TRAUMA AND MEMORY IN THE PROSECUTION OF SEXUAL ASSAULT

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The memory of trauma is shot with higher intensity light than is ordinary memory. And the film doesn't seem to disintegrate with the usual half-life of ordinary film. Only the *best lenses are used, lenses that will pick up every last detail, every line, every wrinkle, and every fleck. There is more detail picked up during traumatic events than one would expect from the naked eye under ordinary circumstances.*

■ Dr. Lenore Terr, *Too Scared to Cry*[1]

Trauma victims often omit, exaggerate, or make up information when trying to make sense of what happened to them or to fill gaps in memory. This does not mean that the sexual assault did not occur.

■ *The Blueprint for Campus Police: Responding to Sexual Assault*[2]

What is sexual trauma, and how accurately do victims remember it? For the criminal law, whose job is to investigate and adjudicate cases of

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[1] LENORE TERR, TOO SCARED TO CRY: PSYCHIC TRAUMA IN CHILDHOOD 170 (Harper & Row, 1990).

[2] NOËL BUSCH-ARMENDARIZ ET AL., THE BLUEPRINT FOR CAMPUS POLICE: RESPONDING TO SEXUAL ASSAULT 90 (2016) *available at* https://sites.utexas.edu/idvsa/files/2019/03/Blueprint_February-2016_FINAL_2-3.pdf [hereinafter *Blueprint*].

sexual assault, sound answers to those questions are both essential and elusive. The phenomenon of emotional trauma is an import from psychiatry where for more than a century it has defied precise description.[3] Pressed into the service of reforming the law of sexual assault, it does not translate well. And the vagaries of memory, even when not burdened with the stress of traumatic reaction, impose significant obstacles to the accurate retrieval and reporting of life events. The best science now tells us that memory is impressionistic rather than objective; is filtered through a person's individual experience and view of the world; is vulnerable to distortion and reconstruction based on subsequent experience; and generally deteriorates over time.[4]

With respect to the specific issue of memory for traumatic events, the complexities multiply. Some experts claim that memory of trauma is especially accurate;[5] others claim that it is routinely disarranged by reactions to extreme stress.[6] Some argue that memories which have been fragmented

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[3] *See, e.g.*, Onne van der Hart, *Concept of Psychological Trauma*, 147 AM. J. PSYCHIATRY 1691, 1691 (1990) ("The concept of psychological trauma has taxed the best psychiatric minds since the late nineteenth century.").

[4] *See, e.g.*, RICHARD MCNALLY, REMEMBERING TRAUMA 35 (Harv. Univ. Press 2005) ("Autobiographical recollection is a reconstructive, not a reproductive, process. Recalling one's past is not like replaying a videotape of one's life in working memory. When we remember an event from our past, we reconstruct it from encoded elements distributed throughout the brain. There are very few instances in which remembering resembles reproducing. These include reciting poems, prayers, telephone numbers, and other material memorized by rote.") (citation omitted); *id.* at 39 ("Ever since Hermann Ebbinghaus published his classic work on remembering in 1885, psychologists have agreed that memories tend to fade over time. . . . Distinctive, emotionally salient events fade less than banal ones, and well-practiced skills may be retained undiminished for years. But all else being equal, time tends to erode our memories.").

[5] *See, e.g.*, TERR, *supra* note 1 (Dr. Terr later drew a distinction between what she called "type I" traumas (single traumatic experiences) and "type II" traumas (repeated traumatic experiences such as chronic incest), arguing that children remember the former vividly but often forget the latter); Lenore C. Terr, *Childhood traumas: An outline and overview*, 148 AM. J. PSYCHIATRY 10 (1991); MCNALLY, *supra* note 4, at 36 (Terr's Type I/Type II distinction "flies in the face of everything we know about how repetition affects memory."); *id.* at 180 ("Neuroscience research does not support [the] claim that high levels of stress hormones impair memory for traumatic experience." On the contrary, "[e]xtreme stress *enhances* memory for the central aspects of an overwhelming emotional experience.").

[6] *See, e.g.*, Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017), *https://www.theatlantic.com/education/archive/2017/09/the-*

by trauma can be accurately retrieved under supportive questioning,[7] while others are skeptical about the retrieval process and dubious about its results.[8] Some experts believe that evidence from neuroscience adds important dimensions to knowledge about traumatic memory in cases of sexual assault;[9] others, that the "neurobiology of sexual assault," as currently presented in trauma-informed training materials, adds little, if anything, that is useful.[10] In short, the available evidence suggests that the science of traumatic memory may not lend itself to easy deployment by the criminal law.

History amply reinforces that conclusion. During the 1980s and 1990s, prosecutors across the country adopted an approach to traumatic memory and its recovery which became known as Recovered Memory Therapy (RMT).[11] These prosecutors made RMT the basis for criminal charges of sexual assault and other violent crimes related to alleged Satanic

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bad-science-behind-campus-response-to-sexual-assault/539211/ (recent scientific evidence in the military setting has "indicated that, in conditions of the most extreme stress, these hormones might prevent certain memories from being retained, causing gaps or errors in a person's recollection.").

[7] *See, e.g.*, Rebecca Campbell, *The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy,* NATIONAL INSTITUTE OF JUSTICE (Dec. 3, 2012), https://www.nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx ("[W]hat we know from the research is that the laying down of that memory is accurate and the recall of it is accurate."); Katherine Mangan, *Trauma Informed Approaches to Sex Assault Are Catching On*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 5, 2018), https://www.chronicle.com/article/Trauma-Informed-/243049.

[8] *See, e.g.*, MCNALLY, *supra* note 4.

[9] *See generally*, Campbell, *supra* note 7; *see also* David Lisak, *The Neurobiology of Trauma*, Presentation to the Arkansas Coalition Against Sexual Assault (Feb. 5, 2013); Katherine Mangan, *Trauma Informed Approaches to Sex Assault Are Catching On*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 5, 2018), https://www.chronicle.com/article/Trauma-Informed-/243049.

[10] *See, e.g.*, Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement,* 128 HARV. L. REV. F. 103, 106 (Feb. 2015) (trauma-informed training at Harvard offers a "sixth-grade level summary of selected neurobiological research"); Yoffe, *supra* note 6 (trauma-informed theory infused with "junk science").

[11] *See, e.g.*, MCNALLY, *supra* note 4, at 5-7 (tracing the rise of recovered memory therapy in psychology).

Ritual Abuse (SRA) and murder.[12] RMT maintained that traumatic memories—memories of terrifying events such as violent sexual assault—are qualitatively different from ordinary memories because they are often repressed, and thus lost to conscious recall, for long periods.[13] Nonetheless, the theory maintained that such memories could be accurately disinterred, sometimes years or decades later, using psychotherapy and particular therapeutic techniques such as hypnosis and guided imagery.[14]

The law's reliance on the theory of recovered memory proved disastrous, embroiling the criminal justice system—on the wrong side—in what many mental health professionals now view as one of the most bitter disputes that has ever divided psychology.[15] Criminal charges based on allegedly repressed memories of sexual trauma generated hundreds of legal cases across the U.S. and caused wrongfully-convicted defendants to serve long prison sentences for atrocities which, in fact, had never occurred.[16] Throwing the weight of the criminal justice system behind wildly improbable charges of sexual and Satanic Ritual Abuse (SRA), these

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[12] *See, e.g.*, LAWRENCE WRIGHT, REMEMBERING SATAN, 163 (1994) ("These claims have become sufficiently routine that some attorneys have standardized forms for their clients, in which the accusations of rape, torture, sodomy, and ritual abuse are already specified."); Elizabeth F. Loftus & Deborah Davis, *Recovered Memories*, ANN. REV. CLINICAL PSYCHOL. 469, 477 (2006) ("Such cases had so permeated our culture that as of 1991, the American Bar Association reported that 25% of prosecuting attorneys had handled cases involving satanic abuse.").

