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BOOK REVIEW

THANKS FOR THE MEMORIES: CRIMINAL LAW AND THE PSYCHOLOGY OF MEMORY

*Victor Barall**

ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW, Harry N. MacLean, New York: HarperCollins (1993). 485 pp.

On September 22, 1969, Susan Nason, a nine-year-old girl living in Foster City, California, disappeared.¹ She had come home from school that day, greeted her mother and immediately gone back out to run an errand, which she completed by around 3:15 p.m.² She was not seen thereafter until December 2, 1969, when her decomposed body was discovered beneath an old boxspring in a wooded area not far from Foster City, a conservative, middle-class community of 12,000 in San Mateo County.³ The conventional wisdom in Foster City was that the killer must have come from Oakland or San Francisco, the scarlet cities not far to the north, but the man ultimately arrested and charged with the murder, George Franklin, in fact had lived in Foster City in 1969.

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¹ HARRY N. MACLEAN, *ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW* 13-16 (1993).

² *Id.*

³ *Id.* at 10-11, 24-27.

That George Franklin *might* have been the killer certainly made sense to those people who knew him well, for George Franklin was, to put it quite accurately, a monstrous individual. All five of his children had spent their childhoods being physically brutalized and/or sexually abused by him.⁴ Furthermore, he had an unquenchable sexual appetite, and a particular fascination for young girls, whose images figured prominently in his pornography collection.⁵ But none of these facts proved anything, absent some evidence connecting Franklin with the murder itself. That evidence did not materialize until some twenty years after the murder, when, in November 1989, Franklin's daughter, Eileen, came forward. In a telephone call to the San Mateo County District Attorney's Office, Eileen Franklin revealed that she had been present when, in a secluded area outside town, her father had raped her best friend, Susan Nason, in the back seat of his van, and crushed Susan's skull with a rock.⁶

In the annals of criminal law, there must be countless instances of persons who, out of fear, love, apathy or any number of other motives fail to report crimes they have witnessed until long after, living, in the meanwhile, with their memories more or less intact. Were Eileen Franklin just one more such person, *Once Upon A Time*, an interesting and timely book, presumably would not have been written. But Eileen Franklin was not someone who lived with her memories intact and finally gave in to the demands of conscience. For twenty years, Eileen Franklin simply *had no recollection* of what she had observed; her memories of the murder, she claimed, had been completely repressed and had re-emerged only shortly before her telephone call to the authorities.

The phenomenon of repressed memory, long the bread-and-butter of psychoanalysis, increasingly has become a part of the diet of the courts as well. Tort actions based on childhood sexual abuse—brought by adult plaintiffs whose long-repressed memories suddenly have become accessible—nowadays are becoming practically commonplace.⁷ Criminal actions, too, as

⁴ *Id.* at 252-56.

⁵ *Id.* at 172, 252-56.

⁶ *Id.* at 5-7.

⁷ See, e.g., *Johnson v. Johnson*, 701 F. Supp. 1363 (N.D. Ill. 1988); *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990); *Lemmerman v. Fealk*, 507

evidenced by the prosecution of George Franklin, are no longer considered off-limits by district attorneys' offices.⁸ Sometimes the "facts" ultimately remembered, years later, by the putative victims of childhood trauma are bizarre and improbable;⁹ even when that is not the case, the mental processes themselves, whereby memories are lost and found, challenge the understanding of even the most sophisticated of jurors. Consequently, in cases involving issues of repressed memory, the parties typically will want to present the testimony of psychiatric experts.

Harry N. MacLean's *Once Upon A Time* is an intelligent and exhaustive study of the successful prosecution of George Franklin. With a novelist's skill, Mr. MacLean perceptively describes both the hostile milieu with which George Franklin had to contend growing up, and the violent and capricious

N.W.2d 226 (Mich. Ct. App. 1993); *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986). In *Lemmerman*, for example, the fifty-four-year-old plaintiff alleged that she had been sexually abused by her father and aunt from the age of three until puberty and that she had repressed the memories of the abuse for some forty-odd years. The memories returned spontaneously and were fleshed out as a result of therapy. The Michigan Court of Appeals, invoking the so-called "discovery rule," held that the plaintiffs' claims were not barred by the two- and three-year statutes of limitation applicable to her causes of action. *Lemmerman*, 507 N.W.2d at 552.

⁸ See also Lawrence Wright, *Remembering Satan*, NEW YORKER, May 17, 1993, at 60; *Id.*, May 24, 1993, at 54.

⁹ *Id.* Wright, *supra* note 8, describes a criminal investigation in Olympia, Washington arising out of a young woman's "recollection" during a sort of group therapy exercise that she had been abused by her father. Soon after, her siblings were also recalling abuse by the father, an employee of the county sheriff's office, as well as by the father's friends, including other law enforcement officials. Ultimately, the children were recalling Satanic rituals in the woods, involving the sacrifice of human babies. Most bizarre of all, the father, with a little prodding, also came to remember these incidents, and pleaded guilty to some of them. As Wright makes clear, however, in all probability, none of these things ever happened.

Although they do not involve *long-term* repressed memories, a number of prosecutions of child-care workers, based on the uncorroborated accusations of the children in their care, involve equally peculiar allegations, and raise the question of whether the children actually remember what they ultimately report, or whether they are adopting the suggestions of investigators. See, e.g., Joseph F. Sullivan, *Woman May Face Retrial in Child-Center Sex Abuse*, N.Y. TIMES, July 16, 1993, at B5 (child care worker was accused of inserting a variety of foreign objects into children's anuses and vaginas; making children lick peanut butter and jelly from each other's bodies; forcing children to eat her feces; and playing Jingle Bells on the piano while naked, all of these acts allegedly having been committed in one room of a day care center having numerous other employees who could have walked in at any time).

environment he went on to create for his own children—an environment that left every one of his children, including Eileen herself, with serious psychological scars. Thereafter, the author narrates in comprehensive detail the renewed investigation of the crime and the unfolding of the trial itself. Mr. MacLean, an attorney himself, is particularly effective in explaining the litigants' respective strategies and the court's evidentiary rulings, in analyzing the strengths and weaknesses of each witness's testimony, and in demonstrating the critical importance of expert psychiatric testimony in propping up the otherwise far-from-persuasive testimony of Eileen Franklin regarding her ancient memories and how they returned. The author makes clear that, in the "battle of the experts," the prosecution did not win by presenting a more knowledgeable witness, but by presenting a more charming, personable witness—a witness who knew how to communicate with a jury.

