiffs' sole proof of causation came from their expert, a fire cause-and-origin investigator.[307] That witness testified that he

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299. *Id.* at 552.

300. *Id.*

301. In *Daubert*, Circuit Judge Kozinski appreciated the nature of this problem with crystal clarity. He said that the affidavits of the plaintiffs' experts in the Bendectin case he considered were defective for failing to give a detailed account of how it was that their work conformed to the scientific method. He said that he would have remanded the case of the trial court so that new affidavits could be filed, were it not for the problem of fit. *Daubert*, 43 F.3d at 1319-20.

302. *Robinson*, 923 S.W.2d at 551.

303. CARL GUSTAV HEMPEL, *Inductive Inconsistencies, in* ASPECTS OF SCIENTIFIC EXPLANATION 53ff (1965).

304. JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE 185-86 (Longmans, Greene and Co., 8th ed. 1925). The two volumes of this magnificent classic were first published in 1843.

305. 920 S.W.2d 664 (Tex. 1996).

306. *Id.* at 666.

307. *Id.* at 668.

examined the remains of the trailer, eliminated arson as a possible cause, eliminated portable appliances as possible causes and eliminated all permanent appliances as possible causes.[308] He testified that through this process of elimination, he was left with only one possible cause of the fire: the wiring running underneath the bathroom floor.[309] The expert testified further that the burn patterns in the trailer were "consistent with the manner in which fires caused by faulty wiring are known to spread."[310] The expert even offered an opinion about "how the wiring could have ignited spontaneously, even though it passed all safety tests and inspections."[311] Justice Gonzalez observed that the fire investigator's testimony was circumstantial.[312] But that circumstantial testimony was appropriate in trying to prove the breach of an implied warranty.[313] Such proof was central to the plaintiffs' case. It is difficult to see the difference between the fire investigator's testimony and the testimony of Dr. Whitcomb, except that the fire investigator looked at the trailer, whereas Dr. Whitcomb did not analyze the actual "stuff" which was said to cause the Robinsons' injuries.

Lawyers for the Robinsons should have established clearly that Dr. Whitcomb was using orthodox inductive reasoning. Based solely upon Justice Gonzalez's opinion, one is inclined to suppose that some lawyer thought the name "comparative symptomatology" sounded official, reliable, professorial, and other good things. Perhaps the lawyer tried to rely too much on an official-sounding name, rather than upon detailed, step-by-step evidence.[314] Several puzzles inhere in this passage. (1) Inductive reasoning, which is the foundation of comparative symptomatology, surely has been subject to publication and peer review. (2) It is unclear how a lawyer can establish that a given methodology is generally accepted in a field. The usual practice up to now has been to have the testifying expert say that it is. What should be done from now on? Perhaps there always have to be two experts: one to testify on the substantive matter, and

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308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. This guess is supported by the following:
> the Robinsons have offered no evidence to support their claim that comparative symptomatology is an appropriate and reliable method to determine chemical contamination. Dr. Whitcomb's method of comparative symptomatology has not been subject to peer review or publication . . . Moreover, there is no evidence that comparative symptomatology has been generally accepted by members of the *relevant* scientific community. Dr. Whitcomb's self-serving statements that his methodology was generally accepted and reasonably relied upon by other experts in the field are not sufficient to establish the reliability of the technique and theory underlying his opinion. *Robinson*, 923 S.W.2d at 559.

one to testify as to the soundness of the methodology utilized by the first. This gambit would substantially complicate litigation and lengthen the trial process. It would also render litigation substantially more expensive than it now is. In the alternative, perhaps an expert has to testify, in detail, as to the nature of his methodology and then testify in detail as to how that methodology is rooted in current scientific practice. Cursory and conclusory testimony as to general acceptance and reasonable reliance are no longer sufficient.

6. Back to S.V.

At this point, we return to *S.V. v. R.V.*[315] Justice Hecht, writing for the majority, contends that the *objectively verifiable* component of the discovery rule has nothing to do with the *Daubert-Kelly-Robinson* rule. Justice Gonzalez, in contrast, contends that the testimony of the experts on repressed memory could not be admitted because it could not survive the test he formulated in *Robinson*. Justice Cornyn agrees with Justice Gonzalez on this matter and for that reason continues to suggest that the test is unworkable.

Justice Gonzalez concurs in the court's judgment. He does so, in part, because he believes that "expert testimony regarding repressed memories does not meet the guidelines for admissibility" set forth in *Robinson*.[316] First, repressed memory theory cannot be empirically tested.[317] Second, a diagnosis of repressed memory "relies heavily upon the subjective interpretation of the expert."[318] This reliance is a sobering reality in sexual abuse cases[.]"[319] Not only are the interpretations of experts crucial in sexual abuse cases, the experts sometimes push their patient/clients in the direction they hypothesize. Third, "the potential error rate is high in cases of repressed memory."[320] "This high rate of error is unacceptable in light of the devastating consequences false allegations of abuse can have on the accused and his or her family."[321] Finally, the theory that there are repressed memories has not been "generally accepted within the scientific community."[322] Justice Gonzalez wants it made clear that he is not suggesting that the use of repressed memory may not be a valuable therapeutic tool.[323] His point is that one must be able to distinguish between literal truth and metaphorical truth in order to make a theory admissible in evidence.[324] Even if

315. 933 S.W.2d 1.
316. *Id.* at 26.
317. *Id.*
318. *Id.* at 27.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*

it is therapeutically valuable, however, Justice Gonzalez characterizes repressed memory theory as "junk-science that should be kept out of our courtrooms[.]"[325]

As indicated, Justice Cornyn wrote two concurrences. He withdrew the first one when the court overruled the appellees' motion for rehearing, and substituted a new opinion. The new concurring opinion is substantively identical to the first one and over two-thirds of its verbiage is identical.

According to Justice Cornyn, the centerpiece of Justice Hecht's opinion is "the credibility of expert testimony about repressed memory syndrome, and . . . the reliability of such testimony[.]"[326] By focusing on these matters, the court makes the admissibility of expert testimony the real issue in the case as opposed to whether the testimony is objectively verifiable.[327]

Justices Hecht and Gonzalez may be right that repressed memory theory is not reliable, suggests Justice Cornyn.[328] Unfortunately, virtually no testimony based on the so-called behavioral sciences, including psychology and psychiatry, is ever reliable in the required sense. This is particularly true if the non-exclusive list of six factors articulated in *Robinson* must be completely satisfied before testimony is admissible. Virtually all expert evidence which hinges upon the testimony of psychiatrists, psychologists, clergy, social workers, or the like, involves the subjective interpretation of the expert. Moreover, virtually no therapy-based (or even therapy-related) behavioral sciences have been articulated in reliable error rates. It is not even clear that any of the social scientific theories are testable, i.e., falsifiable, in the way physical theories are said to be. Therefore, the court maintains strict fidelity to *Robinson*, the chances are that evidence from the so-called social sciences, including psychiatry and evidence based upon virtually all "talk-therapies" will be subject to exclusion. Without quite saying so, Justice Cornyn wonders if this is a sound result.

Justice Cornyn's new opinion is even more focused than was the first one. On the inadequacy of *Robinson* as a device for regulating the admissibility of social scientific testimony, including psychology, economics, sociology and political science, Justice Cornyn's position could not be clearer:

> Even though *Robinson* now plainly controls the admissibility of *some* expert testimony, it *cannot* reasonably be construed to control the admissibility of *all* expert testimony. There are some types of expert testimony to which the non-exclusive factors adopted in *Robinson* are clearly inapplicable.[329]

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325. *Id.* at 27-28.
326. 39 Tex Sup. Ct. J. 386, 409 (1996).
327. *Id.*
328. *Id.* at 411.
329. *S.V.*, 933 S.W.2d at 41.

In support of this point, Justice Cornyn reminds his readers that not all expert testimony needs to be scientific testimony.[330] Lawyers testify in malpractice cases. Historians testify in discrimination cases. Musicians testify in copyright cases. None of this testimony is scientific. Indeed, Rule 702 expressly refers to "technical or other specialized knowledge."[331] There is something bothersome about Justice Cornyn's approach. Comparing testimony of psychiatrists, for example, to that of lawyers, historians, and musicians, is somewhat misleading. Practitioners of psychology and similar disciplines frequently claim the title "social science" for themselves. Unless this is a mere pretension, the behavioral scientist must be claiming to have some sort of special access to knowledge. Unless they are simply begging our indulgence, they must have some sort of superior methodology. Experienced insurance adjusters are permitted to testify about insurance company practices precisely because of their unusual but also reliable experience. Surely, the testimony of behavioral scientists comes to more than this. The problem, of course, is to distinguish between junk science, which is poor science, and social science, which is scientific in some sense, but also different. Simply saying that it's different and less reliable is not very helpful, and yet that is all Justice Cornyn does.

Justice Hecht explicitly responds to Justices Gonzalez and Cornyn. According to Justice Hecht, *Robinson* and *Daubert* required "a judicial determination of the reliability of expert opinion before it is admitted in an effort to exclude what has come to be called 'junk-science'."[332] Justice Hecht contends that the discussion of the two concurring justices is irrelevant because the reliability of the scientific expert testimony offered on behalf of R. is simply not an issue in the case. Justice Hecht suggests that this is true for three reasons. First, none of the parties has raised any question about the admissibility of the testimony. Second, "[e]vidence can be reliable and still not provide objective

330. *Id.* (citing Edward J. Imwinkelried, *The Next Step After* Daubert: *Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271 (1994)).

331. Justice Cornyn relies upon the following authorities: Imwinkelried, *supra* note 330; FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 84 (1994). *See* Richardson et al., *The Problems of Applying* Daubert *to Psychological Syndrome Evidence*, 79 JUDICATURE 10 (1995).

