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# What Should the Courts Do About Memories of Sexual Abuse? Toward a Balanced Approach

By Cynthia Grant Bowman and Elizabeth Mertz

**O**ne of the most heated and troubling debates to enter the courts in recent years involves the reliability of delayed memories of sexual abuse. A topic once limited to discussion among psychologists and research scientists now occupies headlines and, on occasion, court dockets. Can people forget and then remember events from earlier in their lives—and, in particular, traumatic events such as sexual abuse? Are memories always accurate, or can they sometimes be mistaken?

To the uninitiated, there might seem to be a relatively simple and obvious answer to these questions—that memories of all kinds of events, whether from yesterday or from many years ago, can be accurate or inaccurate (or, often, some combination of both). Indeed, existing research seems to support this common sense response.<sup>1</sup> The courts have for many years grappled with the general issue of how to assess the reliability of memory in testimony; it is an issue that crops up literally every time someone testifies about any event that occurred prior to the moment of testifying. The legal response in general has been a measured one, avoiding the pitfalls of extremism on either side (all memories are accurate, or all memories are unreliable). As in so many other areas, judges and juries have taken the more difficult, fact-specific path of sorting out the likelihood of accuracy in each individual case, weighing all that is known about the particular situation before them in determining what to believe. And yet, in the area of remembered childhood sexual abuse, both the courts and the media seem to be in danger of swinging between extremes—first accepting perhaps too credulously claims of remembered sexual abuse, but more recently showing signs of barring any such claim without reasoned consideration.

How has this dramatic about-face occurred, and what approach should the courts take? As recently as 1989,

public opinion and media coverage appeared to accept the possibility of delayed memory<sup>2</sup> relatively unproblematically—in some instances, perhaps, without adequate awareness of the complexities and nuances involved. The generally receptive attitude toward delayed memory at that time found its analogue in the legal arena, with a number of high profile cases reflecting acceptance of evidence based on memories that had returned after a time of forgetting.

Thus, when Eileen Franklin came forward after many years to report having witnessed the murder of her best friend at the hands of her own admittedly abusive father, George Franklin was convicted and media coverage ranged from neutral to approving of this result.<sup>3</sup> Analysis of more recent media coverage shows that the media has since moved in a dramatically different direction, now showing a strong bias in its frequent refusal to report the considerable evidence that supports the reliability of delayed memories—and often concentrating one-sidedly on reports of mistaken or false memories.<sup>4</sup> Whether because of a societal desire to avoid the unpleasant reality of child sexual abuse, a preference in some quarters for sensationalism over the less exciting mixed picture that reality affords, or a disproportionate pressure in one direction from organized groups (see sidebar article, “A Bias in the Flow of Information”), there is reason to doubt that the public is receiving a balanced picture today.

What, exactly, is the state of current scientific knowledge on this issue? When we examine existing studies, we see that there is more scientific evidence documenting the possibility of accurate delayed (or “repressed”) recall of childhood abuse than there is of the possibility of creating full-blown false memories of sexual abuse (see Table). This is important only because some of the more extreme advocates on the “false memory” side of the debate appear to be asking their opponents for levels of documentation that they themselves cannot match. In fact,



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there appears to be ample evidence on both sides; we have good documentation of accurate delayed recall of childhood sexual abuse, and we have at least adequate indications that it is possible to lead some people to produce unfounded claims of childhood sexual abuse. In an effort to cut through some of the hysteria and exaggeration that surround this topic, we review below the current evidence that directly or indirectly speaks to the problem of remembered childhood sexual abuse.

#### ACCURATE "RECOVERY" OF CHILDHOOD SEXUAL ABUSE MEMORIES

The latest studies by Linda Meyer Williams at the University of New Hampshire's Family Research Laboratory directly substantiate a process of delayed recall for a number of women who were molested as children.<sup>5</sup> The abuse had been documented 17 years before in hospital records and by researchers who were conducting a study of sexual assault funded by the National Institutes of Mental Health. Williams followed 129 of those women with documented sexual abuse histories, comparing the prior study and hospital records with the women's own later recollections of what had happened to them. Thirty-eight percent of the women did not report the abuse that had been recorded 17 years earlier.<sup>6</sup> Furthermore, 16 percent of the women who did remember the abuse stated that they had previously forgotten and then "recovered" memories of the events. For these women, the process of recovering the memories was not found to be correlated with therapy, undermining the idea that remembered abuse surfaces only as a result of heavy-handed therapeutic suggestion. Some subjects reported that their memories surfaced after being "triggered" by a similar event, such as seeing someone who looked like the perpetrator. While there were some discrepancies as to details between the descriptions in the hospital records and the "recovered memory" accounts, the "recovered" memories of abuse

turned out to be largely accurate. Indeed, they were just as accurate as the memories described by victims who had never forgotten. In other words, the results of these studies indicate that delayed and continuous memories of childhood sexual abuse are not substantially different as to accuracy, and that they tend to be largely accurate. Interestingly, a number of women who accurately described what happened to them as children seemed unsure, saying things like "What I remember is mostly from a dream" or "I'm really not too sure about this."<sup>7</sup> Thus, it is quite possible for adults, who are accurately reporting abuse that happened to them as a children, to sound unsure, which undermines credibility.

These two studies, which trace current memories of confirmed victims of childhood sexual abuse, lend support to other studies that have looked at the question less directly. In a number of "self-report" studies, people have been asked to report whether they had been abused as children, whether they had at any point forgotten the abuse, how any remembered abuse had been recalled, and/or whether they had been able to obtain external confirmation of the abuse. One study focused on a group of 53 women, who had been in a therapy group for survivors of sexual abuse. These women had sought treatment for symptoms that had resulted from childhood sexual abuse. Of this group, 64 percent reported experiencing varying degrees of amnesia, while 28 percent had high degrees of memory blockage; approximately 74 percent of the subjects in the study were able to obtain verification of their memories. This percentage was about the same for subjects whether they had continuous or delayed memories.<sup>8</sup> External verification included corroboration by the perpetrator, by family members, or through physical evidence (40 percent of the total group in the study), as well as the accounts of other victims, including family members, who had been molested by the same perpetrator (34 percent of the total group). In one telling example, a woman belatedly recalled being molested by a brother who had since died; she subsequently found his diary, which contained written accounts of the very events she had independently remembered. Other self-report studies that focused on subjects with claimed sexual abuse histories have found rates of forgetting that ranged between 19 percent and 40.5 percent.<sup>9</sup>

Another source of scientific evidence that supports the existence of repressed memory in cases involving childhood sexual abuse comes from research on ways in which the brain deals with memory under conditions of fear and

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## We are no longer debating delayed recall of sexual abuse. Instead, judges must decide on a case-by-case basis

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trauma. An increasing body of evidence suggests that normal memory processes are disrupted when a person is experiencing fear or trauma.<sup>10</sup> A normal process of “cross-talk” between parts of the brain permits events to be stored as “explicit” memory, available to conscious reflection. However, when a person is traumatized, the body can release both high levels of adrenaline and also naturally generated opiates to dull the pain.<sup>11</sup> These naturally produced chemicals, biologists have found, may actually interfere with the process that allows us to store and retrieve normal memories—and especially emotional memories.<sup>12</sup> Other work suggests that opportunities to retell a story and consciously discuss it are important to forging and retaining even normal nontraumatic memories.<sup>13</sup> These opportunities are obviously hard to come by for incest victims in families in which the abuse is kept secret (which appears to be the typical case, for obvious reasons).