Although the author does not say whether he believes George Franklin was guilty, after reading *Once Upon A Time*, one cannot help but wonder, at least, whether his guilt was proved beyond a reasonable doubt. More importantly, however, Mr. MacLean's book raises important questions concerning the wisdom of relying on "memory" experts in the search for historical truth, particularly when the life or liberty of a criminal defendant is at stake.

I. THE PSYCHOLOGY OF REPRESSED MEMORY

In psychoanalytic theory, "repression" refers to the process by which the mind conceals traumatic material from itself within the "unconscious." If forgetting involves a failure of the "storage mechanism" of the mind, repression theoretically involves something different; the repressed material does not cease to exist in the mind, it merely becomes inaccessible, and, under ordinary circumstances, it cannot be called up to consciousness in the same manner and with the same ease as other remembered information.¹⁰ Repressed material may re-

¹⁰ In psychoanalytic terminology, the "preconscious" is that part of the mind in which are stored those memories that *can* easily be retrieved into consciousness. The "unconscious," by contrast, is the storehouse of ordinarily inaccessible memories. See, e.g., SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 87-90 (1989).

turn to consciousness, however, through hypnosis or the work of psychotherapy, or may occasionally return spontaneously triggered, for example, by a present sensation.¹¹ Moreover, psychoanalytic theory posits that repressed material may manifest itself symbolically in present-day neurotic symptoms, such as psychosomatic ailments or repetitive/compulsive behavior. Thus, "[t]he patient . . . is obliged to *repeat* the repressed material as contemporary experience, instead of remembering it as something belonging to the past."¹²

"Repression is universal in human beings," the neurologist Oliver Sacks has recently observed, and there are few students of the human mind who today would challenge the accuracy of this observation.¹³ However, there is considerable disagreement in the psychiatric community about the *nature* of the traumatic material that we repress. There are those who believe that the subject matter of repressed memory is actual, historical experience—that we repress the recollection of events too painful to bear. On the other hand, there are those who believe that, although some of what we repress may relate to historical experience, most of what we repress is our own mental life; that is, we repress wishes, fantasies and desires which, if addressed on a conscious level, would be too painful to bear. These differences in outlook are as old as psychoanalysis itself and derive, in fact, from successive strands in Freud's own thinking on the subject of repression.¹⁴

When Freud began administering the "talking cure" in the mid-1890s, he believed what his patients told him. Having previously postulated that the root cause of neurosis was the repression of material that was sexual in nature, he now had his "proof:" his patients, mostly young women from the Vien-

¹¹ The most famous literary example of the spontaneous return of buried memories is in Marcel Proust's *Swann's Way*, in which the narrator, in the course of dipping a madeleine into a cup of tea, suddenly remembers the entire world of his childhood. See MARCEL PROUST, *SWANN'S WAY* 48 (C.K. Scott-Moncrieff et al. trans., 1989).

¹² MACLEAN, *supra* note 1, at 237 (quoting an unspecified article by Freud) (emphasis in original).

¹³ Oliver Sacks, *A Neurologist's Notebook*, NEW YORKER, Dec. 27, 1993, at 122. Dr. Sacks allows that there may be certain individuals who do not repress as a result of organic brain damage, but considers such cases so exceptional as to prove the rule. *Id.* at 122-23.

¹⁴ MACLEAN, *supra* note 1, at 237.

nese middle class, began remembering that they had been sexually abused or "seduced" as children, most often by their fathers or other adults close to them.¹⁵ Accordingly, Freud concluded, neurosis was the ultimate result of the repression of these actual, traumatic experiences.¹⁶ Before long, however, the frequency of these reports of abuse stretched Freud's credulity beyond the breaking point. He concluded that it was not possible that such terrible goings-on could be going on in so many good, bourgeois households. "Almost all my women patients told me that they had been seduced by their father," Freud was to write,¹⁷ and the evidence, to his mind, simply proved too much.¹⁸ Some time in 1897, Freud abandoned his "seduction theory" and replaced it with another.

Psychoanalysis came into existence when Freud reinterpreted the very same clinical data to indicate that it must have been his patients themselves, when scarcely out of the cradle, who had predisposed themselves to neurosis by harboring and then repressing incestuous designs of their own. Every later development of psychoanalytic theory would crucially rely on this root hypothesis.¹⁹

Thus, Freud's thinking shifted from a fundamental belief in the historical reality of repressed memories to a fundamental disbelief.

As Mr. MacLean points out, American psychiatry, dominated for most of the century by Freudian theory, largely discounted the effect of actual traumatic experience on the development of the psyche.²⁰ But in the last couple of decades there has been a shift back in the other direction, i.e., to the view that Freud had it right in the first place. One reason for this shift, Mr. MacLean argues, was the Vietnam War; the thousands of veterans who, without a doubt, had undergone extremely traumatic experiences, and who continued, in peace-

¹⁵ See PETER GAY, *FREUD: A LIFE FOR OUR TIME* 90-96 (1988).

¹⁶ This original formulation of Freud's goes by the name of the "seduction theory." *Id.*

¹⁷ Frederick Crews, *The Unknown Freud*, N.Y. REV. BOOKS, Nov. 18, 1993, at 61 (citing FREUD, *supra* note 10, at 149).

¹⁸ "I was driven to recognize in the end that these reports were untrue and so came to understand that hysterical symptoms are derived from phantasies and not from real occurrences." FREUD, *supra* note 10, at 149; see also GAY, *supra* note 15, at 90-96.

¹⁹ Crews, *supra* note 17, at 61.