332. *S.V.*, 933 S.W.2d at 25.

verification of an injury."[333] Third, "an injury can be objectively verified though evidence of causation is unreliable."[334]

Justice Hecht's position is extremely difficult to understand. He has argued at length that such testimony is necessarily unreliable, because the "consensus of professional organizations reviewing the debate [about repressed memory theory] is that there is no consensus on the truth or falsity of these memories."[335] Thus, Justice Hecht is arguing precisely that psychological theories about repressed memory are insufficiently verified to provide the kind of evidence which is needed to invoke the discovery rule and overcome the statute of limitations. As Justice Hecht himself puts it, "the scientific community has not reached consensus on how to gauge the truth or falsity of 'recovered' memories."[336] "For purposes of applying the discovery rule, expert testimony on subjects about which there is no subtle scientific view—indeed, not even a majority scientific view—cannot provide objective verification of abuse."[337] In

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333. Justice Hecht invokes the authority of Robinson v. Weaver, 550 S.W.2d 18 (Tex. 1977), but this is very weak authority indeed. *Weaver* was a 5-4 decision. Justice Denton wrote for the majority. The majority consisted of Chief Justice Greenhill and Justices Steakely, Reavley and Daniel. Justice Pope wrote for the minority, which consisted of himself, and Justices McGee, Johnson and Yarbrough. The issue in the case was whether the discovery rule might apply in a medical malpractice case where the gist of the plaintiff's theory was negligent misdiagnosis. *Id.* at 19. The court held that the discovery rule will not be applied to a medical malpractice action founded upon misdiagnosis. *Id.* at 22. In reality, *Weaver* is inconsistent with the rule set forth in *Altai* and *S.V.* In those cases, any type of case is subject to a discovery rule, if certain things are both inherently undiscoverable and objectively verifiable. In contrast, *Weaver* holds that a discovery rule will not apply to a type of case, no matter what. The reasoning of the court is very categorical. It distinguishes between "foreign object" medical malpractice cases, cases involving mistreatment, and cases involving misdiagnosis. *Id.* at 20-21. The discovery rule appears to be utilized in the former two categories of case, but not in the latter. The court is impressed by the fact that foreign object cases and mistreatment cases can be established by means of physical evidence. *Id.* at 21. The person with a sponge in his abdomen eventually has it removed. A man who has had a vasectomy fathers a child. A person with radiation burns has ulcers on the skin. And so forth. In contrast, a negligent misdiagnosis case essentially depends upon expert witnesses. "Physical evidence generally is not available when the primary issue relevant to liability concerns correctness of past judgment." *Id.* In misdiagnosis cases, there is frequently "no physical evidence which in-and-of-itself establishes the negligence of some person." *Id.* Expert testimony may even be necessary to establish the fact of injury. As a matter of policy, Justice Denton is extremely uncomfortable with relying upon expert witnesses to construe old medical records. He takes this to be inconsistent with the policy of repose embodied in the court statute of limitations. If the main issue is whether the defendant is guilty of negligent exercise of judgment, then the only available proof will be by expert hindsight. Justice Denton regarded this as a dangerous avenue, and he declined to take the court down it. It appears as though Justice Hecht is contending that expert testimony is never sufficient to constitute the objective verification demanded by the rule in *Altai*. Surely, if expert testimony constituted an uncontroversial derivation from well-established scientific law, the rule in *Altai* would be satisfied. After all, the expert's opinion would not be *mere* opinion, as in, *"That's just your opinion,"* but (quite likely) an objective truth.

334. *S.V.*, 933 S.W.2d at 25.

335. *Id.* at 17 (citing American Medical Ass'n, Council on Scientific Affairs Report on Memories of Childhood Abuse 3:43-45 (1994), reprinted in 43 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 114, 116 (1995)).

336. *Id.* at 18.

337. *Id.*

other words, testimony for those engaged in the practice of psychology and psychiatry is insufficiently scientific to invoke the discovery rule. It is insufficiently scientific because it is unreliable. The major indicator of unreliability is the fact that practitioners in the field have widely divergent views about repression, the mechanisms of repression, whether memories of sexual abuse are likely to be repressed and so forth.

Justice Hecht's view is easily confused with the *Frye* test. However, Justice Hecht is not suggesting that testimony is admissible only if there is a scientific consensus to its truth and validity. Rather, Justice Hecht appears to be saying that, as to recovered memory psychology, there is a consensus among scientists that there is no agreement whatever.[338] In the face of intractable controversy which is accompanied by no agreement about proper methodology, it is hard to invoke the voice of "science." "The point is, the area of science in which the experts at trial work can at present neither confirm nor negate their opinions."[339] Although Justice Hecht contends that he is not writing about reliability, what he is saying is a virtual paradigm of a situation where scientific testimony is not reliable under the factors set forth in *Robinson* and *Daubert.*

Thus, Justice Hecht's critique of the testimony offered on R.'s behalf is really no different than the kind of critiques leveled against junk-science. This is true even though he suggests that evidence which is admissible may not be sufficient to invoke the discovery rule. According to Justice Hecht, "a higher level of certainty"[340] is necessary for invoking the discovery rule than for admissibility. Nevertheless, if expert testimony is unreliable, it will rise to neither standard. The methodology for criticizing the testimony is the same.

Justice Gonzalez wrote a concurring opinion when the court first issued its judgment. He wrote another concurring opinion when the court denied the appellee's motion for rehearing. He indicates that the United States Supreme Court intended that the principles in *Daubert* would "provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science."[341] It was neither the intent of the United States Supreme Court in *Daubert* nor the intent of the Texas Supreme Court in *Robinson* to issue rules governing the admissibility of "technical or other specified knowledge"[342] which is also regulated by evidence Rule 702. Nevertheless, it is designed to regulate everything calling itself *science.*

The behavioral or social sciences therefore constitute a problem. Justice Gonzalez agrees with Justice Cornyn that they may not meet the definition of

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338. *Id.*
339. *Id.* at 19.
340. *Id.*
341. *Id.* at 42.
342. *Id.*

"science" set forth in *Daubert* and adopted in *Robinson*. For this reason, according to Justice Gonzalez, Texas courts need "to develop a standard . . . apart from *Robinson* to judge the validity of expert testimony based on the social sciences."[343]

Nevertheless, Justice Gonzalez does not believe that this problem should be addressed on a case-by-case basis. Instead, he recommends that the Supreme Court refer the matter to its Advisory Committee for recommendations on possible rule changes.[344]

A readily available and splendid solution is still being overlooked. Scientific evidence which lacks the best credentials can be placed in proper perspective through cross-examination. It can also be placed in perspective through the use of counter-experts. For example, there is some suggestion that there may be a "profile" for those offering confabulated memories:

> (1) the alleged abuse is highly improbable and corroborating evidence is lacking;
> (2) the adult patient has only recently remembered the abuse;
> (3) the allegations include a series of abuses across time and in different places;
> (4) the accusations emerged only after exposure to [the book] *The Courage to Heal*,[345] hypnosis, survivor group therapy, or dream analysis;
> (5) the "abuse" occurred at a very young age;
> (6) the therapist claims special knowledge about detecting abuse based on subjective experience; and
> (7) the story of abuse progresses across time from innocuous, relatively innocent behaviors to ever more intrusive, abusive, and highly improbable behaviors.[346]

Justice Owen emphasizes the fact that the trial court directed a verdict against R. Consequently, as a matter of appellate procedure, the Supreme Court is required to take the evidence she presented as true. In essence, although not

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343. *Id.* at 43. *See* John M. Conely & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence*, 74 N.C. L. REV. 1183 (1996) (discussing the REFERENCE MANUAL ON SCIENTIFIC EVIDENCE published by the Federal Judicial Center and whether it is likely to lead judges to the kinds of evidentiary understanding demanded from *Daubert*).

344. *S.V.*, 933 S.W.2d at 43.

345. ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (1988).

346. Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183, 192 (1996).

word-for-word, Justice Owen points out that R.'s testimony consisted of four principal propositions:

> (1) I [R.] now remember being sexually molested by my father.
> (2) I now remember that there was a long period in my life when I did not remember these events.
> (3) I now remember that not long ago vivid memories of these events came back first and a few at a time, and then many more.
> (4) Here, in detail, is what happened to me . . .

Justice Owen contends that the Supreme Court must take this testimony as true. This, she implies, is precisely what the majority does *not* do when it requires corroboration.[347] Moreover, Justice Owen suggests that when R.'s testimony is taken as true, it should be sufficient to invoke the discovery rule tolling the statute of limitations because the events in question took place in the context of a fiduciary relationship, i.e., a parent/child relationship.[348]

Moreover, Justice Owen is dissatisfied with a universalistic approach to applying the test derived from *Altai*. She concurred in that case on the same grounds.[349] Various features of sexual abuse cases convince her that the rule in *Altai* should not "constitute a hard and fast rule."[350] The purpose of a statute of limitations, for example, is to ensure that memories and other evidence will be fresh. Since children allegedly subjected to sexual abuse can bring such cases between their eighteenth and twentieth birthday without any statute of limitations problems, the evidence, including the memories, is not likely to be fresh anyway. Further, in such cases "there will be no objectively verifiable evidence that the abuse occurred[.]"[351] This would be true even if the lawsuit were filed promptly after the incident took place. Moreover, sexual abuse by parents of children is so atrocious, so egregious, so culpable and so long-lasting in its injurious consequences, that special rules may be necessary.[352]

Besides, suggests Justice Owen, statutes of limitations are routinely set aside when the defendant has committed fraud.[353] Childhood sexual abuse cases where memories are repressed should be treated like fraud for fraudulent concealment cases. In such cases, the statute of limitations is tolled because the

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347. *S.V.*, 933 S.W.2d at 30-31.
348. *Id.* at 30-31, 34-35.
349. *Altai*, 918 S.W.2d at 463-66.
350. *S.V.*, 933 S.W.2d at 32.
351. *Id.* at 33 (citing HAUGAARD & REPPUCI, THE SEXUAL ABUSE OF CHILDREN: A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES 151 (1988)).
352. *Id.*
353. *Id.* at 34.

plaintiff is ignorant of his rights as a result of the defendant's deceptive conduct. In a sexual abuse/repressed memory case, the plaintiff is ignorant of her rights because of outrageously immoral conduct of the defendant which has the consequence of the plaintiff being ignorant of her rights. Fraud and sexual abuse are therefore quite similar. Taking R.'s assertions at face value, which we must [since the case came up as a result of a directed verdict], it was the wrongful intentional acts of a child abuser that were the cause of her inability to know of her injury or her claim.[354]

In the end, Justice Owen suggests that Justice Hecht has exaggerated the uncertainties of psychological testimony regarding repressed memory. Impliedly, she accuses the majority of displaying improper mistrust of psychological testimony and concedes that psychiatry and psychology are gray—perhaps essentially contestable—areas.[355] Nevertheless, she asserts that a plaintiff like R. should "still have an opportunity to present . . . her case to the trier of fact[.]"[356] In short, even under prevailing conditions in which issues of repressed memory theory are highly controversial: "[t]he testimony of qualified, reputable mental health experts should suffice as 'corroboration' [for claims of repressed memory]."[357] Justice Owen suggests that the court should apply the discovery rule whenever there exists "direct testimony from the victim, supported by the opinions of reputable, experienced specialists [to the effect] that [the victim] has been sexually abused and that she exhibits traits and behavior associated with sexual abuse."[358]

Justice Hecht declares simplistic the rule Justice Owen suggests. He characterizes her view in these words: "No claim of sexual abuse should be barred by limitations as long as a competent expert thinks it may have merit."[359] Justice Hecht has little use for this rule. Were it adopted, he writes, "few claims of sexual abuse would ever be barred by limitations."[360]