A recent biological study dramatically illustrates how trauma might affect the human brain. Using brain scans of veterans and sexual abuse survivors, researchers actually found that a particular area of the brain had experienced a form of damage that could be traced through visible shrinkage.<sup>14</sup> This damaged area of the brain, the hippocampus, is highly involved in transferring short-term memory to long-term memory. The damage also was found in differential responses to tests that checked for short-term memory. Consequently, both combat veterans and sexual abuse survivors may experience memory difficulties as a result of the severe stress resulting from their exposure to trauma.

Memory difficulties among survivors of other kinds of trauma also have been studied.<sup>15</sup> The existence of amnesia and other varieties of memory difficulties has long been documented among combat veterans and others.<sup>16</sup> Among the most intriguing evidence of “repression” is documentation that perpetrators of various kinds of abuse forget their actions.<sup>17</sup> Thus, both ends of the traumatic interaction—victim and perpetrator—seem able to “put away” the memory of what happened under certain circumstances. If this can occur, then the perpetrators themselves might honestly believe they are innocent, even though they are not.

A final set of sources for evidence regarding accurate “repressed” memories includes documented clinical and anecdotal cases. Clinicians treating traumatized individuals have reported instances of accurate retrieval of verified repressed memories. In one instance, for example, a

psychiatrist reported that a young man who was under treatment recovered the memory of his mother’s attempt to strangle him.<sup>18</sup> This memory was verified by the mother. After the young man retrieved this traumatic memory, a number of his symptoms abated—including his incessant playing of the game of “Hangman,” which seemed to be an attempt to express at the symbolic level a memory that had been stored subconsciously.

In addition to clinical accounts, there are a number of well-publicized accounts of accurate and verified “repressed and recovered” memories. One of the most well-known examples involved a priest, Father Porter, who molested a number of children during the 1960s. Several decades later, in 1989, one of his victims began to remember the abuse that he had suffered and subsequently sought verification of these delayed memories. He was able to obtain confirmation from the perpetrator himself (who admitted to the abuse) and from other victims who came forward when the case received publicity, as well as from contemporaneous reports of Porter’s abuse—reports that were acknowledged by church officials.<sup>19</sup> A similar case, involving abuse by a boy’s choir camp director, also received media attention; in this case Ross Cheit, a professor of political science at Brown University, was able to obtain confirmation of his memories of sexual abuse—memories that surfaced after 25 years. As in the Father Porter case, Cheit substantiated his “repressed” memories in multiple ways: the perpetrator confessed, other victims came forward, and there were contemporaneous witnesses and reports of the abuse.<sup>20</sup>

Once the phenomenon of delayed or repressed memory is documented in even one case, and the evidence goes far beyond that,<sup>21</sup> we are no longer in the realm of debating whether this kind of forgetting can happen at all. Instead, the question becomes how to determine what happened in any individual case.

Significantly, sexual abuse memories that are capable of better documentation frequently involve situations outside of the home, ones in which clergy, teachers, or other trusted confidantes have harmed children. When a molestation occurs within the family, it is less likely that other witnesses—typically family members bound by family habits of loyalty and secrecy—will come forward. Thus children, disproportionately girls, who are molested in their homes are more likely to delay their revelations and are also less likely to be believed when they disclose what happened. Even when molestation happens in the home, however, there are women whose delayed recall of

**Table 1**  
**What We Know—Existing Scientific Research & Anecdotal**  
**Accounts of Remembered Childhood Sexual Abuse**

Evidence showing that genuine ongoing sexual abuse can be forgotten and/or later recalled with accuracy	Evidence showing that adult subjects can be induced to produce detailed false memories of ongoing childhood sexual abuse
<b>1. Scientific studies that directly document the phenomenon:</b>	
Williams (1995) (fn 5) Williams (1994) (fn 5)	
<b>2. Supportive brain biology research:</b>	
Kandel & Kandel (1994) (fn 10-overview) Pitman, van der Kolk, & Greenberg (1994) (fn 11)* Bremner et al.; Stein (fn 14) —see also studies cited in footnotes 12 & 13*	Schacter et al. (1984; 1991)(fn 27, 28)*
<b>3. Survey studies/Self-report studies:</b>	
Feldman-Summers & Pope (1994) (fn 9)* Herman & Schatzow (1987) (fn 8) Elliott & Briere (1995) (fn 9) Briere & Conte (1993) (fn 9) Loftus, Polonsky & Fullilove (1994) (fn 10)	Yapko (1994) (fn 26) Lief & Fetkewitz (1995) (fn 23)
<b>4. Studies of analogous phenomena / other kinds of traumatic memories:</b>	
War veterans (see fn 16)*	Loftus et al. (fn 30)* Neisser et al. (fn 28,32)* —see also studies cited in footnote 32*
<b>5. Clinical case anecdotes:</b>	
Szajnberg (1993) (fn 18)	
<b>6. Other anecdotes:</b>	
<i>Victims:</i> Father Porter's victims (see fn 19) Cheit (see fn 20) Van Derbur (see fn 22) <i>Perpetrators:</i> Holocaust perpetrators (see fn 17) Killer's memories (see fn 17)	Ofshe (fn 33)
<b>7. Popularized accounts:**</b>	
Lenore Terr* <i>Unchained Memories: True Stories of Traumatic Memories, Lost and Found</i> (1993) Eileen Franklin & William Wright* <i>Sins of the Father</i> (1991)	Elizabeth Loftus* <i>The Myth of Repressed Memory</i> (1994) Goldstein, Eleanor & William Farmer* <i>True Stories of False Memories</i> (1993)

\*This indicates that there are a number of other studies or accounts along the lines of the ones listed ones here; for purposes of this article we simply chose one or two as examples of a particular kind of documentation of the phenomenon.

