

# IMPOSSIBLE TO FORGET: MANESS V. GORDON AND ALASKA'S RESPONSE TO THE REPRESSED MEMORY CONTROVERSY

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## ABSTRACT

*Alaska's long-awaited legal approach to repressed memory syndrome and the discovery rule was announced in 2014 in the case of Maness v. Gordon. The Alaska Supreme Court held that discovery rule could not be invoked to toll the statute of limitations in repressed memory syndrome cases absent corroborating expert testimony. The court's brief opinion in Maness provided little discussion on the scientific controversy surrounding repressed memory syndrome, created a relatively unique rule, and ultimately did not decide whether expert testimony would save a repressed memory syndrome claim. This Note aims to provide a deeper understanding of the controversy surrounding repressed memory syndrome in the scientific community and to compare and contrast Alaska's new rule with the approaches of other states. Finally, this Note presents some alternative approaches the Alaska Legislature could consider and raises future issues that Maness did not address.*

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## INTRODUCTION

*There is a pain – so utter –  
It swallows substance up –  
Then covers the Abyss with Trance –  
So Memory can step  
Around – across – upon it –  
As One within a Swoon –  
Goes safely – where an open eye –  
Would drop Him – Bone by Bone<sup>1</sup>*

It is common knowledge that amnesia may result from physical brain trauma. Take the widely publicized case of Trisha Meili, the Central Park Jogger, for example. In 1989, Meili was found in the New York City park brutally raped, beaten, and in a comatose state.<sup>2</sup> Meili's head injuries were so severe that she lost all memories of her activities between the four hours prior to her assault and the six weeks after; even today, she remains unable to recover them.<sup>3</sup> The causal relationship between the incident and Meili's memory loss is tragic and self-evident.

But what about severe memory loss when physical injury to the brain has not occurred? The American Psychiatric Association acknowledges that amnesia may also result from traumatic experience, unconnected to head injury.<sup>4</sup> Memory repression, the theory goes, can occur as a coping mechanism for individuals that have experienced traumatic events.<sup>5</sup> Uninjured veterans<sup>6</sup> and incest victims<sup>7</sup> have

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1. Robert Howard, "Out of sound – Out of sight": *Emily Dickinson and the Poetics of Trauma*, PSYART (July 21, 2005), [http://www.psyartjournal.com/article/show/howard-out\\_of\\_sound\\_out\\_of\\_sight\\_emily\\_dickinson](http://www.psyartjournal.com/article/show/howard-out_of_sound_out_of_sight_emily_dickinson). See Gail S. Goodman et al., *Predictors of Accurate and Inaccurate Memories of Traumatic Events Experienced in Childhood*, 3 CONSCIOUSNESS AND COGNITION 269 (1994) (referencing the poem in relation to psychological trauma).

2. *Book Excerpt: 'I Am the Central Park Jogger'*, ABC NEWS <http://abcnews.go.com/GMA/story?id=1046580> (last visited May 31, 2016).

3. *Id.*

4. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 298 (5th ed. 2013) (explaining that the diagnostic criteria for dissociative amnesia is not attributable to neurological or medical conditions such as head injury).

5. Gary M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Memories Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 133 (1993).

6. *Id.*

7. See Judith Lewis Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 7-9 (1987) (discussing the stories of several incest survival support group participants who repressed some or all of the details about their abuse).

corroborated the existence of such a condition. Still, it remains hard to fathom the phenomena and the mechanics it works.

Perhaps the biggest concern surrounding the believability of repressed memories is that they are, by definition, difficult to study and prove. Researchers cannot ethically design experiments where the types of traumatic events most commonly associated with memory repression, such as child molestation, are inflicted upon participants. Even if researchers could design such experiments, the fact that memory repression is unconscious prevents the creation of effective paradigms through which to obtain objective answers. How can we be sure that such amnesia really occurs? And, if we can't be sure, what should we do when alleged victims claim to have rediscovered these memories decades after the fact and desire to sue in court?

Until recently, Alaska case law pertaining to rediscovered repressed memories claims was nonexistent. Alaska was one of the last states silent towards the issue, despite having one of the top five rates of physical and sexual abuse of children in the United States<sup>8</sup> and a high percentage of adult female sexual violence victims, approximately thirty-seven out of every one-hundred.<sup>9</sup> It remains unclear whether the absence of repressed memory case law was due to a lack of repressed memory syndrome in Alaska or, rather, to victims' reluctance to bring recovered memory claims forward.

In 2014 the Alaska Supreme Court finally had the opportunity to determine the state's stance on how to deal with repressed memory syndrome and statute of limitation laws in *Maness v. Gordon*.<sup>10</sup> Bret Maness, pro se, sued several defendants for a series of sexual assaults he allegedly suffered as a child in the 1970s.<sup>11</sup> Hoping to toll the statute of limitations of sexual assault, Maness explained that he had repressed all memories of the abuse until shortly before 2007, when he filed suit.<sup>12</sup> The superior court granted summary judgment for the defendants after Maness failed to respond to a defendant's expert testimony on repressed memory syndrome with his own expert to support his story.<sup>13</sup> The Alaska Supreme Court affirmed, holding that the discovery rule could

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8. *Facts About Child Sexual Abuse*, PROVIDENCE HEALTH & SERVICES, <http://alaska.providence.org/locations/cares/Pages/abusefacts.aspx> (last visited May 31, 2016).

9. *Intimate Partner Violence and Sexual Violence in the State of Alaska: Key Results from the 2010 Alaska Victimization Survey*, UAA JUSTICE CENTER (2010), [http://justice.uaa.alaska.edu/research/2010/1004.avs\\_2010/1004.07a.statewide\\_summary.pdf](http://justice.uaa.alaska.edu/research/2010/1004.avs_2010/1004.07a.statewide_summary.pdf).

10. 325 P.3d 522 (Alaska 2014).

11. *Id.* at 524.

12. *Id.*

13. *Id.* at 525.

not be invoked to toll the statute of limitations absent expert evidence.<sup>14</sup>

*Maness* set forth Alaska's long-awaited legal approach to dealing with rediscovered memories but the opinion gave only a superficial discussion of the scientific controversy surrounding repressed memory syndrome and the court's reasoning behind the decision. The holding additionally raises due process concerns for indigent victims that may have regained access to previously repressed memories of abuse and desire civil remedies.

This Note discusses *Maness v. Gordon* in light of the nationwide controversy surrounding repressed memories and the implications the holding has for practitioners and future repressed memory plaintiffs. Part I of this Note explains the theory behind traumatic memory repression, the research involved, and its criticisms. Differing approaches taken by courts across the United States to tolling the statute of limitations for rediscovered memories are then presented and subsequently compared to the holding in *Maness*. Part II analyses the Alaska Supreme Court's decision. Possible alternatives to the *Maness* approach are considered in Part III.

## I. REPRESSED MEMORY SYNDROME AND THE LAW

### A. The Psychological Construct

Repressed memory syndrome ("RMS") was first officially recognized by the American Psychiatric Association in 1994 through the association's inclusion of the disorder in the fourth edition of The Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>15</sup> The DSM was developed in response to the need for uniform classification system of mental disorders<sup>16</sup> and is used as a guidebook for diagnoses by health care professionals in the United States and abroad.<sup>17</sup> Revisions of the DSM are published periodically with the help of more than 1,000

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14. *Id.* at 526-27.