Justice Hecht articulates a number of arguments against Justice Owen's position. First, he accuses her of treating sexual abuse cases differently from all other cases without having a genuine principle of demarcation.[361] Second, he suggests that she assumes that all persons accused of the sexual abuse of children are guilty.[362] Third, he suggests that Justice Owen is unable to draw the distinction between a few years and a few decades (i.e., that child abuse torts can

354. *Id.* at 34-35.
355. *Id.* at 38 (citing Tyson v. Tyson, 727 P.2d 226, 232-33 (1986) (Pearson, J., dissenting)).
356. *Id.* (citing Lindabury v. Lindabury, 552 So.2d 1117, 1118 (Fla. Dist. Ct. App. 1989) (Jorgenson, J., dissenting)).
357. *Id.*
358. *Id.* at 37.
359. *Id.* at 22.
360. *Id.*
361. *Id.*
362. *Id.* at 23.

be brought up until two years after a child reaches majority. Consequently, says Justice Owen, evidence will frequently not be fresh anyway.)[363] Fourth, Justice Hecht suggests that Justice Owen's cavalier treatment of statute of limitations would necessarily expand to other torts.[364] Fifth, he complains that she has no public-policy-grounded reasons for treating sexual abuse differently from other torts except for her "personal views."[365] Finally, Justice Owen had argued that circumstances which stimulate repressed memory are rather like fraud, so that the discovery rule should be treated in sexual abuse cases as it is treated in fraud cases.[366] Justice Hecht dismisses this argument by analogy upon the grounds that analogies are not identities. He points out that sexual abuse is not fraud, and he thinks the argument ends there.[367]

It should be obvious from the thrust of the argument in this article that capable and experienced scientific psychologists should be treated as providing the necessary objectification required by *Altai.* In other words, Justice Owen has it right. Alas, Justices Hecht and Owen are talking past each other. Justice Owen says that the opinions of reputable and experienced specialists should be admissible. Justice Hecht characterizes her view as the claim that any competent psychologist could be permitted to testify. That is not what she said. Clearly, she is imposing some sort of higher evidentiary standard than mere competence. While there is a price to be paid for having a plethora of evidentiary standards, her "middle way" seems preferable to Justice Hecht's exclusionary rule.

III. The Majority's Authorities: Expertise and Recovered Memory

In attacking the expert testimony offered on behalf of R. which was designed to demonstrate the trustworthiness of memories reconstructed after repression, the majority relies upon a statement of the American Medical Association, a statement of the American Psychiatric Association, and the work of three scholars: Elizabeth Loftus, Richard Ofshe, and Mark Yapko. The purpose of the Court's reliance is to show that significant, "heavy-hitting," contemporary scholars scorn the use of repressed memory. Before examining these works, it might be profitable to review briefly some of what has been said on behalf of recovered memories.[368] In order to assess the nature and power of

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363. *Id.*

364. *Id.* at 22.

365. *Id.* at 24. No doubt some will think that readers should look between the lines for anti-women views or anti-feminist views. Such an extravagant reading, while politically tempting, is almost certainly wrong.

366. *Id.* at 30.

367. *Id.*

368. For an extensively documented review of the available evidence from psychologists, sociologists and others, *see* Lazo, *supra* note 8:

> Absent legislation specifically authorizing or prohibiting the use of expert

Justice Hecht's arguments, it is necessary to expound this material in some detail.

A. Repression, Recovery and Truth

Perhaps the most sophisticated account of the trustworthiness of recovered memories of childhood sexual abuse is that of Dr. Judith Herman, a physician and psychiatrist, who is an associate clinical professor of psychiatry at Harvard Medical School, the Director of Training at the Victims of Violence Program at Cambridge Hospital, and the Psychiatric Director of the Women's Mental Health Collective in Somerville, Massachusetts. Dr. Herman has worked on problems of childhood sexual abuse for some years. In 1981, she published FATHER-DAUGHTER INCEST, which won the C. Wright Mills Award for the Society for the Study of Social Problems. She is a prime target for almost every critic of memory unrepression work.

According to Dr. Herman, "[t]he conflict between the will to deny horrible events and the will to proclaim them aloud is the central dialectic of psychological trauma."[369] Atrocities are said to be unspeakable, even unthinkable. This metaphor reflects the ordinary response of human beings to atrocities, namely, "to banish them from consciousness."[370] Banishment is accomplished by denial, repression and disassociation. However, while repressed, banished memories struggle to display themselves. This happens through thought behavior, bodily reactions, unprofitable life patterns and even psychosis. Witnesses, like victims, also try to banish atrocities from consciousness, as do perpetrators. They do everything in their power to promote forgetting. "Secrecy and silence are the perpetrator's first line of defense. If secrecy fails, the perpetrator attacks the credibility of his victim."[371] According

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> testimony in repressed memory cases, courts should allow qualified witnesses to provide background information that will help judges decide whether a claim should proceed to trial and help jurors understand the evidence in the case before them. Fairness calls for a case-by-case approach to setting appropriate limits on the scope of the expert testimony and procedural safeguards to minimize its prejudicial impact.

Id. at 1413. In theory, Justice Hecht could agree with this sentence. He would simply claim that the plaintiff's burden of persuasion in overcoming the statute of limitations is much higher than the standard for admissibility. Still, he gives all the same arguments against relying upon expert testimony to invoke the discovery rule, as others give to render such testimony inadmissible.

369. J.L. HERMAN, TRAUMA AND RECOVERY 1 (1992).

370. *Id.* at 1.

371. *Id.* at 8.

to Dr. Herman, "[t]he study of psychological trauma must constantly contend with this tendency to discredit the victim or to render her invisible."[372]

According to Dr. Herman, traumatic events can be counted upon to cause significant and lasting changes in "physiological arousal, emotion, cognition and memory."[373] Some of these transformations include: hyperarousal (a peculiar state of heightened alertness); a state of mind wherein dramatic material repeatedly intrudes upon consciousness; and a state of mind which is constricted or numbed. Very obviously the same person cannot be in all of these states at the same time, but they alternate, often with long fluctuations. For example, intrusive symptoms such as nightmares or pseudo-hallucinations may occur frequently. However, over time numbing or constrictive symptoms prevail.

One form of numbing symptom is a kind of disconnection between the trauma victim and other persons. "Traumatic events call into question basic human relationships."[374] This is especially true in child abuse cases, where the perpetrator has betrayed his substantial trust and where the perpetrator has treated his victim as a captive, closing her off from alternative relationships and alternative sources of information.

Repeated psychological trauma at any age tends to change the structure of the victim's personality. Repeated childhood trauma prevents a structure from forming and deforms any structure which stumbles into being. Children subject to repeated trauma live in a constant state of terror, they have an "omnipresent fear of death,"[375] and they report "an overwhelming sense of helplessness."[376] At the same time, the terrorist is a partner, more likely both parents in some sick, tandem arrangement. In a crucial passage, Dr. Herman describes the process this way:

> All of the abused child's psychological adaptations serve the fundamental purpose of preserving her primary attachment to her parents in the face of daily evidence of their malice, helplessness, or indifference. To accomplish this purpose, the child resorts to a wide array of psychological defenses. By virtue of these defenses, the abuse is either walled off from conscious awareness and

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372. *Id.* ("The perpetrator's arguments prove irresistible when the bystander faces them in isolation. Without a supportive social environment, the bystander usually succumbs to the temptation to look the other way. This is true even when the victim is an idealized and valued member of society. Soldiers in every war, even those who have been regarded as heroes, complain bitterly that no one wants to know the real truth about war. When the victim is already devalued (a woman, a child), she may find that the most traumatic events of her life take place outside the realm of socially validated reality. Her experience becomes unspeakable." *Id.* (citations omitted)).

373. *Id.* at 34.

374. *Id.* at 51.

375. *Id.* at 98.

376. *Id.*

> memory, so that it did not really happen, or minimized, rationalized, and excused, so that whatever did happen was not really abuse. Unable to escape or alter imbearable reality in fact, the child alters it in her mind. The child victim prefers to believe that the abuse did not occur. In the service of this wish, she tries to keep the abuse a secret from herself. The means she has at her disposal are frank denial, voluntary suppression of thoughts, and a legion of dissociative reactions.[377]

Thus, according to Dr. Herman, repressed memories are a fully expectable phenomenon in the aftermath of sexual abuse.

Such children will fragment themselves. They will not become fully integrated adults. They will not develop "a reliable sense of independence within connection."[378] This may manifest itself as instability in relationships. It may manifest itself as various levels of detachment, and in extreme cases, it may manifest itself as self-mutilation. According to Dr. Herman, one way to prove you exist is to inflict pain upon yourself. One way to supplant acute emotional pain, a sense of personal unreality, or an overwhelming sense of numbness is to replace one of these states with physical pain. Pain wonderfully concentrates the mind. So does the kind of arousal which follows upon purging, vomiting, compulsive sexual behavior (including repeated exposure to sexual victimization, such as sexual harassment, or battery), compulsive risk taking, the use of dangerous drugs and so forth. Usually, according to Dr. Herman, things do not go that far. Usually, the distressed symptoms of an abused child are well hidden. Memory lapse plus "acting-out," plus other dissociative symptoms are common and usually not recognized for what they are.[379]

According to Dr. Herman, victims of child abuse will predictably suffer from post-traumatic stress disorder or what she calls "Complex Post-Traumatic Stress Disorder."[380] This will frequently include what the *DSM-IV* calls borderline personality disorder, as well as somatization disorder and multiple personality disorder. All three of these diagnoses, which were formally all called "hysteria," are charged with pejorative meaning, and the phrase "borderline personality disorder" is nothing more than "a sophisticated insult."[381] For this reason, Dr. Herman wants to utilize a new diagnosis, to some degree, a new method of therapy. According to her, the victim's experience of psychological trauma is a complex structure of oppression and isolation.

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377. *Id.* at 102.
378. *Id.* at 107.
379. *Id.* at 110.
380. *Id.* at 121.
381. *Id.* at 123. See HUTCHINS & KIRK, *supra* note 158, at 176-99.