²⁰ MACLEAN, *supra* note 1, at 237.

time, to suffer the psychological after-effects of those experiences, constituted a significant challenge to old theory.²¹

Of greater importance yet has been the impact of feminism on psychoanalytic thinking. Although Freud may have been a visionary, that could not prevent him from absorbing the patriarchal values of his era. One does not have to read much of Freud to realize that he thought women were morally and intellectually inferior to men.²² Ultimately, it has been argued, Freud suffered a "failure of nerve" when it came to listening to his women patients;²³ culturally, he was predisposed not to believe their reports of sexual abuse, and he failed to overcome his predispositions.²⁴ Or, to put the matter more charitably, we may say that although Freud thought that he had been naive in originally crediting the repressed memories of his patients, in fact he was naive in ultimately concluding that childhood sexual trauma was rare.

In any event, if, for these and other reasons, psychologists nowadays are not so skeptical as Freud, neither can it be said that they uncritically accept the reliability of recovered memories concerning traumatic events remote in time. After all, as we all know, even "normal" memories—memories that have not undergone the process of repression—may fade over time, or, alternatively, may be transformed by present ideas of what "must have happened." As a result, gaps in memory may be filled by logic or self-interest, and we eventually may become unable to distinguish between the kernel of actual memory and our extrapolations from it. And we even may come to believe

²¹ *Id.*

²² See, e.g., FREUD, *supra* note 10, at 139-68.

²³ Crews, *supra* note 17, at 61.

²⁴ Perhaps the most notorious example of Freud's failure in this regard can be found in his case history of a patient he called Dora. See SIGMUND FREUD, DORA: AN ANALYSIS OF A CASE OF HYSTERIA (P. Rieff ed., 1993). Dora was brought to Freud by her father, who hoped for a cure to his eighteen-year-old daughter's hysterical symptoms. Freud soon learned from the girl that her father was having an affair with the wife of a family friend, Herr K.; that Herr K. was crudely pressing his attentions on Dora, as he had done several years earlier; and that Dora's father viewed Herr K.'s attentions not with alarm but as convenient to his own purposes. Freud did not discredit this information, but rather than taking the girl's side in the matter and attributing her problems to this untenable situation, he instead attempted to persuade her that her various symptoms derived from her failure to acknowledge her own sexual feelings for Herr K. See GAY, *supra* note 15, at 246-55; Crews, *supra* note 17, at 59-60.

that we truly remember events that we only have heard about.²⁵

There is no reason to believe that repressed memories are any less susceptible to the processes of decay and falsification than "normal" memories. Indeed, it is arguable that persons who have no present recollection of alleged events in the remote past may be particularly vulnerable to suggestion by others, such as psychotherapists or trusted friends, that such events actually occurred, and may come to "remember" accordingly.²⁶ Thus, recovered memories, too, may contain the whole truth, a kernel of truth or no truth at all. As Mr. MacLean succinctly puts it, "The experts in this field don't deny there are both true traumatic memories and false traumatic memories. What they don't agree on is how to tell one from the other, or whether that is even possible."²⁷ This necessarily prompts one to ask: How useful are such experts in a court of law?

²⁵The renowned Swiss psychologist Jean Piaget wrote of his own experience with the ability of the mind to create a false memory. He remembered and talked about for years an incident in which a man tried to kidnap him at age two from his pram in the presence of his nurse. When Piaget was fifteen, his nurse returned to his parents and confessed that the story was false, there never had been an attempted abduction, and that she had made up the incident in order to win their approval. Piaget had heard the incident recounted from his earliest consciousness and had incorporated the details into a visual memory which he believed to be real and recounted as factual for years.

MACLEAN, *supra* note 1, at 239-40.

²⁶ See Susan Chira, *Sexual Abuse: The Coil of Truth and Memory*, N.Y. TIMES, Dec. 5, 1993, at D3:

A number of psychiatrists . . . say that in the hands of an incompetent or ideologically driven therapist, a patient might easily confuse dreams with memories, unconsciously building long-held resentments into a case of forgotten molestation. "Maybe an account is wrong in literal fact," Professor Haaken [a psychologist] said, "but maybe it describes something very deep about her experience in the family and in the culture."

Crews, *supra* note 17, at 61-62, argues that Freud himself was just such an incompetent therapist, and that his "seduction theory" only came into being as a result of his overbearing suggestions to his patients about what they had experienced or witnessed. See also Peter Steinfeld, *Beliefs*, N.Y. TIMES, July 10, 1993, at A6 (reporting on demonstrably false claims of sexual abuse and a psychotherapist's role in having elicited the false memories).

²⁷ MACLEAN, *supra* note 1, at 240.

II. EXPERT TESTIMONY AND REPRESSED MEMORY

For expert testimony to be admitted at trial, two requirements must be satisfied. First, the specialized knowledge to be imparted by the expert must be such as would assist the trier of fact and, second, the specialized knowledge must satisfy some standard of scientific validity.²⁸ Thus, the first requirement focuses on the jury, i.e., whether it could use help, while the second requirement focuses on the expert, i.e., whether information that he or she could supply would help the jury discern the truth. The admission of expert testimony on the subject of repressed memory is problematic on both scores.

As the world continues to become a more complicated place and, accordingly, defies the efforts at comprehension of even the most conscientious individuals, more and more cases can be expected to involve the testimony of experts. However that may be, the credibility and reliability of witnesses are matters that traditionally have been considered *exclusively* within the province of the trier of fact. Consequently, courts usually have held, and continue to hold, that proposed expert testimony that would impinge on these jury prerogatives would not be helpful.²⁹ This judicial reluctance obviously stems from the view

²⁸ See, e.g., FED. R. EVID. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993); *People v. Cronin*, 60 N.Y.2d 430, 432, 158 N.E.2d 351, 352, 470 N.Y.S.2d 110, 111 (1983).