\*\*These popularized accounts also contain anecdotes; note, however, that some are elaborated to make better "stories" for a wider audience: "[c]ertain scenes and dialogue have been dramatically recreated in order to convey important ideas or to simplify the story." Loftus, *Myth*, at xi.



abuse has been confirmed. One of the better-known cases involved Marilyn Van Derbur, who upon recovering delayed memories of sexual abuse by her father received corroboration from her sister, who had never forgotten being sexually abused as a child.<sup>22</sup> In addition to these more visible cases, there are a number of popular books recounting instances of repressed memories (see Table).

Ample evidence from scientific studies and documented anecdotes supports the existence of delayed memory and accurate recall of traumatic events such as child sexual abuse.

### INACCURATE AND MISTAKEN MEMORIES OF CHILDHOOD SEXUAL ABUSE

It seems likely that it also is possible to produce mistaken or inaccurate accounts of childhood sexual abuse. Although there are no studies directly supporting this proposition, there is one survey of "retractors" in which people who claim to have had false memories of abuse (which they subsequently retracted) were asked about their experience.<sup>23</sup> If some of the anecdotes reported by survey respondents are accurate, they indicate that at least a few therapists have indulged in heavily suggestive and unethical practices that may indeed have produced inaccurate recall.<sup>24</sup> (Unfortunately, unlike some self-report studies about remembered abuse, this survey did not produce data about independent sources of confirmation.)<sup>25</sup> An additional survey contains what might be termed a "second-hand report" question: therapists who attended national and international psychotherapy meetings and therapy training courses (taught by the author of the survey) were asked "Do you know of any cases where it seemed highly likely that a trauma victim's trauma was somehow suggested by a therapist rather than a genuine experience?"<sup>26</sup> Nineteen percent of the respondents replied in the affirmative. While it would be preferable, of course, to have more direct reporting and evidence, we can take this at least as an indirect indicator that some members of the profession see cause for concern.

From the area of brain biology, there is work indicating the frailty of what is called "source memory," or the connection of a remembered event to the context within which it occurred. Thus, when source memory grows weaker, it is possible that people will forget when or in what context a particular remembered event occurred and may erroneously put memories from different contexts together.<sup>27</sup> When gaps occur in the "plot lines" of the stories told by memories, people may also fill in the gaps with inferences, thereby combining new information or experience with older material.<sup>28</sup> This process can occur with "regular" continuous memory as well as with delayed recall, and can create mistaken recollections in both settings.

If fading source memory results in an account that amalgamates events from different times and places, the resulting story may not be entirely incorrect; it may sim-

ply contain elements of several "true" stories. For example, if someone remembers having a fistfight with the same person on two different occasions and mixes memories of the two occasions, the resulting account may be erroneous only in attributing details of one event to the other. Thus, in retelling the "story" of the second fight, our subject might mistakenly say that his opponent wore a green shirt, or yelled insulting words, when in fact these were events that occurred during the first fight. The resulting memory, then, is not wholly "false"—it mixes elements that are entirely true ("the second fight occurred") with some that are true but mislocated. Judges are familiar with this type of mistake in eyewitness testimony of all sorts.

Some might advocate a radical response to this and other realizations about the frailty of memory; if mistakes can happen, they might argue, then we should never rely on memory as evidence. In our hypothetical, for example, this might lead to doubting whether either fight ever occurred at all. However, the more reasonable response would be to take a balanced approach, weighing all the evidence in an effort to distinguish whether the essential elements of the story are true. This is in fact what the courts do every day in assessing witness testimony. Thus studies of the fallibility of source memory and of memory processes in general<sup>29</sup> leave us with a clear cautionary message: that all memory is susceptible to error and that care should be taken in assessing the accuracy of recall. It is not clear that these studies distinguish in any meaningful way between continuous and delayed recall. In both cases, it is possible to mix information.

Still better evidence of the possibility of creating incorrect recollections of sexual abuse comes from studies of analogous situations—situations that involve memories not of sexual abuse but of other arguably similar traumatic situations. A frequently cited study caused subjects to create false memories of being lost as a child: five people were told by trusted family members that the event (getting lost) had occurred, and they subsequently adopted the story as a true memory and even elaborated on it, providing details.<sup>30</sup> Of course, there is a difference between hearing a story of an event from one's childhood told by a family member (who claimed to have witnessed it) and being questioned by a therapist or other outsider who had no insider status or knowledge about a person's childhood. Stories from family members are a frequent source of information about and reinforcement of childhood memories. This study involved direct suggestion, where the subject is told that the event actually happened rather than asked whether any such event ever did happen. Furthermore, while an event such as being lost at a mall is arguably traumatic at some level, it is hardly analogous to the trauma of repeated sexual violation by a trusted family member. A recent attempt to replicate the "lost in a mall" study succeeded in implanting false memories of being lost in a mall in three out of twenty subjects, but failed in all cases to implant false memories of having had a rectal

enema as a child.<sup>31</sup> However, these studies at least demonstrate that it is possible through suggestion to bring some people to believe in autobiographical events that never occurred. There are also studies documenting the production of error in memories of other kinds of traumatic events.<sup>32</sup> If it is possible to create false or inaccurate memories regarding some kinds of traumatic events, then it might also be possible to induce unfounded memories of childhood sexual abuse.

Perhaps the best evidence supporting allegations that it is possible to create full-blown memories about sexual abuse when none occurred comes from anecdotes. In one case, an investigator induced a man to confess to events involving sexual abuse that had been fabricated by the investigator.<sup>33</sup> Interestingly, another anecdote involves false memories—but of combat in Vietnam, when the subject had never actually been to Vietnam or in combat.<sup>34</sup> This anecdotal evidence has never led commentators to cast widespread doubt on the validity of the stories of genuine Vietnam veterans who seek treatment for disorders resulting from the trauma they suffered. (Yet the existence of some unfounded memories in the sexual

abuse area has led some commentators to argue for the wholesale rejection of any such claims.) There are also a number of popular accounts involving clients who claim that heavy-handed suggestive techniques produced unfounded memories of sexual abuse (see accompanying Table).

In sum, there is adequate evidence to suggest that some people may create unfounded memories of childhood sexual abuse, either under pressure from heavy-handed suggestive techniques or possibly through some deterioration of source memory. We do not yet have studies directly documenting this phenomenon, nor do we know whether indirect questioning by nonfamily members is likely to have the same effect as heavy-handed suggestion, particularly when performed by family members. But available evidence from analogous situations and anecdotes suggests at least that direct and heavy-handed techniques can induce some individuals to adopt, as true memories, events that didn't occur. Indeed, it is hardly a surprise to legal professionals that people at times confess to crimes they didn't commit or make mistakes in remembering events.