Because disempowerment and disconnection are central to psychological trauma, recovery from it must involve empowerment and reconnection. "Recovery can take place only within the context of relationships; it cannot occur in isolation."[382] More significantly, empowerment and reconnection can only occur in the context of coming to know historic truth. The victim of abuse must recover, reconstruct, grasp and own as much of her history as possible.[383]

The stages of therapy for the abused child, therefore, are three: the creation of a safe haven, the accomplishment of remembrance and mourning, and the establishment of reconnection to human beings. In this role, the therapist is both an empathetic and emotional source and an intellectual source. Safety comes first. Remembrance should not be pushed too quickly. Moreover, remembrance will never be perfect, and it need not be complete. This is a proposition of singular importance:

> Both patient and therapist must develop tolerance for some degree of uncertainty, even regarding the basic facts of the story. In the course of reconstruction, the story may change as missing pieces are recovered. This is particularly true in situations where the patient has experienced significant gaps in memory. Thus, both patient and therapist must accept the fact that they do not have complete knowledge, and they must learn to live with ambiguity while exploring at a tolerable pace.[384]

According to Dr. Herman, there are a number of ways to recover lost memories. The careful exploration of already existing memories is probably the simplest technique for recovery of memories. The patient's existing pattern of memories will probably be rich in clues as to what has been repressed. The patient's reaction to the observance of holidays and other such special occasions is also helpful. The patient's reactions to viewing family photographs, constructing family trees or visiting the site of family childhood experiences can be revealing. Dreams, flashbacks and nightmares are also valuable routes. Dr. Herman also endorses the use of more exotic approaches, including hypnosis, group therapy, psychodrama and even drugs. "Whatever the technique, the same basic rules apply: the locus of control remains with the patient, and the timing,

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382. *Id.* at 133.

383. *Id.* at 195.

384. *Id.* at 179-80. "[I]n order to resolve her own doubts or conflicting feelings, the patient may sometimes try to reach premature closure on facts of the story. . . . Therapists, too, sometimes fall prey to the desire for certainty. Zealous conviction can all to easily replace an open inquiring attitude." *Id.* at 180.

pacing, and design of the sessions must be carefully planned so that the uncovering technique is integrated into the architecture of the psychotherapy."[385]

Mourning follows remembrance. At the same time, there will be substantial resistance to mourning. Mourning implies the admission of the existence of a loss. Anger, righteous indignation and fantasies of forgiveness are all ways to avoid mourning. Even the pursuit of compensation for the wrong done can stand in the way of the mourning process. In general, the actual pursuit of compensation is counter therapeutic. "The fantasy of compensation, like the fantasies of revenge and forgiveness, often become a formidable impediment to mourning."[386] Because of the unjust injuries inflicted upon her, the survivor of childhood sexual abuse naturally feels entitled to compensation. Some sort of quest for compensation may be integral to recovery. At this point, however, a paradox arises, for the actual demand for compensation may present a trap:

> Prolonged, fruitless struggles to wrest compensation from the perpetrator or from others [like insurance companies] may represent a defense against facing the full reality of what was lost. Mourning is the only way to give due honor to loss; there is no adequate compensation.
>
> The fantasy of compensation is often fueled by the desire for a victory over the perpetrator that erases the humiliation of the trauma. When the compensation fantasy is explored in detail, it usually includes psychological components that mean more to the patient than any material gain. The compensation may represent an acknowledgment of harm, an apology, or a public humiliation of the perpetrator. Though the fantasy is about empowerment, in reality the struggle for compensation ties the patient's fate to that of the perpetrator and holds her recovery hostage to his whims.[387] (A variant of the compensation fantasy seeks redress not only from the perpetrator but from real or symbolic bystanders [such as insurance companies].)[388]

Thus, according to Dr. Herman, a learned and sophisticated psychiatrist: repression is a natural and predictable response to childhood sexual trauma; recovered memories should be taken to be true only tentatively; recovered

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385. *Id.* at 186-87.
386. *Id.* at 190.
387. *Id.* at 190.
388. *Id.* at 191.

memories may always be gappy; and lawsuits based upon ancient sexual trauma may be a very bad idea therapeutically. A key point here is that repressed and then recovered memories have a epistemologically equivocal status. Should constitutionally incomplete memories be the foundation for tolling the statute of limitations? Should memories which are constitutionally (and fairly predictably) subject to subsequent revision be the foundation for tolling the statute of limitations? Of course, there are many more expansive and more dogmatic statements of the view that repressed memories can be relied upon. Some clinicians indeed, have described methods for determining which parts of memories are likely to be false.[389] Sweeping, black-and-white generalizations and polemical exaggerations should be worth less than a nuance in qualified view. Surely, because a theory is complex, it should not be discarded. This truth appears to have been recognized by both the American Psychiatric Association and the American Medical Association.

B. American Psychiatric Association

On December 12, 1993, the Board of Trustees of the American Psychiatric Association ("APA") issued a statement on recovered memories of sexual abuse.[390] The APA is concerned that public debate over child abuse and public concern of a false accusation will obscure the fact that there is a body of scientific evidence which underlies "widespread agreement among psychiatrists regarding [proper] psychiatric treatment [of victims of sexual misconduct]."[391] This body of scientific evidence establishes that "sexual abuse is a risk factor for many classes of psychiatric disorders, including anxiety disorders, affective disorders, dissociative disorders and personality disorders."[392] Moreover, scientific evidence supports the proposition that such memories can be repressed:

> Children and adolescents who have been abused cope with the trauma by using a variety of psychological mechanisms. In some instances, these coping mechanisms result in a lack of conscious awareness of the abuse for varying periods of time. Conscious thoughts and feelings stemming from the abuse may emerge at a later date.[393]

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389. *See generally*, LENORE TERR, UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES, LOST AND FOUND (1994).

390. *APA Board of Trustees' Statement on Memories of Sexual Abuse*, 42 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 261 (1994).

391. *Id.* at 261.

392. *Id.*

393. *Id.* at 262.

Unfortunately, according to the APA, this body of evidence does not show "how to distinguish, with complete accuracy, memories based on true events from those derived from other sources."[394] Memory is a complex process, and errors can seep in virtually at any stage of the process. Even persons who have experienced traumatic events may remember some pieces of the event falsely. Even though a person recounts a claim to memory or makes claims to memory which turn out to be inconsistent, a person may have suffered trauma in the general range of what is purportedly remembered. Moreover, the social milieu in which memory is recounted may influence memory itself:

> Memories can be significantly influenced by questioning, especially in young children. Memories can be significantly influenced by a trusted person (e.g., therapist, parent involved in a custody dispute) who suggests abuse as an explanation for symptoms/problems, despite initial lack of memory of such abuse. It has also been shown that repeated questioning may lead individuals to report "memories" of events that never occurred.[395]

Thus, there are false reports. It is not known what percentage of the reports of memories of sexual abuse are true. Corroboration is found, however, in many cases. Nevertheless, the absence of corroboration does not imply that a reported memory is false. At the same time, "there is no completely accurate way of determining the validity of reports in the absence of corroborating information."[396]

For various therapeutic and ethical reasons, psychiatrists should not prejudge reports of sexual abuse. They should "maintain an empathic, non-judgmental, neutral stance towards" such reports.[397] They should under no circumstances discount them, but they should not endorse them prematurely, encourage them, or exert pressure upon patients to believe anything or to disrupt important relationships prematurely.

It seems quite clear that the APA endorses the view that there are veridical reports of recovered memories of childhood sexual trauma. At the same time, there are no litmus tests for truth and falsehood.

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394. *Id.*
395. *Id.* at 263.
396. *Id.*
397. *Id.*

C. *American Medical Association*

In 1994, the Council on Scientific Affairs of the American Medical Association ("AMA") issued a *Report on Memories of Childhood Abuse*.[398] The Report states that the AMA adopted a new policy on recovered memories.[399] The central tenet of that new policy was this: "The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication."[400] Although this statement is much more hostile to recovered memories than the statement of the APA, the AMA regards itself as taking a middle course:

> At one extreme are those who argue that such repressed memories do not occur, that they are false memories, created memories, or implanted memories, while the other extreme strongly supports not only the concept of repressed memories but the possibility of recovering such memories in therapy. Other professionals believe that some memories may be false and others may be true.[401]

The AMA considers child abuse, including sexual abuse of children, to be an important problem, and those in professional positions should remain alert.[402] At the same time, the AMA is harshly critical of the use of amytal in attempting to recover memory, and it is also harshly critical of age regression as a method for obtaining truth.[403] The AMA is also skeptical of the role of therapists in developing "new memories."[404] "It is well established . . . that a trusted person such as a therapist can influence an individual's reports, which would include memories of abuse."[405] Sometimes it appears that therapists indicate to their patients that they may have been abused even when they deny having been abused.[406] The AMA goes on to say that there is research which demonstrates that repeated questions can induce a person to report events falsely.[407] "Unfortunately," says the AMA, "the dynamics that underlie an individual's suggestibility are only beginning to be understood."[408]

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398. 43 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 114 (1995).
399. *Id.*
400. *Id.* at 117.
401. *Id.* at 114.
402. *Id.* at 117.
403. *Id.* at 115.
404. *Id.* at 116.
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*

The AMA Report cites Dr. Judith Herman, whose work has just been discussed as well as Dr. Elizabeth Loftus, whose work will be discussed shortly. This is appropriate since the AMA wishes to take a middle course and acknowledge that "empirical evidence can be cited for both sides of the argument" as to whether there are reliable recovered memories.[409] At the same time, it is odd that the AMA would cite both Dr. Herman and Dr. Loftus, and in the same report blithely contend that lawsuits arising out of trials of sexual abuse may be a good idea from a therapeutic point of view.[410] This is odd because Dr. Herman specifically cautions against such a view, and Dr. Loftus, at least apparently, thinks that seldom are such lawsuits viable.

D. Academic Behavioralism and Recovered Memories

Dr. Elizabeth Loftus, a Ph.D. psychologist who has taught for many years at the University of Washington, has written a large number of technical papers on learning theory, reliability of sense perception, and memory. She has also appeared as an expert witness in a number of cases, often expressing skepticism about eyewitness testimony.[411] Dr. Loftus and Katherine Ketcham have together written an account of Dr. Loftus' forensic experiences.[412] It is not a critical account. For many years lawyers have found eyewitness testimony problematic,[413] and proven difficulties in eyewitness testimony have led to celebrated reversals of criminal convictions.[414]

In recent years Dr. Loftus has taken aim at testimony based on recovered memories. She has concerned herself specifically with whether repressed memories should toll statutes of limitations.[415] Dr. Loftus is *very* skeptical about

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409. *Id.*

410. *Id.*

411. *See generally* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979). This book contains several chapters on memory. *See also* Steven Penrod et al., *The Reliability of Eyewitness Testimony: A Psychological Perspective, in* THE PSYCHOLOGY OF THE COURTROOM 119 (Norbert L. Kerr & Robert M. Bray eds., 1982).

412. ELIZABETH F. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991).

413. Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

414. *See generally* WILLEM A. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY (1988) (Dr. Loftus figured in this case).