15. Laura Johnson, *Litigating Nightmares: Repressed Memories of Childhood Sexual Abuse*, 51 S.C. L. REV. 939, 943 (2000); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 478 (4th ed. 1994).

16. DSM: *History of the Manual*, AM. PSYCHIATRIC ASS'N, <http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual> (last visited May 31, 2015).

17. Am. Psychiatric Ass'n, *Frequently Asked Questions: What is the DSM and Why is it Important?*, DSM-5 DEV., <http://www.dsm5.org/about/Pages/faq.aspx#1> (last visited May 31, 2016). The American Psychiatric Association Committee on Nomenclature and Statistics developed the first edition of the DSM based on the World Health Organization's sixth edition of International Classification of Diseases. *Id.*

individuals and professional organizations in conducting comprehensive reviews of clinical and empirical literature.<sup>18</sup>

The fifth and most recent edition of the DSM (DSM-5) was published in 2013 and continues to include RMS as recognized diagnosis.<sup>19</sup> Alternatively termed “dissociative amnesia,”<sup>20</sup> RMS is found in the DSM-5 within the broader field of dissociative disorders, disorders “characterized by a disruption of and/or discontinuity in the normal integration of consciousness [and] memory” in addition to disruptions in other areas of psychological function such as identity or behavior.<sup>21</sup> Dissociative disorders regularly follow trauma and dissociative symptoms such as amnesia, numbing, and detachment from one’s self or surroundings are frequently experienced by those suffering from posttraumatic stress disorder and other stress-related mental illnesses.<sup>22</sup>

Specifically, RMS is characterized by “an inability to recall autobiographical information, usually of a traumatic or stressful nature, that is inconsistent with normal forgetting.”<sup>23</sup> The forgotten information may concern a mere aspect of an event, include an entire time period, or cover one’s own identity and life events.<sup>24</sup> Furthermore, those suffering from RMS may or may not be aware that a memory gap even exists.<sup>25</sup> In most cases, individuals are unaware of the memory loss unless it involves an aspect of their identity or normal life history.<sup>26</sup> Dissociative amnesia, of course, does not cover disturbances in memory attributable to “physiological effects of a substance . . . or a neurological or other medical condition.”<sup>27</sup> Unlike permanent amnesias due to some sort of physical or chemical alteration to the brain that prevents memory storage or retrieval, one unique aspect of dissociative amnesia is its reversibility: although the memory is presently inaccessible, it was at one point successfully stored and may therefore be regained.<sup>28</sup>

The prevalence of RMS on a national scale would be hard to calculate accurately, though the DSM discusses a 12-month RMS prevalence study among adults in a small U.S. community.<sup>29</sup> The study

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18. *Id.*

19. AM. PSYCHIATRIC ASS’N, *supra* note 4.

20. *Id.*

21. *Id.* at 291.

22. *Id.*

23. *Id.* at 298.

24. *Id.* at 291.

25. *Id.*

26. *Id.*

27. *Id.* at 298.

28. *Id.*

29. *Id.* at 299.

reported a RMS prevalence of 1.8% in the community, specifically 1.0% among males and 2.6% for females.<sup>30</sup> Instances of RMS have been observed in individuals of all ages, however, from children to teenagers to adults.<sup>31</sup>

Theories about the psychological motivation for RMS suggest that repression occurs in some individuals as an involuntary ego-defense mechanism to keep traumatic, painful, or socially unacceptable memories from conscious awareness—in doing so, these individuals can continue to function normally in everyday life.<sup>32</sup> Repression of similarly unacceptable feelings or impulses may occur for this same reason and they, like repressed memories, remain present in one's brain but are pushed into unconscious thought.<sup>33</sup> Though the individual is granted immediate relief, the repressed stress may reveal itself in other ways,<sup>34</sup> however, such as through manifestations of depression, sexual dysfunction, self-harm, and an impaired ability to maintain relationships.<sup>35</sup> Eventual recovery of these repressed memories may occur at a more convenient stage in one's life where the trauma can be dealt with, and recovery is claimed to have been triggered both with and without therapy.<sup>36</sup>

However, determining with certainty how conscious—let alone unconscious—memory functions is incredibly difficult. Due to the unethical nature of the events associated with the onset of repression, researchers are precluded morally and by Institutional Review Boards from significantly testing and experimenting with RMS and its underlying theory.<sup>37</sup> Thus, any support for the existence of repressed memory syndrome must be clinical or statistical.

In a unique attempt to gain insight into how children remember traumatic experiences, researchers located forty-three children ranging from three to ten years old scheduled to undergo a painful medical procedure involving urethral catheterization.<sup>38</sup> These subjects were interviewed at various stages following the procedure to determine the

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30. *Id.*

31. *Id.*

32. Ernsdorff & Loftus, *supra* note 5; Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1204 (1992).

33. Kanovitz, *supra* note 33.

34. Ernsdorff & Loftus, *supra* note 5, at 137.

35. AM. PSYCHIATRIC ASS'N, *supra* note 4, at 299.

36. Ernsdorff & Loftus, *supra* note 5, at 137-38.

37. See *Institutional Review Board Guidebook: Introduction*, OFF. FOR HUM. RES. PROTECTIONS, [http://www.hhs.gov/ohrp/archive/irb/irb\\_introduction.htm](http://www.hhs.gov/ohrp/archive/irb/irb_introduction.htm) (last visited May 31, 2016) (“[B]rutal or inhumane treatment of human subjects is never morally justified.”).

38. Gail S. Goodman et al., *supra* note 1, at 275.

extent and accuracy of their recollection of the procedure's events.<sup>39</sup> Results supported the conclusion that age was correlated with significantly greater accuracy and resistance to misinformation.<sup>40</sup> Thus, memory repression seems more likely to occur at younger ages, which makes sense in light of the frequency of repressed child abuse memory claims. Controlling for age, repetition of the procedure did not significantly affect memory, though other factors, such as the emotional support provided by the children's parents, was correlated with better recollection.<sup>41</sup> This suggests that memory repression may be mitigated through social support immediately surround the traumatic event.

A more typical example of repressed memory research comes from a 1987 study by Herman and Schatzow, who interviewed fifty-three women in an incest survivor therapy group about their experiences.<sup>42</sup> This research was especially important because most of these women had corroborating evidence of their abuse, which is rare. Sixty-four percent of these women reported at least some degree of amnesia related to the abuse, and twenty-eight percent described severe deficits.<sup>43</sup> Abuse involving violence or occurring prior to adolescence was positively correlated with memory loss.<sup>44</sup>

Further support for the existence of repressed memories comes from widespread survey data. One survey directed by Diana Elliot gathered national data from 225 men and 280 women, aged eighteen to seventy-five.<sup>45</sup> A majority of survey participants who had been involved in a traumatic event, including "childhood sexual abuse, military combat, or witnessing the murder or suicide of a loved one," did not suffer from subsequent memory loss; however, approximately twenty percent of respondents experienced a period of temporary amnesia surrounding the entire event.<sup>46</sup> Remembrance of these episodes was generally triggered by an event, such as reading something about the incident in the media.<sup>47</sup> Approximately thirty-three percent of respondents who had been victims of childhood sexual abuse recovered memories during intercourse later in their adult lives.<sup>48</sup> In contrast to the

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39. *Id.* at 276.