[13] MCNALLY, *supra* note 4, at 6.

[14] *Id.* at 5-7.

[15] *See id.* at 1 ("How victims remember trauma is the most divisive issue facing psychology today. . . . The question of sexual abuse and how it affects people's lives has been especially contentious."); Loftus & Davis, *supra* note 12, at 470 ("[A] controversy that has been among the most vitriolic and emotionally charged in the history of psychology. This debate, known as the memory wars, has been referred to as 'psychology's most fiercely contested ground.'") (citation omitted); Lawrence Patihis et al., *Are the 'Memory Wars' Over? A Scientist-Practitioner Gap in Beliefs About Repressed Memory*, PSYCHOLOGICAL SCI., (Dec. 13, 2013), https://journals.sagepub.com/doi/full/10.1177/0956797613510718 ("The 'memory wars' of the 1990s refers to the controversy between some clinicians and memory scientists about the reliability of repressed memories.").

[16] *See, e.g.*, MCNALLY, *supra* note 4, at 13-14 (tracing the rise of recovered memory theory as a basis for criminal and civil charges of abuse); WRIGHT, *supra* note 12, at 200 ("[W]hat happened to [defendants who were falsely accused] is actually happening to thousands of other people throughout the country who have been accused on the basis of recovered memories.").

prosecutions destroyed the lives of wrongfully-convicted defendants and decimated their families.[17]

In retrospect it seems incredible that such serious criminal convictions resulted from "evidence" that was often fantastic in the extreme, and that longstanding rules governing the admissibility of evidence and the processes of criminal investigation and adjudication—rules meant to *prevent* wrongful convictions—were so vulnerable to the claims of a theory which, whatever its usefulness in doing psychotherapy, was deeply flawed from the perspective of doing justice. Nonetheless, in its heyday the recovered memory movement grew an impassioned body of mental health professionals who were summoned to testify in court to the theory of recovered memory, to the accuracy of the memories "recovered" during therapy, and to the credibility of the therapeutic techniques which (apparently) produced them.[18] In addition, the movement spawned dozens of training programs designed to educate police and other legal personnel on how to identify and investigate acts of sexual and Satanic Ritual Abuse .[19] These efforts received vocal support from a political movement which linked RMT to the fight against sexual abuse and which vigorously condemned skepticism about SRA or about the accuracy of "recovered" memories more

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[17] *See, e.g.*, Richard J. McNally, *Dispelling Confusion About Traumatic Dissociative Amnesia*, 82 MAYO CLINIC PROC. 1083 (2007) ("Most experts hold that traumatic events--those experienced as overwhelmingly terrifying and often life-threatening--are remembered very well; however, traumatic dissociative amnesia theorists disagree."); MCNALLY, *supra* note 4, at 245 ("The entire saga of alleged ritual abuse provides one long argument for the reality of false memories of trauma."); WRIGHT, *supra* note 12, at 163 ("Whether truthful or mistaken, recovered memories have had the effect of breaking apart thousands of families.").

[18] MCNALLY, *supra* note 4, at 234-35; DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES 11 (2003) ("Jurors had to be given a reason to believe [the improbable, and in some cases physically impossible, accounts of abuse in these cases]. . . . The state's solution lay with their experts—witnesses who could explain and render such mysteries comprehensible.").

[19] *See, e.g.*, WRIGHT, *supra* note 12, at 85 ("Soon dozens of police workshops around the country were discussing the phenomenon [of satanic ritual abuse].").

generally.[20] Demanding that skeptics "believe the victims,"[21] recovered memory advocates charged that doubting the reality of Satanic Ritual Abuse was comparable to doubting the reality of incest; that skeptics were akin to Holocaust deniers; and that to raise questions about the theory or its results was to silence the voices of trauma victims.[22]

The skeptics persisted, however, and they eventually prevailed. By the mid-1990s the wave of legal actions based on recovered memory was receding. Research in memory science increasingly challenged the concept of recovered memory;[23] leading and suggestive forensic interviewing techniques came under closer scrutiny and were amended;[24] and the courts,

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[20] MCNALLY, *supra* note 4, at 18.

[21] *Open Letter Regarding Inequitable Victim-Centered Practices*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS (2018), http://www.saveservices.org/wp-content/uploads/Victim-Centered-Practices-Open-Letter-FINAL.docx.pdf [hereinafter, "Open Letter"].

[22] *See* McNally, *supra* note 4, at 18 (In response to research and reaction against repressed memory therapy, "therapists specializing in the treatment of sexual abuse launched a counterattack against their critics. The psychologist Laura Brown observed that 'the tactics of the false memory movement have shown remarkable parallels to those of sexual abusers who attempt to silence their victims.' . . . Still others interpreted critiques as reflecting a reactionary backlash against feminism designed to buttress the forces of patriarchy and silence the voices of survivors.") (citation omitted); *see also id.* at 229 ("Expressing skepticism was akin to silencing the voices of survivors. The social worker E. Sue Blume (1995) likened the skeptics to Holocaust deniers, and [psychiatrist Colin] Ross wondered whether skeptics were merely struggling to deny their own histories of abuse."); RABINOWITZ, *supra* note 18, at 18 ("In the late 1980s . . . there was a school of advanced political opinion of the view that to take up for those falsely accused of sex abuse charges was to undermine the battle against child abuse; it was to betray children and all other victims of sexual predators. . . . the facts of a case were simply irrelevant. What mattered was the message—that such crimes were uniquely abhorrent and must be punished accordingly.").

[23] *See, e.g.*, Loftus & Davis, *supra* note 12 (discussing the rise of memory science and its critique of the concept of "repressed memory"); ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (St. Martin's Press New York 1994) (critiquing "recovered memory therapy" from scientific perspective); Steven Jay Lynn et al., *The Trauma Model of Dissociation: Inconvenient Truths and Stubborn Fictions*, 140 PSYCHOLOGICAL BULLETIN 896, 896 (2014) ("[T]he notion that people can encode traumatic experiences without being able to recall them lacks strong empirical support.").

[24] *See, e.g.*, Aldert Vrig et al., *Eliciting Reliable Information in Investigative Interviews*, 1 POLICY INSIGHTS FROM THE BEHAVIORAL AND BRAIN SCIENCES 129, 129 (2014) (Interviewing style which "seeks to establish rapport with interviewees and uses open-ended exploratory questions to elicit information . . . performs better at eliciting accurate

often through the appeals process, began to correct the worst abuses inflicted by the RMT prosecutions, overturning some wrongful convictions and subjecting new claims of recovered memory to more rigorous analysis.[25]

What did not happen, unfortunately, was a systemic examination of just how the theory of recovered memory had produced so many wrongful convictions and, in particular, how it had managed to leapfrog the procedural and substantive protections meant to protect accused defendants against unjust prosecution and punishment. Thus, while RMT itself faded from prominence in sexual assault cases, the criminal process remained vulnerable to arguments which share its foundational claims (1) that traumatic memory is importantly different from ordinary memory in ways that conflict with the normal processes of criminal investigation, and (2) that the law should amend its processes of investigating and adjudicating criminal cases of sexual assault to "fit" the requirements of the theory.

Speaking of "the beliefs that emotional memories are 'special' and that traumatic memories can be repressed into the unconscious and recovered in pristine form years, or even decades, later," psychologists Robert A. Nash and James Ost write: "It is highly troubling that ideas such as these can receive very minimal support from the scientific literatures and yet can continue to thrive as tenacious cultural memes."[26] That such memes

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information and true confessions" than a "confirmatory" style which uses closed-ended questions).