415. *See* Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129 (1993). Repressed memory cases should rarely be allowed to go forward because of dangers to the rights of defendants:

> Allowing repressed memories only under rare circumstances will surely mean that there will be some unredressed injuries resulting from long-ago child abuse, but, unless we want to jettison the Constitution, this is an inevitable cost. Just as surely, the problem of protecting

memory. Surely, it is fair to say that the critique of the reliability of recovered memories is a passion for Dr. Loftus. She and Katherine Ketcham wrote a second book together, *The Myth of Repressed Memory*.[416] Their book opens with a dedication "to the principles of science, which demand that any claim to 'truth' be accompanied by proof."[417] The dedication must be understood in the context of one of the acknowledgments. Dr. Loftus thanks various members of her family "who deserve enduring gratitude and affection for all they have taught her about the importance of protesting injustice."[418] It was her family who first introduced her to the writings of Elie Wiesel. "'There may be times when we are powerless to prevent injustice,' Wiesel wrote, 'but there must never be a time when we fail to protest.'"[419] The book makes it quite clear that these paeans are not mere "abstract principle." Dr. Loftus thinks that the use of recovered memory is nigh unto witchcraft, that it is an epistemic evil, and that its use is pernicious.[420]

Dr. Loftus' views parallel the opinion of Justice Hecht almost perfectly. Dr. Loftus acknowledges that sexual abuse of children exists and that it is injurious.[421] She also acknowledges that some recovered memories may be true.[422] At the same time she believes that she has experimental evidence which demonstrates that false memories can be implanted by various forms of suggestion and that these suggestions can implant "memories" of quite significant events.[423] These findings, she believes, are consistent with the fact that long term memory is not analogous to a cedar closet in which things stay put and stay the same once they are placed there.[424] According to Dr. Loftus, long term memory is dynamic and its contents malleable.[425] She concludes:

> today's children from horrendous abuse will not be successfully addressed by allowing the victims to bring forty-year old claims. Rather, efforts might be more productive if they were aimed at detecting the crimes as, or shortly after, they happen. *Id.* at 174.

416. ELIZABETH LOFTUS & KATHERINE KETCHAM, MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (1994) [hereinafter LOFTUS & KETCHAM, MYTH].

417. *Id.* at x. *See* James E. Beaver, *The Myth of Repressed Memory*, 86 J. CRIM. L. & CRIMINOLOGY 596 (1996) (book review) ("a most valuable book, a sound book, a courageous book." *Id.* at 605).

418. LOFTUS & KETCHAM, MYTH, *supra* note 416, at x.

419. *Id.*

420. *See generally id.*

421. Maryanne Garry & Elizabeth F. Loftus, *Pseudomemories Without Hypnosis*, 42 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 363, 365 (1994).

422. *Id.*

423. *Id.* at 374-75.

424. *Id.* at 367.

425. *Id.*

> Certainly we must accept the reality of childhood traumas that can be highly damaging. But we should also accept the reality of false memories of childhood. That is one lesson to take home from a century of research on memory distortion . . . . We would all be better off if we faced the hard truth which is that, at the moment, we do not have the means for reliably distinguishing true memories about the past from false ones. We cannot get to the truth about the past by remembering alone. Until we can, it seems prudent to be cautious about how one goes about piercing some presumed amnesic barrier.[426]

Dr. Loftus thinks that this truth puts psychotherapists in a particularly difficult situation. On the one hand, therapists must recognize the importance of actual trauma, and they must be open to the possibility of exotic sources of injury. On the other hand, they should not find childhood trauma which is not there, and they should not suggest it to their clients when it is non-existent.[427]

Dr. Loftus believes that many psychotherapists have gone badly wrong in trying to deal with this dilemma. On the one side, she puts what she calls the "'True Believers' who insist that the mind is capable of repressing memories and who accept without reservation or question the authenticity of recovered memories."[428] On the other side, she places the "Skeptics" who insist that "the notion of repression is purely hypothetical and essentially untestable, based as it is on unsubstantiated speculation and anecdotes that are impossible to confirm or deny."[429] Dr. Loftus describes herself as belonging with the skeptics but sympathetic to the true believers.[430] According to Dr. Loftus, psychoanalysis and its progeny conceptualize repression as emotion blocking memory.[431] Freud proposed that repression was a defense mechanism, and many psychiatrists and clinicians have utilized the concept, but there is hardly any research supporting its existence.[432] Strangely, this is true even though there is almost universal agreement among depth psychologists that repression exists and even though the concept is hardly ever discussed in textbooks written by experimental psychologists on memory.[433] More significantly, according to Dr. Loftus, there is no evidence whatsoever to support the idea that memories of extremely significant events are more reliable than other memories. According to Loftus,

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426. *Id.* at 375.
427. *Id.*
428. LOFTUS & KETCHAM, MYTH, *supra* note 416, at 31.
429. *Id.*
430. *Id.* at 32.
431. *Id.* at 49.
432. *Id.*
433. *Id.*

in fact, her experimental work tends to suggest that stress and trauma have a distortive effect on memory.[434]

In her more cautious technical papers, published in professional journals, Dr. Loftus appears to concede that some recovered memories may be true. In *The Myth of Repressed Memory*, she and Katherine Ketcham appear to doubt that there is such a thing as repressed memory of childhood trauma:

> Many tortured individuals live for years with the dark secret of their abusive past and only find the courage to discuss their childhood traumas in the supportive and empathic environment of therapy. We are not disputing those memories. We are only questioning the memories commonly referred to as "repressed"—memories that did not exist until someone went looking for them.[435]

It is extremely difficult to understand, given Dr. Loftus' research on the unreliability of memory, why she would not question memories of childhood events which have been kept secret, which are stressful and which one turns over and over in one's mind. Her general approach to memory suggests that all such memories are suspect. In any case, Dr. Loftus is quite clearly doubting all repressed (so-called) memories.

In many ways, what is most interesting about Dr. Loftus' work on repressed memories is her critique of clinical sloppiness in digging for those memories. She is harshly critical of a number of claims: that incest is epidemic, that repression is widespread, that suggestive techniques are a reliable route to the recovery of memories, that short lists of vague symptoms are reliable indicators of abuse, and so forth.[436] Dr. Loftus is also critical of many specific techniques which abuse therapists use including the analysis of dreams, the use of free association, the use of journals, the use of so-called "body work," the use of hypnosis, the use of art therapy and so forth.[437]

Of course, Dr. Loftus has a point. Therapists who put extreme pressure on disturbed people to see the world in a certain way are very much like characters in Arthur Miller's *The Crucible*, just as Dr. Loftus suggests. Psychotherapy run amok—especially if it relies upon group processes—can

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434. *Id.* at 57. Several dramatic experiments establish this proposition. In 1986, shortly after the explosion of the space shuttle *Challenger*, subjects were asked to write down their recollections. They were asked to do the same thing three years later. Their recollections were often quite different. *Id.* at 91-92. In another experiment, children who attended a school where a sniper repeatedly shot at children on a given day were asked to show their recollections. Children who were not present reported that they were and reported vivid recollections. Garry & Loftus, *supra* note 421, at 373. Dr. Loftus has apparently even experimentally introduced false memories into small children. *Id.* at 374-75.

435. LOFTUS & KETCHAM, MYTH, *supra* note 416, at 141.

436. *Id.*

437. *Id.* at 150-56.

resemble totalitarian thought-reform. Therapists who believe that writing in journals with a non-dominant hand is a sure route to the truth are fools, just as Dr. Loftus implies.[438] Obviously, their testimony should not be admitted into court any more than the allegedly clairvoyant or mystified testimony of a psychologist who claims also to be a psychic or one who claims to base her conclusions on witchcraft.[439]

Dr. Loftus simply cannot have it both ways, however. Either psychiatric practice is making the world worse off, as she implies at one point,[440] or skilled and sensitive therapists working with traumatized children are heroes of the culture.[441] It seems probable that Dr. Loftus' true view is that full-fledged, robust repression is a myth and that the recovery of repressed memory is an illusion. (If there are no robustly repressed memories, then none can be recovered.) If this is Dr. Loftus' view, its derivation is just as fallacious as any view she criticizes. She would have to infer that because some techniques for the recovery of memory are suggestive, all of them are. She would have to conclude that because some reports of repressed memories are false, all of them are. She would have to conclude that because that no theoretically satisfactory account of the nature of repression has been produced, the mechanism does not exist. When these patterns of inference are exposed structurally, they are obviously fallacious.[442]

E. The Critique of "Robust Repression"

Justice Hecht also relies upon the work of Dr. Richard J. Ofshe, a full professor of social psychology at the University of California at Berkeley. He has written at length on methods of coercion, and in 1979 he was a co-recipient of a Pulitzer Prize for Public Service Broadcasting. Dr. Ofshe follows Dr. Loftus in criticizing the techniques used by clinicians who search for repressed memories. Indeed, he goes further and argues that such clinicians "teach" their patients to classify mental states as memories[443] when there is no good reason for doing so.

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438. *Id.* at 160-62.

439. *See, e.g.*, JUDITH ORLOFF, SECOND SIGHT (1996).

440. LOFTUS & KETCHAM, MYTH, *supra* note 416, at 1.

441. *Id.* at 141. "We are not expressing reservations about the skills and talents of therapists who work hard, with compassion and great care, to elicit memories that for many years were too painful to put into words." *Id.*

442. The argument is no less fallacious if Dr. Loftus is merely arguing that no recovered memory is ever reliable if its having been forgotten results from repression. There is no inductive argument strong enough to support this view.

443. Richard J. Ofshe & Margaret Thayer Singer, *Recovered-Memory Therapy and Robust Repression; Influence and Pseudomemories*, 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 396 (1994).

Moreover, according to Ofshe the idea of repression as contemporarily used is quite different from the idea as it was used in the analytic tradition and as it was described even in the *DSM-IV*.[444] The new idea, "robust repression," pictures people as losing "the ability to retrieve knowledge of major life events, extremely long series of traumatic events, and immensely complicated patterns of social behavior."[445] Events which might be repressed would include such things as a lengthy, several year long involvement in complex misconduct (such as a sex ring, or a satanic ritual group). According to Ofshe, there is absolutely no empirical evidence whatever for the existence of robust repression.

Dr. Ofshe has spelled out his ideas at length in *Making Monsters*.[446] But Dr. Loftus is concerned about the use of repressed memory claims in litigation, because the area is so highly volatile. (Dr. Loftus described it as an area in which one is guilty until proven innocent.) According to Dr. Ofshe, those who engage in the practice of uncovering repressed memories are nothing more than faddists who "have created an Alice-in-Wonderland world in which opinion, metaphor, and ideological preference substitute for objective evidence."[447] It is a world in which neither the scientific method nor sound research have any place. In short, Dr. Ofshe believes that recovered memories are nothing more than pseudomemories.[448] He believes that there is "sufficient evidence—within the [recovered memory] therapists' own accounts of their techniques—to show that a significant cadre of poorly trained, overzealous, or ideologically driven psychotherapists have pursued a series of pseudoscientific notions that have ultimately damaged the patients who have come to them for help."[449] Indeed,

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444. *Id.* at 394.

445. *Id.*

446. "This work is intended as an exposé of a pseudoscientific enterprise that is damaging the lives of people in need." OFSHE & WATTERS, *supra* note 24, at ix. Justice Hecht does not cite this book, but it is the closest and most comprehensive exposition of Dr. Ofshe's views.