40. *Id.* at 278.

41. *Id.*

42. Herman & Schatzow, *supra* note 7, at 10.

43. *Id.* at 4.

44. *Id.* at 5.

45. Bruce Bower, *Trauma Survey Delves into Delayed Recall*, SCI. NEWS (Aug. 26, 1995), <http://www.thefreelibrary.com/Trauma+survey+delves+into+delayed+recall.-a017288645>.

46. *Id.*

47. *Id.*

48. *Id.*

DSM survey discussed earlier, the results of this survey suggest that RMS may actually affect a substantial number of individuals in some form.

Still, given the inability to scientifically reproduce RMS in the controlled laboratory setting, many are not convinced of its existence. Adding fuel to the fire are studies exposing the general vulnerability of memories and, in some cases, even the implantation of false memories, which raise questions about the validity of recovered memories.<sup>49</sup>

People's stored memories can be altered to include false information.<sup>50</sup> Research concerning this "misinformation effect" was first published in 2005 and involved presenting subjects with a video of an event, such as the theft of a girl's wallet.<sup>51</sup> Some subjects were then subsequently misinformed about certain aspects of the event, including the girl receiving an *arm* injury, when it was apparent from the footage that only her *neck* had been hurt.<sup>52</sup> When interviewed later, approximately forty-seven percent of participants claimed to have remembered the later-provided misinformation as having actually been part of the event.<sup>53</sup> If memory repression does occur, repressed memories could be just as vulnerable to the issues of malleability as normal memories, perhaps even more so because of how much time has passed. One counter to this critique, however, is that unconscious memories are unlike conscious memories inasmuch that they do not have the same opportunity for modification through rehearsal, as exemplified in experiments like these. Perhaps unconscious memories are actually less subject to misinformation because we are unable to consciously revise them according to conflicting outside information.

Researchers have also delved into the possibility of implanting false memories of entire events in an individual's mind.<sup>54</sup> Loftus and Coan

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49. See Elizabeth F. Loftus, *When a Lie Becomes Memory's Truth: Memory Distortion After Exposure to Misinformation*, 1 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 121 (1992) (discussing many studies demonstrating the malleability of memory).

50. See Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-year Investigation of the Malleability of Memory*, 12 *LEARNING MEMORY* 361 (2005) (discussing several research studies on the effects of misinformation on memory, including one where subjects who watched a video of an event, and then were given incorrect information about the event, incorporated the incorrect information into their actual memory of watching the event).

51. *Id.*

52. *Id.*

53. *Id.*

54. See Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 *AM. PSYCHOLOGIST* 518, 530 (1993) ("There are numerous anecdotes and experimental studies that show it is indeed possible to lead people to construct entire events.").

created several paradigms in which false memories were implanted in child subjects by trusted family members.<sup>55</sup> One of the most memorable was described in a 1993 report: a fourteen-year-old boy named Chris was convinced by his older brother Jim that he had been lost in a shopping mall at the age of five when in truth such an event had not happened.<sup>56</sup> Jim's story about Chris was told to Chris as follows:

It was 1981 or 1982. I remember that Chris was 5. We had gone shopping at the University City shopping mall in Spokane. After some panic, we found Chris being led down the mall by a tall, oldish man (I think he was wearing a flannel shirt). Chris was crying and holding the man's hand. The man explained that he had found Chris walking around crying his eyes out just a few moments before and was trying to help him find his parents.<sup>57</sup>

In the days following this story, Chris began to "remember" how he had felt while lost at the mall, and made statements such as "[t]hat day I was so scared that I would never see my family again. I knew that I was in trouble" and "I remember mom telling me never to do that again."<sup>58</sup>

A period of weeks later, Chris was capable of providing great detail about the made-up event.<sup>59</sup> He stated to his family:

I was with you guys for a second and I think I went over to look at the toy store, the Kay-bee toy, and uh, we got lost and I was looking around and I thought, "Uh-oh. I'm in trouble now." You know. And then I . . . I thought I was never going to see my family again. I was really scared you know. And then this old man, I think he was wearing a blue flannel, came up to me . . . he was kind of old. He was kind of bald on top . . . he had like a ring of gray hair . . . and he had glasses.<sup>60</sup>

The ability of the mind to create vivid but false memories out of lies illustrates the fragile nature of memory and its potential for manipulation, especially, as illustrated by Loftus and Coan, in children.

Similarly, techniques by police have induced false memories of defendants in interrogations.<sup>61</sup> In the infamous case of Paul Ingram,

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55. *Id.* at 532.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* at 533 (discussing how five months of police interrogation caused Paul Ingram to create and confess to memories of fantastical allegations);

Ingram was accused of and arrested for the molestation of his two daughters following their return from a church camp that supported the discovery and recollection of such memories.<sup>62</sup> Long employed in the Olympia, Washington Sheriff's Office as chief civil deputy, Ingram denied the abuse but was convinced after five months of interrogation by detectives and a psychologist that he had committed "rapes, assaults, child sexual abuse, and [participated] in a Satan-worshipping cult alleged to have murdered 25 babies"<sup>63</sup> and even began to describe increasingly fantastical memories of such events.<sup>64</sup> Ingram couldn't believe that his daughters could be wrong about experiencing such conduct, and believed satanic possession was possible as part of his religious beliefs.<sup>65</sup> Richard Ofshe, a psychologist, was hired by the prosecution for trial.<sup>66</sup> Ofshe tested Ingram by attempting to convince Ingram that he had committed an additional, fabricated act of molestation on his children.<sup>67</sup> As a result, Ingram developed memories of the event to such a detailed extent that he could write a confession several pages long.<sup>68</sup> Despite being presented this discovery, Ingram was so convinced of his newfound memories that he pled guilty to his charges and was sentenced to twenty years in prison.<sup>69</sup>

It is clear from Paul Ingram's case that false memories can have devastating consequences, and that those who believe them are capable of describing those false memories in great detail and certainty. This certainty likely also influences those who hear them. As the recollections of repressed memories are often assisted through therapy, there is similarly great concern that therapists may implant false memories in their patients.<sup>70</sup> Several cases surrounding the issue of therapy-derived implanted memories popped up around the US during the 1980s and 90s, a period that has been compared to the Salem witch trials.<sup>71</sup>

Patients have come forward to discuss the suggestive nature of

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Richard A. Leo, *The Social and Legal Construction of Repressed Memory*, 22 LAW & SOC. INQUIRY 653, 656 (1997) (discussing how once police interrogation ended, Paul Ingram realized his memories were coerced).

62. Leo, *supra* note 61, at 655.

63. Loftus, *supra* note 54, at 533.

64. Leo, *supra* note 61, at 655.

65. *Id.*

66. Loftus, *supra* note 54, at 533.

67. *Id.*

68. *Id.*

69. Leo, *supra* note 61, at 656.

70. See Loftus, *supra* note 54, at 533 (discussing the great need for research and reexamination of psychotherapy practices).