*(Continued on page 14)*

## Issues to Consider in Assessing Studies and Accounts of Remembered Sexual Abuse

Courts are increasingly faced with weighing testimony and writings by social scientists on the topic of "repressed" and "false" memory. We note here some issues to be considered in assessing whether sources—in journalistic or social scientific accounts—are relatively neutral or balanced:

*In assessing a study, scientist, or symposium:*

- Is the scientist a member in good standing of the appropriate, duly accredited professional organization?
- Is the scientist or commentator an acknowledged member of a lobbying or interest group?
- Does the scientist or commentator testify regularly as an expert witness in such cases, and if so, does he or she generally appear as a witness for one side of the issue only? (An additional issue—how much of this scientist's or commentator's income in recent years depends upon such activity?)
- Does the study directly confront the issue it claims to address, or does it depend upon analogies? If it depends on analogy, is there careful consideration of how well-founded the analogy is?
- Is the study or symposium funded or sponsored by an advocacy group?

*In assessing an account or literature summary:*

- Were scientists on both sides given fair consideration?
- Was contrary evidence considered or omitted? (Due consideration of contrary evidence is, of course, a prime tenet of scientific inquiry.) \*
- Were the same standards for scientific documentation or proof required for all assertions? \*\*
- How much of the account or summary relies upon undocumented assertions, anecdote, or dramatized/imagined storytelling?

\*A few more balanced treatments of the issue of remembered sexual abuse have begun to emerge.

See, e.g., KENNETH POPE AND LAURA BROWN, *RECOVERED MEMORIES OF ABUSE: ASSESSMENT, THERAPY, FORENSICS*. Published by the American Psychological Association (1996).

\*\*Also see, for a probing analysis of this issue, Kenneth Pope, *Memory, Abuse and Science*, 51 *AMERICAN PSYCHOLOGIST* 957 (1996).

## A Bias in the Flow of Information?

It is hard to imagine a more dramatic reversal of press coverage than that seen in the area of recovered memories of childhood sexual abuse. As recently as 1989, media coverage of the phenomenon of repressed memory ranged from neutral to accepting of the phenomenon, as exemplified by headlines such as this one: "Long-Lost Memories Key in Two Slaying Inquiries."<sup>1</sup> By 1993, the tone of coverage had changed dramatically, with stories now often playing down or excluding evidence that supports the existence of accurate repressed memory—and headlines like the following: "Remembering Things that Never Happened?"<sup>2</sup> Where once tales of remembered child sexual abuse received uncritical and often sensationalistic coverage, tales of wrongfully accused parents and false accusations began to appear, without proper counterbalance or critical consideration. Although many factors may be at work, it is clear that some of this shift in media coverage is the result of the existence of a well-organized lobby on one side of the issue, a lobby that has no parallel on the other side.

A number of commentators have noted the coincidence of the media's shift in coverage of this issue with "the formation, in early 1992, of an advocacy group for accused parents [parents accused of sexually abusing their children] called the False Memory Syndrome Foundation."<sup>3</sup> Well-funded and well-connected within the academic world, this advocacy group has done an unparalleled job of reaching not only the media but also academic publications. For example, a mainstream academic journal entitled *Psychiatry and Law* recently devoted an entire issue to a symposium organized by the False Memory Syndrome Foundation, without response from any advocacy group on the other side. The bulk of the papers in this symposium could be characterized as taking the FMSF's position—for example, casting doubt on the credibility of recovered memories of sexual abuse, or attempting to critique studies that have documented the long-term negative effects of childhood sexual abuse. This is somewhat akin to having the tobacco lobby place a symposium it had organized in a mainstream journal devoted to law and medicine—a symposium largely devoted to studies and articles designed to dispel fears over tobacco use.<sup>4</sup> That this advocacy group, composed largely of parents accused of sexual abuse, has attained its current level of public influence and credibility speaks well of its savvy in dealing with the media and the academy.<sup>5</sup>

There is, of course, nothing wrong with effective lobbying. One can hardly fault the lobbyist for being successful. And it is clear that many members of this parents' advocacy group have strong and deeply held convictions about the correctness of their position. The problem in this case is caused both by the absence of a similarly effectual lobby on the other side and by the apparent lack of safeguards to ensure balanced treatment within either the media or the academy. Therapists and clients have been understandably slow to take up their cause in organized and public fora (for fear of retaliation and loss of privacy, or to protect confidentiality), and many scientists and scholars prefer the cloistered anonymity of their laboratories and offices to the heat of public and legal battles.<sup>6</sup> Even when groups have formed in an effort to represent this alternative point of view, they have not been heard or reached the level of influence that the parents' lobby has attained. Thus there is reason to doubt that the current flow of information within the academy and, especially, outside of it is particularly balanced.

1. Frankel, *Long-Lost Memories Key in Two Slaying Inquiries*, USA TODAY, Apr. 23, 1991, at 3A.

2. *Remembering Things that Never Happened? The Therapeutic Community Must Police Itself Better*, L.A. TIMES, Apr. 17, 1994, at M4. For discussions of the pendulum swing in media treatment of this issue, see K. Beckett, *Culture and the Politics of Signification: The Case of Child Sexual Abuse*, 43 SOCIAL PROBLEMS 57 (1996); M. Maies, *False Media Syndrome: "Recovered Memory," Child Abuse and Media Escapism*, 7 EXTRA (Publication of Fairness and Accuracy in Media) 10-11, Sept./Oct. 1994; C. G. Bowman & E. Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 618-22 (1996).

3. J. Herman, *Presuming to Know the Truth*, 48 NIEMAN REP. 43, 44, Spring 1994; see also K. Butler, *Marshalling the Media*, FAMILY THERAPY NETWORKER, Mar/Apr. 1995, at 36-38; H. Metz, *Fact or Fantasy? The Debate over "Repressed Memory Syndrome" Enters the Courtroom*, STUDENT LAWYER, Dec. 1995, at 22.

4. We were informed just prior to publication of our *Judges' Journal* article that the journal *Psychiatry & Law* will be publishing a more balanced issue on this topic in the near future, in an effort to correct this situation.

5. One difference between an advocacy group and a scientific organization is precisely its degree of willingness to work toward balanced debate and inclusion of opposing points of view. Psychologist Kenneth Pope has noted the FMSF's resistance to even consider the issue of balance. Kenneth Pope, *Memory, Abuse and Science*, 51 AM. PSYCH. 957, 968 (1996).