447. OFSHE & WATTERS, *supra* note 24, at 5.

448. The debate over the reality of repression and recovered memory has excited absurdly strident comments. "Recovered memories of childhood sexual abuse arguably are one of the most embarrassing mistakes ever made in the course of modern psychotherapy." Richmond, *supra* note 8, at 521. There are a variety of theories about how repression works. Because the science is not settled, one author is concerned about admissibility of testimony, the memory of which has been repressed:

> Yet an open, rational discussion of the reliability of repressed memories must take place. Comprehensive research into the phenomenon must accompany dispassionate social discourse on what we will permit in the courtroom, for trials founded on confabulated memories do not solve the grave problem of child abuse. Instead, they will lead only to a public backlash against those who have genuinely been abused. It is for the real victims of abuse, as much as it is for innocent defendants, that the hysteria over repressed memories must subside, and be replaced with healthy skepticism and rational inquiry.

See Murray, *supra* note 8, at 522. So, should testimony about events ever be admissible when it has been repressed for a time?

449. OFSHE & WATTERS, *supra* note 24, at 5-6.

given that these "clinicians" focus on sex, if their treatments are invalid and unnecessary, then at least "some recovered memory therapists perhaps deserve recognition as a new class of sexual predator."[450]

Significantly, Dr. Ofshe recognizes that he is not merely attacking repressed memory clinicians. He is critical of all psychotherapy, indeed, all talk-therapies. From the beginning, they have all made the same series of mistakes. These errors:

> include the presumption that psychotherapy increases clients' accurate knowledge of their pasts, the belief that therapists can trace the etiology of a given behavior to its true source, and their stubborn insistence that patients, at the beginning of treatment, have only a minimal understanding of their true selves and their true pasts. Recovered memory therapy has emerged out of a tradition of treatment that is filled with fatal flaws—but flaws left unexposed because results, up to now, have been largely benign.[451]

Like Dr. Loftus, Dr. Ofshe attacks the static theory of long-term memory. Instead, he says that long-term memories deteriorate, disappear, and drift. Memory, in other words, is dynamic. Thus, the recovery of long-term memory is not like bobbing for apples, it is much more like putting together a picture puzzle. Also, like Dr. Loftus, he attacks the existence of the mechanism of repression. His attack on robust repression has already been considered. He is also dissatisfied with the definitions and conceptualizations of repression which have been offered up until now, and he wonders why it is that we are "the first generation to notice that people can repress often-repeated trauma so completely as to have no knowledge that they experienced a life filled with horror and brutality?"[452] Finally, apparently unlike Dr. Loftus (at least in print), Dr. Ofshe attacks the idea of etiological therapy upon the grounds that it assumes meaningful causal relationships can be established between sets of events which happened long ago and current behavior.[453] Again unlike Dr. Loftus, Dr. Ofshe says he is skeptical of psychotherapy because it presupposes a romantic view of life which, in turn, creates a mythic sense that the patient-client is on a quest or extraordinary journey and that life is actually larger than life. In general, sound meta-theories about talk-therapy must draw a distinction between historic truth and narrative truth. The proposition is true historically when it corresponds to the world. A proposition possesses narrative truth when it helps someone make

450. *Id.* at 7.
451. *Id.* at 8.
452. *Id.* at 36.
453. *Id.* at 50 (discussing Samuel Guze's dismissal of etiological therapy).

sense of the world, even if it is literally (historically) false. Narrative truth is a creature of literature. Its habitat is the realm of aesthetics. It may be quite valuable and, in the end, quite helpful therapeutically.[454]

Professor Ofshe's critique of recovered memory is radical both in its breadth and in its depth. Looking backwards from symptoms to causes is virtually impossible in a part of life as complex as this one. Moreover, he implies the therapists who advocate for recovered memory are irresponsible and make reliable inference more difficult. It is simply impossible, says Ofshe, that every recovered-memory of abuse must be believed. Some of them are simply not worthy of belief. Some of them involve massive conspiracies including the CIA. Some of them involve allegations of witchcraft. Yet others involve alleged experiences of previous lives. Moreover, the mechanism by means of which many of these so-called memories are recovered are suspect. People in need make a heavy investment in counselors. They depend on them. Often the success of a therapy depends, to some degree, on having faith in the therapist. All of this gives the therapist power. If the therapist advocates a proposition, a patient may be inclined to believe it. Moreover, some therapists advocate group therapy as a way to form a surrogate family. These surrogate families lack the thick texture of real family, but they can tend towards authoritarian thought control.[455]

In general, Professor Ofshe regards those who advocate the reliability of recovered memories of abuse with both disdain and contempt. He is disdainful of them because they are not particularly objective, much less scientific. He is contemptuous of them because they are disingenuous. It cannot be that all persons with recovered memory have a right to their belief, unless those who deny committing abuse have exactly the same epistemological latitude. Moreover, Ofshe cites several significant cases in which leading proponents of recovered memory have participated in securing adjudications which Professor Ofshe regards as unjust.

F. Clinical Behavioralism and Repressed Memories

Justice Hecht also relies upon the work of Michael D. Yapko, a Ph.D.-level clinical psychologist and marriage-family therapist in private clinical practice. Formerly, Dr. Yapko wrote a self-help book entitled *When Living Hurts*.[456] He also took up the issue of repressed memory in *Suggestions of*

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454. As already discussed, Justice Gonzalez utilizes this distinction in his concurring opinion and all lawyers would agree that verdicts and judgments should not be based upon narrative truth but upon historic truth only.

455. OFSHE & WATTERS, *supra* note 24, at 114-17.

456. MICHAEL D. YAPKO, WHEN LIVING HURTS: DIRECTIVES FOR TREATING DEPRESSION (1988).

Abuse.[457] In general, Dr. Yapko's orientation is that of the pragmatic clinical psychologist. He is scornful of Freudian psychoanalytic theory, and there is no indication that he is more charitably inclined towards a similar approach to psychology or psychotherapy.

Dr. Yapko believes that childhood sexual abuse is widespread, but he argues that the role of repression is not clear in the aftermath of abuse. Yapko finds it necessary to distinguish among the following four situations:

(1) those cases in which someone knows *and has known all along* that he or she was abused from
(2) those cases in which someone independently remembers repressed memories from
(3) those cases in which a therapist facilitates recall of repressed memories from
(4) those cases in which a therapist *suggests* memories of abuse.[458]

Dr. Yapko says that he is interested only in cases in the fourth category, although it is entirely unclear how Dr. Yapko would distinguish between categories (3) and (4). Facilitating recall and suggesting what might be subject to recall are only a hair's breadth apart.

Dr. Yapko defines repression as psychologically motivated forgetting. He describes it as a classic defense mechanism and concludes that "the wealth of cumulative clinical experience suggests that [repression exists]."[459] At the same time, Dr. Yapko points out that repression is highly controversial in the mental health care community. Not only do some doubt its existence, but it appears likely that "[r]epression clouds our understanding regarding memories of abuse [and] little is known about its effect on the accuracy of memory."[460] "There is no scientific evidence whether memories which surface after years of being repressed are authentic or inauthentic. It is a legitimate concern to wonder how we can objectively tell when repression is in force in a client's life. Symptoms alone are not evidence."[461] "It remains unclear whether repressed memories of abuse are likely to be more or less accurate than memories of trauma that were never repressed."[462]

Memories recovered from repression are made suspect by a number of factors. Therapists have a good deal of influence over their clients. If the therapists believe something, they can often nudge clients towards believing it

457. MICHAEL D. YAPKO, SUGGESTIONS OF ABUSE, *supra* note 23.
458. *Id.* at 31.
459. *Id.* at 52.
460. *Id.* at 41.
461. *Id.* at 85-86.
462. *Id.* at 175-76.

too. Some of the methods therapists use are inherently unreliable. Hypnotism is like this.[463] Moreover, clients of therapists in some stressful situations are more likely to confabulate than they are in other situations. Dr. Yapko claims that he has data which suggests that accusations made in the context of divorce cases—as R.'s accusation against S. was made—tend to be less accurate than other such accusations.[464] Further, sometimes people are tempted to make accusations which turn out to be false. Sometimes, for example, the cluster of symptoms will make sense if you hypothesize abuse. Thus, accusing a parent of sexual abuse appears to be, and sometimes is in the short run, a route to getting better. Sometimes, perhaps, accusations of sexual abuse are a way of dealing with an even more threatening problem. "It's easier to have an identified 'bad guy' in your life, whether or not he or she is actually guilty."[465] Sometimes clients succumb to the pressure of a group to believe that they have been abused and to make an accusation. Sometimes people want revenge. Dr. Yapko is particularly concerned about accusations of revenge in the face of some indication that there is a trend towards recanting:

> An unspecified percentage of people who were defined [in a 1985 study conducted by the United States National Center on Child Abuse and Neglect] as abuse survivors on the basis of recovering repressed memories are now retracting their accusations. (In fact, two such recanters have formed an association for others like them and publish a newsletter called *The Retractor.*)[466]

But if accusations of abuse are not always truthful and to be believed, then how can one tell the difference between true ones and false ones. The clarity and detail of the memory, says Dr. Yapko, do not, even together, guarantee their truth.[467] (Of course, R.'s three witnesses relied heavily upon the clarity and details of R.'s memories.) It is unknown whether trauma makes memory clearer or less clear. There is evidence both ways, according to Dr. Yapko.[468] Projections distort memory. This is true both in fantasy projections of the client and the projections of the therapist who is leading the way. Moreover, according to Yapko, none of the methods therapists use to recover memories are reliable. Free flow, free association, and the like, for example, may be more reliable than direct questioning.[469] But, in the absence of outside objective evidence, it is

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463. *Id.* at 56-59 (discussing therapists' attitudes and beliefs about the validity of hypnosis).
464. *Id.* at 159.
465. *Id.* at 151.
466. *Id.* at 157-58.
467. *Id.* at 80.
468. *Id.* at 161.
469. *Id.* at 162.

simply not possible to be sure that a mental state which presents itself as a memory, albeit a recovered memory, is not simply a fantasy. "Doubt and ambiguity are nearly inevitable when repressed memories are involved."[470]

Another factor which inclines Dr. Yapko to the view that it is virtually impossible to determine the truth of allegedly recovered memories is his evaluation of the contemporary social order. We live in a culture of blame, he says. We live in a culture where we would like to place responsibility for the unfortunate portions of our lives on someone else. Some therapists facilitate this transfer. If a patient can make himself out to be a complete victim of overpowering forces much beyond his control, like "Daddy," then a patient can get the "monkey" off his own back. According to Yapko, this cultural climate invites stories of repressed memories of abuse "by encouraging individuals to believe they are entitled to whatever they want, however unrealistic or irresponsible. We are encouraged to lay the blame elsewhere when we are disappointed."[471] Dr. Yapko suggests that a permissive culture, a pro-plaintiff legal system, an educational system which permits all less-than-perfect people to see themselves as victims, and a (mental) health system which permits all partial victims to see themselves as completely innocent, encourages false charges and pollutes the therapeutic order.[472]

IV. Evaluation of *S.V.*

According to *S.V.*, all torts are to be treated the same for statute of limitations purposes. Texas is not to select some torts for special treatment and make it easier to suspend the statute of limitations within. The majority suggests that that is exactly what the lone dissenter, Justice Owen, wants to do. Instead, the statute of limitations for torts will be suspended as a result of the discovery rule only if a wrongful act and an injury can be objectively verified.