²⁹ See, e.g., *United States v. Thevis*, 665 F.2d 616, 632 (5th Cir. 1982) (problems of perception and memory can be adequately addressed through cross-examination); *United States v. Brown*, 540 F.2d 1048, 1054 (10th Cir. 1976) (rejecting proposed testimony on reliability of eyewitness identification as a usurpation of the jury's function); *United States v. Alexander*, 526 F.2d 161, 169 n.16 (8th Cir. 1975) (polygraph evidence not necessary since jury is capable of performing the function served by the polygraph); *Robertson v. McCloskey*, 676 F. Supp. 351, 353-54 (D.D.C. 1988) (rejecting proposed expert testimony on the processes of memory; subject is within comprehension of the average juror); *People v. Foulks*, 143 A.D.2d 1038, 1039, 533 N.Y.S.2d 619, 620 (2d Dep't 1988) (expert testimony on reliability of eyewitness identification "is not a proper subject for expert testimony, since it pertains to matters of common knowledge not beyond the ken of lay jurors"); *Utah v. Malmrose*, 649 P.2d 56, 61 (Utah 1982) (proposed testimony on reliability of eyewitness identification would "amount to a lecture to the jury about how they should perform their duties"); see also *Iowa v. Myers*, 382 N.W.2d 91, 97-98 (Iowa 1986) (expert testimony based on studies showing that children tend to be truthful erroneously admitted); *Pennsylvania v. Seese*, 517 A.2d 920, 922 (Pa. 1986) (whether a witness is truthful is a question to be answered on basis of "ordinary experiences of life and common knowledge as to the natural tendencies of human nature, as well as upon observations of the demeanor and character of

that average citizens, collectively applying their common sense and worldly experience, can figure out not only whether a person is being honest, but also, whether an honest person's perceptions are accurate reflections of external reality. This pragmatic faith in the common man, however admirable politically, is psychologically naive. It is frequently difficult to know when someone is lying: the proverbial sweaty palms and averted gaze may be more indicative of language difficulties, cultural differences in etiquette or stowage than of fabrication; conversely, skillful liars or well-rehearsed witnesses may pass all the traditional demeanor tests.³⁰ Similarly, the average person does not know enough about the effects of stress, for example, to determine whether stress enhances or impairs the reliability of perceptions.³¹ These considerations suggest that courts should be less quick to assume that expert testimony touching on matters of credibility and perception would not be of assistance to a lay jury. For example, expert testimony concerning the untrustworthiness of eyewitness identifications, routinely excluded in many jurisdictions as an unacceptable invasion of the jury's functions,³² perhaps should not be viewed with such a "distinct distaste"³³—particularly given the Supreme Court's recognition that suggestive identifications account for more miscarriages of justice than any other factor.³⁴

Courts, however, have modified their stance on what would be of assistance to a jury when the proffered expert testimony is thought to run completely counter to the conven-

the witness"); *Yount v. Texas*, No. 617-91, 1993 Tex. Crim. App. LEXIS 192, at *7 (Tex. Crim. App. Dec. 8, 1993) (expert may not give an opinion that complainant in sexual abuse case, or class of persons to which complainant belongs, is truthful).

³⁰ See 1 MCCORMICK ON EVIDENCE § 206 n.22 (4th ed. 1992).

³¹ Thus, defense attorneys in one-witness identification cases typically argue that the crime victim was too frightened to have formed a clear picture of the perpetrator; prosecutors typically respond that during the few seconds it took for the incident to transpire, the face of the perpetrator became deeply and permanently etched in the victim's brain.

It should be noted, as well, that at least some evidentiary rules—such as the hearsay exceptions for excited utterances and dying declarations—are logical but not necessarily psycho-logical.

³² See *supra* note 29. See generally 1 MCCORMICK, *supra* note 30, § 206A.

³³ 1 MCCORMICK, *supra* note 30, at 904.

³⁴ See *United States v. Wade*, 388 U.S. 218, 229 (1967).

tional wisdom as to witness credibility. For example, studies have found that some rape victims initially react calmly to having been attacked or blame themselves and, accordingly, fail to report the crime. Owing to "common misperceptions" and "cultural myths" about rape, lay juries, lacking assistance, might conclude that these responses are inconsistent with rape, and might be inclined to discredit the complainant's testimony. Expert testimony on "rape trauma syndrome," therefore, has generally been accepted as admissible in recent years, as such testimony imparts to the jury information that otherwise might be counterintuitive.³⁵

Expert testimony on "normal" memory processes may justifiably be rejected as within the comprehension of the average juror for, as the district court observed in *Robertson v. McCloskey*,³⁶ "It is no secret that memory decreases over time, that individuals can selectively remember or even fabricate events, or that stress can have an impact on memory or perception."³⁷ These matters, therefore, usually can be dealt with adequately through cross-examination. By contrast, *recovered* memory is not a phenomenon with which the average juror necessarily can be expected to be familiar. The idea that a person could suddenly remember, years later, a vivid occurrence that theretofore had never entered his or her consciousness may well strike the lay juror as completely preposterous, or indicative of pure insanity. Accordingly, although expert testimony on this subject does relate to matters of credibility and reliability, such testimony should not, for that reason, be rejected.

But to say that the jury could use assistance is not to say that an expert witness would necessarily be of assistance, and it is this latter requirement that presents the greater difficulty

³⁵ See *People v. Taylor*, 75 N.Y.2d 277, 289, 292, 552 N.E.2d 131, 136, 138, 552 N.Y.2d 883, 888, 890 (1990) (citing several cases on the admissibility of testimony on "rape trauma syndrome"). Likewise, testimony has been permitted on "sexual abuse accommodation syndrome" to explain a child's delay in reporting the abuse. See, e.g., *United States v. Hadley*, 918 F.2d 848, 852-53 (9th Cir. 1990) (permitting expert testimony about the general behavioral characteristics exhibited by children who have been sexually abused because it assisted the jury in understanding the evidence).

³⁶ 676 F. Supp. 351 (D.D.C. 1988).

³⁷ *Id.* at 354; see also *United States v. Affleck*, 776 F.2d 1451, 1458 (10th Cir. 1985).

for recovered memory testimony and for psychologically oriented offers of expert proof in general. Broadly speaking, expert testimony must constitute "scientific knowledge" for it to be capable of assisting the jury.³⁸ Under the standard enunciated in *Frye v. United States*,³⁹ and adopted by the courts of many jurisdictions, expert testimony is inadmissible unless the scientific technique on which it is based has won "general acceptance" in the relevant scientific community.⁴⁰ This exacting standard is no longer applicable to trials in federal court,⁴¹ and has fallen into disfavor elsewhere as well;⁴² nevertheless all courts still require some sort of demonstration that the scientific technique can be tested for accuracy, and that it is, in fact, an accurate indicator of the variable it is supposed to measure.⁴³

Repressed memory, by its very nature, does not lend itself to empirical assessment. The traumatic event supposedly being remembered will usually have occurred in private, with no witness other than the alleged perpetrator himself, who will have every reason to deny that the event being reported ever occurred.⁴⁴ Thus, the person claiming to have recovered a repressed memory generally will be the sole source of information available to anyone studying the phenomenon, and, accordingly, the type of statistical or experimental methodology we ordinarily think of as constituting the "scientific method"

³⁸ See generally *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993) (construing FED. R. EVID. 702).