6. See K. Butler, *Like Herding Cats*, FAMILY THERAPY NETWORKER, March/April 1995, at 35.



**TOWARD A "BALANCED" APPROACH: WHY  
THE LABELS "TRUE" AND "FALSE"  
MIGHT BE MISLEADING**

Throughout this article, we have frequently used quotation marks when writing about "true" or "false" memory, and about "normal" or "repressed" memory. This is because these labels themselves may be part of the problem—they simplify a complex situation in a way that may be misleading. As we have noted, memory works in complicated ways, sometimes mixing a plot line that is accurate as to gist with inaccurate details. Memories of past events may also exist somewhere along a continuum of conscious awareness that has many shades of gray between fully conscious and completely blocked recall. Thus it would be possible to have a memory that could be described as partially blocked, or one that is uneasily sending signals that are not fully conscious but also not completely outside of conscious awareness. When we sort this complicated reality into black-and-white categories, it may create a misleading sense of clarity and comfort. As messy and complex as this might be, it is often more accurate to approach the phenomenon of delayed recall as an issue of "more" and "less" accurate rather than in terms of "true" versus "false."

The law has frequently dealt with complicated social realities of this kind by adopting balancing and weighing approaches rather than "on/off" or "black/white" methods. Rather than bar all recalled testimony, for example, we encourage a process of weighing the evidence in each individual case. Similarly, in balancing or weighing delayed recall testimony, courts and juries should consider all available information and circumstances, giving each case the attention required if we are to achieve justice both for those accused and for victims of child abuse. This would involve, for instance, careful inquiries into the circumstances surrounding the return of the memories (Was heavy-handed suggestion involved? Was there something in the current context that might have triggered the recollection?), as well as consideration of all other evidence that contributes to an overall assessment of the credibility of the recollections.

As Judge Lowell Jensen of the Northern District of California noted,

By definition, trials are based on memories of the past. The recognition that memories grow dim with the passage of time is part and parcel of the trial system. Jurors are instructed that in assessing credibility they are to consider the ability of the witness to remember the event with the implicit assumption that asserted memories of events long past must be subject to rigorous scrutiny . . . . [A "recovered memory" case] is a "memory" case like all others.

After direct and cross examination, after consideration of extrinsic evidence that tends to corroborate or to contradict the memory, the focus must be on the credibility, the believability, the truth of the asserted memory.<sup>35</sup>

This balanced approach prevents the exclusion of reliable testimony while subjecting more dubious testimony to the proper scrutiny. The Second Circuit has noted that a "more optimistic view of witness reliability and jury perceptiveness" underlies the move in Federal Rule of Evidence 601 to "abolish[ ] almost all grounds for witness disqualification,"<sup>36</sup> and has also directed our attention to the "presumption of admissibility of evidence" recently underlined by the U.S. Supreme Court.<sup>37</sup> These goals can best be served by the kind of balanced, case-by-case consideration of evidence based on memory (of whatever kind) described by Judge Jensen.

Certainly, as some have urged, tragic results would follow were all "recovered" memories unquestioningly accepted, without any careful inquiry as to accuracy.<sup>38</sup> At the same time, there is a tragedy in rejecting all "recovered" memories of abuse: child molesters may go unpunished and undeterred, while their victims

find once again that there is no hope of a fair hearing for the truth.

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When confronted with a witness's testimony based on delayed memory, the most measured response, as is so often true, involves much work and painful decisionmaking. While the media and the public may be free to swing wildly between extremes on such issues, the courts and legal system need to develop a more balanced and careful approach—in order to serve the ends of justice better. This is hardly a new role for the legal system; once again, judges and juries must avoid quick or easy decisions, live with the difficult sense of uncertainty that comes of refusing to pre-judge individual cases, and perform the painstaking task of weighing all the evidence and listening to each story that comes before them. In providing a middle way between the extremes (all delayed memories are true, all delayed memories are false), judges and juries may lead the way toward a reasoned response to this polarized and emotionally charged problem.

1. The American Psychological Association's Working Group on the Investigation of Memories of Childhood Abuse, although deeply divided, managed to agree both that "it's possible to create a false belief" and that "it's possible to retrieve a lost memory." K. Ode, *Task Force Investigates Repressed Memory Issue*, STAR TRIB. (Minneapolis-St. Paul), Oct. 11, 1993, at 3E.

2. We avoid the use of the controversial terms "repression" and "repressed memory." While the exact mechanism by which forgetting occurs is obviously very interesting to psychologists, the legal community is probably most concerned with the outcome—that some kind of for-

**Judges and juries  
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uncertainty**

getting does occur, in whatever fashion.

3. See Cinde Chorness, *Her Memory, Her Dad on Trial in '69 Killing*, CHI. TRIB., Nov. 10, 1990, at\*8 ('the defense is expected to suggest that Franklin Lipsker's subconscious concocted the memory of murder to avenge her sexual abuse by her father.'). Life Sentence in 1969 Killings, S. F. CHRON., Jan.30, 1991 at A4 ("I feel the abuses I have committed upon my family have led my accusers to either dream... [or] fabricate... that I had murdered Susan Nason in order that they could

vent their rage...") (quoting George Franklin)). The United States District Court for the Northern District of California recently granted Franklin's habeas petition on other grounds, but resoundingly rejected Franklin's argument that his conviction was improper because founded on "recovered" memory:

It was clear at the time of the trial, as it is today, that reliance by a jury on "recovered memory" testimony does not, in and of

## Third-Party Liability Against Therapists

Imagine this: a doctor succeeds in treating a difficult-to-cure, life-threatening ailment; his or her patient is delighted about the recovery. Nonetheless, a third party is allowed to sue the doctor and receive damages. Hard to imagine, especially in this time when calls for tort reform echo louder and louder across the country. Yet in the area of sexual abuse survivor therapy, precisely this sort of result has been permitted—albeit in a trial court ruling that will not be appealed. In that case, a father accused of sexually abusing his daughter sued his daughter's therapist, against his daughter's wishes, and obtained a jury verdict of \$500,000 in damages.\* The daughter, who had been successfully treated by the therapist for bulimia, was pleased with the therapy and testified in her therapist's defense at what was essentially a malpractice trial. The case, *Ramona v. Ramona*, occurred in California, a jurisdiction that led the way in expanding third-party liability in tort. [The father originally sued the mother and the therapist, thus the case name, *Ramona v. Ramona*.] Yet even the California Supreme Court has recently sent out strong signals that it is moving in the direction of limiting rather than expanding third-party liability. Of course, popular coverage of the case has not made these finer legal distinctions, and so the facts that no precedent was established, that the case occurred in an unusually liberal jurisdiction, that it appeared to fly in the face even of recent state supreme court pronouncements—none of this caught the public eye.

