University of Richmond Law Review

Volume 30 | Issue 1 Article 5

1996

Patient-Psychotherapist Privilege: Acces to Clinical Records in the Tangled Web of Repressed Memory Litigation

Elizabeth F. Loftus

John R. Paddock

Thomas F. Guernsey
University of Richmond

Follow this and additional works at: http://scholarship.richmond.edu/lawreview

Part of the Evidence Commons, and the Health Law and Policy Commons

Recommended Citation
Elizabeth F. Loftus, John R. Paddock & Thomas F. Guernsey, *Patient-Psychotherapist Privilege: Acces to Clinical Records in the Tangled Web of Repressed Memory Litigation*, 30 U. Rich. L. Rev. 109 (1996).
Available at: http://scholarship.richmond.edu/lawreview/vol30/iss1/5

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

PATIENT-PSYCHOTHERAPIST PRIVILEGE: ACCESS TO CLINICAL RECORDS IN THE TANGLED WEB OF REPRESSED MEMORY LITIGATION

*Elizabeth F. Loftus**
*John R. Paddock***
*Thomas F. Guernsey****

I. OVERVIEW

The 1990s promise to be an era of mental health litigation whose outcomes that some predict will dwarf the settlements awarded recently in lawsuits over sexual improprieties between psychotherapists and their patients. One expert estimates that over 17,000 claims will be filed in the next decade, with litigation costs in excess of $250 million.[1] These new cases emerged as therapy patients began to accuse fathers and mothers, uncles and grandfathers, former neighbors and teachers, psychotherapists and countless others of sexually abusing them years ago.[2]

Particularly noteworthy is that the accusers were *not* people who have harbored in secret genuine memories of abuse, only recently to work up the courage to tell trusted friends or psychotherapists. These were *not* instances of the over 175,000

* Professor of Psychology and Adjunct Professor of Law, University of Washington. B.A. 1966, University of California at Los Angeles; Ph.D., 1970, Stanford University.

** Visiting Associate Professor of Psychology, Emory University. B.A., 1977, Williams College; M.A., 1981, Emory University; Ph.D., 1982, Emory University. Licensed Psychologist (GA #911). National Register of Health Service Providers in Psychology (#41589).

*** Professor of Law, University of Richmond School of Law. B.A., 1973, University of Michigan; J.D., 1976, Wayne State University; LL.M., 1980, Temple University. Member, New Hampshire and Virginia Bars.

1. Henry Saeman, *Repressed Memory Claims Expected to Soar*, 4 NAT'L PSYCHOLOGIST, May-June 1995, at 1-7.

2. *See* ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994); Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518 (1993).

cases of substantiated cases of sexual abuse reported annually in the United States.[3]

Instead, accusers stepped forth to confront their alleged abusers after memories of sexual molestation were unearthed in psychotherapy from layers of psychic sediment that kept these recollections undisturbed in the unconscious, sometimes for decades. In treatment, which in some instances we liken to a "psychoarcheological" dig, therapists often use a variety of tools to help "dust off" the patient's psychic landscape; tools or techniques that intrinsically have enormous potential for creating pseudomemories; tools that meet no known legitimate scientific standard for validity and reliability;[4] tools such as "suggestion, social contagion, hypnosis, misdiagnosis, and the misapplication of hypnosis, dreamwork, or regressive therapies"[5] and others described below that appear to have convinced many that they are genuine survivors of childhood sexual abuse. More than a few accusers have taken their alleged abusers to court in apparent efforts to obtain damages for the psychological distress they claim to have suffered. By 1994, over 800 of these cases had already been brought before civil and criminal courts.[6] Some defendants have been sent to jail.[7]

---

3. *See* 2 COMPREHENSIVE TEXTBOOK & PSYCHIATRY (H.I. Kaplan & [illegible] Sadock eds., 5th ed. 1989); Mark Sauer & Jim Okerblom, *Trial by Therapy*, NAT'L REV., Sept. 6, 1993, at 30.

4. *See generally* LOFTUS & KETCHAM, *supra* note 2; RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA (1994); MARK PENDERGRAST, VICTIMS OF MEMORY: INCEST ACCUSATIONS AND SHATTERED LIVES (1995); MICHAEL D. YAPKO, SUGGESTIONS OF ABUSE: TRUE AND FALSE MEMORIES OF CHILDHOOD SEXUAL TRAUMA (1994); Fred H. Frankel, *Adult Reconstruction of Childhood Events in the Multiple Personality Literature*, 150 AM. J. PSYCHIATRY 954 (1993); J. Hochman, *Recovered Memory Therapy and False Memory Syndrome*, 2 SKEPTIC 58 (1994); D. Stephen Lindsay & J. Don Read, *"Memory Work" and Recovered Memories of Childhood Sexual Abuse*, PSYCHOL. PUB. POL. & LAW (forthcoming 1996) [hereinafter *"Memory Work"*]; D. Stephen Lindsay & J. Don Read, *Psychotherapy and Memories of Childhood Sexual Abuse: A Cognitive Perspective*, 8 APPLIED COGNITIVE PSYCHOL. 281 (1994); Loftus, *supra* note 2; Harrison G. Pope Jr. & James I. Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?*, 25 PSYCHOL. MED. 121 (1995).

5. Philip M. Coons, *Reports of Satanic Ritual Abuse: Further Implications About Pseudomemories*, 78 PERCEPTUAL & MOTOR SKILLS 1376, 1377 (1994).

6. Anita Lipton, Status of Lawsuits at Memory and Reality: Reconciliation, Memory and Reality: Reconciliation Conference, Baltimore, Md. (Dec. 1994).

7. *See* LAWRENCE WRIGHT, REMEMBERING SATAN (1994).

As increasing numbers of people have had to defend themselves in criminal proceedings against sexual abuse allegations, a curious problem has emerged. Because accusers often recover memories of molestation in psychotherapy, a professional relationship that in many jurisdictions is privileged by law, the defendant is at a distinct disadvantage in refuting the charges brought against him or her (although the defender is typically male). To defend successfully against these allegations, one *must* have access to the clinical record to evaluate the extent to which the therapy process itself may have created a complex web of unsubstantiated or *unverifiable* memories and beliefs about prior life events as traumatizing as sexual victimization.

Loftus[8] has articulated five assumptions that flow from the notion that one can repress memories of prior experience and then subsequently resurrect them in pristine form—an idea that has virtually no support in controlled scientific studies in either basic or applied psychological research.[9] To-wit:

(1) We are more prone than not to banish traumatic experiences from consciousness completely, because they are too horrifying to contemplate;

(2) We usually do not remember these forgotten experiences by any normal process, but only through special psychotherapeutic techniques;

(3) These counseling interventions produce reliable and valid recovery of memories;

(4) Before re-emerging to conscious awareness, the forgotten experiences cause miserable symptoms and problems in living for many people;[10]

---

8. *See* Loftus, *supra* note 2.

9. *See* DAVID S. HOLMES, *The Evidence for Repression: An Examination of Sixty Years of Research*, *in* REPRESSION AND DISSOCIATION 85 (Jerome L. Singer ed., 1990); *see also* David S. Holmes, *Is There Evidence for Repression? Doubtful*, 10 HARV. MENTAL HEALTH LETTER 4 (1994).

10. This is not to say that people cannot forget horrible things that happened to them; most certainly they can. But there is virtually no support for the idea that clients presenting for therapy necessarily have extensive histories of abuse of which they are completely unaware, and that there is a constellation of symptoms which reliably distinguish survivors from others. *See infra* note 188.

(5) "Psychoarcheological" excavations and reliving the forgotten experiences supposedly cure diagnosable mental conditions such as depression, chronic anxiety, panic attacks, bulimia/anorexia, personality disorders, and others too numerous to mention.[11]

Notwithstanding scientific data, the runaway train of repressed memory therapy charges onward: some therapists appear to hold beliefs that have immense potential for creating pseudomemories;[12] others encourage patients to take their alleged abusers to court based on these newfound recollections.[13] Litigation has reached both civil and criminal courts. Although beyond the scope of this article, an understanding of and familiarity with civil cases is necessary to appreciate the full breadth of the repressed memory problem.

A. *Civil Suits*

In addition to the wave of scientifically undisciplined/New Age therapies alluded to above (and discussed in more detail below) and possibly the blurring of a treatment provider's political agenda with so-called therapeutic interventions, repressed memory litigation has been driven to the shore by legislation that has swept across America in the past six years.

Invoking a novel application of the "delayed discovery doctrine," the Washington State Legislature was the first to decide that the statute of limitations in sexual abuse cases does not begin to run until the plaintiff has discovered the facts essential to the cause of the action.[14] Thus, in Washington and about half of the states, plaintiffs can sue for recovery of dam-

---

11. *See* E. SUE BLUME, SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECT IN WOMEN (1990); RENEE FREDERICKSON, REPRESSED MEMORIES: A JOURNEY TO RECOVERY FROM SEXUAL ABUSE (1992).

12. YAPKO, *supra* note 4, at 42-61; Debra A. Poole et al., *Psychotherapy and the Recovery of Memories of Childhood Sexual Abuse: U.S. and British Practitioners' Opinions, Practices, and Experiences*, 63 J. CONSULTING AND CLINICAL PSYCH. 426, 426-37 (1995).

13. Clinicians well-grounded in both the empirical and theoretical foundations of effective psychotherapy are particularly appalled by this litigation trend; rarely can dysfunctional family relationships be repaired, or alleged victims cured or truly compensated for psychological trauma in the adversarial courtroom forum.

14. WASH. REV. CODE ANN. § 4.16.340 (West Supp. 1989).

ages for injury suffered as a result of childhood sexual abuse anytime within three years of when they *remember* the molestation. Indeed, several states have adopted this posture without legislation.[15] Consequently, juries now hear cases in which plaintiffs base their arguments on a bastardized version of Freudian theory and the notion that one can, through the process of psychotherapy, excavate pristine memories of sexual abuse long buried in the unconscious under layers of mental sediment.

These cases are difficult to defend, especially when the "evidence" is as ephemeral as the spectral appearances used to condemn young girls and women as witches in Salem, Massachusetts over 300 years ago.[16] Because there is usually no corroborating evidence in these cases, the prototypical repressed memory trial ends up as a credibility contest between accuser and accused. Consider, for example, the following five types of cases: accuser's suits; retractor's suits; third-party suits; retractor/third-party suits; suits against self-help book authors.

1. Accuser's Suits

A typical case is that of twenty-four-year-old Mary D. who sued her father, John D., claiming that she had been abused by him from infancy until age twenty-three.[17] After at least six months of psychotherapy, Mary recalled being manually penetrated and masturbated by her father as both an infant and a young child of two or three. In a declaration, Mary asserted that her therapist said that many of her psychological problems were caused by the alleged sexual abuse. Further, her apparent ability to repress these memories was interpreted in therapy as a natural and adaptive coping response under the circumstances.

15. Julie M.K. 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, 477-78 & n.4 (1995).

16. *See, e.g.*, JOHN P. DEMOS, ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND (1982).

17. Mary D. v. John D., 264 Cal. Rptr. 633, 634-35 (Ct. App. 1989).

2. Retractor's Suits

A second wave of lawsuits has been initiated by retractors who, while in therapy, came to believe they had been sexually molested, but now realize that their memories are false. By 1994, about 300 people had recanted their allegations; some had sued their former therapists and achieved six-figure settlements or jury verdicts.[18] For example, Laura Pasley, one such plaintiff (an employee of the Dallas Police Department), walked into her therapist's office with one problem, bulimia, and exited with another: a belief that she had been an incest victim.[19] She was hypnotized in an attempt to resurrect memories of traumatic abuse. She tore up telephone books in cathartic attempts to alleviate her emotional pain. She reported experiencing flashbacks which her therapist insisted were actual data from her past. She described dreams, which were interpreted as what actually happened to her years before, no matter how bizarre. She remembered group sexual abuse, a dead man hanging from a rope, and sexual abuse by animals. She devoured the required reading list, including titles such as *The Courage to Heal*[20] and *Healing the Child Within*[21] that contain disinformation about fundamental and well-established characteristics of human memory. The result: Laura spent four years with these memories, became disenchanted and downright angry with her therapist, and finally realized that these recollections, in effect, had been created in treatment. Only then could she put her estranged family back together and have the energy to sue her former therapist for malpractice. She was awarded a sizable six-figure settlement.[22]

---

18. *See* Lipton, *supra* note 6.