³⁹ 293 F. 1013 (D.C. Cir. 1923).

⁴⁰ *Id.* at 1014.

⁴¹ *Daubert*, 113 S. Ct. at 2794 (*Frye* test superseded by the Federal Rules of Evidence).

⁴² See, e.g., *People v. Mooney*, 76 N.Y.2d 827, 828-29, 559 N.E.2d 1274, 560 N.Y.S.2d 115 (1990) (Kaye, J., dissenting) (questioning whether *Frye* test should apply to all types of proposed expert testimony). See generally 1 MCCORMICK, *supra* note 30, at 871.

⁴³ In *Daubert*, the Court suggested some of the criteria that a court should consider in determining whether a proposed subject of expert testimony constitutes "scientific knowledge": whether the theory can be and has been tested, i.e., whether the theory is capable of refutation; whether the theory has been subjected to peer review or publication; whether the theory (or technique) has a known or potential rate of error; and, finally, whether there has been general acceptance in the relevant community. 113 S. Ct. at 2796-97.

⁴⁴ One of the peculiarities of the case reported by Wright, *supra* note 8, was the willingness of the accused father to confess to a panoply of acts he had not committed.

will be impossible to utilize. What is known about repressed memory comes overwhelmingly from the work of psychotherapists, but, as one court has observed, "Psychology and psychiatry are imprecise disciplines. Unlike the biological sciences, their methods of investigation are primarily subjective and most of their findings are not based on physically observable evidence."⁴⁵ Therapists listen to what their clients tell them, they ask more or less probing questions, they offer their clients interpretations and gauge their clients' responses and, over time, they develop a sense of when to trust the accuracy of what each particular client reports. Over the course of seeing many clients, they develop hypotheses about the *types* of stories that are likely to be true. Undeniably, the hypotheses derived constitute a form of knowledge, but not necessarily a form of knowledge congruent with the requirements of the judicial system, i.e., "scientific knowledge."⁴⁶

⁴⁵ *Tyson v. Tyson*, 727 P.2d 226, 229 (Wash. 1986). In *Tyson*, the Washington Supreme Court held that the discovery rule did not apply to intentional tort claims in which the delay in filing suit during the applicable limitation period was alleged to be due to repressed memory. As the court also observed, "The purpose of emotional therapy is not the determination of historical facts, but the contemporary treatment and cure of the patient. We cannot expect these professions to answer questions they were not intended to address." *Id.*; see also *Louisiana v. Foret*, 628 So. 2d 1116, 1125 (La. 1993) ("[P]sychodynamic theories on the explanation of human behavior is, at best, a science that is difficult to impossible to test for accuracy. . . . Thus, the key question of testability in determining whether a technique is valid enough for admissibility cannot be conclusively answered."); *New Hampshire v. Cressey*, 628 A.2d 696, 699 (N.H. 1993) ("[T]he separate fields of behavioral science and criminal justice are different enough in their foundations and goals that what may be considered helpful information in one may not be so valued in the other. Generally speaking, the psychological evaluation of a child suspected of being sexually abused is, at best, an inexact science. . . . [and] does not present the verifiable results and logical conclusions that work to ensure the reliability required in the solemn matter of a criminal trial.").

⁴⁶ One outspoken critic of psychoanalysis—the form of psychotherapy associated with Freud and his followers—has characterized the discipline as a "pseudoscience" and has listed among its "anti-empirical features:"

its casually anecdotal approach to corroboration; its cavalier dismissal of its most besetting epistemic problem, that of suggestion; . . . its penchant for generalizing from a small number of imperfectly examined instances; its proliferation of theoretical entities bearing no testable referents; . . . its ambiguities and exit clauses, allowing negative results to be counted as positive ones; . . . its absence of any specified means for preferring one interpretation to another; its insistence that only the initiated are entitled to criticize; [and] its stigmatization of disagreement as "resistance," along with the corollary that, as Freud put it, all resistance constitutes "actual evidence in favor of the correctness" of the theory.

It is one thing for psychologists to be permitted to testify that the phenomenon of repressed memory *occurs*; on that proposition, there is general acceptance in the scientific community, and the testimony can be useful in dispelling the natural doubts of the lay jury. It is another thing, however, for expert witnesses to be permitted to identify the differing signposts of "true" memories and "false" memories. As indicated earlier, there is no general agreement on how to tell whether a memory is true or false; thus, if such testimony is permitted, a jury in a case involving repressed memory generally will hear two discrepant opinions—one in support of the eyewitness, the other opposed to the eyewitness—but will not have at its disposal any rational basis for evaluating those opinions.⁴⁷

Expert testimony on rape trauma syndrome sexual abuse accommodation syndrome or other conditions beyond the ken of the average juror, when allowed, generally is admitted solely on the issue of the complainant's credibility, and not to prove that the crime, in fact, occurred.⁴⁸ So, too, in the George Franklin prosecution, the court, rejecting the defendant's argument that the prosecution's proposed expert testimony did not meet the standards of reliability for scientific evidence, permitted expert testimony on "the nature of memory, the mechanisms of repression, and the process of the retrieval of lost memories." But the court would not permit the experts on either side to state an opinion on whether Eileen Franklin's memory of the Nason murder was, in fact, a repressed memory, or if it was a repressed memory, whether it was a true or false one.⁴⁹ Thus, this testimony merely was supposed to supply the jury with the tools to determine whether Eileen

Crews, *supra* note 17, at 62 & n.20.