It is unclear what the phrase "objective verification" means. The word "objective" has at least three meanings. First, objective can be the opposite of subjective. Something is subjective when it is a matter of taste. I like eggs and you don't. Michael likes moist carrot cake, while Paula can't stand the thought of it. And so on. On this account, any proposition which is not a mere matter of taste is objective. In this sense, some propositions are objectively true, while some are objectively false. Subjective propositions are not true or false. They are simply expressions of approval or disapproval, as in "Eggs. Hurrah!" or "Carrot cake. Yuck!" Justice Hecht cares about the true ones.

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470. *Id.*
471. *Id.* at 142.
472. *Id.*

Second, "objective" is the opposite of "subjective," in the sense that anything which is about the mind is subjective, so that the proposition is objective only if it is about something other than the contents of a mind. In general, objective propositions will be those which are about the external world. Usually, the phrase "the external world" refers to physical reality, although it need not. (God is not physical, but if He exists, He is part of the external world.) In the second sense of objective, some propositions are objectively true, while some are objectively false. Subjective propositions are also either true or false. If you try to describe the content of my mind and get it wrong, then what you said is not true. On the other hand, if you correctly describe my mental states, then what you've said is true. Notice that many objective propositions, in the second sense of "objective" may be true but not provable. They may be true, but they are also such that there is no evidence available to establish them. Similarly, many objective propositions may be false, although there is no evidence available to establish their falsity. Interestingly, in the second sense of "objective," the proposition may be subjective and yet susceptible of being proved either true or false. There may or may not be evidence available to prove the truth (or falsity) of a subjective proposition. In the second sense of "objective," the availability of evidence has nothing whatsoever to do with the status of the proposition.

In the third sense of "objective," the proposition is objective only if it is provable. What the proposition is about is irrelevant. If there is an available body of evidence which can be invoked to demonstrate that a proposition is true or false - irrespective of what the proposition is about - then the proposition is objective. If there is no evidence on the basis of which the truth or falsity of the proposition can be proved, then the proposition is not objective, no matter what it is about. Obviously, only the third sense of "objective," matters from the point of view of the rule in *Altai*, and hence the rule is *S. V.*

In our world, as it exists now, recovered memory psychology is not objective in the third sense, Justice Hecht implies. Recovered memory psychology is unreliable, according to Justice Hecht. There is a consensus that it is controversial. The "truths" it urges are passionately disputed. And some exponents of recovered memory psychology say outlandish things. So much for Justice Hecht's view. Is he right? This question involves three components. First, do the sources upon which he relies sustain his critique of recovered memory psychology? Second, is there any way to conceptualize the evidence in *S. V.* in such a way as to find objective verification? Third, is the rule in *Altai* and *S. V.* the right one?

A. Justice Hecht's Use of Nonlegal Authority

Although Justice Hecht cites a number of sources, he relies particularly upon reports from the American Psychiatric Association and the American

Medical Association, together with the product of three scholars: Elizabeth Loftus, Richard Ofshe, and Michael Yapko. Each of these sources of authority express some skepticism about uncritical reliance upon reports of recovered memory. Michael Yapko, however, admits that there is such a thing as repression and does not deny that some reports of recovered memory may be true. He claims that one can never know for sure, but he appears to concede that some claims are more probable than others. The APA and AMA reports are similarly tentative, although the AMA report is slightly more skeptical than the APA report. Professors Loftus and Ofshe, in contrast, are both extremely skeptical of all recovered memory reports. Both of them appear to be skeptical of the hypothesis that there is such a thing as the unconscious mind, and it is certain that neither of them thinks that the unconscious is a pristine repository of memory images, which can be counted on not to distort them.[473]

All of the sources are, to one degree or another, critical of sloppy psychologists who uncritically accept all reports of recovered memories. Supportive psychotherapy may require that a clinician not express skepticism towards some ideas of some clients. That does not make those ideas true, and the supportive dimension of psychotherapy diminishes, or at least limits, its value as a scientific enterprise. Professional comforters may not be operating as engines for the production of truth.

In the end, the critique of recovered memory psychology provided by both Professor Loftus and Professor Ofshe is inconclusive. The fact that some psychologists are irresponsible does not imply that all reports of recovered memories are false. The fact that some therapists use unreliable methods does not prove that all methods are unreliable. The fact that there is enduring controversy about talk-therapy does not imply that talk-therapy is worthless. After all, it has a century-long tradition behind it. It is an integral part of American and European cultures, as well as many other cultures, and it should not be despised—when done responsibly—as a source of information for law courts. Psychiatric and psychological testimony are routinely admitted, even in criminal cases. Indeed, Justice Hecht tried to suggest that his sole concern is whether recovered memory psychology can establish objective verification for recovered memories and not whether recovered memory psychology is admissible on some other point. (At the same time, as argued herein, the logical

473. As indicated, Professor Ofshe is also skeptical of the vast number of recovered memories which have come to the floor only now. He wonders why it is that we would be the first generation ever to have noticed the prevalence of so much child abuse. To some extent, the answer lies in the sociology of our times. Probably, Professor Ofshe and his cohorts are in a minority when they doubt the existence of unconscious mental states. That has not always been true. Moreover, almost anything can be discussed, nowadays even in public. This includes sexual matters, even scandalous sexual matters. Hence, it's not that we're the first generation ever to have noticed it. We're simply the first generation where people have been willing to talk about it in relatively public places.

structure of his critique, together with its forceful presentation, suggests that the evidence does not meet the requirement of the rule in *Daubert-Kelly-Robinson-Hanna.*)

In the end, three out of the five sources Justice Hecht most relies upon concede two important points: (1) repression exists, and (2) some recovered memories may be true. The skepticism of those three sources is devoted solely to whether one can be sure that a given recovered memory is true. The other two sources do not clearly, unmistakably and in-so-many-words deny the existence of repression or the claim that some recovered memories might be true. They hint at it. They don't like the practices of recovered-memory psychologists, and they spit on their rhetoric. However, they do not expressly deny that they might be right sometimes.

B. S.V.'s Reasoning

The thrust of the decision in *S.V.* was that R.'s symptoms are consistent with sexual abuse, that psychological testing administered to both R. and S. gave results consistent with sexual abuse, that R. presented vivid, detailed and consistent memories of sexual abuse, and that R. suffered from Post Traumatic Stress Disorder. At the same time, R. had been subjected to therapy by her first therapist which was clearly, and over time more and more energetically, directed towards uncovering memories of sexual abuse. Her first therapy, therefore, suffered from confirmatory bias, and her first therapist may have been a true believer. She remarked at the trial, after all, that accusations of childhood sexual abuse are always to be believed.

At the same time, R.'s second therapist, a physician-psychiatrist and a Ph.D. in psychology, likewise hypothesized that R. had suffered injury at the hands of S. He testified that "R. did not appear to be the sort of person who was highly suggestible or who could be brain washed."[474] The third psychologist, hired solely for forensic purposes, confirmed this view.[475] The second psychologist acknowledged that a patient can sometimes have false memories, and he acknowledged that he was not absolutely certain that R. was telling the truth. At the same time, for various clinical reasons he believed R.'s account. This psychologist was both well trained and objective.

Thus, the second clinician who said nothing outlandish at all, and who cannot be grouped with the pseudoscientists and near-lunatics, Drs. Loftus and Ofshe criticized, made a diagnosis. He is a physician, so one would suppose that his diagnosis is, in some sense, a medical diagnosis. Such diagnoses often involve craft, intuition, hunch, and ultimately judgment. Medical diagnoses are

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474. *S.V.*, 933 S.W.2d at 13.
475. *Id.*

hardly ever algorithmic. Thus, given the now current requirement governing the admissibility of scientific testimony, if a testimony of R.'s psychiatrist cannot qualify as some objective verification, then it shouldn't be admissible in evidence, ever.

This very radical conclusion appears to have dawned on Justice Gonzalez when he concurred in the court's order overruling R.'s application for rehearing. Most psychiatric diagnoses flaut the *Daubert-Robinson* test. But if this is true, then all sorts of procedures will have to be changed radically. These will include insanity hearings in criminal cases, commitment hearings in lunacy proceedings, psychiatric testimony in sexual harassment cases, psychiatric testimony designed to prove pain and suffering in bodily injury cases, and so forth.

C. *Objective Verification: Is it the Right Rule?*

The rule in *Altai* requires objective verification of injury in order to toll the statute of limitations. The rule in *S. V.* requires the objective verification of both the injury and the unlawful act. Probably, the full rule which is still only incipient in Texas common law, would require objective verification of delict, injury *and* causal nexus. (Hardly anyone seems to doubt the idea that if serious sexual abuse takes place then there will be some injury. However, some have recognized that this may depend on the seriousness of the abuse, the age of the child, and the extent of consent.)[476] Is this evolving rule the standard as a matter of normative public policy?

Of course this question is complicated by the equivocation upon the term "objective" which is inherent in the majority opinion in *S. V.* Suppose the rule requires the strongest sense of "objective" so that a nonculpable absence of knowledge on the part of the plaintiff will not suspend the statute of limitations, unless there is external evidence of bad act, injury, and causal nexus to the mind, not dependent on the plaintiff's memory or any other state of consciousness and not dependent on any chain of interpretive reasoning by anyone. There is something suspect about the discovery rule understood in this way. It gets rid of too much. It forbids lawsuits which do not violate the normative policies underlying the statute of limitations. The problem inheres in the arbitrariness of statutes of limitation. Of course, all statutes of limitation are arbitrary. In essence, a statute of limitations, precisely because it is a bright-line rule, will permit a claim to go forward because it's filed on Thursday and deny the claim that's filed on Friday. But, the *objective verification* component of the discovery rule understood in the strong sense, creates even more arbitrariness. A person who files a sexual abuse claim on Friday may go forward if there are ancient

476. *See generally* PHILIP JENKINS, PEDOPHILES AND PRIESTS 83-84 (1996) (discussing changing social considerations of prevalence and severity of pedophilia within different eras during this century).

hospital records, or if a teacher can remember what the victim told her ten or fifteen years before, but not otherwise, even if a very respectable clinical psychologist, who is also a physician, endorses the plaintiff's view. Of course, since arbitrariness surrounds all statutes of limitation, the mere fact that a little more arbitrariness has been added to the stew is not necessarily a dispositive consideration. After all, the discovery rule still permits more claims than would be permitted without a discovery rule, and there is no proposition of jurisprudence, constitutional or otherwise, which requires that the harsh effects of statutes of limitation be mitigated by discovery rules.