[25] *See, e.g.*, Sinead Ring, *Due Process and the Admission of Expert Evidence on Recovered Memory in Historic Child Sexual Abuse Cases: Lessons from America*, 16 INT'L J. EVIDENCE & PROOF 68, 68 (2012) ("Unlike their English and Irish counterparts, most US state courts scrutinise the reliability of expert testimony on recovered memory."); *id.* at 75 (Stating that "[t]he Supreme Court of New Hampshire has led the way in the US in establishing a rigorous approach to the admission of recovered memory testimony and expert evidence," and citing State v. Hungerford, 697 A.2d 916 (N.H. 1997) as a leading case on point).

[26] In their 2017 book *False and Distorted Memories*, psychologists Robert A. Nash and James Ost bemoan the "malleability" of knowledge about memory, including memory for trauma. ROBERT A. NASH & JAMES OST, FALSE AND DISTORTED MEMORIES 159 (Routledge 2017) ("[F]inally, we predict that many of the issues that trouble today's memory scientists will persist for many a year to come. Two examples . . . are the beliefs that emotional memories are 'special' and that traumatic memories can be repressed into the unconscious and recovered in pristine form years, or even decades, later. It is highly troubling that ideas

morphed into serious criminal charges and produced hundreds of wrongful convictions should concern lawyers as well.

The belief that traumatic memory must be treated specially by the law in sexual assault cases has shown considerable staying power in the criminal sphere. A current iteration of the idea is grounded in neuroscience rather than psychological repression, [27] but its structural elements are familiar. Known as "Trauma-Informed Investigation," or TII, the new theory is now being taught to police, prosecutors, and judges across the country.[28] It teaches, first, that terrifying events such as sexual assault cause the brain to be flooded with "fight-or-flight"-related hormones which, scattered throughout the brain like "post-it notes,"[29] can scramble the

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such as these can receive very minimal support from the scientific literatures and yet can continue to thrive as tenacious cultural memes."). *See also* Henry L. Roediger, III, & Erik T. Bergman, *The Controversy Over Recovered Memories*, 4 PSYCHOL., PUB. POL'Y. AND L. 1091, 1104 (1998) ("[T]he evidence that repeated early childhood traumas are repressed or dissociated from other experiences is, at best, highly questionable. Believing such a theory of dissociation from repeated trauma also is inconsistent with long-established findings from the study of memory with numerous experiments showing that repeated events are generally remembered better than single events.").

[27] For background on the purportedly Freudian roots of repressed memory theory, *see, e.g.*, Frederick C. Crews, *The Revenge of the Repressed*, THE NEW YORK REVIEW OF BOOKS (Nov. 17, 1994), https://www.nybooks.com/articles/1994/11/17/the-revenge-of-the-repressed/ [hereinafter Crews I]; Frederick C. Crews, *The Revenge of the Repressed: Part II*, THE NEW YORK REVIEW OF BOOKS (Dec. 1, 1994), https://www.nybooks.com/articles/1994/12/01/the-revenge-of-the-repressed-part-ii/ hereinafter Crews II].

[28] *See, e.g.*, National Center on Domestic & Sexual Violence, *Pre-Conference Training: Trauma-Informed Investigations and Prosecutions*, (Apr. 6, 2015), http://www.ncdsv.org/.../EVAWI_Pre-conference-training-trauma-informed-nvestigations-and-prosecutions_4-6-2015.pdf ("This one-day course is designed for law enforcement personnel, prosecutors, and others involved in the criminal justice and community response to sexual assault."); Deborah Smith, *What Judges Need to Know About the Neurobiology of Sexual Assault*, NATIONAL CENTER FOR STATE COURTS: TRENDS IN STATE COURTS (2017), https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/What-Judges-Need-to-Know-About-the-Neurobiology-of-Sexual-Assault.aspx ("It is important that judges, attorneys, law enforcement, victim advocates, and other professionals understand the neurobiology of traumatic events such as sexual assault so that they can put the behavior of victims in the proper context.").

[29] *See* Campbell, *supra* note 7.

victim's memory of the incident.[30] The theory posits that such flooding often causes gaps in memory which can confuse or confound attempts by police and prosecutors to discover the truth about what happened.[31] Nonetheless, under "trauma-informed" questioning which prioritizes sympathy with victims, such trauma-infused memories—including not only cognitive memory of facts but also "primitive brain" memory focusing on sensory and emotional reactions -- can be accurately recovered and can form a valid basis on which to build a criminal case.[32]

TII theory has produced the investigative method of "trauma-informed interviewing," which purports to apply the above principles to the practice of interviewing complainants in sexual assault cases as well as investigating and prosecuting their claims.[33] "The trauma informed approach," according to a presentation by the International Association of Chiefs of Police, "helps [victims'] brain[s] retrieve information from a traumatic event and offers them more control as they recount a time when they were violated and had no control."[34] Under the rubric "The Neurobiology of Trauma," TII teaches campus investigators, community police, and other legal personnel the hormonal flooding theory of traumatic reaction and advises them, when interviewing a complainant, to expect behaviors such as difficulty remembering facts about the assault or even lying about it.[35] Investigators are told to head off possible defense

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[30] *See id.*; *see also* ACASA Arkansas, *Neurobiology of Trauma*, YOUTUBE (Feb. 5, 2013), https://www.youtube.com/watch?v=py0mVt2Z7nc, (Interview with clinical psychologist Dr. David Lisak).

[31] *See, e.g.*, Campbell, *supra* note 7 (discussing the flooding phenomenon, "freezing", and "tonic immobility").

[32] *See, e.g.*, *id.* (affirming that research demonstrates the accuracy of memories retrieved post-trauma).

[33] *See Successful Trauma Informed Victim Interviewing*, INTERNATIONAL ASSN. OF CHIEFS OF POLICE (2020), https://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf.

[34] *Id.*

[35] *Blueprint*, *supra* note 2, at 90 ("Trauma victims often omit, exaggerate, or make up information when trying to make sense of what happened to them or to fill gaps in memory. This does not mean that the sexual assault did not occur.").

arguments[36] and to interpret mistakes, gaps in memory, or outright fabrications by complainants as symptoms of trauma.[37] Critics, on the other hand, have attacked the quality of the science behind TII[38] and have expressed the concern that trauma-informed approaches to investigation pose a threat to core elements of due process, including the presumption of innocence and an accused's right to confront their accuser.[39]

Meanwhile, a contrasting view of trauma and its effect on memory has attracted considerable support in the field of psychology. In striking

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[36] *See, e.g.*, *id.* at 68 ("In subsequent interviews with victims and suspects, avoid repeating a detailed account of prior interview statements and instead only record in detail the new information"); *id.* at 106 ("Write the report with potential defense strategies in mind. Anticipate what type of defense will likely be raised at trial (e.g., consent defense).").

[37] *See Successful Trauma Informed Victim Interviewing*, *supra* note 33; *Blueprint*, *supra* note 2 at 90 ("Being supported in their sexual assault claim is paramount for victims, whether or not they are able to prove beyond a reasonable doubt that it occurred.").

[38] *See, e.g.*, Halley, *supra* note 10, at 106 (noting that Harvard's training materials provided a "sixth-grade level summary of selected neurobiological research"); Yoffe, *supra* note 6.