⁴⁷ A related problem is whether a court should even permit a fact witness to testify regarding memories recovered as a result of psychotherapy. Courts have been fairly uniform in holding that witnesses may not testify about posthypnotic recollections because hypnosis, depending so heavily on suggestion, is not a reliable method for restoring memory. *See, e.g.,* *People v. Hughes*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983) (thoroughly discussing the reliability issues involved with posthypnotic recollections). Psychotherapy, too, may involve large doses of suggestion, which may be particularly problematic when the clients are children. But adults, too, are susceptible to suggestion. *See supra* notes 9 & 26.

⁴⁸ *See People v. Taylor*, 75 N.Y.2d 277, 292, 552 N.E.2d 131, 138, 552 N.Y.S.2d 883, 890 (1990).

⁴⁹ MACLEAN, *supra* note 1, at 344-45.

Franklin's "believable but still rather incredible story" was true.⁵⁰ But how was the jury supposed to do that, if the jury itself lacked the expertise possessed by the experts?

Consider, by way of rough analogy, what it would be like to be the trier of fact in a case turning on the meaning of words in a foreign language. Suppose the issue in the case were: What is written in the first book of *The Iliad*? Suppose, further, that in this adversary proceeding, each side presented a scholar of ancient Greek—an expert witness—to provide a translation for the non-Greek-speaking jury, and suppose the translations had little in common. Lacking any proficiency in the language itself, the jury would be in the position of having to decide the ultimate question—the content of the text—by deciding which scholar to believe; that is, by evaluating the *credibility* of the experts.

In a case involving repressed memory, the jury will hear from the accusing witness himself or herself, and perhaps will be able to form some tentative judgment about the witness's general credibility; presumably, though, the jury will need the assistance of experts to evaluate the validity of the memory at the heart of the accusation. And here, too, as with the non-Greek-speaking jury, the trier of fact will lack the "language"—the body of specialized, psychological knowledge—necessary for evaluating the hypotheses of the experts on their merits. Accordingly, in a case hinging on the credibility of the accusing witness, the jury will have to assess that witness's credibility by assessing the credibility of the experts. As Mr. MacLean argues, the testimony of the prosecution's expert was "essential" to the prosecution's case;⁵¹ as he demonstrates, that testimony and the corresponding defense testimony could scarcely have been more different.

III. THE "REPRESSED MEMORIES" OF EILEEN FRANKLIN

On direct examination, Eileen Franklin testified that on September 22, 1969, when she was eight years old, she was with her father in his van; they saw Eileen's friend, Susan

⁵⁰ *Id.* at 346.

⁵¹ *Id.*

Nason, and Eileen's father stopped to pick Susan up.⁵² There was a mattress in the back of the van, Eileen stated, and she and Susan, who wore a dress, white socks, and brown shoes, bounced on the mattress as her father drove.⁵³ At some point, the van stopped and Eileen moved to the front seat; her father moved to the mattress, and Eileen saw him rape Susan.⁵⁴ Next, Eileen testified, she, her friend and her father all left the van.⁵⁵ She saw her father approach Susan with a rock held over his head.⁵⁶ Susan's eyes met Eileen's and Susan's arms flew up in an effort to protect herself.⁵⁷ Eileen looked away, she heard two blows and next she saw Susan's bloody, lifeless body.⁵⁸ She ran screaming toward the van, but her father grabbed her, told her she would have to forget what had happened—because people would blame her for letting her friend get in the van—and threatened to kill her if she told anyone what she had seen.⁵⁹ Then, Eileen testified, she saw her father discard the mattress and arrange rocks around Susan's body to make it look like she had fallen.⁶⁰ From that moment on, she had no memory of the crime.⁶¹

After testifying about the crime, Eileen testified about the violence perpetrated by her father against all of his children.⁶² Then, she described two occasions when she had been sexually abused by her father; the first time when she was five years old, and the second time when she was seven.⁶³ She followed with testimony about an incident when she had been nine or ten when her father held her down while her godfather raped her.⁶⁴

Finally, Eileen Franklin described how she had come to recover the memory of the murder, twenty years after the fact.

⁵² *Id.* at 294.

⁵³ *Id.*

⁵⁴ MACLEAN, *supra* note 1, at 294-95.

⁵⁵ *Id.* at 296.

⁵⁶ *Id.* at 297.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 298.

⁶⁰ *Id.*

⁶¹ MACLEAN, *supra* note 1, at 323.

⁶² *Id.* at 299.

⁶³ *Id.* at 301.

⁶⁴ *Id.* at 302; *see also id.* at 253.

She stated that she had been sitting on her sofa when her daughter, playing on the floor in front of her, had asked her a question.⁶⁵ Something about the way her eyes connected with her daughter's brought to mind the way her eyes had met Susan Nason's as her father stood over Susan with a rock above his head.⁶⁶ Eileen testified that once she had recovered the image of her father with the rock, more details came back to her, randomly, over the succeeding months.⁶⁷ She had resisted these memories and, in fact, had wondered how they were possible.⁶⁸ Ultimately, however, she had confided in her therapist, Kirk Barrett, who had told her to trust and believe in her recollections, and not to be afraid, because she had survived the traumas of her past.⁶⁹

On direct examination, the prosecutor brought out some of the weaknesses in Eileen's story, in an effort to have her explain them away; on cross-examination, the defense attorney zeroed in on these weaknesses, which were distributed over every area of Eileen's testimony: her memory of the murder, her memory of the defendant's sexual violence against her and her account of the return of her memory. With respect to the murder, Eileen admitted to numerous changes in her recollection:

originally her father was drinking beer, but that got dropped from the story; originally she thought she saw Susan carrying something in her hand, but that also was dropped; she told Etter [an investigator with the district attorney's office] that Susan was wearing a lavender or blue sweater, but that has disappeared; originally there was no dress, but now there is one; originally there was no rock on the body, now there is one; originally there were no shoes, now she remembers her father throwing one or two.⁷⁰

Eileen's memory also changed regarding whether her sister, Janice, had been in the van when they had picked up Susan;⁷¹ the location of the murder had changed;⁷² and the time of day

⁶⁵ MACLEAN, *supra* note 1, at 304.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ MACLEAN, *supra* note 1, at 328.

⁷¹ *Id.* at 294, 317-18.