On the other hand, suppose that there had been no recovered-memory craze. Suppose that this (trendy) social phenomenon had simply never happened. Imagine a world to be just as it is, absent approximately three and one half shelves of self-help books in all large bookstores, all devoted to recognizing and recovering from incest. If R. had brought her lawsuit in that world, it seems extremely unlikely that the Supreme Court would bar the use of the discovery rule when R.'s theory that she had been abused, that she had repressed the memory and that it was now recovered, receives support from a reputable physician-psychologist. It seems likely that R.'s lawsuit would be permitted to go forward.

Now imagine a world, substantially similar to our own, with one major difference. It does not view itself awash in lawsuits. It does not contain political movements loudly proclaiming that the social fabric is being threatened by illegitimate claims.[477] In that world, it seems extremely likely that R.'s testimony plus the endorsement of the second expert would get her the advantage of the discovery rule.

But if these two thought-experiments produce true conclusions, then R. is being denied access to the court for reasons other than deficiencies in her claim. She is being denied access to the courts in order that the jurisprudence of Texas may be fashioned so as to discourage other claims. Her claim may not need to be deterred, but others do, so R. may not have recovery. In the language of Kantian ethics, a jurisprudence founded on this kind of move is immoral. It fails to treat R. as an end in herself, as a human being with inherent dignity, as opposed to a pawn in some grand game of public policy, and this no one may do. When a Kantian moralist says, "*no one* may do something," that scripture would include an official, a government, a branch of government, and a court.

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477. For an exposition of this view *see generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) and WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).

V. Conclusion

Courts around the country have struggled to determine the proper relationship between childhood sexual abuse, repressed memories, and statute of limitations. One court thought it possible that persons suffering from repressed memory might be of unsound mind and for that reason toll the statute of limitations.[478] Another court held, as a matter of law, that post-traumatic stress disorder did not add up to unsoundness of mind for the purpose of tolling the statute of limitations.[479] One state has created a special statute of limitations for incest, but has declined to utilize that statute for claims of sexual abuse against others such as priests.[480] One state held that flashback memories of sexual abuse by a father were enough to toll the statute of limitations.[481] Another state has specifically rejected the rule that statutes of limitation will be suspended only if there is independent cooperative evidence for the child's memory, a rule which is very close to the Texas rule.[482]

A number of these cases have avoided jurisprudential discussion of tolling the statute of limitations for many, many years. The Supreme Court of Ohio dealt with the problem head on, however in *Ault v. Jasko*.[483] The court was sharply divided. Not only did two judges dissent, but two judges concurred.[484] Sweeney, J. wrote for the majority.[485] He concluded that tolling the statute of limitations does not require physical evidence and that it may be done on the basis of expert psychiatric testimony.[486] He wrote that the Ohio Tolling Rule "will not cause defendants undue prejudice, as plaintiffs still bear the burden of proving their claims."[487] Moreover, Judge Sweeney observed that "defendants will be able to present expert testimony to rebut testimony offered by plaintiffs."[488] Finally, he thought that the "application of the discovery rule is fair to defendants in light of the hardship that would be visited upon plaintiffs by refusing them a remedy for an injury they were unaware existed until after the expiration of the statute of limitations."[489] If *S.V.* is problematic, *Ault* is also troublesome. Justice Sweeney's fairness argument seems particularly

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478. Kelly v. Marcantonio, 678 A.2d 873, 879 (R.I. 1996).

479. *See* Florez v. Sargeant, 917 P.2d. 250 (Ariz. 1996); *cf.* Lemmerman v. Fealk, 534 N.W.2d 695 (Mich. 1995) (stating that repression of memory is not insanity for the purpose of tolling the statute of limitations).

480. Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 788 (Wis. 1995).

481. Claus v. Whyle, 526 N.W.2d 519 (Iowa 1994).

482. McCollum v. D'Arcy, 638 A.2d 797, 799 (N.H. 1994).

483. 637 N.E.2d 870 (Ohio 1994).

484. *Id.*

485. *Id.*

486. *Id.* at 872.

487. *Id.*

488. *Id.*

489. *Id.* at 872-73.

problematic. He appears to argue that because it would be unfair to the plaintiffs to apply the discovery rule rigidly, it must therefore be fair to the defendants that it be tolled because of repression. This argument of course, is a howling *non sequitur.*

The intellectual world is substantially polarized on the topic of repression. The concept itself is subject to serious critique.[490] Daniel L. Schacter, a Professor of Psychology at Harvard University and a recognized expert on memory, recently wrote a graceful, tentative, and generous book, which included a consideration of the topic of repressed memories of sexual abuse.[491] Dr. Schacter makes a number of very important points. First, he believes that there have unquestionably been cases of repressed memories regarding sexual abuse.[492] However, there is little known about those cases, from a scientific point of view, or about the phenomenon in general.[493] Second, a remarkable number of recovered memories of sexual abuse involve so-called satanic rituals such as blood sacrifice, cannibalism, naming, and the like.[494] Unfortunately, although thousands of patients have "remembered" these types of acts, "not a single such case has ever been documented in the United States despite extensive investigative efforts by state and federal law enforcement."[495] Third, Dr. Schacter doubts that human beings have the ability to deploy amnesia as a way of dealing with repeated acts of brutality.[496] Moreover, since most of these "memories" are uncovered only after therapy is begun, it seems likely that therapy has something to do with these "memories."[497] Fourth, a "growing number of people are retracting their memories, but that does not necessarily mean that all their memories are illusory."[498] After all, the retractions may be defective.[499] The relationship between recantations and changes in therapeutic technique is completely unclear. Although therapy may have something to do with the occurrence of "memories" of satanic abuse, there is no good evidence either that various therapeutic techniques create these memories or aid in the retrieval of repressed memories.[500] "Few times in the history of psychology or

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490. REPRESSION AND DISSOCIATION: IMPLICATIONS FOR PERSONALITY THEORY, PSYCHOPATHOLOGY, AND HEALTH (Jerome L. Singer, ed., 1990).

491. DANIEL L. SCHACTER, SEARCHING FOR MEMORY: THE BRAIN, THE MIND, AND THE PAST (1996).

492. *Id.* at 252.

493. *Id.* at 267 ("The current state of scientific evidence concerning the accuracy of recovered memories of childhood sexual abuse can be summarized easily: there are a few well-documented cases, but little scientifically credible information is available.").

494. *Id.* at 268.

495. *Id.* at 269.

496. *Id.*

497. *Id.*

498. *Id.* at 270.

499. *Id.*

500. *Id.* at 272.

psychiatry has the ratio of data to impassioned argument been so low."[501] So how should law courts respond in a polarized situation where there is at least something to be said on behalf of the proposition that some memories of sexual abuse can be repressed? Should the statute of limitations simply be treated as a given?

The theme of this article has been to suggest that the appellate legal system should trust the pre-trial and trial adversarial systems. If there really has been repression, the statute of limitations should be tolled. Underneath it all, pretty much everyone agrees about this. The real disagreements lie elsewhere. Is there such a thing as repression? Can memories of sexual abuse be repressed? Can repeated incidents of sexual abuse be cast out of consciousness? *Yes*—answers to these questions seem implausible to persons of commonsense. But virtually all physicians, psychiatrists, psychologists, and clinicians agree that there may be a phenomenon of this sort. The argument is not over abstract possibility. The argument is over frequency, evidentiary standards, and so forth.

Jennifer J. Freyd, Professor of Psychology at the University of Oregon, has recently argued that *betrayal of trust* is the key to understanding repression of childhood sexual abuse.[502] If a child is betrayed by a trusted care giver the occurrence of amnesia may be predicted.[503] The child is attached to the care giver and must maintain that sense of attachment.[504] Under such circumstances, amnesia is adaptive.[505]

No wonder it makes sense to say that children are at the mercy of their parents. Nevertheless, what is true at the level of psychology is almost certainly false at the level of sociology.

Societal amnesia with respect to the dangers of childhood sexual abuse is not adaptive. Children may need to believe falsely in the virtue of their parents, but our society does not need to believe falsely in the virtues of its members. Moreover, society does not need to look the other way if children are being molested by their parents. Society needs to be able to utilize the tort law not only as a method for compensating victims, but also as a symbolic expression of denunciation.

At the same time, people who are accused of molesting their children should not automatically be classified *guilty as sin*. This father or that mother may not have done it. This daughter, or that son, may be subject to some mental disorder. At least one historian of medicine has suggested that accusations of

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501. *Id.* at 277.

502. JENNIFER L. FREYD, BETRAYAL TRAUMA: THE LOGIC OF FORGETTING CHILDHOOD ABUSE (1996). The author is Professor of Psychology at the University of Oregon. The book is said to have a personal origin.

503. *Id.* at 75.

504. *Id.*

505. *Id.* at 75-78.

sexual molestation and satanic abuse based on so-called recovered memory may reflect the mental disorder once known as *hysteria.*[506] From the legal point of view, we should let the adversary system run its course, while recognizing the *sui generis* nature of these kinds of complaints. Because of their uniqueness, our approach to the statute of limitations should be flexible. At the same time, the position of "accused" needs to be recognized. Plaintiffs must prove their cases. Even then, since plaintiffs only need to prove their cases by a preponderance of the evidence, there will be mistakes from time to time. That's what appellate courts are for. Even they will not discover all the mistakes. They never have. Consequently, although the sexual abuse of children is a scandal and an outrage, society needs to have a sophisticated view about people who have been accused after many years. Observers need to consider the source of the accusations, as well as their content.

Finally, lawyers are beginning to learn how to try cases for the defense. Verdicts are not being returned against all accused parents. Indeed, as public interest in the topic rises, as public consciousness becomes better informed and as perceptions become more sophisticated, it becomes more and more difficult for plaintiffs to win these lawsuits simply by uttering the unimaginable.

Thus, the right approach to the statute of limitations in childhood sexual abuse cases is quite simple and quite traditional. Fully litigate the matter: wide-open discovery, wide-open trials, wide-open cross-examination, careful appellate scrutiny. The rigid application of the statute of limitations without proper appreciation for phenomenon of repression ill serves the polis.

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506. ELAINE SHOWALTER, HYSTORIES: HYSTERICAL EPIDEMIC AND MODERN MEDIA 11, 147 (1997). The author is Avalon Foundation Professor of Humanities and Professor of English at Princeton.