19. Laura E. Pasley, *Misplaced Trust*, *reprinted in* TRUE STORIES OF FALSE MEMORIES 347 (Eleanor Goldstein & Kevin Farmer eds., 1993).

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

21. C. WHITFIELD, HEALING THE CHILD WITHIN: DISCOVERY AND RECOVERY FOR ADULT CHILDREN OF DYSFUNCTIONAL FAMILIES (1987).

22. Another patient, Diana Halbrooks obtained a successful jury verdict against the same therapist. Steve Blow, *Memories Almost Split Their Family*, DALLAS MORNING NEWS, May 21, 1995, at 35A.

3. Third-Party Suits

A third set of cases is being filed by those accused of sexual abuse on the basis of repressed and recovered memories. These people take the offensive by filing negligence actions against psychotherapists who they believe engendered pseudomemories of molestation. The accused abusers demand compensation for the psychological upheaval, ruined reputations and careers, and the breakup of families that often follow the supposed recall of childhood abuse. A California father, Gary Ramona, sued not only the psychotherapists who treated his daughter, Holly, but also the hospital where a portion of the treatment occurred.[23] Ramona's daughter claimed that she had been molested by her father between ages five and sixteen, including numerous times with the family dog, Prince.[24] These memories apparently surfaced after both sodium amytal and psychotherapy sessions with her counselors.[25]

Ramona has been called "the first successful courtroom challenge to practitioners of 'recovered memory' therapy"[26] for a couple of reasons. First, it is the initial case in which a jury awarded damages (over $ 500,000) to a family member against a therapist for creating and reinforcing pseudomemories of sexual abuse in a relative. Second, *Ramona* departed from typical negligence actions, wherein clients (not their relatives) sue a therapist for failing to meet the standard of care extant at the time of treatment. Instead, the patient's father was permitted to sue his daughter's therapists, causing some commentators to suggest that "anyone who is harmed by a false memory may, in the future, recover damages."[27]

In *Ramona*, Holly had previously waived her physician-patient privilege when she initiated the litigation process by filing suit against her father for sexual abuse.[28] As a result, the

---

23. Ramona v. Isabella, No. 61898 (Super Ct. Napa City, Cal. May 13, 1994), *reprinted in* Milo Geyelin, *Lawsuits over False Memories Face Hurdles*, WALL ST. J., May 17, 1994, at B1.

24. *Id.*

25. *Id.*

26. *Id.*

27. J.G. Schneider, *Legal Issues Involving 'Repressed Memory' of Childhood Sexual Abuse*, THE PSYCHOLOGIST'S LEGAL UPDATE, Aug. 1994, at 11.

28. Ramona v. Isabella, No. 61898 (Super. Ct. Napa City, Cal. May 13, 1994), *re-*

plaintiff was able to gain access to these records, especially because the process of therapy was distinctly at issue in the malpractice action. But, one can imagine that third-party civil plaintiffs will face insurmountable hurdles in efforts to prove false memories due to inappropriate treatment interventions, when unable to access the clinical record.

4. Retractor/Third-Party Suits

Recently, a combined retractor and third-party case was argued in Pittsburgh.[29] In psychotherapy, Nicole Althaus, still a teenager, developed memories of her parents molesting her earlier in adolescence. After a heartbreaking fourteen-month separation from them, she recanted her accusations, joined the parents in suing the treating psychiatrist, and subsequently received $272,000 in compensatory damages.[30]

5. Suits Against Self-Help Book Authors

Two highly unusual legal cases have been filed by retractors against authors whose books have been implicated in fostering development and reinforcement of pseudomemories of abuse. In *Mark v. Zulli*,[31] the plaintiff sued her therapists and the author of *The Courage to Heal Workbook*,[32] arguing that the writer represented herself as an expert in helping adults heal from the effects of childhood sexual abuse—even those with no memories of molestation.[33] The plaintiff also claimed that the writer taught her to believe in recovered memories as accurately representing past experience and deserving of uncritical and un-

---

printed in Geyelin, *supra* note 23, at B1.

29. Althaus v. Cohen, *reprinted in* Jon Schmitz, *Malpractice Jury Told of 'Nightmare' in False Abuse Case*, PITTS. POST GAZETTE, Nov. 22, 1994, at C1.

30. *Cleared Parents Win Suit Against a Psychiatrist*, N.Y. TIMES, Dec. 17, 1994, at A9. *See* Jon Schmitz, *Jury Finds Psychiatrist Negligent in Treatment*, PITT. POST-GAZETTE, Dec. 17, 1994, at A1; Jon Schmitz, *Malpractice Jury Told of 'Nightmare' in False Abuse Case*, PITT. POST-GAZETTE, Nov. 22, 1994, at C1.

31. Mark v. Zulli, No. 075386 (Cty. of San Luis Obispo filed April 27, 1994).

32. LAURA DAVIS, THE COURAGE TO HEAL WORKBOOK (1990).

33. *See Mark*, No. 075386.

qualified belief.[34] As a result, Mark claimed to suffer severe mental anguish and emotional distress.[35]

In *David v. Jackson,*[36] the plaintiff sued her therapists and the authors of *The Courage to Heal*[37] for fraud and misrepresentation. Deborah David alleged that Bass and Davis promoted their book through advertising which engendered ideas that fostered false delusions of childhood sexual abuse.[38] In David's case, she left the therapist's office believing that she was a victim of organized satanic ritual abuse[39] and that she had Multiple Personality Disorder as a consequence.[40]

6. Miscellaneous Suits

In addition to the actions described above, disputes about repressed versus false memories have led to legal difficulties for an array of unusual defendants.

One therapist found herself charged with negligence and incompetence in the "recovered memory" treatment of a woman who accused her father of sexually abusing her as a child.[41] She was notified by the state health department that she would lose her license to practice unless she could successfully defend against the charges.

A rather different dispute developed between a Salt Lake City therapist and a local professor over recovered memories of satanic ritualistic abuse. The professor criticized the therapist for, among other things, not knowing the literature on memory

---

34. *Id.*

35. *Id.*

36. David v. Jackson, No. 540624 (Cty. of Sacramento filed May 16, 1994).

37. BASS & DAVIS, *supra* note 20.

38. *Mark*, No. 075386.

39. Despite extensive investigations by law enforcement officials, there appears to be no evidence of widespread Satanic ritual abuse in the United States. *See* ROBERT D. HICKS, IN PURSUIT OF SATAN: THE POLICE AND THE OCCULT (1991); ARTHUR LYONS, SATAN WANTS YOU: THE CULT OF DEVIL WORSHIP IN AMERICA (1988); JEFFREY S. VICTOR, SATANIC PANIC: THE CREATION OF A CONTEMPORARY LEGEND (1993); Kenneth V. Lanning, *Satanic, Occult, Ritualistic Crime: A Law Enforcement Perspective*, THE POLICE CHIEF, Oct. 1989, at 62-83.

40. *Mark*, No. 075386.

41. *Therapist Faces Charges in Case of 'Recovered Memory' of Sex Abuse*, SEATTLE POST-INTELLIGENCER, Feb. 22, 1995, at B5.

and suggestibility. The therapist sued the professor alleging defamation and seeking $1 million in damages.[42]

Problems of a different kind faced a Florida woman, Donna Serritella, who was charged with insurance fraud after she tried to get Nationwide Insurance Company to pay for her injuries related to recovered memories of sexual abuse.[43] According to news reports, Serritella was nearly involved in an auto accident but escaped without injury—either to herself or her car. About nine months later, she contacted her insurer stating that she had flashbacks of sexual abuse caused by the near accident. She demanded $25,000. While pursuing her demand, she also sued her alleged abuser, and he filed a countersuit alleging slander and malicious prosecution. During that case, evidence emerged that indicated that she had remembered abuse on numerous occasions preceding her near-accident. At last report, Serritella was being held in jail in lieu of $5,000 bail.

One of the strangest cases of repressed memory led to freedom for a rather surprised defendant from Minnesota. Dennis Truwe had been convicted of criminal sexual conduct in early 1994. In Truwe's first trial, a juror realized belatedly—after the conviction but before sentencing—that she had been sexually abused in childhood. Had her history been known at the time of jury selection, she would not have been chosen. The judge declared a mistrial, and his decision was upheld on appeal. Truwe was tried again and acquitted.[44]

B. *Criminal Cases*

Repressed memory cases present particularly interesting legal challenges in criminal courts, since many states have extended the statute of limitations for criminal child sex abuse charges—most often to several years beyond the age of majority, which is usually eighteen years. In a few states (e.g., Wyoming), there is no statute of limitations for sex crimes against children. Moreover, in more states moves are afoot to pass laws

---

42. Joan O'Brien, *State Won't Help U. Professor in Defamation Suit*, SALT LAKE CITY TRIBUNE, Feb. 1, 1995, at B1.

43. Henry Kaylois, *Fraud Charge Cites Claim of Recovered Memory*, ST. PETERSBURG TIMES, May 12, 1995, at 1.

44. Kevin Duchschere, *Once Convicted, Maple Grove Man Now Free*, MINNEAPOLIS STAR TRIB., May 9, 1995, at B2.

that would toll the statute of limitations and permit these types of criminal prosecutions to go forward any time hidden memories are unearthed.[45] Criminal prosecutions based upon de-repressed memories of murder have now occurred in a number of states because there is no statute of limitations for this particular crime.[46] The most famous of these is *Franklin v. Duncan*,[47] in which George Franklin was convicted of murder after his daughter, Eileen, claimed she witnessed the crime twenty years earlier and repressed the memory. Then the recollection surfaced.[48] Thus now, and perhaps more so in the future, accused individuals are defending themselves against prosecutions based on allegedly de-repressed memories. A battle over therapy records typically ensues.

C. *The Problem*

In her initial foray into the litigation waters, Holly Ramona sued her father after she uncovered a decade's worth of abuse in therapy, and waived her right to the confidentiality of the clinical record. Available to the defense were the following: proof that Holly's therapist had told her during an initial therapy session that seventy to eighty percent of people who suffered from her presenting problem, bulimia, were child sex abuse victims—a misleading if not purely erroneous piece of information; proof that Holly attended group therapy sessions in which sexual victimization was extensively discussed and the

---

45. *See* Elizabeth F. Loftus et al., *Repressed Memories*, A.B.A. J., Sept. 1994, at 42.

46. For example, in 1994, a jury convicted an Indiana woman, Anita Vega, of involuntary manslaughter in the death of her toddler daughter 25 years earlier. Vega's oldest daughter said she suppressed the memory until she began having nightmares about it in 1992 after receiving counseling. *Mother Guilty of Child's 60's Death*, SACRAMENTO BEE, July 30, 1994, at A24, *reprinted in Daughter with Nightmares Helps to Convict Mother of a Killing*, N.Y. TIMES, Aug. 7, 1994, at 34.

47. 884 F. Supp. 1435, *rev'd on other grounds*, 891 F. Supp. 516 (N.D. Cal. 1995) (granting habeas relief in the form of a stay pending appeal). Among other reasons, Judge Jensen reversed because the trial judge had denied the defense the ability to introduce evidence that the daughter's memory had been reported in the public media prior to testimony. The prosecutor had been permitted to argue, after the evidence had been excluded, that Eileen's memory could only have been produced by a person who actually witnessed the event. *See* LOFTUS & KETCHAM, *supra* note 2, at 4.

48. *Franklin*, 884 F. Supp. at 1438. For an account of this case, see LOFTUS & KETCHAM, *supra* note 2.

symptoms interpreted accordingly; and proof that Holly had agreed to a sodium amytal ("truth serum") interview, after having expressed reservations about her memories and being assured that lying while under the influence of this drug was virtually impossible. These facts were absolutely essential to her father's ability to defend the allegations of abuse and to his ultimately successful third-party lawsuit against the therapists.

But, what if Holly had *not* gone to a civil lawyer? Criminal charges could have readily been brought since Holly was under the age of majority at the time she "recalled" the alleged abuse. In this hypothetical instance, her father would have faced an even worse conundrum: undoubtedly, he would have sought review of his daughter's therapy records, and Holly probably would have denied him that access. After all, when a recent rape victim testifies against her rapist, and she happens to be in therapy at the time, she is not routinely required to disclose her confidential therapy records. Why should a crime victim of any sort have to disclose such private matters?