[39] *See, e.g.*, Open Letter, *supra* note 21 ("By their very name, their ideology, and the methods they foster, 'believe the victim' concepts [such as TII] presume the guilt of an accused. This is the antithesis of the most rudimentary notions of justice. In directing investigators to corroborate allegations, ignore reporting inconsistencies, and undermine defenses, the 'believe the victim' movement threatens to subvert constitutionally-rooted due process protections."); *id.* ("[U]nder the umbrella of 'trauma-informed' theories, victims' advocates not only recommend disregarding complainants' inconsistencies or behavioral anomalies; they also insist such inconsistencies should be viewed as probative evidence of trauma. Illogically, this interpretation precludes any consideration of a complainant's incongruous statements or inconsistent behavior as evidence, resulting in an irrefutable argument that the victim's fragmented or lost memories are certain evidence of trauma, with the implication that therefore the allegations are true."); *see also* Halley, *supra* note 10, at 106 (Harvard's trauma-informed training materials are "100% aimed to convince [investigators] to believe complainants, precisely when they seem unreliable and incoherent."); Katherine Mangan, *"Trauma-Informed" Approaches to Sex Assault Are Catching On. They're Also Facing a Backlash*, THE CHRONICLE OF HIGHER EDUCATION (Apr. 5, 2018), https://www.chronicle.com/article/Trauma-Informed-/243049 ("If inconsistencies can be explained away by trauma, [critics] ask, how can people accused of assault defend themselves?"); Yoffe, *supra* note 6 ("But commonsense goals, when dressed up by policy makers and victims' advocates in the inaccurate science now widespread on campus, can be (and have been) easily expanded to serve the idea that virtually every action and behavior that might cast legitimate doubt on an assault should be routinely discounted – and that no matter what precedes or follows an accusation of assault, the accused is always guilty.").

parallel to the dispute between clinicians and memory scientists over RMT, this second view challenges all the major premises of Trauma-Informed Theory as well as their implications for the criminal process.[40] According to skeptics, whose adherents include Harvard psychologist Richard McNally among others:[41] (1) neuroscience does *not* demonstrate that traumatic memories are differently processed, stored, or retrieved in the brain as compared to "non-traumatic" memories;[42] (2) all memories, including both traumatic and non-traumatic ones, are distributed and stored throughout the brain, and are reassembled upon recall – thus, the process of storing and recalling memories of trauma is no different from the process of storing and recalling any memory;[43] (3) traumatic memory is no more "fragmented" than non-traumatic memory;[44] (4) memory, including traumatic memory, is not a "video-recorder" and is vulnerable to gaps, distortions, and falsification;[45]

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[40] *See, e.g.*, Iris M. Engelhard et al., *Retrieving and Modifying Traumatic Memories: Recent Research Relevant to Three Controversies*, 28 CURRENT DIRECTIONS IN PSYCHOLOGICAL RESEARCH 91, 91-92 (2019); Loftus & Davis, *supra* note 12, at 476-80; MCNALLY, *supra* note 4, at 2.

[41] *See, e.g.*, MCNALLY, *supra* note 4, at 2 (arguing that, contrary to the assertions of recovered memory theory, science demonstrates that "people remember horrific experiences all too well . . . [that] victims are seldom incapable of remembering their traum . . . [and that] there is no reason to postulate a special mechanism of repression or dissociation to explain why people may not think about disturbing experiences for long periods."); Engelhard et al., *supra* note 40, at 92 ("[C]omprehensive study" demonstrates that "trauma memories were as coherent as very positive and very important memories"); Loftus & Davis, *supra* note 12, at 476-80 (discussing studies which demonstrate the creation of false memories).

[42] *See, e.g.*, Engelhard, *supra* note 40, at 92 ("Taken together, these data counter the claim that trauma memories are characterized by a lack of narrative coherence, especially in individuals with PTSD."); David C. Rubin et al., *Participant, Rater, and Computer Measures of Coherence in Posttraumatic Stress Disorder*, 125 J. ABNORMAL PSYCHOL. 11 (2016) [hereinafter Rubin et al. I]; David C. Rubin et al., *Scientific Evidence Versus Outdated Beliefs: A Response to Brewin*, 125 J. ABNORMAL PSYCHOL. 1018 (2016) [hereinafter Rubin et al. II].

[43] *See, e.g.*, MCNALLY, *supra* note 4, at 77 (describing the process of storing and retrieving memory).

[44] *See, e.g.*, Rubin et al. I, *supra* note 42; Rubin et al. II, *supra* note 42 (disputing the "fragmentation" view of traumatic memory).

[45] *See, e.g.*, MCNALLY, *supra* note 4, at 77 ("[A]utobiographical memory is reconstructive; it does not operate like a video recorder. Recollection entails reassembly of encoded elements of experience that are distributed throughout the brain"); *id.* at 123 (studies of

(5) Trauma victims are *not* more prone than other witnesses to misremember, distort or lie about what happened to them;[46] and, (6) People actually remember the central aspects of traumatic events *better* than they do non-traumatic ones.[47]

Of course all reasonable people agree that police investigators and prosecutors should always treat complainants with respect; should not assume that a complainant's lack of physical resistance means that the assault did not happen; and should not apply a *higher* level of skepticism to accusations of sexual assault than they do to reports of other crimes. But concerns about TII are grounded in the worry that trauma-informed theory pushes the criminal process far beyond such obviously sound guidance, threatening to violate the rights of the accused.[48] Skeptics worry that in advancing TII despite formidable challenges to it both from legal critics and psychologists, the criminal law has once again undermined its own central tasks: finding the truth about allegations of crime, including allegations of sexual assault; convicting and punishing perpetrators; and protecting the innocent from the injustice, public condemnation, and stigma of a criminal conviction.[49]

With the recovered memory debacle as historical backdrop, it seems clear that the criminal law should approach theories of traumatic memory with caution. Where claims about the relationship between trauma and memory interfere with the basic requirements of legal investigation—the impartial collection of facts and an unbiased assessment of the strength of the evidence under the standard of beyond a reasonable doubt,or where such claims threaten to diminish or set aside foundational procedural protections designed to prevent wrongful convictions, the tests for admitting such

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PTSD patients indicate that "genuine memories and pseudomemories of trauma *feel* the same, but one is historically accurate and the other is not.") (emphasis in the original).

[46] *See id.* at 149-52 (describing research showing trauma survivors are not especially capable of forgetting trauma).

[47] *See, e.g., id.* at 77 ("[I]ntense emotion enhances memory for the central aspects of stressful experiences, sometimes at the expense of peripheral details. Activation of the amygdala enhances the ability of the hippocampus to establish long-lasting memories of emotionally arousing positive as well as negative experiences. From an evolutionary perspective, this makes perfect sense.").

[48] *Id.*

[49] *Id.*

theories into the investigation and adjudication of cases should be rigorous. The burden of proof must be on the theory of traumatic memory to demonstrate logical soundness and to show that it is consistent with the principles underlying the constitutionally protected rights of defendants. Thus far, the "Neurobiology of Trauma" theory and its associated investigative techniques have not been required to meet this standard.[50]

Part I of this article traces the history of the recovered memory movement in the criminal prosecution of sexual assault, discussing some prominent cases and their consequences for wrongly convicted defendants. Part II asks why the criminal law was so vulnerable to claims of sexual assault, and other violent crimes, that were often wildly improbable on their face. The article concludes that the structure of recovered memory theory had the effect of disabling checks in the criminal process which are designed to prevent unjust convictions. Part III applies that conclusion to the theory of TII and the "Neurobiology of Trauma". Although the law itself "recovered" from the recovered memory craze, it remains susceptible to manipulation by theories, such as TII, which unite these three claims: (1) that memory of trauma is importantly different from ordinary memory; (2) that the experience of trauma chases memory from consciousness, but (3) that memory for traumatic events can be accurately recovered using techniques that (intentionally or not) require the circumvention of the normal, fact-based investigation and prosecution of a criminal case.[51] In addition, and in striking parallel to the scientific debate over repression and recovered memories in the 1980s and 1990s, the science on these questions is far from settled.[52] Ultimately, the article questions the need to import psychological conceptions of "trauma" and "traumatic memory" into the task of investigating and processing cases of sexual assault. The history demonstrates that cherry-picking controversial scientific findings and deploying them as the basis for criminal investigation and charges undermines the law's core mission of discovering the truth behind criminal

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[50] *Id.*

[51] MCNALLY, *supra* note 4, at 77.