71. Jorge L. Carro & Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239, 1245 (1996).

their therapy sessions.<sup>72</sup> Elizabeth F. Loftus discusses the informative experience of Greg Zimmerman, among others, in an article on repressed memories.<sup>73</sup> An interview with Zimmerman on ABC News in 1992 led to the discussion of his experience seeing a psychotherapist in an attempt to cope with the suicide of his father.<sup>74</sup> He expressed that “I would try to talk to her about the things that were very painful in my life and she kept saying that there was something else.”<sup>75</sup> Eventually she told Zimmerman that he exhibited the characteristics of a victim of satanic ritual abuse.<sup>76</sup> Zimmerman, an attorney, was fairly certain he had not experienced any satanic abuse in his life, and could not understand how the therapist could have come to such a conclusion.<sup>77</sup> Around this time, the False Memory Syndrome Foundation was established as a source of support and public awareness by parents across the country falsely accused of incest.<sup>78</sup> Several books criticizing the unprecedented increase in child sex abuse cases and the popularization of repressed memory syndrome as a disorder were also published.<sup>79</sup>

This history of suggestive therapy and implanted memories casts a shadow of doubt over the accuracy of recovered repressed memories, particularly for those recovered by therapists. It also brings into question whether any state law requiring therapist expert testimony is actually meaningful in determining whether or not to allow such a lawsuit to proceed.

## B. The Legal Response

As the issues of RMS broke into the legal arena in the 1980s and 90s, courts had to determine the admissibility of expert witness testimony on RMS and, in cases where the statute of limitations had run out, whether to allow such testimony for the purposes of the discovery

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72. See Loftus, *supra* note 54, at 528 (describing client descriptions of the suggestive techniques used in their therapy sessions).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Early History of the False Memory Syndrome Foundation*, FALSE MEMORY SYNDROME FOUND., <http://www.fmsfonline.org/?about=EarlyHistory> (last updated Dec. 13, 2013).

79. See, e.g., MARK PENDERGRAST, *VICTIMS OF MEMORY: SEX ABUSE ACCUSATIONS AND SHATTERED LIVES* (2d ed. 1996); RICHARD OFSHE & ETHAN WATERS, *MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA* (1996); ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE* (reprt. rev. 1996).

rule.

Statutes of limitations are the result of the legislative belief that eventually “the right to be free of stale claims . . . prevail[s] over the right to prosecute them.”<sup>80</sup> The idea that claims have an expiration period protects both defendants and the courts from cases “in which the search for truth may be seriously impaired by the loss of evidence.”<sup>81</sup> Witnesses die, physical evidence is lost, and, as discussed above, memories fade, resulting in difficulty for both mounting a defense and determining a case. Thus, statutes of limitations allow for better accuracy in settling claims, and encourage plaintiffs to either bring suit or forever hold their peace.

Nonetheless, courts have recognized that, in some cases, statutes of limitations may need to be tolled in the interest of fairness. In these cases, states have adopted what is commonly known as the “discovery rule,” which generally delays statutes of limitations from accruing until the harm committed by the defendant is actually discovered.<sup>82</sup> The discovery rule was traditionally applied in medical malpractice cases. For example, the rule was applied in cases where surgical instruments were left in patients during surgery and the patient became aware of that fact only after the statute of limitations had passed.<sup>83</sup>

Application of the discovery doctrine has been sought by plaintiffs in recovered repressed memory cases. The first case attempting to toll the discovery rule was unsuccessful. In *Tyson v. Tyson*,<sup>84</sup> the Washington state Supreme Court refused to apply a delayed discovery rule to toll the statute of limitations for the plaintiff, who claimed she had repressed all memory of her father sexually assaulting her over a nine-year period until she had entered therapy fifteen years later.<sup>85</sup> The court explained that the discovery rule may only apply in cases where “the objective nature of the evidence makes it substantially certain that the facts can be

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80. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)).

81. *Id.*

82. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 70 (2011) (“Because lack of notice and disability on the part of the claimant—particularly when combined with dissembling or concealment on the part of the defendant—are among the principal grounds on which a delay in bringing suit may be excused, restitution claimants in such circumstances will often be granted the protection of a discovery rule.”).

83. See, e.g., *Ruth v. Dight*, 453 P.2d 631 (Wash. 1969) (holding that the discovery rule shall be applied when medical malpractice occurs as a result of negligently leaving foreign articles in surgery patients).

84. 727 P.2d 226 (Wash. 1986) (en banc), *superseded by statute*, WASH. REV. CODE ANN. § 4.16.340 (West 1988).

85. *Id.* at 229–30.

fairly determined even though considerable time has passed since the alleged events occurred.”<sup>86</sup> To allow application of the discovery rule to recovered repressed memory actions would defeat the purpose of statute of limitations, given that the balance of interests weighed in favor of defendants given the low likelihood of ascertaining the truth.<sup>87</sup> The Washington legislature made the ruling obsolete, however, by enacting Wash. Rev. Code § 4.16.340. The statute provides that actions based on childhood sexual abuse claims may be brought “[w]ithin three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act.”<sup>88</sup> This act was the first to apply the discovery doctrine to civil cases of childhood sexual abuse.<sup>89</sup>

Since *Tyson v. Tyson*,<sup>90</sup> legal approaches to dealing with RMS amongst the several states have varied. Some states have passed statutes providing extended periods of time for which child sex abuse claims may be brought.<sup>91</sup> In states without such provisions—or even in states like Alaska, which passed such a provision, but non-retroactively—tollled claims must be fit into broader tolling statutes or into common law discovery rule. State courts have split between whether to allow application of the discovery rule to tollled recovered repressed claims.

Some states refuse to apply the discovery rule to any types of cases under any circumstances. Idaho, for example, has declared that it “is not a discovery jurisdiction.”<sup>92</sup> States that do apply the discovery rule have provided a variety of reasons for refusing to do so in RMS cases. The Maryland Court of Appeals, for example, held that RMS does not activate the discovery rule because it is “unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting.”<sup>93</sup> The Supreme Court of Michigan declined to apply the discovery rule or a statutory insanity grace period because doing so “would endanger precisely those policy goals advanced by statutes of

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86. *Id.* at 229.

87. *Id.* at 230.

88. WASH. REV. CODE ANN. § 4.16.340 (West 1988).

89. See Julie M. Kosmond Murray, *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, 487 (“Since [WASH. REV. CODE ANN. § 4.16.340], at least twenty-eight other states have adopted similar legislation.”).

90. 727 P.2d 226.

91. See, e.g., ALASKA STAT. § 09.10.140 (1990); ARK. CODE ANN. § 16-56-130 (1993); CAL. CIV. PROC. CODE § 340.1 (West 1995); COLO. REV. STAT. § 13-80-103.7 (1994).

92. *Bonner v. Roman Catholic Diocese of Boise*, 913 P.2d 567, 568 (Idaho 1996).