Just this sort of scenario was recently played out in two repressed memory cases decided contemporaneously by the New Hampshire Superior Court.[49] The criminal prosecution of Joel Hungerford was based on memories recalled by his daughter, Laura B., who claimed that he had molested her more or less continually for eighteen years beginning at age five. When about twenty-five, she began therapy and recovered these memories of sexual abuse.[50] Unusual here was that the judge ruled that the state had the burden of proving: (a) the scientific legitimacy of memory repression, (b) the validity of veridical memory recovery through psychotherapy, and (c) that this kind of treatment had gained general acceptance in the field of psychology. During a two-week hearing, records were available for the judge to confirm the witness's recollections of what went on in therapy, because the defense filed motions for discovery and

49. State v. Hungerford, No. 94-5-045, 1995 WL 378571 (N.H. Sup. Ct., May 23, 1995); *see also* Christine Gorman, *Memory on Trial*, TIME, May 23, 1995, at 54.

50. *Hungerford*, 1995 WL 378571. The companion prosecution of John Morahan was based on memories of a former student, Sarah F., who claimed that her teacher had raped and impregnated her when she was 13. Over five years later, while in therapy, she recovered this memory. *Id.*

depositions to challenge the validity of the allegedly repressed memories.[51] The defense sought:

> Any and all counselling and or therapeutic records pertaining to psychiatric, psychological, therapeutic or any other mental health counselling of [complainant] from 1992 to the present, including but not limited to the following:
> 1. Any notes, correspondence or memoranda generated by said counsellors;
> 2. Any audiotapes, videotapes, or drawings generated during counselling sessions or at the requests of said counsellors;
> 3. The title, author, publisher of any books, articles, videotapes provided [by] said counsellor to [complainant] for reading and/or consultation.[52]

In one motion, the defense asserted the need for the complainant's therapy records to challenge, in pretrial proceedings, the reliability of repressed memories. "If this matter were ever to be before a trier of fact, not only must the defense argue that the incidents in the repressed memories did not occur, but the defendant must also be prepared to address the jury's question that if these memories are untrue, how did they occur?"[53]

As the defense understood all too well, the complainant's entire therapy had to be explored. When the State objected on the grounds that the records were privileged, the defense responded that the privilege in New Hampshire, while recognized, was not absolute. Prior New Hampshire cases in which the privilege balancing act tilted against the patient included a civil action in which the plaintiff put her medical condition at issue in a malpractice case[54] and a criminal case in which the treatment records of the state hospital were introduced at a defendant's recommitment hearing.[55] In short, the physician-patient privilege was not absolute and could yield when the

---

51. Memorandum of Law Supporting Dependent's Second Motion for Discovery and Motion for Depositions, State v. Hungerford, No. 94-5-45, 1995 WL 378571 (N.H. Sup. Ct., May 23, 1995).

52. *Id.*

53. *Id.*

54. Nelson v. Lewis, 534 A.2d 720, 722 (N.H. 1987).

55. State v. Kupchun, 373 A.2d 1325 (N.H. 1977).

disclosure of information was essential. Indeed, the records in their entirety were needed both to assess the validity of the process by which the clinician reached the diagnosis[56] and the possibility that "suggestive influences may have been operating in the hands of the complainant's therapist."[57]

The clinical record well represents the kind of treatment process which many of these patients appear to have undergone. In Laura B.'s case, she began therapy in 1992 with a social worker seeking treatment for symptoms of clinical depression and sexual problems in her marriage.[58] She had no memories of any sexual abuse.[59] However, her sister claimed to be recovering memories of abuse by their father, which led Laura to wonder about her own history.[60] Analysis of her treatment record indicated that based on the presenting symptomatology, one of her therapist's stated goals was to recover memories of possible sexual abuse.[61] Along the way, the clinician had a joint therapy session with both the patient and her sister, during which the latter's claims of sexual abuse were discussed.[62] After about nine months and approximately 100 psychotherapy sessions, Laura B. would eventually "remember" abusive episodes including an unremembered rape that occurred two days before her wedding a few years earlier.[63] The clinical record clearly indicated that these recollections were induced via a variety of techniques such as guided visualization, dream interpretation, body pain analysis, and other interventions.[64] In-

56. *Id.* at 1327. In this case, a defense psychiatrist stated in an affidavit that "patients with many types of psychiatric disorders are commonly diagnosed as being victims of childhood sexual abuse, and/or having so-called post-traumatic stress disorder. For example, the psychomotor agitation, anhedonia, impairments of sleep, appetite, and libido, feelings of guilt, and other symptoms of major depression are often misconstrued to represent after-effects of trauma when, in fact, these symptoms are characteristics of major depressive illness in individuals with no history of trauma at all." *See* Aff. of James Irvin Hudson, MD at 1, State v. Kupchun, 373 A.2d 1325 (N.H. 1977).

57. Aff. of James Irvin Hudson, MD at 3, State v. Kupchun, 373 A.2d 1325 (N.H. 1977).

58. *See generally Hungerford,* 1995 WL 378571.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

deed, it appeared from the records that the therapist 'educated' Laura about repression, affirmed Laura's memories, and validated her abuse.[65]

After a two-week hearing during which the science of memory, memory repression, and its applicability to the facts of the present case were thoroughly aired, the judge ruled that the state had not met its burden and the women would not be permitted to testify at trial.[66] In reaching his opinion, the judge also analyzed the process of psychotherapy, finding that the approach used in these cases was highly suggestive and "not scientifically reliable," and that it "thoroughly and systematically violated the guidelines and standards of the practice of psychotherapy."[67]

D. *Patient Privacy and Defendant Liberty*

This case illustrates well the problem that defendants face in repressed memory trials. For instance, *Hungerford* demonstrates classic tensions between the rights of privacy of a patient who claims to be a victim of a crime (or on other occasions a witness to a crime) and the defendant's due process rights guaranteed under the Constitution.[68] The Sixth Amendment secures "at a minimum, . . . the right [of criminal defendants] to put before a jury evidence that might influence the determination of guilt."[69] Of course, trial judges have the right to exclude evidence that is confusing, misleading or prejudicial, but that right usually yields to a defendant's constitutional right "to present all relevant evidence of significant probative value to the defense."[70] The criminal defendant in a typical repressed memory

65. *Id.* Therapy records were also made available concerning the alleged victim, 21-year-old Sarah F., in the companion case. While the facts of Sarah F.'s allegations are somewhat different, the analysis in her case revealed that she had attended a "therapeutic boarding school," and her memories were recovered using hypnosis, "inner child therapy," and other activities aimed at ferreting out suspected abuse. She accused many other individuals before settling on her seventh grade teacher, defendant Morahan, who she claimed raped her when she was 13.

66. *Id.*

67. *Id.*

68. *See generally id.*

69. Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987).

70. People v. Babbitt, 755 P.2d 253, 265 (Cal. 1988) (citing People v. Reeder, 872 147 Cal. Rptr. 275 (Ct. App. 1978)).

case argues that minute details of the therapy process are critical to a showing that the purported de-repressed memories could have arisen in some way other than genuine forgetting and remembering. Clearly, access to the clinical record is essential to guarantee a defendant due process. However, much of the work conducted in effective psychotherapy might well be significantly hampered should patients perceive the relationship to be in fact routinely open to scrutiny.

E. *Confidentiality and Privilege in Psychotherapy*

1. Confidentiality

While axiomatic to note, individuals usually begin psychotherapy wanting to learn new and more effective ways for coping with life difficulties.[71] They seek help for problems in thinking, behavior, or emotional expression/regulation which significantly impair everyday social and occupational functioning.[72] In repressed memory cases, some patients evolve to present as "survivors" who meet the diagnostic criteria for Posttraumatic Stress Disorder (PTSD) or Dissociative Identity Disorder (DID) (formerly called Multiple Personality Disorder).[73]

---

71. *See generally* LORNA S. BENJAMIN, INTERPERSONAL DIAGNOSIS AND TREATMENT OF PERSONALITY DISORDERS (2nd ed. 1996).

72. AMERICAN PSYCHIATRIC ASS'N & TASK FORCE ON DSM-IV, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994).

73. With PTSD, the patient describes having experienced an event that involved threat to one's physical integrity coupled with intense fear and feelings of helplessness and seems causally linked with the following four types of symptom clusters: the tendency to re-experience the traumatic event (e.g., via flashbacks or disturbing dreams); the tendency to avoid activities or situations that remind one of the trauma; the tendency to show reduced responsiveness to the external world (e.g., feeling detached from others or emotionally numb); and the tendency to display increased arousal (e.g., an exaggerated startle response, sleep problems, or concentration difficulties). For extensive discussions of this disorder and methods used to distinguish it from malingering or deliberately faking symptoms when there is an external (e.g., financial) incentive to do so, see ROBERT I. SIMON, POST-TRAUMATIC STRESS DISORDER IN LITIGATION: GUIDELINES FOR FORENSIC ASSESSMENT (1995); Alan A. Stone, *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULLETIN AM. ACAD. PSYCHIATRY & LAW 23, 23-36 (1993).

With DID, the patient appears to display two or more distinct and fully developed personalities (i.e., each with his/her own characteristic thought, feeling, and action pattern), and some clinicians believe the disorder's origins may be found in a history of extensive—often sexual—abuse. For clinical descriptions of this phenomenon *see* Phillip M. Coons et al., *Multiple Personality Disorder: A Clinical Investigation of*

Regardless of a patient's psychiatric diagnosis, psychotherapists typically believe that the intensity and extent of emotional pain, shame, and inadequacy felt by many persons in treatment must be understood thoroughly, carefully, and accurately for therapy to help the person feel better and function more effectively in the world.

To obtain reliable and valid assessments of psychological conditions or disorders, clinicians have long assumed the necessity of ensuring patients a confidential psychotherapy environment.[74] Such an assumption seems like just plain common sense: encouraging patients to disclose "the unspeakable [and] the unthinkable . . . requires an atmosphere of unusual trust, confidence, and tolerance. . . ."[75]

In this regard, empirical research supports common sense and clinical lore. While some investigators report that failing to assure privacy does not significantly inhibit self-disclosure,[76]

---

50 Cases, 176 J. NERVOUS & MENTAL DISEASE 519 (1988); RICHARD P. KLUFT, CHILDHOOD ANTECEDENTS OF MULTIPLE PERSONALITY (1985); Frank W. Putnam et al., *The Clinical Phenomenology of Multiple Personality Disorder: Review of 100 Recent Cases*, 47 J. CLINICAL PSYCHIATRY 285 (1986); Colin A. Ross et al., *Abuse Histories in 102 Cases of Multiple Personality Disorder*, 36 CANADIAN J. PSYCHIATRY 97 (1991); Colin A. Ross et al., *Multiple Personality Disorder: An Analysis of 236 Cases*, 34 CANADIAN J. OF PSYCHIATRY 413 (1989).

Detailed case examples of both PTSD and DID may be found in R.L. SPITZER, DSM-IV CASEBOOK: A LEARNING COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

74. PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW (2d ed. 1991); ROBERT LANGS, PSYCHOTHERAPY: A BASIC TEXT (1982); Paul Chodoff, *Psychiatry and the Fiscal Third Party*, 135 AM. J. PSYCHIATRY 1141 (1978); Joseph Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974); Henry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972); Ryan D. Jagim et al., *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 PROF. PSYCHOL. 458 (1978); Mildred M. Reynolds, *Threats of Confidentiality*, 21 SOC. WORK 108 (1976); Alan O. Ross, *Confidentiality in Child Guidance Treatment*, 42 MENTAL HYGIENE 60 (1979); Max Siegel, *Privacy, Ethics, and Confidentiality* 10 PROF. PSYCHOL. 249 (1979).

75. CLIFFORD D. STROMBERG ET AL., THE PSYCHOLOGIST'S LEGAL HANDBOOK 371 (1988) (*quoting* Doe v. Roe, 400 N.Y.S.2d 668, 674-76 (N.Y. Sup. Ct. 1977) (citations omitted)).