⁷² *Id.* at 320.

had changed from morning to afternoon.⁷³ With respect to the sexual abuse, as it came out, Eileen Franklin's memories of these incidents, too, had been repressed; the incident when she was seven was only recovered some twenty years later,⁷⁴ and the rape, also, underwent a startling transformation—originally, the perpetrator had been black, but eventually, he had revealed himself to have been her godfather, a white man.⁷⁵ And last, Eileen's account of how she came to remember the murder was inconsistent: she admitted having told her brother and mother that her memory had resurfaced as a result of hypnosis.⁷⁶ Additionally, she was confronted with the statements of various people to whom she had spoken about her recovered memory; each statement contained a different account of the memory's return.⁷⁷

This, then, was the messy testimony the jury had to assess—testimony rich in contradictions from a psychologically damaged witness with a powerful motive to testify falsely against her persecutor.⁷⁸ A jury confronted with such testimony in an ordinary case, involving recent events, would be expected to reject it. But as the prosecution hoped to show through its expert, the testimony's apparent weaknesses in actuality proved its truth.

The prosecution expert, Dr. Lenore Terr, had unimpeachable credentials: she was a professor of psychiatry, the author of dozens of articles and a specialist in the field of childhood trauma and the type of memory created by such trauma.⁷⁹ Although Dr. Terr was not permitted to testify that she believed Eileen's story,⁸⁰ she was able to say as much indirectly, by correlating the facts of Eileen's life and account of the murder with her own hypotheses regarding repression in trauma victims. For example, Dr. Terr said, repression could be

⁷³ *Id.* at 299.

⁷⁴ MACLEAN, *supra* note 1, at 312, 315.

⁷⁵ *Id.* at 303, 327-28.

⁷⁶ *Id.* at 304, 314. Had that been the case, her testimony would have been inadmissible under California law. *Id.* at 156-57; see CAL. EVID. CODE § 795 (West 1966).

⁷⁷ MACLEAN, *supra* note 1, at 324.

⁷⁸ Additionally, she had committed herself to book and movie deals in which she would be paid for telling her story. *Id.* at 328-29.

⁷⁹ *Id.* at 346.

⁸⁰ *Id.* at 348.

brought on by a "loyalty conflict" in which somebody threatens you with what will happen if you remember; the shame and guilt over feeling that you were an accomplice to the terror; the 'gore' of the event; [and] the failure of a third party to talk to the child shortly after the event."⁸¹

Tipton [the prosecutor] poses a hypothetical question which matches Eileen's story perfectly: If a child is subjected to one hideous, violent act coupled with a death threat in the midst of a childhood filled with physical and sexual abuse by a parental figure, would the single act be repressed? It most likely would be, Terr responds.⁸²

Similarly, Dr. Terr's testimony with respect to the conditions under which a repressed memory is recovered closely paralleled Eileen's testimony. A repressed memory would be more likely to resurface, Dr. Terr stated, if, among other things, a person had children of roughly the same age as the person was at the time of the trauma, and if the person were in therapy.⁸³ The memory might well be triggered by seeing someone in a similar posture or position to a person who participated in the forgotten event.⁸⁴ Dr. Terr further testified that when a repressed memory returns, initially there is often a flood of images, followed thereafter by a continual trickle of details.⁸⁵ But some details of the event may never be filled in.⁸⁶ Nonetheless, Dr. Terr asserted, "the fact that the memory has been repressed may actually *enhance* its accuracy."⁸⁷

On the subject of differentiating a false recovered memory from a true one, Dr. Terr was quite confident of her ability to do so, notwithstanding that no controlled studies of the subject were possible.⁸⁸ She enumerated the three factors she considered dispositive: the rememberer's symptoms, the level of detail of the memory and the level of emotion accompanying the rememberer's reporting of the memory.⁸⁹ In the case of a true memory, during the period of repression, the event causing

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MACLEAN, *supra* note 1, at 349.

⁸⁶ *Id.*

⁸⁷ *Id.* at 350.

⁸⁸ *Id.* at 355.

⁸⁹ *Id.*

that repression would have manifested itself in destructive ideation or behavior;⁹⁰ when the true memory returned, it would be rich in detail, and the person reporting the memory would be much affected by the telling.⁹¹ Thus, after hearing Dr. Terr's testimony, the jury had a rational basis for believing Eileen. She fit the profile of a memory repressor, and her memory had returned in the manner of a true memory.

But the testimony of the defense expert, Dr. David Spiegel, a highly-decorated psychiatry professor with credentials equal to Dr. Terr's,⁹² told a thoroughly different story. For example, according to Dr. Spiegel, it was extremely difficult to tell a false memory from a true one, particularly when the memory concerned ancient events.⁹³ The older the memory, Dr. Spiegel believed, the more likely it was to combine fact and fantasy: "when events are kept out of awareness and kept unconscious, there's certainly opportunity for transformation of the events to occur."⁹⁴ However, in the case of a *true* recovered memory, the details were not likely to change, and it was unusual for remembered details to be discarded, "because the memory, in a sense, leaps back into consciousness rather than it being a kind of process of accretion."⁹⁵ Whereas Dr. Terr had implicitly indicated that the physical and psychological abuse Eileen had undergone *validated* her recovered memory, Dr. Spiegel believed that the opposite was true; he testified that memories could be influenced by suggestion; that people who have suffered traumas are more suggestible than people who have not; and that people who have suffered repeated traumas are likely to interpret later events through the prism of the earlier traumas.⁹⁶ All of these premises led Dr. Spiegel to the conclusion that persons, such as Eileen, who had suffered "repeated traumatic experiences might be more likely to have . . . false memor[ies]."⁹⁷

On several other points, Dr. Spiegel disagreed with Dr.

⁹⁰ See *supra* text accompanying note 12.

⁹¹ MACLEAN, *supra* note 1, at 349.

⁹² *Id.* at 390.

⁹³ *Id.* at 392, 394.

⁹⁴ *Id.* at 392, 395.

⁹⁵ *Id.* at 394.

⁹⁶ MACLEAN, *supra* note 1, at 392.

⁹⁷ *Id.* at 392.