93. *Doe v. Maskell*, 679 A.2d 1087, 1092 (Md. 1996).

limitations.”<sup>94</sup> Unlike the majority of jurisdictions who allow the discovery rule in RMS claims, the Supreme Court of Pennsylvania follows an objective approach to limitation periods and thus applies the discovery rule in only the most limited of circumstances “by focusing on the nature of the injury rather than the particularities of the specific plaintiff.”<sup>95</sup> In *S.V. v. R.V.*,<sup>96</sup> the Texas Supreme Court refused to apply the discovery rule based on “expert testimony on subjects about which there is no settled scientific view” because of the inability to provide objective verification of the claim.<sup>97</sup> Minnesota has taken a similar view: that expert testimony on the theory of repressed and recovered memory may lack foundational reliability and therefore may not be used to show timeliness.<sup>98</sup>

A substantial number of states allow RMS claims to extend the statute of limitations, though expert testimony may be required at trial.<sup>99</sup> In *Doe v. Roe*,<sup>100</sup> the Arizona Supreme Court explained that allowing application of the discovery rule to RMS cases was consistent with the underlying policy of the discovery rule, and “logically appropriate given that the intentional act of the tortfeasor caused both the damage and the repression of memory.”<sup>101</sup> To hold otherwise would reward perpetrators and contradict the Arizona legislature’s policy of imposing severe criminal penalties for the sex abuse of children.<sup>102</sup> In its first RMS case, New Hampshire simply explained that it found “no reason why it should not apply.”<sup>103</sup>

The South Carolina Supreme Court affirmatively held the discovery rule applicable to RMS cases, reasoning that “equating a

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94. *Lemmerman v. Fealk*, 534 N.W.2d 695, 702 (Mich. 1995).

95. *Dalrymple v. Brown*, 701 A.2d 164, 170-71 (Pa. 1997).

96. 933 S.W.2d 1 (Tex. 1996).

97. *Id.* at 18.

98. *Doe v. Archdiocese of Saint Paul*, 817 N.W.2d 150, 171 (Minn. 2012).

99. These states include the District of Columbia, Hawaii, Iowa, Maine, Missouri, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, and Utah. *See, e.g.*, *Farris v. Compton*, 652 A.2d 49 (D.C. 1994); *Dunlea v. Dappen*, 924 P.2d 196 (Haw. 1996), *abrogated by* *Hac v. Univ. of Hawai’i*, 73 P.3d 46 (Haw. 2003); *Doe v. Cherwitz*, 518 N.W.2d 362 (Iowa 1994); *Nuccio v. Nuccio*, 673 A.2d 1331 (Me. 1996); *Sheehan v. Sheehan*, 901 S.W.2d 57 (Mo. 1995) (en banc), *reh’g denied* (July 25, 1995); *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990); *McCollum v. D’Arcy*, 638 A.2d 797 (N.H. 1994); *Peterson v. Huso*, 552 N.W.2d 83 (N.D. 1996); *Ault v. Jasko*, 637 N.E.2d 870 (Ohio 1994), *superseded by statute*, OHIO REV. CODE ANN. § 2305.11 (West 2006), *as recognized in* *Pratte v. Stewart*, 929 N.E.2d 415 (Ohio 2010); *Lovelace v. Keohane*, 831 P.2d 624 (Okla. 1992); *Olsen v. Hooley*, 865 P.2d 1345 (Utah 1993).

100. 955 P.2d 951 (Ariz. 1998) (en banc).

101. *Id.* at 960.

102. *Id.*

103. *McCollum*, 638 A.2d at 799.

repressed memory to merely 'forgetting' ignores advances in the understanding of the human mind."<sup>104</sup> Although RMS does not concern a precise science, the court determined that "the same can be said about many cases involving a 'battle of experts.'"<sup>105</sup> In court, expert testimony must prove both the abuse and that the memories of the abuse were repressed<sup>106</sup>; however, application of the discovery rule and the existence of corroborating evidence are questions of fact for the jury to determine.<sup>107</sup>

Including Alaska, some states require something extra at the pleading stage for discovery rule to apply in RMS cases. Oklahoma requires by statute objective, verifiable evidence that the victim psychologically repressed the memory of the facts upon which that claim was predicated and that the alleged sexual abuse occurred.<sup>108</sup> New Mexico requires "competent medical or psychological testimony" for discovery rule to apply.<sup>109</sup> Application of these two statutes has yet to be tested in court.

Taking a slightly different approach, California requires "certificates of merit" to be filed in order for discovery rule to apply in child abuse cases where the plaintiff is of 26 years of age or older.<sup>110</sup> These certificates of merit require that the attorney review the facts of the case with at least one licensed mental health practitioner who is not a party to the litigation and has concluded that there is reasonable and meritorious cause to file the action.<sup>111</sup>

The Alaska Supreme Court held in *Maness* that expert testimony is required for the discovery rule to apply in RMS cases; however, in contrast to states like South Carolina, Alaska did not treat discovery rule as a question of fact for the jury. The requirement instead serves a barrier between RMS plaintiffs and a jury if the abuse they suffered occurred prior to the enactment of Alaska's current limitation-extending statutes and they cannot afford expert testimony at the pleading stage. While such a rule is not without support, it is perhaps more unique than *Maness* suggests.

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104. *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 677 (S.C. 2000).

105. *Id.*

106. *Id.* at 679.

107. *Id.* at 681.

108. OKLA. STAT. 12, § 95(6) (2006).

109. N.M. STAT. ANN. § 37-1-30A(2) (1996).

110. CAL. CIV. PROC. CODE § 340.1(g) (West 2004).

111. § 340.1(h).

## II. MANESS V. GORDON: REQUIRING REPRESSED MEMORY EXPERT TESTIMONY FOR DISCOVERY RULE IN ALASKA

### A. The Facts

The facts discussed in the opinion surrounding *Maness v. Gordon*<sup>112</sup> are brief, and there is limited information to be found on the online docket besides motions to waive fees, bonds, or filing extensions.<sup>113</sup> The Alaska State Law Library has on file three other documents from the appeal from the Superior Court: Maness's opening brief, the brief of the Gordon appellees, and the brief of appellee James Serfling. Factual information from these briefs is included here to supplement the Supreme Court's opinion.

In the Anchorage superior court on October 30, 2007, Bret Maness, representing himself pro se, sued Mike Gordon, Shelley Gordon, James Serfling, and nine other defendants for assault and battery, sexual assault, intentional infliction of emotional distress, and false imprisonment, based on a series of alleged sexual assaults inflicted on him as a child in the 1970s.<sup>114</sup> According to Maness, the acts took place in a backroom of the Mike and Shelly Gordon's Novelty shop, near Fourth Avenue and D Street in downtown Anchorage when he was eleven years old.<sup>115</sup> Maness claims he was given date rape drugs, put under hypnosis, and sexually assaulted on several occasions.<sup>116</sup> The hypnosis was allegedly so strong that Maness had no recollection of the incident between assaults and instead recalled only making purchases at the store.<sup>117</sup> Maness said he returned to the shop several times and occasionally brought friends, who were likewise hypnotized and assaulted.<sup>118</sup> Eventually, Maness had a break in his hypnosis and made a report to the police.<sup>119</sup> Maness then realized "nothing would be done to the Gordons by APD [and] [s]o he decided he must do something himself."<sup>120</sup> Maness allegedly vandalized the store by throwing rocks at

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112. 325 P.3d 522 (Alaska 2014).

112. See e.g., *Alaska Appellate Courts Case Management System*, ALASKA STATE APPELLATE COURTS, <http://www.appellate.courts.state.ak.us/main.asp> (entering into the search engine the *Maness v. Gordon* Appellate Case Number S14753).