76. *See* B. Kobocow, *The Influence of Confidentiality Conditions on Self-Disclosure of Early Adolescents*, 14 PROF. PSYCH.: RES. & PRAC. 435 (1983); John M. McGuire et al., *Depth of Self-Disclosure as a Function of Assured Confidentiality and Videotape Recording*, 64 J. OF COUNS. & DEV. 259, 261 (1985); Thomas Muehlman et al., *Informing Clients About the Limits to Confidentiality, Risks, and Their Rights: Is Self-*

the body of empirical research indicates that confidentiality increases the likelihood that people will report psychological symptoms,[77] encourages people to seek help,[78] and generally promotes more frequent and intimate self-disclosure.[79]

Furthermore, competent and ethical clinicians are quite sensitive to the importance of confidentiality in psychotherapy for three additional reasons. First, practitioners of any number of scientifically validated approaches to psychotherapy[80] share a common foundation. The treatment crucible *is* the patient and therapist's relationship. Successful outcome reflects directly the

---

Disclosure Inhibited? 16 PROF. PSYCH.: RES. & PRAC. 385, 395 (1985); Bruce Pickens, 1992 *The Effects of Explaining Client Rights and Limits to Confidentiality on Subsequent Self-Disclosure in a Client Population*, 52 DISSERTATION ABSTRACTS INT'L 4983-B (1992); *see also* Lorraine Wodiska, *Concern About Confidentiality: Its Relationship to Self-Disclosure and Group Climate in a Small Group Setting*, 48 DISSERTATION ABSTRACTS INT'L 279—B, 280-B (1987).

77. *See* Paul J. Lane, *Effects of Complete and Limited Confidentiality on Self-Disclosure*, 40 DISSERTATION ABSTRACTS INT'L 2845-B (1979); J.R. McNamara, *Confidentiality: It's Effect on Interviewee Behavior*, 11 PROF. PSYCH. 714-21 (1980); David Nowell & Jean Spruill, *If It's Not Absolutely Confidential, Will Information be Disclosed?*, 24 PROF. PSYCH.: RES. & PRAC. 367, 368 (1993).

78. *See* Jacob J. Lindenthal & Claudewell S. Thomas, *Psychiatrists, the Public, and Confidentiality*, 170 J. OF NERVOUS AND MENTAL DISEASE 319, 321 (1982); Thomas V. Merluzzi & Cheryl Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors*, 30 J. OF COUNS. PSYCH. 245, 250-51 (1983); David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 PROF. PSY.: RES. & PRAC. 15, 17-18 (1986); Donald Schmid et al., *Confidentiality in Psychiatry: A Study in the Patient's View*, 34 HOSP. & COMMUNITY PSYCHIATRY, 353, 354-55 (1983); M.F. Weiner & D.W. Shuman, *The Privilege Study*, 40 ARCHIVES OF GENERAL PSYCHIATRY 1027 (1983).

79. Thomas O. Bennett, *The Effects of Confidentiality Instructions on Symptom Admission, Socially Desirable Responding, and Self-Disclosure, Among Clinical and Non-Clinical Populations in a Rural Setting*, 42 DISSERTATION ABSTRACTS INTER'L 2977, 2978 (1982); Robert I. Edelman & Roderick Snead, *Self-Disclosure in a Simulated Psychiatric Interview*, 38 J. OF CONSULTING & CLINICAL PSYCH. 354, 354 (1972); Gabriel Y. El-Hage Boutros, *The Effects of Confidentiality and Subjects' Race on Subjects' Symptom Admission, Socially Desirable Responding, and Projected Self-Disclosure in Psychotherapy*, 46 DISSERTATION ABSTRACTS INT'L 2456-B (1986).

80. For sophisticated reviews of empirical psychotherapy outcome research indicating that treatment significantly increases the level of functioning of patients relative to untreated controls, see MARY L. SMITH ET AL., THE BENEFITS OF PSYCHOTHERAPY (1980); Paul Crits-Christoph et al., *Meta-Analysis of Therapist Effects in Psychotherapy Outcome Studies*, 2 PSYCHOTHERAPY RES. 81-91 (1991); Mary L. Smith & Gene V. Glass, *Meta-Analysis of Psychotherapy Outcome Studies*, 32 AM. PSYCHOLOGIST 752, 760 (1977). For a more general discussion of psychotherapy effectiveness, see *Mental Health: Does Therapy Help?*, Consumer Reports, November, 1995 at 734; Martin E.P. Seligman, *The Effectiveness of Psychotherapy: The Consumer Reports Study*, 50 AM. PSYCHOLOGIST 965, 974 (1995).

quality of that relationship: the extent to which treatment occurred in a confidential atmosphere of mutuality, collaboration, acceptance, understanding, trust and other non-specific relationship factors.[81] Second, ethical guidelines published by every major professional organization whose members practice psychotherapy, specifically require them to safeguard patient confidentiality and to disclose information only when permitted or explicitly demanded by law.[82] Third, in most jurisdictions, mental health records are protected by the privilege of confidentiality, which may be broken only in very circumscribed instances, such as in cases of suspected child/elder abuse and when patients are threats to themselves, others, or cannot care for themselves.

2. Privilege and the Legal Right to Inspection

Nevertheless, access to the psychotherapeutic records of victims in criminal actions is more and more widely litigated. Whether there is access to these records is a state-specific ques-

---

81. *See* LORNA S. BENJAMIN, *supra* note 71; SHELDON CASHDAN, OBJECT RELATIONS THERAPY: USING THE RELATIONSHIP (1988); JEFFERSON M. FISH, PLACEBO THERAPY (1973); JEROME D. FRANK, PERSUASION AND HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY (1991); Arthur K. Shapiro & Louis A. Morris, *The Placebo Effect in Medical and Psychological Therapies*, *reprinted in* HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 369 (Sol L. Garfield & Allan E. Bergin eds., 2d ed. 1978); G.T. Evans & Ian M. Evans, *The Therapist-Client Relationship in Behavior Therapy*, *reprinted in* EFFECTIVE PSYCHOTHERAPY, A HANDBOOK OF RESEARCH 544, 553 (Alan S. Gurman & Andrew M. Razin eds., 1977); Sean O'Connell, *The Placebo Effect and Psychotherapy*, 20 PSYCHOTHERAPY THEORY, RES. & PRAC. 337, 339, 342-43 (1983); Carl R. Rogers, *The Necessary and Sufficient Conditions of Therapeutic Personality Change*, 21 J. CONSULTING PSYCH. 95, 95-100 (1957).

82. *See generally* AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY, AAMFT CODE OF ETHICS (1991); AMERICAN ASSOCIATION OF SEX EDUCATORS, COUNSELORS AND THERAPISTS, CODE OF ETHICS (1993); AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS AND CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS (1994); AMERICAN NURSES ASSOCIATION, CODE FOR NURSES WITH INTERPRETIVE STATEMENTS (1985); ETHICS COMMITTEE OF THE AMERICAN PSYCHIATRIC ASSOCIATION, OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 3 (1992); AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 5.02, 5.05 (1992); Association for Specialists in Group Work, *Ethical Guidelines for Group Leaders*, 7 JOURNAL OF SPECIALISTS IN GROUP WORK 174 (1983); Feminist Therapy Institute, *Feminist Therapy Code of Ethics*, *in* FEMINIST ETHICS IN PSYCHOTHERAPY 37-40 (Hannah Lerman & Natalie Porter eds., 1990); NATIONAL ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE COUNSELORS, ETHICAL STANDARDS OF ALCOHOLISM AND DRUG ABUSE COUNSELORS (1991); NATIONAL ASSOCIATION OF SOCIAL WORKERS, CODE OF ETHICS (1993).

tion. Access can be obtained, however, under at least limited circumstances in most, though by no means all, jurisdictions. The theories, which vary from state to state, range from the straightforward belief that clinical records are not privileged in the first instance, to the theory that the defendant has a constitutional right to at least limited access to the treatment records.

3. Constitutional Claim—*Pennsylvania v. Ritchie*

Any constitutional claim of access to the records must begin with an understanding of the United States Supreme Court's plurality decision in *Pennsylvania v. Ritchie*.[83] In *Ritchie*, the defendant was charged with, among other crimes, the rape of his thirteen-year-old daughter. The victim claimed that she had been assaulted by the defendant two or three times per week for four years. She reported these assaults to the police who then contacted Child Welfare Services (CWS), a government agency responsible for investigating mistreatment and neglect of children.[84]

Ritchie made a pretrial request for CWS records related to the victim, including both the current charges as well as to a previous investigation.[85] The agency refused to release the documents, and claimed that they were privileged under Pennsylvania law.[86] Ritchie moved for sanctions against CWS, but the trial court held that "no medical records are being held by CWS that would be of benefit to the defendant."[87] On appeal, the Pennsylvania Superior Court agreed with Ritchie's argument that the lower court's refusal to order production of the docu-

83. 480 U.S. 39 (1987). Chief Justice Rehnquist and Justices White, Blackmun and O'Connor joined the opinion written by Justice Powell. Justice Blackmun, however, disagreed with the Court's narrow interpretation of the Confrontation Clause's relevance to pretrial discovery, but nonetheless concurred because the result was adequate to meet the Confrontation Clause concerns. *Id.* at 65. Justices Brennan and Marshall dissented based upon the Court's narrow reading of the Confrontation Clause. *Id.* at 72. Justices Stevens, Brennan, Marshall and Scalia dissented, believing the Court lacked jurisdiction to hear the case. *Id.* at 78.

84. *Id.* at 43.

85. Commonwealth v. Ritchie, 472 A.2d 220, 224 (Pa. Super. Ct. 1984).

86. *Id.*

87. *Id.*

ments violated the Confrontation Clause of the Sixth Amendment,[88] as applied to the states through the Due Process Clause of the Fourteenth Amendment."[89] The court ordered an *in camera* review by the trial court with the defendant having access to any verbatim statements made by the victim.[90] On appeal by the Commonwealth, the Supreme Court of Pennsylvania agreed that there had been a violation of both the Confrontation Clause and the Compulsory Process Clause.[91] Thus, the court held that the defendant's lawyer was entitled to review the entire file to search for any useful information.[92]

Addressing the Confrontation Clause claim, the Supreme Court of the United States stated that the clause only guarantees the right physically to face adverse witnesses and the right to cross-examine those witnesses.[93] The Court stated, however,

> [t]he ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. In short, the Confrontation Clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[94]

The Court also rejected the defendant's Compulsory Process Clause argument, stating that the Court had never held that the Clause guaranteed the right to discover the identity of

---

88. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

89. *Ritchie*, 480 U.S. 39, 45 & n.5 (construing *Ritchie*, 472 A.2d at 225); U.S. CONST. amend. XIV.

90. *Ritchie*, 472 A.2d at 225.

91. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

92. Commonwealth v. Ritchie, 502 A.2d 148, 153. (Pa. 1985). The court stated: "When materials gathered become an arrow of inculcation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." *Id.*

93. *Ritchie*, 480 U.S. at 39.

94. *Id.* at 53, (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (footnote omitted) (citation omitted)).

witnesses.[95] The Court stated that it had traditionally evaluated such claims under the Due Process Clause and, in any event, the Compulsory Process Clause gave the defendant no more rights than did the Due Process Clause.[96] Under this rationale, the Court held that the defendant did not have a right to unlimited access to the records.[97]

While recognizing the public interest in protecting from disclosure sensitive information such as that contained in the CWS records, the Court held that such interest did not prevent disclosure in all circumstances. In what may be a critical distinction, the Court pointed out that the Pennsylvania statute failed to provide an unqualified privilege.[98] Indeed, the statute specifically allowed disclosure when court ordered, and, emphasizing the importance of this distinction, the court "express[ed] no opinion on whether the result in this case would have been different if the statute had protected the CWS files from disclosure to anyone, including law enforcement and judicial personnel."[99]

The Court, however, held that the defendant did not have a right to unlimited access to the records, remarking that "[a]lthough the eye of the advocate may be helpful to a defendant in ferreting out information . . . this Court has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of the information."[100] Rather, the defendant's rights and interests could be protected by submitting the records for an *in camera* inspection by the trial judge.[101]

What is critical to an understanding of any constitutional argument concerning access to clinical records is:

95. *Id.* at 56.
96. *Id.*
97. *Id.* at 61.
98. *Id.* at 57-58.
99. *Id.* at 58 n.14.
100. *Id.* at 59 (citation omitted).
101. *Id.* at 60.