In a recent *Harvard Law Review* article,\*\* we argued on a number of grounds against permitting this kind of third-party liability. First, at a time when tort reform is much-debated and even the California Supreme Court appears to be drawing back from expansive third-party liability doctrines, it makes little sense to open the courts to malpractice claims in cases where the recipients of the services themselves dispute any allegations of malpractice. If there were ever a situation in which it made sense to return to traditional notions of privity, this is it. Second, in terms of public policy, we point out that when memories of abuse are accurate, third-party suits permit the courts to be used by abusers in their efforts to disrupt their victims' lives and sources of support. We suggest alternative routes for resolving the problems that arise around false allegations; if caused by improper and heavyhanded therapeutic techniques, the client her- or himself can sue, and defamation suits against the now-adult child and/or the therapist are available to protect parents' reputations. In the difficult situation where child and

parent stick to conflicting stories, we argue, it is preferable that the confrontation in court squarely face the choice between these two accounts and these two parties. Third-party suits evade the key confrontation and permit therapists to emerge as convenient scapegoats. They also may deter therapists from treating women and men who suffered sexual abuse as children. Given current projections of the incidence rates for sexual abuse, and the growing understanding of the consequences of sexual abuse for adults, this would be a very undesirable result.

After reviewing the existing evidence on memory, our article further noted the difficulty of translating delayed memories and the therapeutic process in court. Attempting this translation is necessary in certain instances, for example, when a court has to determine whether a crime such as child molestation occurred, or when a client claims to have suffered malpractice. However, at least when the party suing was him- or herself an active participant in the treatment process, there is some opportunity for a nuanced and subtle understanding to emerge.

Finally, leaving the decision to sue in the hands of the party in privity is crucial to ensuring a sense of agency for both victims of sexual abuse and those suffering from therapeutic malpractice. Third-party suits can permit child molesters to use the legal system to silence their victims once again, going over their heads and ignoring their perceptions. At the same time, third-party suits can be used by abusers to punish the professionals who sought to help abuse victims. Even in cases where the abuse allegations are unfounded, some commentators suggest that resort to third-party suits may only exacerbate the situation, alienating the now-adult child still further and virtually ensuring a continued family stand-off.

In sum, after reviewing issues surrounding doctrine, public policy, optimal translation of social science and psychology in the courtroom, and the "agency" of clients, we conclude that permitting third-party liability in these cases is unsound.

\*The father accused the therapist of implanting false memories and sued for negligent infliction of emotional distress.

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

itself, violate the Constitution. Then as now, such testimony is admitted into evidence and is then tested as to credibility by the time-honored procedures of the adversary system . . . This case, then, may be described as a "recovered memory" case, but in reality it is a "memory" case like all others.

Franklin v. Duncan, 1995 WL 166229 (N.D. Cal.). It is therefore puzzling to see the *Franklin* habeas ruling characterized in the popular press by commentators such as Alan Dershowitz as "a stunning rebuke to the 'repressed memory' movement". A. Dershowitz, *Repressed Memories and the Law*, ALBANY TIMES-UNION, Apr. 10, 1995, at A8.

4. M. Males, *False Media Syndrome: "Recovered Memory," Child Abuse and Media Escapism*, 7 EXTRA (Publication of Fairness and Accuracy in Media) 10-11, Sept./Oct. 1994; K. Butler, *Marshalling the Media*, FAMILY THERAPY NETWORKER, Mar./Apr. 1995, at 36; J. Herman, *Presuming to Know the Truth*, 48 NIEMAN REPORTS 43-45, Spring 1994; C. G. Bowman & E. Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L.REV. 549, 618-22 (1996); M. Landsberg, *Beware of False Prophets*, TORONTO STAR, Feb. 11, 1996, at A2.

5. L. M. Williams, *Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories*, 8 J. TRAUMATIC STRESS 649 (1995); L. M. Williams, *Recall of Childhood Trauma: A Prospective Study of Women's Memories of Child Sexual Abuse*, 62 J. CONSULTING & CLINICAL PSYCHOL. 1167 (1994).

6. There is good reason to interpret failure to report here as an indicator of a person's forgetting sexual abuse and not as just an oversight or failure to mention it. For example, the same women reported on other intimate matters, and in some cases discussed other sexual assaults; in a number of cases subjects gave "dramatic" indications that they had no recollection of the events recorded in earlier hospital documents. *Id.*

7. Williams (1995), *supra* n.5, at 670.

8. See J. Herman & E. Schatzow, *Recovery and Verification of Memories of Childhood sexual Trauma*, 4 PSYCHOANALYTICAL PSYCHOL. 1 (1987); re: percentages of subjects with delayed recall who were able to obtain verification, see Bowman and Mertz, *supra* n.4, at n.305.

9. See D. Elliott & J. Briere, *Posttraumatic Stress Associated with Delayed Recall of Sexual Abuse: A General Population Study*, 8 J. TRAUMATIC STRESS 629 (1995) (42% of respondents with a history of sexual abuse report periods of memory loss; delayed recall was found to be associated with threats at the time of the abuse); S. Feldman-Summers & K. Pope, *The Experience of "Forgetting" Childhood Abuse: A National Survey of Psychologists*, 62 J. CONSULTING & CLINICAL PSYCHOL. 636 (1994) (40.5% had a period of forgetting; 46.9% of subjects who had forgotten were able to obtain corroborating evidence); J. Briere & J. Conte, *Self-Reported Amnesia for Abuse in Adults Molested as Children*, 6 J. TRAUMATIC STRESS 21 (1993) (59.3% reported a time of amnesia); E. Loftus, S. Polonsky & M. Fullilove, *Memories of Childhood Sexual Abuse: Remembering and Repressing*, 18 PSYCHOL. WOMEN Q. 67 (1994) (19% report periods of complete amnesia; 12% report remembering only part of the abuse continuously while forgetting other parts).

10. For a good summary, see M. Kandel & E. Kandel, *Flights of Memory*, DISCOVER, May 1994, at 32.

11. See *id.*, and R. Pitman, B.A. van der Kolk, S. Orr & M. Greenberg, *Naloxone- Reversible Analgesic Response to Combat-Related Stimuli in Posttraumatic Stress Disorder: A Pilot Study*, 47 ARCHIVES GEN. PSYCHIATRY 54, 5441 (1990).