114. *Maness*, 325 P.3d at 524.

115. Appellant's Opening Brief, at 2, *Maness v. Gordon*, 325 P.3d 522 (Alaska 2014) (No. S-14753) [hereinafter *Maness Brief*].

116. *Maness Brief*, *supra* note 115, at 3-6.

117. *Id.* at 4.

118. *Id.* at 4-5.

119. *Id.* at 5.

120. *Id.*

it.<sup>121</sup>

Maness claimed his mother also reported to the police that suspicious activity was occurring at the novelty shop.<sup>122</sup> Maness was subsequently called to meet with the vice-principal at his elementary school.<sup>123</sup> In that meeting, Maness claims to have been hypnotized by vice-principal Serfling, who instructed him to “forget all about that novelty shop.”<sup>124</sup> Maness claims the hypnosis worked and that he completely forgot about all of these events until shortly before the case was filed.<sup>125</sup>

Denying all of the allegations against them, defendants moved for summary judgment, arguing that the applicable statute of limitations had run.<sup>126</sup> Maness argued that his recent recovery of his repressed memories should cause the discovery rule to apply, therefore tolling his time to bring a claim until his memories had been recovered.<sup>127</sup> Defendants retained a developmental and experimental psychologist, Dr. Brainerd, who proclaimed Maness’s claims as inconsistent with repressed memory syndrome in an affidavit to the court.<sup>128</sup> The court then ordered Maness to respond in kind with the affidavit of a qualified expert to support his claim.<sup>129</sup> When Maness failed to do so, the superior court granted summary judgment in favor of the defendants.<sup>130</sup>

Maness appealed, arguing (1) that his claims were timely under sections 09.10.065(a) and 09.10.140(b) of the Alaska Statutes; (2) that the discovery rule tolls the statute of limitations until he recovered the repressed memories and thus his claims are timely; and (3) requiring an indigent plaintiff to provide expert testimony violates the due process clauses of the Alaska and United States Constitutions.<sup>131</sup>

## **B. AS 09.10.065 and AS 09.10.140**

Sections 09.10.065(a)<sup>132</sup> and 09.10.140(b)<sup>133</sup> of the Alaska Statutes provide for the tolling or elimination of statute of limitations for certain

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121. *Id.* at 5–6.

122. *Id.* at 6.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Maness v. Gordon*, 325 P.3d 522, 524 (Alaska 2014).

127. *Id.*

128. *Id.* at 524–25.

129. *Id.* at 525.

130. *Id.*

131. *Id.* at 525–27.

132. ALASKA STAT. § 09.10.065(a) (2013).

133. *Id.* § 09.10.140(b).

sexual abuse claims. Section 09.10.065(a) provides as follows:

A person may bring an action at any time for conduct that would have, at the time the conduct occurred, violated provisions of any of the following offenses: (1) felony sexual abuse of a minor; (2) felony sexual assault; (3) unlawful exploitation of a minor; (4) felony sex trafficking; or (5) felony human trafficking.<sup>134</sup>

Section 09.10.140 provides:

(a) . . . [I]f a person entitled to bring an action mentioned in this chapter is at the time the cause of action accrues either (1) under the age of majority, or (2) incompetent by reason of mental illness or mental disability, the time of a disability identified in (1) or (2) of this subsection is not a part of the time limit for the commencement of the action. Except as provided in (b) of this section, the period within which the action may be brought is not extended in any case longer than two years after the disability ceases.

(b) An action based on a claim of sexual abuse under AS 09.55.650 [providing for claims based on sexual abuse to a minor under sixteen years of age] that is subject to AS 09.10.065(b) [which sets the statute of limitations for misdemeanor sexual abuse of a minor and misdemeanor sexual assault at three years] may be brought more than three years after the plaintiff reaches the age of majority if it is brought under the following circumstances:

- (1) if the claim asserts that the defendant committed one act of sexual abuse on the plaintiff, the plaintiff shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered that the act caused the injury or condition;
- (2) if the claim asserts that the defendant committed more than one act of sexual abuse on the plaintiff, the plaintiff

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134. *Id.* § 09.10.065. It should additionally be noted that section 11.81.900(a)(24) of the Alaska Statutes provides that “felony” means a crime for which a sentence of imprisonment for a term of more than one year is authorized. Alaska law considers sexual abuse of a minor in the first, second, and third degrees to be felonies, and sexual abuse of a minor in the fourth degree to be a misdemeanor. *Id.* §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440. As the court found these statutes not retroactively applicable, there is no discussion on whether or not, if the statutes were applicable, section 09.10.065(a) would apply. The ages of defendants in comparison to the plaintiff at the time of the alleged assaults are not discussed.

shall commence the action within three years after the plaintiff discovered or through use of reasonable diligence should have discovered the effect of the injury or condition attributable to the series of acts; a claim based on an assertion of more than one act of sexual abuse is not limited to plaintiff's first discovery of the relationship between any one of those acts and the injury or condition, but may be based on plaintiff's discovery of the effect of the series of acts.<sup>135</sup>

The Alaska Supreme Court found these two statutes to be inapplicable to Maness's case, as "both of these statutes were enacted long after the events [Maness] describes in his complaint,<sup>136</sup> and neither applies retroactively."<sup>137</sup> In arriving at this conclusion, the court cited *Catholic Bishop of Northern Alaska v. Does*,<sup>138</sup> a 2006 case where the Alaska Supreme Court considered whether section 09.10.065 applied retroactively to civil claims of abuse despite the legislature's clear intention to prevent retroactive effect of the statute on covered criminal claims.<sup>139</sup> Under section 01.10.090, which states that "[no] statute is retrospective unless expressly declared therein," a presumption in Alaska exists against retrospective legislation.<sup>140</sup> In light of section 01.10.090, *Catholic Bishop of Northern Alaska* held that without the legislature's express provision for retroactive effect to *civil* claims under section 09.10.065, such protection did not apply in light of clear legislative expression that there was no retroactive application to *criminal* claims.<sup>141</sup> Although section 09.10.140 had not previously been held as non-retroactive, the *Maness* court determined that neither the statute itself nor the session laws surrounding it contained any language providing express legislative intent to do so.<sup>142</sup>

### C. Discovery Rule

Without the protection of either statute, Maness's claim could only be considered timely if the discovery rule was applicable.<sup>143</sup> The opinion

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135. *Id.* § 09.10.140(b).

136. Section 09.10.065(a) was enacted in 2001, section 09.10.140(b) was enacted in 1990, and the latest event described by Maness apparently occurred in 1985. *Maness*, 325 P.3d at 525 n.9.

137. *Id.* at 525.

138. 141 P.3d 719 (Alaska 2006).

139. *Id.* at 720.

140. ALASKA STAT. § 01.10.090 (1962).

141. *Catholic Bishop of Northern Alaska*, 141 P.3d at 724–25.

142. *Maness*, 325 P.3d at 525 n.10.