1) If there is an absolute privilege, the United States Supreme Court may well uphold a refusal to provide any access;

2) Where the privilege is not absolute, a defendant's due process rights can be adequately protected by *in camera* review by the trial judge alone;

3) A defendant cannot require the trial court to review the records "without first establishing a basis for [a] claim that it contains material evidence."[102]

4. State Court Interpretations Following *Ritchie*

Since *Ritchie*, courts have had little difficulty dealing with routine discovery requests in circumstances where it was clear that the privilege attempted to be invoked was not absolute.

Since at least a year before *Ritchie* was decided, California courts have used a five-step process to govern discovery requests concerning the psychotherapy records of nonparty witnesses, including victims. In *People v. Reber*,[103] the court was confronted with the claim that California's psychotherapist-patient privilege precluded release of the records of complaining witnesses in a criminal action in which the defendants were charged with sexual and nonsexual assaults.[104] Relying on the Sixth Amendment Confrontation Clause, the court held that the psychotherapist-patient privilege must give way.[105] Stating that "[c]ertain types of mental disorders are highly probative on the issue of a witness' [sic] credibility,"[106] the court held that "adherence to a statutory privilege of confidentiality must give way to pretrial access when it would deprive a defendant of the constitutional right of confrontation and cross-examination."[107]

The court in *Reber* articulated the five steps necessary to an analysis of when a court's decision to withhold subpoenaed documents may constitute error. First, the defendant must

102. *Id.* at 58 n.15.
103. 223 Cal. Rptr. 139 (Ct. App. 3d 1986).
104. *Id.* at 139.
105. *Id.* at 144.
106. *Id.* at 145.
107. *Id.* at 146 (citation omitted).

establish "good cause" for the discovery.[108] Second, upon such a showing, the trial court, in deciding whether to release the information, should review the records *in camera*. Third, the court should weigh the constitutional right to cross-examine against the statutory privilege. Fourth, the court should determine if any of the privileged materials are essential to the vindication of the defendant's constitutional right. Finally, the court must make an adequate record for review.[109]

Even after the plurality's rejection of the Confrontation Clause argument in *Ritchie*, courts in California have continued to use the five step process laid out in *Reber*. In *People v. Nandkeshwar*,[110] the defendant was charged with, among other crimes, rape.[111] The victim was born with Down's Syndrome.[112] On appeal, the defendant asserted that the refusal to release the victim's medical and psychotherapy records was reversible error.[113] The defendant requested that the trial court review the medical and psychotherapy records *in camera* to determine whether there was any evidence relevant to the victim's competency to testify, and whether there was any medical information that might help explain other physical evidence. The trial court agreed to review the medical records, but refused to review the psychotherapy records. Defense counsel later requested that the medical records be examined by defendant's own medical experts. The trial court refused.

Relying on *Reber*, the court held that review of the psychotherapy records to determine whether they contained relevant materials was essential to vindicate the defendant's constitutional rights. Citing *Ritchie*, the court held that the "trial court was to determine whether the records contained relevant and material information, that is 'information that probably would have changed the outcome.'"[114] The court, however, then reviewed the psychotherapy records and found they did not "con-

108. *Id.*

109. *See id.*

110. 38 Cal. Rptr. 2d 41 (Ct. App. 1995); *see also* People v. Boyette, 247 Cal. Rptr. 795 (Ct. App. 1988); People v. Caplan, 238 Cal. Rptr. 478 (Ct. App. 1987).

111. *Nandkeshwar*, 38 Cal. Rptr.2d at 41.

112. *Id.*

113. *Id.*

114. *Id.* at 49 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987)).

tain information that probably would have changed the outcome of the trial."[115] Finally, the court turned to the argument that records of people voluntarily or involuntarily committed for mental health reasons were protected from disclosure under the California Welfare and Institutions Code.[116] Here, the court held that the Welfare Code, which protected the mentally disordered and the developmentally disabled, was indistinguishable from the CWS records in *Ritchie*; therefore the trial court was required to conduct a "Reber-type review."[117]

5. Good Cause Standard

Ritchie and the California line of cases indicate that some preliminary showing must be made by the defendant before an *in camera* inspection is required. What must the defendant establish to trigger such a review? *People v. Pack*[118] describes the standard to be used by the court for determining whether good cause exists. Here, the court held that the defendant's request "must describe the requested information with reasonable specificity and must be sustained by plausible justification for production of the items requested."[119]

---

115. *Id.* (footnote omitted).

116. CAL. WELF. & INST. CODE § 5328 (Deering 1995).

117. *Nandkeshwar*, 38 Cal. Rptr. at 51.

118. 240 Cal. Rptr. 2d 367 (Ct. App. 1987).

119. *Id.* at 370 (citation omitted); *see also* People v. Boyette, 247 Cal. Rptr. 795 (Ct. App. 1988) (stating that records must describe with specificity and make plausible showing the information is relevant); People v. McMillan, 607 N.E.2d 585 (Ill. Ct. App. 1993) (holding that a showing that records are material and relevant is sufficient); Zaal v. State, 602 A.2d 1247 (Md. Ct. App. 1992) (demanding a showing that records likely contain relevant information); Commonwealth v. Bishop, 617 N.E.2d 990 (Mass. 1993) (stating that records must be likely to contain relevant evidence); State v. Hummel, 483 N.W.2d 68 (Minn. 1992) (requiring that a plausible showing that there will be material information); State v. Gagne, 612 A.2d 899 (N.H. 1992) (stating that records must show reasonable probability of material and relevant evidence); State v. Kalakosky, 852 P.2d 1064 (Wash. 1993) (stating that more than demand of records is required—motion and supporting affidavit giving specific reasons why the information should be revealed must be provided); State v. S.H., 465 N.W.2d 238 (Wis. Ct. App. 1990) (demanding a showing that records contain relevant information).

6. Defense Counsel Inspection

In *Ritchie* the Court held that the *in camera* inspection was to be conducted by the trial court. Under what circumstances, if any, may defense counsel participate in the inspection? A clear majority of courts utilize a system in which the defense only has access to the records if the court first determines that they are material. In other words, although most courts might recognize "that defense counsel is generally in a better position than the trial judge to make a determination of what may or may not be useful to the defense,"[120] they still will not allow counsel to participate.[121] Exceptions have been made, though.[122]

7. When the Privilege is Absolute

If Pennsylvania's privilege was not absolute because of a public policy that the privilege should defer to a higher competing public policy, are there other circumstances where comparable evidence exists? For example, does the existence of a statutory privilege versus a common law privilege evidence a stronger public policy? Perhaps not surprisingly, following *Ritchie*, steps were taken to increase the protection afforded sex abuse victims by creating statutory privileges that were absolute. The obvious hope here, was that the Supreme Court's express statement that it was not addressing such a statute indicated that this kind of privilege would be completely sacrosanct. Pennsylvania itself modified the CWS statute to make the privilege absolute.[123]

---

120. *E.g.*, State v. Ramos, 858 P.2d 94, 98 (N.M. Ct. App. 1993) (citing State v. Romero, 532 P.2d 208, 211 (N.M. Ct. App. 1975)).

121. *See, e.g.*, Commonwealth v. Bishop, 617 N.E.2d 990 (Mass. 1993); State v. Ramos, 858 P.2d 94, 97 (N.M. 1993).

122. *See, e.g.*, State v. Allman, 352 S.E.2d 116, 120 (W. Va. 1986) (providing that victim's psychiatric records be made available to defendants counsel); People v. Dace, 449 N.E.2d 1031, 1035 (Ill. Ct. App. 1983) (holding, before *Ritchie*, that defendant should be able to discover victim's mental health history); People v. McMillan, 607 N.E.2d 585, 600 (Ill. Ct. App. 1993) (holding that the trial court did not commit reversible error in denying production of victim's psychiatric report).

123. *See supra* note 64.

Even in cases dealing with an absolute privilege, however, some courts have recognized that in certain circumstances an *in camera* inspection might be required. Perhaps the leading case addressing the distinction between absolute privilege and exceptions to the privilege is *People v. Foggy*.[124] In *Foggy*, the defendant was charged with criminal sexual assault and unlawful restraint.[125] As a result of the assault, the victim received treatment from a rape/sexual assault counseling program.[126] During pretrial discovery, defense counsel sought production of "all records, reports, notes, memoranda, statements, oral, recorded, or written, and any and all other documents concerning the alleged assault in the victim."[127] The trial court quashed the subpoena with regard to the rape counseling, holding that the communications between the counselor and the victim were privileged under the Illinois statute.[128]

The Illinois Supreme Court first pointed out that the Illinois privilege "is unqualified, and we are therefore met with an issue unresolved by *Ritchie*: whether an absolute privilege must yield to a criminal defendant's pretrial discovery request for otherwise privileged information that may provide material for use in cross-examining witnesses."[129] In upholding the trial court's refusal to conduct an *in camera* review of the documents, the court made several points. First, the stated purpose of the statute was to encourage victims to receive treatment and to assist police in preventing future crimes. Second, the predecessor statute was a qualified privilege that specifically allowed *in camera* inspection; the legislature intentionally strengthened the newer statute by making it absolute. Third, the role of the rape crisis counselor is "to help the victim understand and resolve her feelings" and not to assist the investigation of the crime.[130] The court went on to add:

---

124. 521 N.E.2d 86 (Ill. 1988).
125. *Id.* at 87.
126. *Id.* at 88.
127. *Id.*
128. *Id.* The Illinois statute provides in relevant part: "No rape crisis counselor shall disclose any confidential communication or be examined as a witness in any civil or criminal proceeding as to any confidential communication without the consent of the victim." ILL. REV. STAT. ch. 110, para. 8-802.1(c) (1985).
129. *Foggy*, 521 N.E.2d at 91.
130. *Id.*

> It is important to note that in this case the defendant's request for an *in camera* inspection of the counseling records was merely general; he did not allege that information may exist in the counseling files that would be subject to disclosure. Moreover, the defendant had access to the array of unprivileged statements made by the complaining witness to other persons following the commission of the offenses, including . . . nearly contemporaneous statements.[131]

Finally, using language that would appear to indicate that what was functionally missing was the good cause showing required by *Ritchie* and cases such as *Reber*, the court stated: "Because of the strong policy of confidentiality . . . and the absence of any indication by the defendant that the victim's communications with the counselor would provide a source of impeachment, we do not believe that the privilege was required to be breached in this case."[132] Indeed the court, in summary, distinguished *Davis v. Alaska*[133] on the basis that the defendant in *Davis* was able to point to specific information and had no other means of access to the information.[134] This interpretation was subsequently followed by *People v. Foskey*,[135] in which the court held that the defendant was entitled to an *in camera* inspection of confidential communications between a rape crisis counselor and the victim. The court distinguished *Foggy* on the basis that, in *Foskey*, "the defendant was aware of specific information that had the potential to demonstrate the witness' bias and motive to falsify her testimony."[136]

At least two courts, however, have rigidly held that in the face of an absolute privilege, a defendant is not entitled to an *in camera* inspection. In *Pennsylvania v. Wilson*,[137] the court was confronted with the scope of a sexual assault counselor's privilege. Having determined that the statutory privilege was

131. *Id.*
132. *Id.* at 92.
133. 415 U.S. 308 (1974).
134. *Foggy*, 521 N.E.2d at 92.
135. 554 N.E.2d 192 (Ill. 1990).
136. *Id.* at 205.
137. 602 A.2d 1290 (Pa. 1992).

absolute, the court turned to the question of whether the privilege denied the defendant his constitutional rights. Relying on *Ritchie*, the court stated that the right to confrontation only requires wide latitude to question witnesses, and went on to say that no disclosure was permissible because of the absolute nature of the privilege.[138] The holding in Colorado in *People v. District Court* was similar.[139]

8. Determining Whether the Privilege is Absolute

In light of an absolute privilege, is there a constitutional requirement to allow some type of disclosure?

In a jurisdiction like Pennsylvania, determining whether a privilege is absolute can be of critical importance. For statutory privileges, the determination should usually be a simple matter of statutory interpretation. In addition, a number of courts that have addressed the issue make a distinction between statutory privileges that by their terms are absolute, and common law privileges that by the nature of their judicial development are not absolute. For example, the Pennsylvania Supreme Court in *Wilson*[140] distinguished that case from *Commonwealth v. Lloyd*.[141] In *Lloyd*, the Pennsylvania Supreme Court stated:

> We now hold under the Confrontation Clause of the Pennsylvania Constitution, that [the defendant] was denied his right to confrontation when his attorney was denied access to the contents of the victim's psychotherapeutic records. In addition we hold that the right to inspect these records is also mandated by the Compulsory Process Clause of the Pennsylvania Constitution.[142]

---

138. *Id.* at 1296; *see also* Commonwealth v. Kennedy, 604 A.2d 1036 (Pa. Super. Ct. 1992) (holding that the statutory psychotherapist-patient privilege is absolute and therefore no *in camera* inspection was allowed).