[52] *See, e.g., id.*; Rubin et al. I, *supra* note 42; Rubin et al. II, *supra* note 42.

allegations, ensuring that the guilty are convicted and punished, but also ensuring that the innocent are protected from false or wrongful allegations.

To be clear, nothing in this article is intended to assess—let alone criticize—the definition, role, or function of emotional trauma as used within psychology. It is for the professionals in those fields to decide such questions. The focus here is on the criminal process, not on psychology or psychotherapy. Indeed, psychiatry and psychology are quite aware, and have repeatedly warned, that psychiatric concepts designed for diagnosing and treating mental disorder may be a poor fit with the requirements of law.[53] A lesson that might be drawn from the criminal law's experience with theories of traumatic memory is that police, prosecutors, courts, and legislatures should take this warning more seriously. Although psychological input can be extremely helpful to the criminal law, in the end the two fields have very different goals and functions and must answer to very different imperatives. This truth was forgotten by many legal actors in the era of Recovered Memory Therapy—with calamitous results for the criminal defendants who were unjustly convicted and punished.

I. TRAUMATIC MEMORY OF SEXUAL ABUSE: A RECORD OF CRIMINAL INJUSTICE[54]

A fundamental problem is that the phenomenon of emotional trauma and the nature of memory are both notoriously difficult to define in legal

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[53] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM-5] (containing the so-called "caveat paragraph" stating: "[T]he use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings"); Allen Frances & Robert Halon, *The Uses and Misuses of the DSM in Forensic Settings*, 6 PSYCHOL. INJ. AND L., 336, 336 (2013) ("Psychiatry and the law are separated by a deep chasm created by their differing purposes, methods, histories, and philosophies. When they interact in criminal and civil cases, it is usually without a common understanding of basic terms and definitions. The inevitable result is misunderstanding and the likelihood of bad legal decisions.").

[54] This section of the article discusses numerous cases of alleged sexual abuse involving children and adults.

settings. Recent experience gives the criminal law good reason to proceed with caution.[55]

A. *The "Memory Wars"*

In the 1980s and 1990s, disagreements about the nature and accuracy of traumatic memory produced a long and bitter feud in the field of psychology.[56] Later dubbed the "Memory Wars,"[57] the conflict involved a dispute over the relationship between memory and sexual trauma and, by extension, the effectiveness of psychotherapy at relieving the suffering of assault victims and at aiding the criminal process via therapeutic "recovery" or "refreshing" of trauma-infused memories.[58]

On one side was a group of mental health professionals, consisting mainly of practicing clinicians, who argued that a victim's memory of sexual trauma—especially, though not exclusively, repeated trauma suffered during childhood—often disappeared from consciousness for long periods.[59] Such "forgetting" was depicted as a drastic coping mechanism against psychological damage that might otherwise be caused by the emotionally overwhelming experience of sexual abuse and the concurrent absence of assistance or redress for the victim.[60] Sometimes associated with the Freudian concept of repression,[61] the theory was that memories of sexual abuse, swept from conscious recall for years or even decades, could be successfully, and accurately, exhumed by the process of Recovered Memory

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[55] *See, e.g.*, Chris French, *False Memories of Sexual Abuse Lead to Terrible Miscarriages of Justice*, THE GUARDIAN (Nov. 25, 2010) ("To avoid the innocent being convicted, police, lawyers and judges must understand the fickle nature of human memory.").

[56] *See, e.g.*, Alan Scheflin, *Ground Lost: The False Memory/Recovered Memory Therapy Debate*, 16:11 PSYCHIATRIC TIMES 1, 1 (Nov. 2, 1999), ("The recovered memory debate has been the most acrimonious, vicious and hurtful internal controversy in the history of modern psychiatry.").

[57] FREDERICK CREWS ET AL., THE MEMORY WARS: FREUD'S LEGACY IN DISPUTE (1995).

[58] *See, e.g.*, Patihis et al., *supra* note 14, at 519 (describing the controversy).

[59] *Id. See also* Loftus & Davis, *supra* note 12, at 470-71 (describing the disagreement within psychology that produced the "memory wars").

[60] *See, e.g.*, Crews I, *supra* note 27 (explaining that non-sexual but violent and repeated abuse could cause the same reactions).

[61] *See, e.g.*, *id.*

Therapy using such techniques as hypnosis, guided imagery, and/or medications such as sodium amytal.[62]

On the other side of this debate were memory scientists who questioned the idea of massive repression of psychological trauma and worried that many of the memories "recovered" in therapy were in fact being *created* by the therapeutic methods employed in treating these patients.[63] In a 2006 article discussing the conflict over repressed and recovered memories, Psychologists Elizabeth Loftus and Deborah Davis wrote:

> Beginning with the assumption that, if anything, memories for trauma are stronger than are those for ordinary events, these researchers viewed traumatic experiences as unlikely to be repressed and as subject to the same sources of distortion and confabulation as memories of other kinds of experiences. These [clinical, social, and cognitive] scholars and scientists found no compelling evidence that people massively repress sexual abuse and then reliably recover the memories later.[64]

Despite the concerns of memory science, in the 1980s the theory of recovered memory became an important factor in many criminal prosecutions across the country.[65] As the nation grappled with a moral panic over the supposed prevalence of Satanic Ritual Abuse, victim advocates

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[62] *See, e.g.*, MCNALLY, *supra* note 4, at 5-7 (recounting the history and premises of recovered memory therapy); *id.* at 3 (explaining and defending use of term "recovered memory therapy" to describe above practices). *See generally* Loftus & Davis, *supra* note 12, at 469, 471 (discussing therapeutic methods of "recovering" memories).

[63] *See, e.g.*, Loftus & Davis, *supra* note 12, at 469, 471 ("[T]he repression skeptics worried that suggestive procedures used by some psychotherapists to try to extract allegedly buried trauma memories (such as direct suggestion that the patient was probably abused, guided imagery, hypnosis, age regression, or dream analysis) could lead to false memories—even such seemingly improbable false memories as those of satanic abuse.").

[64] *Id.*

[65] *See, e.g.*, MCNALLY, *supra* note 4, at 13 ("[R]ecovered memory therapy would have had little impact beyond the consulting room had it not been for two developments. First, after recalling abuse, many patients accused their fathers and others of sex crimes and severed ties with their families. . . . Second, some patients sought to file suit against alleged abusers."); *id.* at 13-18 (detailing history of the criminal cases and civil lawsuits in this area).

succeeded in removing procedural obstacles to criminal prosecutions based on repressed and "recovered" memories.[66] For example, one procedural block to prosecution was statutes of limitation—often memories of abuse recovered many years later were not actionable because the statute had expired.[67] Under the sway of the recovered memory movement, between 1989 and 1994 more than half the states in the U.S. amended their statutes of limitations to extend the time for filing of claims alleging childhood sexual abuse.[68] Other states allowed plaintiffs to allege "delayed discovery" of assault or battery as a means of being heard in court post-expiration of the relevant SOL.[69]

In the mid 1980s, the lawsuits and prosecutions began in force. During the decade 1985-1995, thousands of defendants across the country were sued, charged, and convicted of serious crimes including murder, rape, and other forms of sexual assault, on the strength of "recovered memories" from complaining witnesses.[70] In 1992, during the most intense phase of litigation, forty-one percent of resolved civil cases went to trial, and almost twice as many cases ended in verdicts for the plaintiff as in verdicts for the defendant.[71] On the criminal side the story was similar; during the height of repressed memory litigation between 1992 and 1994, most criminal cases

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[66] Anita Lipton, *Recovered Memories in the Courts*, *in* RECOVERED MEMORIES OF CHILD SEXUAL ABUSE 165 (Sheila Taub ed., 1999); MCNALLY, *supra* note 4, at 13-14 (stating that in thirty-seven states, laws changed during this period to incorporate the belief in recovered memory, and citing the example of Massachusetts, where state law was changed to extend the statute of limitations because "[a] child may repress all memory of the abuse, lack understanding of the wrongfulness of the conduct, or be unaware of any harm or its cause until years after the abuse." (citation omitted); WRIGHT, *supra* note 12, at 50 (Reporting on the change in the relevant statutes of limitation in Washington State, which "[w]as a pioneering statute and has since been replicated by twenty-two other states.").