143. *Id.* at 525.

explains the discovery rule as “where an element of a claim is not immediately apparent, the statute of limitations does not begin to run until a reasonable person would have enough information to alert him that he ‘has a potential cause of action or should begin an inquiry to protect . . . her rights.’”<sup>144</sup> To bolster his argument, Maness cited *Phillips v. Gelpke*,<sup>145</sup> a New Jersey case, for the proposition that expert testimony was unnecessary to invoke the discovery rule in his case.<sup>146</sup>

In *Gelpke*, 19-year-old Phillips sued her uncle Gelpke for childhood sexual abuse, the memory of which she had for some time repressed.<sup>147</sup> Though Phillips provided expert testimony at trial on her psychological suffering, the expert did not diagnose Phillips with repressed memory syndrome.<sup>148</sup> The jury returned a verdict for Phillips and Gelpke appealed, arguing that such a diagnosis was necessary.<sup>149</sup> The New Jersey Supreme Court determined that because Phillips had recovered her memories without expert help, an expert’s explanation of how she could recover such memories was not necessary.<sup>150</sup>

The Alaska Supreme Court found that *Gelpke* did not support Maness’s claims because under the facts of that case, the statute of limitations for Philip’s claim had not yet expired.<sup>151</sup> The court then held that invocation of the discovery rule to allegations of repressed memories could not occur without the production of expert testimony.<sup>152</sup> Such a decision, the court claimed, was “consistent with the decisions of most courts considering repressed memory syndrome claims” as well as Alaska case law requiring expert testimony to prove medical or legal malpractice unless the negligence alleged is sufficiently non-technical to be cognizable by laypersons.<sup>153</sup> The court affirmed the superior court’s grant of summary judgment on Maness’s claims, concluding that his claims were time-barred in light of his lack of expert testimony.<sup>154</sup>

The reasoning behind the court’s holding in *Maness*, albeit brief, addresses valid concerns in dealing with RMS cases. Maness’s alleged facts are also fantastical, which may make limit sympathy for this case. Nonetheless, the court did not address in their opinion at least three areas of importance for potential future RMS plaintiffs.

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144. *Id.* at 526 (citations omitted).

145. 921 A.2d 1067 (N.J. 2007).

146. *Maness*, 325 P.3d at 526.

147. *Gelpke*, 921 A.2d at 582–83.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Maness*, 325 P.3d at 526.

152. *Id.*

153. *Id.*

154. *Id.* at 526–27.

First, the court did not acknowledge the relative uniqueness of its rule or acknowledge the controversy in the scientific community surrounding repressed memory syndrome. As discussed above, several states have allowed RMS claims to extend the statute of limitations without the use of expert testimony at the summary judgment stage, though they require expert testimony at trial. The court cites cases like this,<sup>155</sup> in addition cases where expert testimony on RMS is not admissible at all under evidentiary standards,<sup>156</sup> without making a distinction between those holdings and what is being held in *Maness*. RMS and the varying attempts by states to deal with it in court are not so easily classified.

The connection that the court draws between medical and legal malpractice suits on the one hand, and child sexual abuse claims on the other hand, is furthermore conclusory. Medical malpractice claims have statutory provisions allowing for a court-mandated expert panel,<sup>157</sup> while sex abuse victims are not mandated the same luxury. The alleged similarities between child molestation and legal malpractice also remain to be clarified.

Finally, the court added in a footnote that given *Maness*'s failure to offer expert testimony, the court would not decide whether even properly supported allegations of repressed memory syndrome might extend the statute of limitations.<sup>158</sup> Thus, it is important to note that that discovery rule may potentially be found not to apply to RMS victims, even with proper expert testimony, if their abuses occurred prior to the enactment of sections 09.10.065 and 09.10.140.

#### D. Due Process

*Maness* argued on appeal that "requiring an indigent plaintiff to 'hire an expert witness or suffer a summary judgment dismissal'" violated due process under both the Alaska and United States Constitutions.<sup>159</sup> Amendment XIV, Section 1 of the United States Constitution provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

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155. *E.g., id.* at 526 n.15 (citing *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 680 (S.C. 2000), which holds that expert testimony is required to prove at trial that plaintiff recovered a repressed memory.)

156. *E.g., id.* at 526 n.15 (citing *Doe v. Archdiocese of Saint Paul*, 817 N.W.2d 150, 171 (Minn. 2012)).

157. ALASKA STAT. § 09.55.536 (2006).

158. *Maness*, 325 P.3d at 527 n.20.

159. *Id.* at 527 (citations omitted).

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>160</sup>

Similarly, Article I, section 7 of the Constitution of the State of Alaska provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.”<sup>161</sup>

Access to the court system has been recognized as an important right both federally and in Alaska,<sup>162</sup> particularly for certain indigent litigants.<sup>163</sup> Alaska has furthermore recognized a right of access to the judicial system beyond that recognized in United States Supreme Court case law.<sup>164</sup>

Questions of substantive due process ask whether the government’s deprivation of a person’s life, liberty, or property is justified.<sup>165</sup> The three elements of a substantive due process claim are as follows: first, there must be a deprivation; second, it must be of life, liberty, or property; and third, the government did not have an adequate justification for its action.<sup>166</sup> A justification is inadequate if it is not sufficiently substantive.<sup>167</sup>

The court analyzed the claims for both state and federal law simultaneously, by “comparing the private interest involved and the risk of erroneous deprivation of that interest against the government’s

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160. U.S. CONST. amend. XIV, § 1.

161. ALASKA CONST. art. I, § 7.

162. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (“In short, ‘within the limits of practicability,’ a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.”); *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988) (“We have construed the right to court access under the Alaska Constitution to be an important right.”).

163. See, e.g., *Boddie*, 401 U.S. at 385 (“[M]arriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge.”); *Varilek v. City of Houston*, 104 P.3d 849, 855 (“[p]rohibitive’ filing fees should not be allowed to hamper an indigent litigant’s access to the justice system . . .”).

164. *Varilek*, 104 P.3d at 853–54 (“Alaska is not precluded from offering greater rights and legal protections to its citizens than those offered by the federal government. Accordingly, we have not limited the right to access Alaskan courts without fees to indigents claiming ‘fundamental family interests.’ Rather, we have widened the right of access to the judicial system beyond the *Boddie* line of cases.”).

165. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

166. *Id.* at 1527.

167. *Id.* at 1501.

interest, including the fiscal and administrative burden of additional procedural safeguards.”<sup>168</sup> In doing so, the court described the private interest involved in Maness’s case as “the right of access to the courts to pursue a personal injury claim” and determined the right was “important but not fundamental.”<sup>169</sup> The compelling state interest, the court found, was the purpose of the statute of limitations: to protect defendants and the courts from having to prosecute cases where necessary evidence is no longer available.<sup>170</sup> In comparing these two aspects of Maness’s claim, the court determined that—despite Alaska Supreme Court case law finding that preventing an individual from civil court access “rends the fabric of justice”<sup>171</sup> and both Alaska and United States Supreme Court case law holding that prohibitively high filing fees violate due process<sup>172</sup>—requiring RMS plaintiffs to provide expert testimony prior to jury access did not violate an individual’s due process rights under either the United States or Alaska Constitutions.<sup>173</sup> The analysis did not include any consideration of alternative procedural requirements to protect against stale claims or delve deeply into how other state courts have handled the issue. The court instead stated that requiring expert testimony at the pleadings stage of the case addressed a legitimate concern and that paying for such testimony for indigent civil litigants would be expensive.<sup>174</sup>

Further justification provided for the decision included federal cases holding that there are situations in which a party may, consistent with due process, be required to bear the reasonable expenses involved in proving or defending a civil case.<sup>175</sup> *McNeil v. Lowney*,<sup>176</sup> a Seventh Circuit Court of Appeals case, concerned an inmate’s denied requests for subpoenas requesting the testimony of his treating physicians in light of his inability to pay witness fees.<sup>177</sup> Failing to find an abuse of discretion, the court noted that “the right of access to the courts does not independently include a waiver of witness fees so that the indigent

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168. *Maness v. Gordon*, 325 P.3d 522, 527 (Alaska 2014).