Terr. He disagreed that, by looking at a person's symptoms, one could reliably deduce the nature of the trauma that had caused these symptoms: "As psychiatrists, we do much better reasoning forward than backward."⁹⁸ He disputed that a memory was any more likely to be true when it had been recovered in response to a specific triggering stimulus.⁹⁹ And he posited that an abused child might well have a distorted perspective on external events: blaming herself for the acts perpetrated against her, the child might also place herself "at the center of stories that occur outside the home as well."¹⁰⁰ Thus, Dr. Spiegel's testimony implied, having been marginally associated with Susan's death—since Susan had been her friend—Eileen might have come to believe that she was "the center and author of that event [the murder] which also involve[d] her abuser."¹⁰¹ So, whereas Dr. Terr had posited, in effect, that Eileen's guilt over her "participation" in the murder had made her repress her memory of it, Dr. Spiegel in effect theorized that Eileen's guilt over other incidents had transformed itself into a fantasy of participation in the murder.¹⁰²

Thus, the upshot of Dr. Spiegel's testimony was that one can never be certain, absent corroborating evidence, of the truth of a repressed memory,¹⁰³ but that, with a person such as Eileen Franklin, the uncertainties should be resolved against her. How, then, in considering the ultimate question of Eileen's credibility, was the jury to choose between the competing theories of these well-matched adversaries? As Mr. MacLean describes their respective performances on the witness stand, the validity of their theories aside, Dr. Terr was the far more effective witness: "Rather than the predictable heavy countenance of the self-important intellectual, . . . she

⁹⁸ *Id.* at 393.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 392-93.

¹⁰¹ MACLEAN, *supra* note 1, at 392-93.

¹⁰² The defense presented another expert, Dr. Elizabeth Loftus, an experimental psychologist. *Id.* at 398. She testified about studies she had conducted indicating that memories are highly susceptible to suggestion; that older memories are especially vulnerable to distortion; and that people are not very good at separating their actual memories from later-acquired information. *Id.* at 399. But her research involved "normal" memories, not recovered ones. *Id.*

¹⁰³ *Id.* at 394.

display[ed] an open, pleasant smile and an easy self-confidence."¹⁰⁴ She testified in a "folksy, down-home manner,"¹⁰⁵ and illustrated her theories with interesting examples from her clinical experience. She provided "mesmeriz[ing]," "superb entertainment."¹⁰⁶ Dr. Spiegel, on the other hand, came across as a classic academic, and during his testimony, authoritative but boring, he had one of the most attentive jurors yawning.¹⁰⁷

If Terr was bad science and good theater, Spiegel is good science and bad theater. Spiegel . . . speaks as though he were in a lecture hall. There are no anecdotes, no stories, . . . no encounters with famous authors to illustrate his points and enthrall his audience.¹⁰⁸

To the extent, then, that the outcome of the case depended on the expert testimony, the prosecution won, Mr. MacLean suggests, because the jury liked its expert more.

To be sure, Mr. MacLean does not insist that George Franklin was convicted because of Dr. Terr's testimony. As the author shows, despite the best efforts of Franklin's very able attorney, Douglas Horngrad, just about every discretionary evidentiary ruling that could have gone against the defendant did go against him. Particularly shattering was the trial judge's ruling permitting a girlfriend of the defendant to testify about his sexual proclivities, as well as permitting Eileen to testify about the physical and sexual abuse she had suffered.¹⁰⁹ And in a case in which the prosecution went to great lengths to demonstrate that Eileen's memory of the murder had to be accurate because the details she recalled were corroborated by physical and forensic evidence only an eyewitness

¹⁰⁴ *Id.* at 346.

¹⁰⁵ *Id.* at 347.

¹⁰⁶ MACLEAN, *supra* note 1, at 347-56.

¹⁰⁷ *Id.* at 394.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 252-57, 260-61. As Mr. MacLean argues, the sexual abuse evidence went a long way

to . . . excuse what should have been Eileen's tremendous failings as a witness. . . . all of the lying and instability was understandable, perhaps predictable, because of what her father had done to her. . . . [T]he uncharged conduct evidence provided Eileen with the cloak of victimhood, and that cloak immunized her from the effects of her lying and constantly shifting and changing stories.

Id. at 471-72.

could have been aware of, the trial court severely undercut the defense by excluding evidence proving that all of the corroborating information had been well-publicized at the time of the murder in 1969.¹¹⁰ These factors, rather than the expert testimony, well may have been decisive in the prosecution of George Franklin.¹¹¹

Nevertheless, it is not hard to envision a prosecution based on a recovered memory in which the defendant is not the grotesque individual Franklin was, and in which there is neither a record of prior bad acts nor corroborating evidence of the crime itself. The lack of such evidence of course would not necessarily indicate that the complaining witness was either lying or mistaken, but it would make the competing expert witnesses—if their testimony were permitted—all the more important. Whenever a trial depends on the resolution of an esoteric issue beyond the experience and knowledge of the average juror, the jury is likely to find itself having to choose between the discrepant hypotheses of experts without any acceptable method for making the choice. This would be no less true in a civil trial involving late-twentieth-century physics than in a criminal trial involving repressed memory. In the former instance, however, the parties at least will have the option of resolving their dispute outside the judicial system—before, for example, a tribunal of experts. In the latter instance, the defendant will have no such option, and he may wind up in jail—and, possibly, on death row. Among the merits of *Once Upon A Time*—and it is a well researched, easily readable and fascinating account of the Franklin trial—is that it highlights the dangers inherent in any trial in which psychological notions of truth must be reconciled with the requirement of proof beyond a reasonable doubt.

¹¹⁰ *Id.* at 412-13.

¹¹¹ In April 1993, the defendant's conviction was affirmed. *Court Affirms Conviction Based on Repressed Memory*, SACRAMENTO BEE, Apr. 6, 1993, at B5. On June 15, 1993, the California Supreme Court declined to review the matter further. *Court Won't Review Conviction of Man in 1969 Rape-Murder*, SACRAMENTO BEE, July 16, 1993, at B4. In April 1994, George Franklin filed a petition for a writ of habeas corpus in the District Court for the Northern District of California, seeking a new trial. *New Trial Sought in Revived Memory Case*, SACRAMENTO BEE, Apr. 27, 1994, at B4.