[67] MCNALLY, *supra* note 4, at 13.

[68] *Id.*

[69] MCNALLY, *supra* note 4, at 13-14.

[70] *Id.* (803 repressed memory claims had led to litigation in the U.S. by 1999); *see also* WRIGHT, *supra* note 12, at 200 (citing the satanic ritual abuse case of Paul Ingram and stating that, '[W]hat happened to the Ingram family...is actually happening to thousands of other people throughout the country who have been accused on the basis of recovered memories.").

[71] MCNALLY, *supra* note 4, at 13-14.

went to trial and "very few" were dismissed.[72] Defendants were convicted of rape, murder, and other types of abuse and sentenced to terms up to and including life in prison.[73]

Most accusations, civil and criminal, were brought against parents or other family members for sexual abuse.[74] In a large subset of cases, accusers claimed to have recovered memories of Satanic Ritual Abuse, often at the hands of family members and sometimes by others.[75] In his 2003 book, *Remembering Trauma*,[76] Harvard Psychologist Richard McNally notes that the trauma alleged by these victims was typically recovered during psychotherapy and

> was not solely sexual. [Patients] also remembered being forced to consume urine, blood, and feces; to worship the devil in ceremonies featuring satanic paraphernalia, dancing, and chanting; to participate in human sacrifice; to serve as baby breeders furnishing fresh infants for ritual murder; to eat the remains of sacrificed infants; and to endure brutal tortures designed to make them forget everything they had experienced.[77]

Cases of alleged SRA appeared not only throughout the United States, but also in Europe.[78] In psychology, specialists in the subfield of dissociative disorders developed a substantial literature describing SRA and outlining its proper treatment.[79] Some theories seem deranged. For

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[72] *Id.* at 14 ("As of July 1998, 803 claims filed in the United States on the basis of recovered memories had led to litigation (citation omitted). These included 633 civil suits, 103 criminal actions, and 67 miscellaneous actions (such as restraining orders). . . . In 79 percent of the civil and criminal suits, memories surfaced while the complainant was in psychotherapy, and 69 percent of all claims concerned adults who recovered memories of having been abused by their parents; alleged perpetrators in the other cases were usually other relatives, clergymen, or teachers.").

[73] *Id.*

[74] *Id.* at 13-14.

[75] *Id.* at 234-35.

[76] *Id.* at 13-14.

[77] MCNALLY, *supra* note 4, at 234 (citation omitted).

[78] *Id.* at 234.

[79] *Id.* at 234-46.

example, among the prominent defenders of the reality of SRA was Dr. Corydon Hammond, a past president of the American Society of Clinical Hypnosis who (along with two coauthors) received the American Psychiatric Association's Guttmacher Award in 1999 for his book *Memory, Trauma Treatment, and the Law.*[80] In *Remembering Trauma*, Richard McNally of Harvard describes Dr. Hammond's theory of Satanic Ritual Abuse:

> Using hypnosis on his patients, Hammond supposedly learned that individuals with MPD [Multiple Personality Disorder][81] are survivors of ritual abuse, torture, and mind-control programming. They are victims of a vast international cult consisting of secretive, tightly organized cells of multi-generational satanists whose avowed aim is world domination. The conspiracy, says Hammond, is masterminded by one "Dr. Greenbaum," a Jewish doctor who once worked for Nazi Germany and now conspires with the CIA and other governmental agencies to advance the cause of the cult. Hammond discovered this conspiracy during hypnotic treatment of his MPD patients, who, he believes, have been enslaved by the cult.[82]

Often the patients initially denied having been abused, only to be met with firm insistence by their therapists that the abuse had in fact happened.[83] Patients were steered into therapy groups with others who claimed to have

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[80] MCNALLY, *supra* note 4, at 237. *See also Manfred S. Guttmacher Award* , AM. PSYCHIATRIC ASS'N, *https://www.psychiatry.org/psychiatrists/awards-leadership-opportunities/awards/guttmacher-award* (last visited Sept. 21, 2020) ("The Manfred S. Guttmacher Award, established in 1975, recognizes an outstanding contribution to the literature of forensic psychiatry in the form of a book, monograph, paper, or other work published or presented at a professional meeting between May 1 and April 30 of the award year cycle.").

[81] *See generally* DSM-5, *supra* note 53 (DSM-5 Code 300.14) (Multiple Personality Disorder, now termed Dissociative Identity Disorder or DID, is among the most serious dissociative disorders in the DSM).

[82] MCNALLY, *supra* note 4, at 235; *see also id.* at. 234 ("Before beginning psychotherapy, few were aware that they had been victimized by satanists.").

[83] *See, e.g.*, Loftus & Davis, *supra* note 12, at 483 (discussing "coercive" therapeutic procedures which eventually produced traumatic memories).

recovered repressed memories of abuse.[84] They were assigned homework which encouraged them to imagine what *might* have happened and then elaborate those imaginings into firm "memories"; therapists informed patients that their body language, even in the absence of affirmative memories, proved that they had been abused, and that patients' very denials of abuse were in fact proof that the abuse had happened.[85] The clear message was that doubts and inconvenient facts must be transcended in favor of reconstructed "memory." According to the best-selling book *The Courage to Heal: A Guide for Women Survivors of Child Sexual Abuse*, often a required text in such therapies, "[T]he memories don't really matter, not in the sense of proving to yourself or anyone else that you were abused. What matters is how you feel. If you think you were abused and your life shows the symptoms, then you were."[86] In her 1994 book *The Myth of Repressed Memory*, psychologist Elizabeth Loftus described the therapeutic process as follows:

> Is this real? Am I making it up? The women [patients] would ask. "No," their therapists gently reassured them, "crippling disbelief," accompanied by self-hatred and guilt, often affects survivors. The existence of doubt and skepticism is an indication that the memories do, in fact, exist. Ignore your doubts. Trust your feelings. Let go of denial. Don't seek external proof, because in most cases it won't be available.[87]

The other logical possibility, that the lack of memory indicated the abuse had *not* happened, was met with firm resistance from many therapists.[88]

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[84] *Id.* at 483-89.

[85] *Id.* (discussing the various therapeutic techniques used to recover memories of abuse).

[86] LOFTUS & KETCHAM, *supra* note 23, at 21 (quoting ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (4th ed. 2008) (1998)).

[87] *Id.* at 24.

[88] Loftus & Davis, *supra* note 12, at 481 (discussing confirmation bias on part of therapists in recovered memory treatments).