12. See, e.g., J. Brioni, A. Nagahara, & J. McGaugh, *Involvement of the Amygdala GABAergic System in the Modulation of Memory Storage*, 487 BRAIN RES. 105, 110 (1989); E. Murray & Mortimer Mishkin, *Amygdectomy Impairs Crossmodal Association in Monkeys*, 228 SCIENCE 604 (1985); see general account in Kandel & Kandel, *supra* n.10.

13. Unsurprisingly, language plays an important role in explicit or conscious memory. See, e.g., S. KOSSLYN & O. KOENIG, *WET MIND: THE NEW COGNITIVE NEUROSCIENCE* 386 (1992). An opportunity to tell the story of what happened can increase the likelihood that an event will be

retained as a continuous memory. See A. Burke, F. Heuer & D. Reisberg, *Remembering Emotional Events*, 20 MEMORY & COGNITION 277 (1992); U. Neisser, *Snapshots or Benchmarks?* in MEMORY OBSERVED 43 (Ulric Neisser ed., 1982).

14. These studies were performed by Dr. Douglas Bremner, Dr. Dennis Charney and their colleagues at the Veterans Affairs Medical Center in West Haven, Connecticut, and Dr. Murray Stein at the University of California at San Diego. D. Goleman, *Severe Trauma May Damage the Brain as Well as the Psyche*, N.Y. TIMES, Aug. 1, 1995, at C3.

15. As we will see, on the other side of the debate, analogies to other kinds of traumatic memories are in fact the most direct scientific evidence that we have for the creation of incorrect or "false" memories; if we are to rely on that kind of analogy on one side of the argument, then the correct procedure would be to consider similar analogical evidence on both sides.

16. See, for example, W. Sargant & E. Slater, *Amnesic Syndromes in War*, 34 PROC. ROYAL SOC'Y MED. 757 (1941); J. D. Bremner et al., *Dissociation and Posttraumatic Stress Disorder in Vietnam Combat Veterans*, 149 AM. J. PSYCHIATRY 328 (1992).

17. See, e.g., D. Bar-On, *Holocaust Perpetrators and Their Children: A Paradoxical Morality*, 29 J. HUMANISTIC PSYCHOL. 424 (1989) (memory blockage among Holocaust perpetrators). In an extreme example, a serial killer who had fled the U.S. and established a new life abroad managed to repress memories of his past; 20 years later he turned himself in after "long-buried memories of his past began to re-emerge in bits and nightmares." Associated Press, *'Smooth' Killer's Trail Ends After 20 Years With Surrender*, COMMERCIAL APPEAL (Memphis, Tennessee), Mar. 11, 1994, at A2. The previous killings were apparently well documented, and the killer had actually been detained and then escaped at the time, so there seems to be little doubt that the re-emerging memories were actually accurate. The existence of this phenomenon renders somewhat doubtful any attempt to track the veracity of accounts of past abuse based upon polygraph tests of the accused abusers (see S. Abrams, *False Memory Syndrome vs. Total Repression*, 23 J. PSYCHIATRY & LAW 283 (1995)).

18. N. M. Szajnberg, *Recovering a Repressed Memory, and Representational Shift in an Adolescent*, 41 J. AM. PSYCHOANALYTIC ASS'N 711 (1993). A recent article in the journal of family therapists detailed some additional cases in which "recovered" memories involving sexual abuse appear to have been verified. K. Butler, *Caught in the Crossfire*, FAMILY THERAPY NETWORKER, Mar./Apr. 1995, at 24, 77-78. These case accounts include one father who began by denying his daughter's recovered incest memory and later admitted to sexual conduct with his daughter, one father who apparently immediately confessed when asked if he remembered the abuse his daughter had just recalled, and two women clients who recovered memories of abuse and received apologies from their fathers.

19. E. BURKETT AND F. BRUNI, *A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH* 3-9, 11-21 (1933).

20. See M. Horn, *Memories Lost and Found*, U.S. NEWS & WORLD REP., Nov. 29, 1993, at 52; and see *Complaint for Damages and Injunction, Cheit v. San Francisco Boys Chorus* (Cal. Super. Ct. filed Aug. 19, 1993) (No. 954272). A founder of the False Memory Syndrome Foundation conceded that Cheit's case appears to be very well corroborated. See K. Butler, *S. F. Boys Chorus Settles Abuse Case*, S.F. CHRONICAL, Sept. 1, 1994. (The False Memory Syndrome Foundation is an advocacy group formed by parents accused of sexually abusing their children.) In another, less publicized case, a man confessed to child sexual abuse that had occurred 16 years before, after a woman recovered memories of the abuse; the man was sentenced to two years in prison as a result. *News, Local and National*, THE COLUMBUS DISPATCH, June 16, 1994, at 01A.

21. In view of well-documented examples like Cheit's and a number of the Father Porter's victims, it is puzzling that the public debate so often remains centered on the not-very-interesting question of whether accurate delayed recall is possible. What is needed now is research into indicia of reliability rather than hot-headed debates over whether any such memory could be reliable.

22. See L. Terr, *Day Child/Night Child*, FAMILY THERAPY NETWORKER, July/August 1994, at 54.

23. H. Lief & J. Fetkewitz, *Retractors of False Memories: The Evolution of Pseudo-Memories*, J. PSYCHIATRY & LAW 411 (Fall 1995).

24. These practices were often sufficiently egregious that a case-by-case investigation would easily disclose them; they included therapists insisting, with no reasonable foundation, to clients who themselves did not think they might have been sexually abused that abuse had definitely occurred, and therapists using heavy-handed suggestion while encouraging clients to cut off all forms of outside support and to become enormously dependent upon their therapy. *Id.*

25. In other words, just as researchers have inquired about other forms of verification for self-reports claiming that abuse occurred, it would make sense to seek other forms of verification when subjects claim that their original story was false. As we know from other kinds of cases, it is possible for a person to falsely retract an accusation (that is, to disclaim a true accusation), just as it is possible for a person to make a false accusation. The authors of the "retractors" study acknowledge the difficulty they face here; in response, they attempt to take aspects of the stories told on their face as *per se* indicators. Thus if a story involved egregious violence or Satanic ritual abuse, the authors argue that this could be taken as an indication that the retraction was likely well-founded. Apart from the small percentage of cases in which egregious violence might actually have occurred, this method also faces the problem that it is possible for subjects to combine accurate and inaccurate information in an account. For example, someone who was molested by a step-mother might combine accurate recall with symbolic expressions of the pain and anger involved—saying, for example, that the step-mother was a wicked witch who performed terrible magical deeds as part of the abuse. See Bowman & Mertz, *supra* n.3, at 347. If critics from the "false memory" side of the debate want to demand high levels of verification before reports of remembered sexual abuse are accepted as true, they should not then accept reports of false memories bona fide without any external verification whatsoever.