139. 719 P.2d 722, 727 (Colo. 1986).

140. 602 A.2d 1290 (Pa. 1992).

141. 567 A.2d 1357 (Pa. 1989).

142. *Id.* at 1359; *see also* Commonwealth v. Kennedy, 604 A.2d 1036 (Pa. Super. Ct. 1992) (stating that the statutory psychotherapist-patient privilege is absolute where the records are not in the possession of the prosecution, and therefore no *in camera* inspection was allowed).

The court in *Wilson*, however, stated that "*Lloyd* was concerned with a common law privilege which could not defeat a defendant's constitutional rights. Implicit in the distinction drawn by the *Lloyd* court is the recognition that . . . the legislature acknowledges the significance of a particular interest and has chosen to protect that interest."[143] Assuming that the jurisdiction rejects the narrow Pennsylvania approach and follows what is apparently the majority view represented by the *Ritchie-Reber-Foggy* cases, the ability of a defendant to show good cause in order to trigger an *in camera* inspection in a criminal action where the victim alleges he or she has recovered memory during some type of therapy had been strengthened.

9. Exceptions to Privilege

a. No Privilege Applies

Perhaps the easiest way to justify access to the records is to examine jurisdictions in which there is no privilege. At least three federal circuits have specifically refused to recognize the privilege.[144]

Sexual abuse cases are an exception to some therapist-patient privileges. The Tenth Circuit Court of Appeals[145] for example, recently held that a psychotherapist-patient privilege did not apply to criminal child sexual abuse cases. Statutory privileges themselves may also contain explicit exceptions. In *State v. Kalakosky*,[146] a case involving charges of rape, the Supreme

143. *Wilson*, 602 A.2d at 1290, 1297-98; *see generally* State v. Ramos, 858 P.2d 94 (N.M. Ct. App. 1993) (citing *Wilson*'s interpretation of *Lloyd* with apparent approval, in a case where it approved a process by which records were denied, but after an *in camera* inspection).

144. *See, e.g.*, *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989); United States v. Corona, 849 F.2d 562 (11th Cir. 1988); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976).

145. United States v. Burtrum, 17 F.3d 1299 (10th Cir. 1994). Although *Burtrum* involved the discovery of the defendant's therapy records, its rejection of a major underlying rationale of the privilege, that of encouraging treatment, is equally applicable to victims as well.

146. 852 P.2d 1064 (Wash. 1993).

Court of Washington pointed out that the rape crisis counselor privilege in that state explicitly recognizes *in camera* inspection and states the conditions for possible discovery.[147]

In addition to explicit exceptions to the privilege, some courts have held that implicit in statutes designed to encourage child abuse reporting and investigation is an exception as well. In *State v. Hansen*,[148] the defendant, a high school teacher, was charged with sodomy of a sixteen-year-old student. Defense counsel sought to introduce evidence of communication between the plaintiff and her private psychologist concerning the student's relationship with the defendant. The Oregon psychotherapist-patient statutory privilege contained an exception that provided "[i]n the case of abuse of a child . . . the psychotherapist-patient privilege . . . shall not be a ground for excluding evidence regarding a child's abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 418.750."[149] Rejecting the state's argument that the legislation's purpose was to apply only to evidence that could prove guilt, not evidence that would exculpate the accused, the Oregon Supreme Court stated:

> [T]he legislature intended to make a limited exception to the psychotherapist-patient privilege in order to assist in a search for the truth regarding an instance of possible child abuse, not in order to prove a particular result. The state has pointed to nothing, and we have been unable to find anything, in the legislative history of the child abuse reporting laws from which we could infer that in addition to facilitating proof of child abuse the legislature intended to limit the exception so as to prevent a person accused of abuse from introducing exculpatory evidence.[150]

The exception to the privilege may actually exist separate from the privilege statute. For example, a similar result to that in *Hansen* was reached in *Jett v. State*,[151] where the Florida

147. *Id.* at 1074 (citing WASH. REV. CODE § 70.125.065 (1992)).
148. 743 P.2d 157 (Or. 1987).
149. OR. REV. STAT. § 418.775(1) (1983).
150. *Hansen*, 743 P.2d at 163.
151. 605 So. 2d 926, 928 (Fla. Dist. Ct. App. 1992).

district court of appeal held that the child sex abuse reporting statute required any person, including psychotherapists, to report suspected child abuse.[152] This requirement, the court held, constituted a waiver of the privilege. Having held that the privilege was waived by the reporting statute, the court held that the information was available not only to the state, but to the accused as well.

The general criminal discovery statutes may also constitute an exception to the privilege. In *Spencer v. State*,[153] the Alaska Court of Appeals required an *in camera* inspection of evidence to determine whether it was relevant. In so holding, the court relied upon the general discovery provisions of the Alaska Rules of Criminal Procedure:

> In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.[154]

Non-disclosure, the court held, was only permissible when there would be harm to people or law enforcement *and* the material was not relevant to the defense.[155]

It should also be kept in mind that a particular therapist may not fall within the protection afforded by a specific privilege. For example, in *Hulett v. State*,[156] the Indiana Court of Appeals held that the statutory psychologist-patient privilege did not apply to a counselor who was not a certified psychologist.

b. Refreshing Recollection: At Trial

Discovery of the psychotherapist-patient records may also be possible using the evidentiary principles related to refreshing

152. FLA. STAT. ANN. § 415.504 (West 1993 & Supp. 1994).
153. 642 P.2d 1371 (Alaska Ct. App. 1982).
154. *Id.* at 1374 (citing ALASKA R. CRIM. P. 16(a)).
155. *Id.* at 1375.
156. 552 N.E.2d 47 (Ind. Ct. App. 1990).

recollection, and by drawing an analogy to hypnotically refreshed memory. When a witness is on the stand and something, usually a document, is used to refresh that witness's memory, opposing counsel has a right to inspect that item.[157] If the item used to refresh happens to be otherwise privileged or constitutes work product, those protections are waived. What is not so clear is whether documents used to refresh a witness's memory prior to trial are discoverable and, if so, whether they lose their protection.

The Federal Rules of Evidence clearly envision that the items used prior to trial are discoverable, but not as a matter of right. The rule specifically refers to the court's discretion to allow disclosure.[158] Also, certainly prior to passage of the Federal Rules of Evidence by Congress and by its counterparts in a majority of states, the majority rule was that such pretestimonial use did not constitute a waiver of the privilege or of work-product.[159] The cases, however, are split.[160] If, in a jurisdiction that allows waiver, a clear argument can be made that recovered memory is the result of a refreshment process, then the items used to refresh the witness's memory, whether they are documents, communications between psychotherapist and patient, or other tangible items, should be open to inspection.

c. Refreshing Recollection: Pre-trial Hypnosis of Witnesses

The prevalence of pre-testimonial hypnosis has generated considerable litigation. Since as far back as 1974, for example, courts have held that testimony given in court by a witness

157. FED. R. EVID. 612.

158. *Id.*

159. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 6.23-.26 (1995).

160. *See also* Derjerian v. Polaroid Corp., 121 F.R.D. 13 (Mass. Dist. Ct. 1988) (questioning whether the rulings of the *Berkey Photo* and *Wheeling-Pittsburgh* courts are in accord with Congressional intent). *Compare* Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs, Inc., 81 F.R.D. 8 (N.D. Ill. 1978) (work product waived) *with* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977) (work product not waived).

under hypnosis is inadmissible.[161] A different issue, however, is whether a witness who has been subjected to hypnosis may subsequently testify at trial. The United States Supreme Court has noted that, even though a per se rule excluding hypnotically refreshed testimony is unconstitutional, there are significant dangers to such testimony.[162] Individual states have taken very different approaches. Some jurisdictions exclude the hypnotically refreshed testimony as scientifically unreliable.[163] The opposite result has also occurred, with some courts holding that the fact that the testimony was hypnotically refreshed goes to credibility.[164] A number of courts appear to leave the decision to the court's discretion. For example, the Virginia Supreme Court in *Hopkins v. Commonwealth*[165] stated that "[i]n determining the competency of a previously hypnotized witness, a trial court should review the circumstances surrounding any hypnosis session. The court should consider any evidence of suggestion and should compare the subject's prior statements with those made after hypnosis."[166] Because the witness in *Hopkins* testified that the post-hypnotic testimony concerned only matters that the witness remembered before hypnosis, the witness was allowed to testify.

Some courts allow testimony if certain procedures have been followed. In *State v. Hurd*,[167] the Supreme Court of New Jersey, established the following procedures:

- a psychiatrist or psychologist experienced in the use of hypnosis should conduct the session;

- the person conducting the session should be independent of and not regularly employed by the prosecutor, investigator or defense;

- information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session should be recorded;

161. Greenfield v. Commonwealth, 204 S.E.2d 414, 418-19 (Va. 1974).
162. Rock v. Arkansas, 483 U.S. 44 (1987).
163. *See, e.g.*, State v. Marin, 684 P.2d 651 (Wash. 1984).
164. *See, e.g.*, State v. Wren, 425 So. 2d 756 (La. 1983).
165. 337 S.E.2d 264 (Va. 1985).
166. *Id.* at 271.
167. 432 A.2d 86 (N.J. 1981).

- before hypnosis the professional should obtain a detailed description by asking structured questions or adding new details;

- the professional should avoid influencing the description by asking structured questions or adding new details;

- all contacts between the professional and the witness should be recorded;

- the use of videotape is strongly encouraged;

- only the professional and the subject should be present during the sessions, including the pre-hypnotic testing and post-hypnotic interview.[168]

The risks associated with hypnotically refreshed testimony are strikingly similar, indeed, to the extent that hypnosis is used to recover memory, *they are identical to* the dangers of recovered memory. As stated by the United States Supreme Court in *Rock v. Arkansas*:[169]

> The popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation and, in fact, hypnosis often has no effect at all on memory. The most common response to hypnosis, however, appears to an increase in both correct and *incorrect* recollections. Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him or her great confidence in both true and false memories, making effective cross-examination more difficult.[170]

---

168. *Id.* at 96-97.

169. 483 U.S. 44 (1987).

170. *Id.* at 59-60 (footnotes omitted) (emphasis added) (citing Martin T. Orne et al., *Hypnotically Induced Testimony, reprinted in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 171 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 333-42 (1980)).

With these caveats about suggestibility, confabulation, and the malleability of memory, how then can experts effectively evaluate the clinical record in cases where repressed recollections of past sexual abuse are at issue?

II. EVALUATING THE PSYCHOTHERAPY RECORD

A. *Effective Psychotherapy: What It Is*

We believe that even when a person's difficulties in living are largely a function of biological aberrations (e.g., schizophrenia, major depression, bipolar disorder (manic-depression)), effective psychotherapy:

(1) Does not pathologize or conceptualize patients as diseased, and instead reflects a collaborative relationship with a therapist that helps one "make sense of" his or her gallant attempt to adapt to previous life experiences as well as their genetic "hardware";[171]

(2) Teaches people new ways to construe past, current, and future experiences, so they can live a richer, more rewarding, and effective life;[172]

(3) Helps patients learn new thought patterns, behaviors, ways to appropriately regulate emotional expression, and responses to changes in relationships or predictable life transitions (e.g., birth of a child, death of a parent) based on well-developed theory supported by empirical data;[173]

---

171. One of the most widely held notions in the past 15 years has been the concept of co-dependency, where one gets labeled as mentally ill or diseased because of one's relationship with an addicted person. The theory of co-dependency represents the first time in psychiatric history where one could be diagnosed primarily on the basis of another person's behavior. In our experience, many times in repressed memory cases, the patient has been labeled co-dependent and encouraged to rise above this condition, break an interactional pattern that supposedly maintains the diseased person's behavior, and often confront the addict or abuser with the consequences of his or her behavior.