> "You cannot wait until you are doubt-free to disclose to your family," [wrote] Renee Frederickson in her 1992 book, *Repressed Memories: A Journey of Recovery from Sexual Abuse*. "Avoid being tentative about your repressed memories. Do not just tell them; express them as truth. If months or years down the road, you find you are mistaken about details, you can always apologize and set the record straight."[89]

Elizabeth Loftus goes so far as to call the approach of some recovered memory theorists "coercive" toward their own patients.[90] Patients, she wrote, were conditioned to accept their abuse and to elaborate on their "memories" of it.[91] Then the "memories" were treated as though they had originated with the patient and turned into the basis for legal action.[92]

Skepticism expressed by third parties was met not only with disagreement but with vigorous condemnation.[93] Harvard psychologist Richard McNally wrote: "Given the absence of evidence to support allegations of satanic ritual abuse, how did belief in the phenomenon spread so rapidly among highly educated mental health professionals?"[94] Dr. McNally traces the problem to the proliferation of continuing education

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[89] WRIGHT, *supra* note 12, at 162-63; *see also id.* at 153 (quoting ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (4th ed. 2008) "To say 'I was abused,' you don't need the kind of recall that would stand up in a court of law.").

[90] Loftus & Davis, *supra* note 12, at 491 ("The most coercive form of recovered memory therapy will greatly resemble a coercive interrogation.").

[91] *Id.*

[92] *See, e.g.*, WRIGHT, *supra* note 12, at 77 n.

> [R]egrettably the most common lik ely cause of cult-related memories may very well turn out to be a mutual deception between the patient and the therapist. . . . Once reinforced by the therapist, this belief system may become fixed and highly elaborated, sometimes with tragic consequences. In these cases the common denominator in the satanic ritual abuse phenomenon may very well turn out to be the therapists themselves.

Id. (quoting George Ganaway, *on the Nature of Memories: Response to "A Reply to Ganaway,"* 5 DISSOCIATION 120, (1992)).

[93] *See, e.g.*, MCNALLY, *supra* note 4.

[94] *Id.* at 244.

seminars for professionals, where presenters "exhorted, threatened, and admonished attendees to believe in the reality of satanic cults. Questioning survivors' memories of sexual torture, ritual murder, cannibalism, and mind-control programming, they said, was tantamount to repeating the grievous error of the past when professionals denied the reality of sexual abuse."[95]

Feminist groups took up the cause of recovered memories as a woman's issue, urging the necessity of "believing the victim."[96] And the "believe the victim" mantra was echoed by others whose religious convictions had persuaded them of the reality of satanic abuse.[97] Asked about the lack of tangible evidence to support claims of SRA, radio evangelist Bob Larson replied:

> The difficulty is that the evidentiary basis of the justice system is not commensurate with what you deal with in a therapeutic process. . . . When are we going to start believing people who come forward like this, instead of putting them through some type of legal litmus test? . . . When are we going to start believing the victims?[98]

In their 2006 analysis of recovered memory theory, psychologists Elizabeth Loftus and Deborah Davis suggested that "a focus on 'believing the victim' has essentially eliminated healthy skepticism as a quality to be encouraged in all who encounter questionable claims... Just because a 'memory' report is detailed, just because a person expresses it with confidence and emotion, does not mean that the event actually happened."[99]

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[95] *Id.*

[96] *See, e.g.*, Open Letter, *supra* note 21 (discussing "the believe the victim movement"); Loftus & Davis, *supra* note 12, at 493 (discussing clinician Susan Kiss Sarnoff's worry "that a focus on 'believing the victim' has essentially eliminated healthy skepticism as a quality to be encouraged in all who encounter questionable claims." (citing SUSAN KISS SARNOFF, SANCTIFIED SNAKE OIL: THE EFFECT OF JUNK SCIENCE ON PUBLIC POLICY 169 (Prager) 2001)); *but see* WRIGHT, *supra* note 12, at 174 ("Once a victim's account is believed, however, the evidence must be stretched to fit it. Often, it's a big stretch.").

[97] WRIGHT, *supra* note 12, at 174.

[98] *See, e.g.*, *id.* at 192.

[99] Loftus & Davis, *supra* note 12, at 493 (citation omitted); *see also* RABINOWITZ, *supra* note 18, at 18 ("[T]o take up for those falsely accused of sex abuse charges was to undermine

In too many cases, the criminal process proved no ally of the truth. In his book *Remembering Satan*, journalist Lawrence Wright reported:

> By the mid-eighties, the annual number of alleged satanic murders had reached the tens of thousands. . . . [W]ord circulated in the police workshops that satanic cults were sacrificing between fifty and sixty thousand people every year in the United States, although the annual national total of homicides averaged less than twenty-five thousand.[100]

Despite the dearth of physical evidence, prosecutors around the country began to charge alleged perpetrators with serious crimes including rape and other sexual abuse—often without any evidence other than the recovered memory claim.[101] Indeed, "[s]uch [SRA] cases had so permeated our culture that as of 1991, the American Bar Association reported that 25% of prosecuting attorneys had handled cases involving satanic abuse."[102] According to Lawrence Wright: "These claims have become sufficiently routine that some attorneys have standardized forms for their clients, in which the accusations of rape, torture, sodomy, and ritual abuse are already specified."[103]

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the battle against child abuse; it was to betray children and all other victims of sexual predators. To succeed in reversing the convictions in such cases was to send a discouraging message to the victims and to encourage predators. . . . [T]he facts of a case were simply irrelevant. What mattered was the message—that such crimes were uniquely abhorrent and must be punished accordingly.").

[100] WRIGHT, *supra* note 12, at 86.

[101] *See, e.g.*, *id.* at 73 ("Most accusations of satanic-ritual abuse in early eighties were attached to allegations of sexual molestation in day-care centers. . . . There was virtually no evidence in any of these cases except for the uncorroborated stories of the very young children."); *see also* MCNALLY, *supra* note 4, at 241 ("In hundreds of investigations, the FBI has failed to uncover a single shred of evidence corroborating the existence of a satanic cult. . . . Having investigated many horrible crimes in his career, the supervisory FBI agent Kenneth Lanning originally thought the satanic allegations might be true. But in view of the absence of evidence, he eventually concluded that mental health professionals must explain why patients 'are alleging things that don't seem to be true.'" (citations omitted)).

[102] Loftus & Davis, *supra* note 12, at 477 (citation omitted).

[103] WRIGHT, *supra* note 12, at 163.

Law enforcement officers—some trained in the art of identifying and investigating satanic cults[104]—were too often biased in favor of the accuser, to the point where interviews of suspects lost any semblance of impartiality. In *Remembering Trauma*, Dr. McNally discusses the criminal case of Paul Ingram.[105] In 1988, Ingram's adult daughters began to give horrific accounts of their father's alleged satanic and sexual abuse.[106] No physical evidence of these acts was ever recovered, despite a months-long police investigation that at one point involved aircraft-led searches and heat-seeking devices in a hunt for satanic burial grounds.[107] Under the pressure of an intense, even "quasi-hypnotic"[108] police interrogation, Ingram, who was apparently highly suggestible, "recovered memories not only of having brutally raped his own children for many years, but also of having led a satanic cult for nearly two decades and [of] having coordinated the sacrificial murders of hundreds of babies."[110] Over time, his daughters' recovered memories became increasingly elaborate,[111] eventually encompassing other members of the sheriff's department where their father worked.[112] Except for Ingram's bizarre confession and the accounts of his children, no evidence of the alleged cult, its murderous activities, or sexual abuse was ever discovered.[113] Nonetheless, based on the testimony of his daughters, Ingram was charged and convicted of multiple rapes and in April 1990 he was sentenced to twenty years in prison.[114] Ingram recanted his confession and appealed, but the Washington State appellate court upheld his convictions.[115]

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[104] *Id.* at 85 (discussing police attendance at satanic ritual abuse workshop during their investigation of the *Ingram* case).
[105] MCNALLY, *supra* note 4, at 239-40.
[106] *Id.*; WRIGHT, *supra* note 12, at 3-11 (discussing origins of the *Ingram* case).
[107] *See id.* at 179 ("nighttime aircraft patrols [] were intended to spot the bonfires of satanic cults.").
[108] MCNALLY, *supra* note 4, at 240.
[109] *Id.* at 93.
[110] *Id.* at 240.
[111] *See* Malcolm Jones, *Speaking of the Devil*, TIME MAG., Apr. 3, 1994 (reviewing LAWRENCE WRIGHT, REMEMBERING SATAN (2011) (describing how memories progressed from sodomy to cannabilism)).
[112] *Id.*
[113] *See, e.g., id.*
[114] WRIGHT, *supra* note 12, at 187-88
[115] *Id.* at 188 (Paul Ingram served his full sentence and was released in 2003).