26. MICHAEL YAPKO, SUGGESTIONS OF ABUSE 60 (1994).

27. See, e.g., D. Schacter, J. Harbluk & D. McLachlan, *Retrieval without Recollection: An Experimental Analysis of Source Amnesia*, 23 J. VERBAL LEARNING & VERBAL BEHAV. 593, 609 (1984); D. Schacter, A. Kaszniak, J. Kihlstrom & M. Valdiserri, *The Relation between Source Memory and Aging*, 6 PSYCHOL. & AGING 559 (1991).

28. See, e.g., U. Neisser & N. Harsch, *Phantom Flashbulbs: False Recollections of Hearing the News About Challenger*, in E. Winograd & U. Neisser (eds.), AFFECT AND ACCURACY IN RECALL (1992); D. Schacter & P. Graf, *Effects of Elaborative Processing on Implicit and Explicit Memory for New Associations*, 12 J. EXPERIMENTAL PSYCHOL. 432, 442 (1986).

29. Indeed, one of the most ardent advocates of the "false memory" position has also been a leader in pointing out the fallibility of memory generally; a frequent expert witness for defendants in criminal cases, her work on eyewitness testimony stressed the ways in which questions can shape the answers given by witnesses. See E. LOFTUS, EYEWITNESS TESTIMONY (1979); E. LOFTUS & K. KETCHUM, WITNESS FOR THE DEFENSE (1991).

30. M. Garry & E. Loftus, *Pseudomemories without Hypnosis*, 42 INT'L J. CLINICAL & EXP. HYPNOSIS 363, 374-75 (1994); E. Loftus, *The Reality of Repressed Memories*, 48 AMERICAN PSYCHOLOGIST 518, 532 (1993).

31. K. Pedzek, *Planting False Childhood Memories: When Does It Occur and When Does It Not?*, Presentation at 36th Annual Meeting of the Psychonomic Society, Los Angeles (1995).

32. Some studies have focused on children's memories. J. Haugaard, N. Reppucci, J. Lourd & T. Nauful, *Children's Definitions of the Truth and their Competency as Witnesses in Legal Proceedings*, 15 LAW & HUMAN BEHAVIOR 253 (1991) (children induced to say they witnessed a man hitting a girl when no such event happened; adults, however, tended to remember correctly); R. Pynoos & K. Nader, *Children's Memory and Proximity to Violence*, 28 J. AMERICAN AD. CHILD & ADOLESC. PSYCH. 236 (1989) (children who were not on scene recall being at their school playground when sniper shoots); see also S. Ceci, E. Loftus, M.

Leichtman & M. Bruck, *The Possible Role of Source Misattributions in the Creation of False Beliefs among Preschoolers*, 42 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 304 (1994) (interviewers who cite children's mothers and repeatedly tell children that fictional events occurred create false memories in preschoolers). Researchers studying adult recall have found inaccuracies in "flashbulb" memories (memories about how subjects heard about events such as the Challenger explosion or a presidential assassination), memories regarding voting behavior, and memories of wartime events. See, e.g., Neisser & Harsch, *supra*; R. Abelson, E. Loftus & A. Greenwald, *Attempts to Improve the Accuracy of Self-Reports of Voting*, in J. M. Tanur (ed.), QUESTIONS ABOUT SURVEY QUESTIONS: MEANING, MEMORY, EXPRESSION, AND SOCIAL INTERACTIONS IN SURVEYS (1992). Studies of word list recall have found that participants can falsely report having seen an associated word that didn't appear on the list. H.L. Roediger & K.B. McDermott, *Creating False Memories: Remembering Words Not Presented in Lists*, 21 J. EXPERIMENTAL PSYCH. 803 (1995). However, other researchers have noted that recall of entire episodes is different from recall of individual words, and that falsely remembering a word that is similar in meaning to words on a list is quite different from recalling sexual abuse as part of an overall childhood experience. J. J. Freyd & D. H. Gleaves, *"Remembering" Words Not Presented in Lists: Relevance to the Current Recovered/False Memory Controversy*, 22 J. EXPERIMENTAL PSYCH. 1 (1996). Subjects have also been induced through direct hypnotic suggestion to remember events that did not occur. See, e.g., J. Laurence & C. Perry, *Hypnotically Created Memory Among Highly Hypnotizable Subjects*, 222 SCIENCE 523 (1983).

33. R. Ofshe, *Inadvertent Hypnosis during Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992). But see, K. Olio and W. Cornell, *The Paul Ingram Case: Pseudomemory or Pseudo Science?*, 4 VIOLENCE UPDATE 3 (1994).

34. Yapko, *supra*, at 15-16.

35. Franklin v. Duncan, 1995 WL 166229 (N.D. Cal.), 884 F.Supp 1435, 1438 (N.D. Cal. 1995).

36. Federal Practice Sec. 601 at 124, 129, quoted in Borawick v. Shay, 1995 U.S. App. LEXIS 29707.

37. Borawick, *supra*, at 43. The Second Circuit declined to apply the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993), to admissibility of repressed memory testimony, noting that *Daubert* applies to admissibility of scientific evidence. *Borawick* at 43. However, the Second Circuit took note of the underlying policies that guided the *Daubert* decision: (1) to loosen strictures so as to support a presumption of admissibility; (2) to permit flexibility in determining admissibility of evidence; (3) to allow admission of evidence not generally accepted by the scientific community if it has independent support; and (4) to emphasize and support faith in the adversary system's ability to test "shaky but admissible" evidence. *Id.*

Although we do not here discuss at any length the issue of admissibility of expert or scientific testimony on the subject of repressed memory, it should be apparent from our discussion that at least some kinds of expert testimony from both sides of this heated debate ought to be admissible under the terms of *Daubert*, as there are scientific studies using the usual methods (and published in peer-reviewed journals) supporting both the existence of accurate repressed memories and the possibility of creating inaccurate memories. Indeed, a survey by one of the "false memory" advocates actually supports the existence of relatively widespread acceptance of the phenomenon of repressed memory among psychologists: when presented with the statement "events that we know occurred but can't remember are repressed memories," 59.3% of the psychologists surveyed agreed, while only 38.5% disagreed. Yapko, *supra*, at 231.

38. See Garry & Loftus, *supra*, at 363, 375. Although it is hard to imagine this kind of unquestioning acceptance of an accusation in any legal forum, given all the protections that inhere in our adversarial system, still it is salutary to be reminded that caution is essential. And certainly, outside of the legal system, it might be possible for an accusation to receive unquestioning acceptance.