172. GEORGE A. KELLY, THE PSYCHOLOGY OF PERSONAL CONSTRUCTS (1955).

173. *See* AARON T. BECK ET AL., ANXIETY DISORDERS AND PHOBIAS: A COGNITIVE PERSPECTIVE (1985) (hereinafter ANXIETY DISORDERS AND PHOBIAS); AARON T. BECK ET AL., COGNITIVE THERAPY OF DEPRESSION (1979) (hereinafter THERAPY OF DEPRESSION); AARON T. BECK & ARTHUR FREEMAN, COGNITIVE THERAPY OF PERSONALITY DISORDERS (1990) (hereinafter THERAPY OF PERSONALITY DISORDERS); BENJAMIN, *supra*

(4) Accomplishes these objectives in the context of an empathic and genuinely caring relationship with the therapist.[174]

B. *Effective Psychotherapy: What It Is Not*

In addition to psychotherapeutic interventions that are neither driven by well-developed theory or scientific data, we are seriously skeptical of treatment providers who approach their work from a decidedly political standpoint. While the personal may be political, as some feminists have argued,[175] we have yet to see family pain or trauma fully salved by litigation. Indeed, we view with considerable skepticism advice by either self-proclaimed experts or licensed treatment providers who encourage patients to sue alleged abusers on the basis of memories recovered in therapy, especially recollections unearthed using the psychic "tool kit" of techniques described below. Furthermore, we wonder whether the adversarial legal process can increase the probability of an accuser feeling re-abused rather than cleansed and vindicated.

Additionally, we want to underscore our principal concern over the use of so-called therapeutic techniques that have not been tested by scientific research (or explained *a priori* as experimental to the client); techniques that can create pseudomemories of abuse, fuel unsubstantiated accusations of molestation, and consequently destroy the lives and families of innocent people. These caveats emphasize our position that the documented record of psychotherapy must be evaluated by experts who have a sophisticated understanding of mental health treatment.

note 71; DANIEL J. LEVINSON ET AL., THE SEASONS OF A WOMAN'S LIFE (1995), DANIEL J. LEVINSON ET AL., THE SEASONS OF A MAN'S LIFE (1978); MARSHA M. LINEHAN, COGNITIVE-BEHAVIORAL TREATMENT OF BORDERLINE PERSONALITY DISORDER (1993); DONALD MEICHENBAUM, A CLINICAL HANDBOOK/PRACTICAL THERAPIST MANUAL FOR ASSESSING AND TREATING ADULTS WITH POST-TRAUMATIC STRESS DISORDER (1994).

174. Rogers, *supra* note 81.

175. *See generally* LAURA S. BROWN, SUBVERSIVE DIALOGUES: THEORY IN FEMINIST THERAPY (1994); FEMINIST THERAPY INSTITUTE, FEMINIST THERAPY CODE OF ETHICS (1987); LENORE E. WALKER, ABUSED WOMEN AND SURVIVOR THERAPY (1994).

C. *Expert Witnesses to Evaluate Treatment*

In this regard, we believe the clinical record needs extremely careful analysis by expert clinicians well-schooled in and sophisticated about the art, *science*, and complexity of psychotherapy. Other professionals, for instance experts in cognitive processes (e.g., memory, suggestibility, etc.) or social psychology (e.g., interpersonal influence, coercion, and small group processes), should also be afforded access to these records. This might, under certain circumstances, be done in conjunction with a clinician who could help interpret certain interventions that might be iatrogenic[176] or inconsistent with the empirical knowledge base in psychology. Note however that, in our view, advanced degrees per se are not enough, because even doctoral level professionals sometimes hold dangerous and ill-founded beliefs,[177] practice in ways that have no theoretical or empirical support in the scientific literature,[178] and may not fully appreciate the interpersonal dynamics of persuasion, suggestibility, and iatrogenesis.[179] Thus, we believe that the following protocol could be helpful in keeping clinical experts focused on relevant material in the record.

D. *Proposed Evaluation Protocol*

1. Standard of Care

Awareness of the evolving standard of care in clinical recordkeeping is important because only recently has at least one group of treatment providers (psychologists) developed a

---

176. Iatrogenic is defined as " . . . caused by the diagnosis, manner, or treatment of a physician." RANDOM HOUSE UNABRIDGED DICTIONARY 946 (2d ed. 1993).

177. YAPKO, *supra* note 4; *see also* Poole et al., *supra* note 12.

178. ROBIN M. DAWES, HOUSE OF CARDS: PSYCHOLOGY AND PSYCHOTHERAPY BUILT ON MYTH (1994).

179. For a discussion of iatrogenesis and psychiatric diagnosis, with special reference to DID or Multiple Personality Disorder, see OFSHE & WATTERS, *supra* note 4; PENDERGRAST, *supra* note 4; Thomas A. Fahy, *The Diagnosis of Multiple Personality Disorder*, 153 BRIT. J. PSYCHIATRY 597 (1988); Harold Mersky, *The Manufacture of Personalities: The Production of Multiple Personality Disorder*, 160 BRIT. J. PSYCHIATRY 327 (1992); Nick Spanos, *Multiple Identity Enactments and Multiple Personality Disorder: A Sociocognitive Perspective*, 116 PSYCHOL. BULL. 143 (1994).

formal set of documentation guidelines.[180] In years past, despite counsel from numerous authorities,[181] the standard in the field has varied widely, perhaps being a 'nonstandard' of sorts. As recently as five years ago, sixty-six percent of a random sample of 300 licensed doctoral level psychologist-psychotherapists admitted failing to keep information in the treatment record that could afford them a minimal amount of legal protection.[182] When reviewing treatment records, the careful and fair clinical record evaluator keeps in mind the extent to which the practitioner's overall behavior—including recordkeeping—conformed to the minimal standard of care extant at the time of treatment. With regard to documentation of psychotherapy, in practical terms, this means that with the advent in the last few years of managed mental health care and third-party payers' demands for explicit treatment plans and outcome measurement, one would hope to see a record of care that finally bears

---

180. American Psychological Association Committee on Professional Practice and Standards, *Record Keeping Guidelines*, 48 AM. PSYCHOLOGIST 984 (1993), *reprinted in* SHARON L. YENNEY, BUSINESS STRATEGIES FOR A CARING PROFESSION: A PRACTITIONER'S GUIDEBOOK (1994).

181. *See generally* RONALD J. COHEN & WILLIAM E. MARIANO, LEGAL GUIDEBOOK IN MENTAL HEALTH (1982); RONALD J. COHEN, MALPRACTICE: A GUIDE FOR MENTAL HEALTH PROFESSIONALS (1979); CLIFFORD D. STROMBERG ET AL., THE PSYCHOLOGISTS LEGAL HANDBOOK (1987); ROBERT H. WOODY, FIFTY WAYS TO AVOID MALPRACTICE (1988); Gary W. Buttone, *Understanding and Managing the Litigious Patient*, 9 PSYCHOTHERAPY IN PRIVATE PRAC. 27 (1991); Donald J. Dawidoff, *Some Suggestions to Psychiatrists for Avoiding Legal Jeopardy*, 29 ARCHIVES OF GENERAL PSYCHIATRY 699 (1973); Thomas G. Gutheil, *Paranoia and Progress Notes: A Guide for Forensically Informed Psychiatric Recordkeeping*, 31 HOSP. & COMMUNITY PSYCHIATRY 479 (1980); Dennis J. Horan & Robert J. Milligan, *Recent Developments in Psychiatric Malpractice*, 1 BEHAVIORAL SCI. & L. 23 (1983); R. Slovenko, *On the Need for Recordkeeping in the Practice of Psychiatry*, 7 J. PSYCHIATRY & L. 339 (1979); Paul D. Snider, *Client Records: Inexpensive Liability Protection for Mental Health Counselors*, 9 J. MENTAL HEALTH COUNSELING 134 (1987); Ellen L. Soisson et al., *Thorough Recordkeeping: A Good Defense in a Litigious Era*, 18 PROF. PSYCHOL. RES. & PRAC. 498 (1987); S.A. Watkins & J.C. Watkins, *Malpractice in Clinical Social Work: a Perspective on Civil Liability in the 1980s*, 1 BEHAVIORAL SCI. & L. 55 (1983).

182. *See generally* John R. Paddock et al., *Recordkeeping Practices of Psychologist-Psychotherapists: Part I, Empirical Findings and Implications for Clinical Practice*, 42 G.A. PSYCHOL. 24 (1989); *see also* Carole Siegel & Susan K. Fischer, *A National Questionnaire Survey of Mental Health Professionals on their use of and Attitudes Toward Psychiatric Records*, in PSYCHIATRIC RECORDS IN MENTAL HEALTH CARE (C. Siegel & S.K. Fischer eds., 1981); Solomon M. Fulero & Jeffrey R. Wilbert, *Recordkeeping Practices of Clinical and Counseling Psychologists: A Survey of Practitioners*, 19 PROF. PSYCHOL.: RES. AND PRAC. 658 (1988).

some resemblance to the suggestions articulated by experts over the past fifteen years.

2. Record Content

The expert should examine thoroughly the organization and content of the clinical record. In addition to the demographic data that common sense dictates be included on a "face sheet,"[183] and developmental and psychosocial history and clear description of presenting problem(s),[184] we recommend examining the following five areas:

(1) Has a *diagnosis* been made consistent with criteria published in the DSM in use at the time of service?[185]

(2) Have the *presenting symptoms been evaluated* by methods other than clinical intuition or observation? That is, did the practitioner conduct a formal Mental Status Evaluation (a technique questionable from a psychometric standpoint but nevertheless quite common in clinical psychiatry)?[186] Did the practitioner use semi-structured rather than free-ranging diagnostic interviews to elucidate and describe symptoms?[187] Finally, did the practitioner administer scientifically developed, normed, validated, reliable, and objective measures of symptoms or interpersonal behavior patterns?[188]

---

183. *E.g.*, name, address, sex, marital status, date of birth, school/employer, emergency contact numbers, next of kin, and insurance carrier/policy number.

184. *See* WOODY, *supra* note 181.

185. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

186. *See* R.A. Mackinnon & Stuart C. Yudofsky, *Outline of the Psychiatric History and Mental Status Examination*, *in* TEXTBOOK OF PSYCHIATRY (John A. Talbott et al., eds., 1988).

187. RICHARD ROGERS, DIAGNOSTIC AND STRUCTURED INTERVIEWING: A HANDBOOK FOR PSYCHOLOGISTS (1995).

188. *See, e.g.*, AARON T. BECK & ROBERT A. STEER, BECK ANXIETY INVENTORY: MANUAL (1993a); AARON T. BECK & ROBERT A. STEER, BECK DEPRESSION INVENTORY: MANUAL (1993b); AARON T. BECK & ROBERT A. STEER, BECK HOPELESSNESS INVENTORY: MANUAL (1993c); AARON T. BECK & ROBERT A. STEER, BECK SCALE FOR SUICIDE IDEATION: MANUAL (1991); JAMES N. BUTCHER ET AL., MINNESOTA MULTIPHASIC PERSONALITY INVENTORY-2 (MMPI-2): MANUAL FOR ADMINISTRATION AND SCORING (1989); CATTELL ET AL., THE 16 PF (5th ed. 1994); LEONARD R. DEROGATIS, BSI, BRIEF SYMPTOM INVENTORY: ADMINISTRATION, SCORING, AND PROCEDURES MANUAL (1993); LEONARD R. DEROGATIS, SCL-90-R: ADMINISTRATION, SCORING, AND PROCEDURES MANUAL (1993); 1 & 2 JOEL FISCHER & KEVIN CORCORAN, MEASURES FOR

(3) Has a formal *treatment plan* been developed that not only focuses on the presenting and evaluated symptoms, but also is driven by a clearly stated theoretical rationale, and schedules periodic assessment of symptomatology to evaluate efficacy of interventions?[189]

(4) Has the theoretical rationale underlying treatment been successfully subject to challenge in the empirical psychological literature? For instance, in our experience some practitioners appear to cling rigidly to Freudian concepts of repression, despite the lack of empirical evidence supporting the phenomenon,[190] instead of re-orienting their thinking to modern, scientifically developed, and empirically supported theoretical conceptualizations.[191]

CLINICAL PRACTICE: A SOURCEBOOK (2nd ed. 1994); T. MILLON, MCMI-III: MANUAL (1994).