169. *Id.*

170. *Id.*

171. *Bush v. Reid*, 516 P.2d 1215, 1218 (Alaska 1973).

172. *See, e.g., Varilek v. City of Houston*, 104 P.3d 849, 855 (Alaska 2004) (holding that prohibitively high filing fees violate due process); *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (forbidding states from erecting financial barriers to an indigent person’s access to the divorce tribunals in the form of “a prohibitive filing fee”).

173. *Maness*, 325 P.3d at 528.

174. *Id.*

175. *Id.*

176. 831 F.2d 1368 (7th Cir. 1987).

177. *Id.* at 1373.

litigant can present his case fully to the court.”<sup>178</sup> Relatedly, in *Johnson v. Hubbard*,<sup>179</sup> the Sixth Circuit held as constitutional the denial of the district court to pay the witness fees of a psychopath involuntarily committed to a mental hospital.<sup>180</sup> Along with these cases, the Alaska Supreme Court found its decision in *Maness* consistent with previous denials of providing state-paid medical experts to indigent medical malpractice plaintiffs.<sup>181</sup>

### III. ALTERNATIVE LEGAL SOLUTIONS

A few states have designed alternative solutions to dealing with the concerns surrounding RMS. Though both California and Louisiana allow application of the discovery rule to RMS cases, those states also require the filing of a certificate of merit stating that the attorney of an RMS case has conversed with a licensed mental health practitioner and received advice.<sup>182</sup> Failure to do so results in sanctions<sup>183</sup> and, in California, the possibility of paying a defendant’s attorneys’ fees.<sup>184</sup> California courts will also not name a defendant in a RMS complaint without corroborating evidence.<sup>185</sup>

Additional ideas include requiring that the RMS plaintiffs be treated by a licensed therapist in order for the discovery doctrine to be applied, and sealing RMS-related complaints given the chance of false accusations.<sup>186</sup> Other states have disallowed claims for childhood sexual abuse against defendants who have died.<sup>187</sup> Still other states have enacted RMS statutes limiting the time an individual can file a claim to after they have reached the age of majority.<sup>188</sup> Distinctively, Colorado limits the recoverable damages in childhood sex abuse claims brought after the plaintiff turns thirty-three, in which case only psychological expenses and attorneys’ fees will be permitted.<sup>189</sup>

Psychologists continue to suggest alternative legal approaches to

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178. *Id.*

179. 698 F.2d 286 (6th Cir. 1983).

180. *Id.* at 289.

181. *Maness v. Gordon*, 325 P.3d 522, 528 (Alaska 2014).

182. CAL. CIV. PROC. CODE § 340.1 (West 1992); LA. REV. STAT. ANN. § 9:2800.9B (1993).

183. CAL. CIV. PROC. CODE § 340.1 (West 1992); LA. REV. STAT. ANN. § 9:2800.9B (1993).

184. CAL. CIV. PROC. CODE § 340.1.

185. § 340.1(j).

186. Sheila Taub, *The Legal Treatment of Recovered Memories of Child Sexual Abuse*, 17 J. LEGAL MED. 183, 200 (1996).

187. *Id.* at 199.

188. *Id.*

189. COLO. REV. STAT. ANN. § 13-80-103.7(3.5)(c) (West 1992).

RMS claims as well. In Holdsworth's article on the RMS controversy, she discusses the proposition of a Truth and Responsibility in Mental Health Practices Act, which would require therapists to obtain informed consent of clients to all psychological treatment modalities before using them.<sup>190</sup> Failure to do so would result in license revocation.<sup>191</sup>

It is unclear in *Maness*<sup>192</sup> whether the Alaska Supreme Court considered these alternatives in crafting its opinion, but the option to implement such changes remains available to the legislature. States discontent with their current approach to RMS cases may also benefit from considering these alternatives should the opportunity for change arise.

## CONCLUSION

*Maness* is a critical decision for any potential RMS plaintiff in Alaska whose abuse occurred prior to 2001. These individuals will need to finance expert testimony for the chance to see their day in court, at which point Alaska courts may still be able to refuse to allow the discovery rule to apply. It is unclear to what extent the expert testimony must corroborate the plaintiff's claims.

*Maness* also leads to additional, related questions. For example, Alaska courts have yet to determine how to deal with defendants of RMS cases who may want to sue plaintiffs' therapists for malpractice. The Alaska Supreme Court has generally approached duty of care issues by first determining whether an actionable duty exists by statute or existing precedent.<sup>193</sup> If one does not exist, there is likely no duty for an individual to protect another from a third party unless that person "stands in a special relationship to either the dangerous person or the potential victim, [and] the defendant is required to control the dangerous person or warn or otherwise protect the victim."<sup>194</sup> The court has additionally held that confidentiality statutes do not necessarily nullify such a duty in the case of substance abuse treatment facility employees.<sup>195</sup> A case in Alaska has yet to occur where a third party sues therapists for malpractice in light of implanted memories. It seems unlikely, but should Alaska courts see an increase in RMS cases in the

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190. Lynn Holdsworth, *Is it Repressed Memory with Delayed Recall or is it False Memory Syndrome? The Controversy and its Potential Implications*, 22 LAW & PSYCHOL. REV. 103, 128 (1998).

191. *Id.*

192. *Maness v. Gordon*, 325 P.3d 522, 522 (Alaska 2014).

193. *Bryson v. Banner Health Sys.*, 89 P.3d 800, 804 (Alaska 2004).

194. *Id.*

195. *Id.*

future, the prevalence of therapist malpractice suits in the state may also increase.

Fortunately for RMS plaintiffs who fall under section 09.10.065 or section 09.10.140, paying for expert testimony for the sole purpose of bringing a claim is not necessary. However, the extent to which Alaska courts will allow experts to testify as to RMS diagnosis has yet to be determined. *Maness* does not discuss any limitations of such expert testimony, as the case did not go to trial. Alaska has adopted the *Daubert* two-part test for expert testimony admissibility, but in light of the controversy surrounding the acceptance of RMS in the scientific community and the problems surrounding empirical tests, it is not clear what a given court would decide, although Alaska's Rules of Evidence "contemplate a broad[] inquiry, allowing a proponent to establish admissibility even if general acceptance is absent."<sup>196</sup>

What is known is this: the Alaska Supreme Court has finally responded to the national RMS controversy with unique, thought-provoking rule, the ramifications of which will be felt in the years to come.

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196. *State v. Coon*, 974 P.2d 386, 398 (Alaska 1999).