189. *See generally* DAVID H. BARLOW ET AL., THE SCIENTIST-PRACTITIONER: RESEARCH AND ACCOUNTABILITY IN CLINICAL AND EDUCATIONAL SETTINGS (1994); MARTIN BLOOM & JOEL FISCHER, EVALUATING PRACTICE (1982).

190. *See* HOLMES, *supra* note 9.

191. *See, e.g.* Lorna S. Benjamin, *Use of the SASB Dimensional Model to Develop Treatment Plans for Personality Disorders: I. Narcissism.* 1 J. PERSONALITY DISORDERS 43 (1987); Lorna S. Benjamin, *Brief SASB-Directed Reconstructive Learning Therapy,* PAUL CRITS-CHRISTOPH & JEFFREY P. BARBER, HANDBOOK OF SHORT-TERM DYNAMIC PSYCHOTHERAPY (1991); BENJAMIN, *supra* note 71 (all discussing interpersonal psychotherapy).

For a discussion of cognitive-behavioral treatment of depression, anxiety, and personality disorders see DAVID H. BARLOW, ANXIETY AND ITS DISORDERS (1988); THERAPY OF PERSONALITY DISORDERS, *supra* note 173; ANXIETY DISORDERS AND PHOBIAS, *supra* note 173; THERAPY OF DEPRESSION, *supra* note 173; HANDBOOK OF CLINICAL BEHAVIOR THERAPY (Samuel M. Turner et al. eds., 2d ed. 1992).

(5) Does the prescribed treatment have documented efficacy in the scientific literature?[192] If not, did the therapist obtain informed consent for the treatment protocol?

3. Iatrogenic Interventions

In our judgement, the most important data in the record of repressed memory cases are evidence of suggestive techniques that are potentially *iatrogenic* and likely to lead a patient to develop false memories of sexual abuse trauma. These fall in

---

192. While not exhaustive, the following are lists of empirically documented treatments for many of the kinds of symptom patterns initially presented in repressed memory cases:

For treatment of *depression* see THERAPY OF DEPRESSION *supra* note 173; Alberto DiMascio et al., *Therapy of Depression, Differential Symptom Reduction by Drugs and Psychotherapy in Acute Depression*, 36 ARCHIVES OF GENERAL PSYCHIATRY 1450 (1979); Keith S. Dobson, *A Meta-Analysis of the Efficacy of Cognitive Therapy for Depression*, 57 J. CONSULTING & CLINICAL PSYCHOL. 414 (1989); Peter M. Lewinsohn et al., *The Coping with Depression Course*, 21 CANADIAN J. BEHAVIOR SCI. 470 (1989).

For treatment of *anxiety disorders*, see David H. Barlow et al., *Behavioral Treatment of Panic Disorder*, 20 BEHAVIOR THERAPY 261 (1989); ANXIETY DISORDERS AND PHOBIAS, *supra* note 173; Edna B. Foa et al., *Treatment of Post-Traumatic Stress Disorder in Rape Victims: A Comparison Between Cognitive-Behavioral Procedures and Counseling*, 59 J. CONSULTING & CLINICAL PSYCHOL. 715 (1991); Richard S. Heimsberg et al., *Cognitive Behavioral Group Treatment for Social Phobia: Comparison with a Credible Placebo Control*, 14 COGNITIVE THERAPY AND RES. 1 (1990); Alan E. Kazdin & Linda A. Wilcoxon, *Systematic Desensitization and Nonspecific Treatment Effects: A Methodological Evaluation*, 83 PSYCHOL. BULL. 729 (1976); Isaac Marks & Geraldine O'Sullivan, *Drugs and Psychological Treatments for Agoraphobia/Panic and Obsessive-Compulsive Disorders*, 153 BRIT. J. PSYCHIATRY 650 (1988); Richard P. Mattick et al., *Treatment of Panic and Agoraphobia*, 178 J. NERVOUS & MENTAL DISEASE 567 (1990); Richard P. Mattick & Lorna Peters, *Treatment of Severe Social Phobia: Effects of Guided Exposure With and Without Cognitive Restructuring*, 56 J. CONSULTING & CLINICAL PSYCHOL. 251 (1988); Lars-Göran Ost, *Applied Relaxation vs. Progressive Relaxation in the Treatment of Panic Disorder*, 26 BEHAVIOR RES. & THERAPY 13 (1988); Gary Steketee et al., *Recent Advances in the Behavioral Treatment of Obsessive-Compulsives*, 39 ARCHIVES OF GENERAL PSYCHIATRY 1365 (1982); Timothy J. Trull et al., *The Use of Meta-Analysis to Assess the Clinical Significance of Behavior Therapy for Agoraphobia*, 19 BEHAVIOR THERAPY 527 (1988).

For treatment of eating disorders *see* Christopher G. Fairburn et al., *Psychotherapy and Bulimia Nervosa: Longer-Term Effects of Interpersonal Psychotherapy, Behavior Therapy, and Cognitive Behavior Therapy*, 50 ARCHIVES OF GEN. PSYCHIATRY 419 (1993); Denise E. Wilfley et al., *Group Cognitive-Behavioral Therapy and Group Interpersonal Psychotherapy for the Nonpurging Bulimic Individual* 61 J. CONSULTING & CLINICAL PSYCHOL. 296 (1993).

For treatment of *suicidality* and *Borderline Personality Disorder* see LINEHAN, *supra* note 173; Marsha M. Linehan et al., *Cognitive-Behavioral Treatment of Chronically Parasuicidal Borderline Patients*, 48 ARCHIVES OF GEN. PSYCHIATRY 1060 (1991).

three general categories: self-help bibliotherapy; pseudo-medical interventions; and shamanic rituals.

a. Self-Help Bibliotherapy

Our experience in these cases indicates that many therapists recommend books to their patients containing information that directly and explicitly contradicts established scientific data about the reconstructive nature of memory. That is, they appear to assert the "Camcorder Model of memory" which asserts—quite without empirical substantiation—that the mind records *every* experienced event, and through psychotherapeutic techniques, memories may be unearthed with pristine clarity and accuracy.[193] These books convey very powerful and suggestive messages to patients about the origins of their symptomatology and utility in adopting the identity of a victim. Some contain so-called checklists (with no reported scientific reliability or validity), ostensibly to help people diagnose themselves as victims of sexual abuse.[194] Others assert, once again contrary to data reported in the literature,[195] that sexual abuse survivors and perpetrators possess definite personality characteristics and symptom patterns. Still other books fuel the myth of organized alleged widespread satanic ritual abuse.[196]

---

193. *See* Bass & Davis, *supra* note 20; JOHN BRADSHAW, BRADSHAW ON: THE FAMILY (1992); J.E. BRADSHAW LEARS, INCEST: WHEN YOU WONDER IF IT HAPPENED TO YOU 43 (1992); FREDRICKSON, *supra* note 11.

194. MELODY BEATTIE, CO-DEPENDENT NO MORE 37 (1987); BLUME, *supra* note 11, at xvii.

195. Utah v. Rimmasch, 775 P.2d 388 (Utah 1989); Andrew Cohen, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429 (1985); Kathleen A. Kendall-Tacket et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164 (1993); David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1 (1989); Melissa A. Polusny & Victoria M. Follette, *Long-Term Correlates of Child Sexual Abuse: Theory and Review of the Empirical Literature*, 4 APPLIED & PREVENTATIVE PSYCHOL. 143 (1995); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987).

196. For excellent discussions of this phenomenon, see OFSHE & WATTERS, *supra* note 4; PENDERGRAST, *supra* note 4.

b. Pseudo-Medical Interventions

Frequently in these records one finds reference to the use of hypnosis and/or a sodium amytal interview to help a patient unlock the mental gates of repression and thereby liberate memories from her psychic straight jacket. Again, both the courts (per *Rock v. Arkansas*)[197] and well-trained clinicians know of the inherent unreliability of "memories" reported under hypnosis,[198] and have heeded the warning issued over 10 years ago by the Council on Scientific Affairs of the American Medical Association: "Contrary to what is generally believed by the public, recollections obtained during hypnosis not only fail to be more accurate but actually appear to be generally less reliable than . . . recall [when the patient is not hypnotized]."[199] Similarly, interviewing patients following a sodium amytal ("truth serum") injection in fact does *not* increase memory reliability, but creates a situation ripe for confabulation and distortion,[200] and in one case has led to a successful malpractice action against a psychiatrist.[201]

c. Shamanic Rituals

Finally, an overview of clinical records indicate a plethora of unvalidated, potentially suggestible and downright harmful techniques used by therapists when going on these kind of well-intended but misguided psycho-archeological digs: guided imagery; dream interpretation; journal writing; "body work"; art therapy, and other specious interventions such as "aroma therapy."[202] In each case, these interventions could readily lead a

197. 483 U.S. 44 (1987); *see supra* notes 162, 168-69 and accompanying text.

198. Peter W. Sheehan et al., *Pseudomemory Effects and Their Relationship to Level of Susceptibility to Hypnosis and State Instruction*, 60 J. PERSONALITY & SOC. PSYCHOL. 130 (1991).

199. Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. AM. MED. ASS'N 1918, 1923 (1985).

200. August Piper Jr., *"Truth Serum" and 'Recovered Memories' of Sexual Abuse: A Review of the Evidence*, 21 J. of PSYCHIATRY & L. 447 (1993).

201. Elizabeth Loftus, *Therapeutic Recollection of Childhood Abuse: When a Memory May Not be a Memory*, THE CHAMPION 5-10.

202. *See* LOFTUS & KETCHAM, *supra* note 1; WALKER, *supra* note 175; Lindsay & Read, *supra* note 4.

highly suggestible person to develop beliefs that are just not true. Particularly dangerous, we believe, are interventions such as certain group therapies in which potentially suggestible patients are subjected to an interpersonal process that socially reinforces misinformation about the nature of memory storage and recall.[203] While group therapy is not intrinsically an inappropriate intervention for genuine survivors of sexual abuse, if the leaders are unschooled in the scientific data on memory, patients could in effect find themselves victimized by the treatment, perhaps having acquiesced to a group norm and socialization process developed via techniques that foster disinformation about the *undoubted* and *unchallenged* legitimacy of recollections allegedly buried under layers of repression prior to psychotherapeutic excavation.

III. CONCLUSION

We believe that persons accused of crimes recalled by witnesses or victims only after a prolonged period of alleged repression have a special status. Because plaintiffs invoke the mental state of repression[204]—a process that we have argued has virtually no support in the scientific literature—one effective defense could be that the recent recollections were a product of suggestion within or outside of psychotherapy. Strong support for that defense would necessitate detailed information about treatment including, but not limited to, the therapist's theoretical viewpoint, knowledge of the relevant empirical literature in psychopathology, cognitive and social psychology, and methodology for diagnosing nervous and mental disorders. Most critical, we believe, is an understanding of the ways suggestion and interpersonal influence can be and have been abused in psychotherapy.

---

203. *Compare* Judith L. Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1 (1987) *with* Elizabeth F. Loftus et al., *Forgetting Sexual Trauma: What Does it Mean When 38% Forget?*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1177 (1994) *and* Pope & Hudson, *supra* note 4 at 121-26.

204. Terms such as dissociation or psychogenic amnesia are also used to describe similar phenomena.

Because much of the discussion in therapy might involve irrelevant matters, sometimes of a highly personal nature, witnesses or victims in these cases need to be protected from undue invasion of their privacy. To guard these competing interests, *in camera* inspections of otherwise confidential material by experts with the credentials discussed above could be an effective way—and one with precedent[205]—to balance the due process rights of a defendant with the privacy rights of the accuser.

Cases that involve claims of repressed memories of sexual abuse evoke unpredictable and often volatile reactions from people. Perhaps this is just the nature of the territory. After all, the subject is our children: few social problems deserve as much informed discussion and intervention aimed at prevention as childhood sexual abuse and few criminals elicit the rage often directed toward pedophiles. Thus, in such volatile cases, generating sensible solutions to sometimes thorny legal questions can face emotional hurdles, and it is fair to say that finding the truth is far from easy. But, when evaluating potential solutions, we must keep in mind that innumerable victims—both the genuine abuse survivors and the falsely accused—are harmed when we fail to do so. It is in this spirit, out of concern for the genuine survivors of sexual abuse trauma and a desire not to trivialize their horrible experience, that we advocate *in camera* inspection of clinical records as a sensitive and respectful approach for attempting to determine the truth when these cases enter litigation.

205. *See supra* notes 83-156 and accompanying text.