The Ingram case attracted substantial interest, not only because it is now widely acknowledged that Paul Ingram was wrongly convicted, but also because it offers a close look at how false confessions can arise under police interrogation.[116] In *Remembering Satan*, journalist Lawrence Wright describes psychologist Richard Ofshe's work on the Ingram case. Dr. Ofshe believed that Paul Ingram's confessions were based on false memories generated by his interrogators and the accounts of his daughters.[117] As a test, Dr. Ofshe falsely told Paul Ingram that two of his children, a son and a daughter, had accused him of a particular act of sexual abuse.[118] When Ingram denied the accusation, Dr. Ofshe instructed him to pray about the matter.[119] Shortly thereafter, Ingram wrote a detailed confession to the alleged incident Dr. Ofshe then told him the truth, that the incident had never happened—and Ingram refused to believe him.[120] "It's just as real to me as anything else," he said.[121] In *Remembering Satan*, Lawrence Wright drew attention to the weakness not only of the Ingram case but of others involving recovered memories of abuse. His conclusion:

> "[W]hat happened to the Ingram family . . . is actually happening to thousands of other people throughout the country who have been accused on the basis of recovered memories. . . . Whatever the value of repression as a scientific concept or a therapeutic tool, unquestioning belief in it has become as dangerous as the belief in witches."[122]

There were skeptics. Some even warned of the danger that recovered memory therapy might in fact be the source of false tales of abuse.[123]

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[116] MCNALLY, *supra* note 4, at 240 (Paul Ingram's case "provides a vivid illustration of how suggestive interviewing techniques can create bizarre false memories.") (citation omitted).
[117] WRIGHT, *supra* note 12, at 135-36.
[118] *Id.* at 136-37.
[119] *Id.* at 137.
[120] *Id.*
[121] *Id.* at 146; *see also* Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Misidentified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT. J. CLINICAL & EXPERIMENTAL HYPNOSIS 125, 156 (1992).
[122] WRIGHT, *supra* note 12, at 200.
[123] *Id.* at 164-67.

Lawrence Wright quotes Dr. Paul McHugh, Director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins University:

> In the contemporary era patients who were sexually abused and those with pseudo-memories of sex abuse are often placed together by therapists in "incest survival" groups. The patients with the pseudo-memories tend to develop progressively more complicated and even quite implausible memories of their abusive childhood. Particular ideas seem quite contagious and spread throughout the group–such as satanic-cult explanations for parental excesses and vile abuse including cannibalism. The patients often do not get better. Years of therapy continue to keep many of these repressed-memory patients angry, misinformed.[124]

Some pointed out that the role of memory in psychotherapy can differ greatly from its role in the criminal law. For example, at the 1992 meeting of the American Psychological Association in Washington, D.C., Michael Nash, an associate professor of psychology at the University of Tennessee, spoke about treating patients who recover memories in therapy.[125] Nash concluded that "in terms of clinical utility, it may not really matter whether the event actually happened or not. . . . In the end, we (as clinicians) cannot tell the difference between believed-in fantasy about the past and viable memory of the past. Indeed, there may be no structural difference between the two."[126]

For the criminal law, of course, there is all the difference in the world between fantasy and truth, with an accused defendant's freedom and reputation hanging in the balance. The problem addressed here is that in so many criminal cases, fantasy was accepted as truth and became the sole basis for conviction, without any other evidence.

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[124] *Id.* at 166-67.
[125] *Id.* at 78.
[126] *Id.* at 79.

B. *A Moral Panic Over Daycare*

In the early 1980s, public fear of sexual and satanic abuse produced a nationwide panic concerning children in daycare.[127] In the daycare setting, most cases did not involve "recovered" memories *per se*.[128] Many of the children who allegedly experienced horrific sexual and other physical abuse at the hands of daycare workers repeatedly denied the abuse until their memories were "refreshed" by interviews with therapists, family members, attorneys and/or police.[129]

These criminal cases usually began with a single accusation which was then amplified by law enforcement and mental health professionals who persistently questioned and prompted the children until they "remembered" their abuse.[130] Glenn E. Stevens, a prosecutor who worked on the infamous McMartin Preschool case, recalled: "If a child said no, [that] nothing [had] ever happened to them, the interviewer would then say, 'You're not being a very bright boy. Your friends have come in and told us they were touched. Don't you want to be as smart as them?"[131]

Some of the resulting criminal cases against daycare workers involved hundreds—even thousands—of charges based on grotesque and outlandish stories of ritual abuse which (for example) involved witches flying, underground tunnels leading to secret torture chambers, children traveling with their abusers in hot-air balloons or being flushed down toilets in order to be sexually violated, and sexual orgies conducted at car washes

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[127] *See, e.g.*, Aja Romano, *The History of Satanic Panic in the U.S.—and Why It's Not Over Yet*, VOX (Oct. 30, 2016, 10:30 AM), https://www.vox.com/2016/10/30/13413864/satanic-panic-ritual-abuse-history-explained.

[128] *Id.*

[129] *See, e.g.*, MCNALLY, *supra* note 4, at 246-56.

[130] *See, e.g.*, WRIGHT, *supra* note 12, at 73 (discussing a 1988 newspaper investigation of 36 SRA cases around the country: "[M]ost cases evolved out of a single incident involving one child; but through publicity and runaway police inquiries, the investigations spread, and subsequent accusations were made against police officers, defense lawyers, and even the social service workers investigating the complaints. . . . There was virtually no evidence in any of these cases except for the uncorroborated stories of the very young children.").

[131] WRIGHT, *supra* note 12, at 74. (Glenn Stevens "quit [the McMartin case] in disgust, denouncing the prosecution as a massive hoax.").

and airports.[132] A small sample will offer a clearer picture of the "evidence" used to bring these cases.

Many believe that the daycare sexual abuse panic began with the McMartin Preschool case in Manhattan Beach California.[133] Judy Johnson, mother of a two-year-old student at the preschool, informed the Manhattan Beach police that her two-year-old son was being sexually abused by Ray Buckey, one of the teachers at the school.[134] The child failed to identify Buckey from photographs, and no dispositive physical signs of sexual abuse were found.[135] Nonetheless, shortly thereafter the local police sent a letter to 200 McMartin parents, informing them of Johnson's report and asking them to speak with their children about their experiences at the school.[136] Meanwhile the two-year-old's account of abuse became increasingly elaborate, adding reports that Ray Buckey sodomized him while his head was in the toilet; that Buckey had kidnapped and locked him in a trunk before driving him to a carwash; and that teachers at the school had chopped up rabbits within sight of the children.[137] As the investigation broadened, the Manhattan Beach District Attorney's office asked psychologist Kee MacFarlane, of the Children's Institute International (CII) in nearby Los Angeles, to investigate the possibility of widespread child abuse at the McMartin Preschool.[138] Using anatomically correct dolls as well as leading questions and other suggestive interview techniques (for example, rewarding children when they got the "right" answers to questions about whether they had been abused at the school), psychologists at CII interviewed more than 400 children who had attended the preschool, ultimately finding that more than 90 percent of them had been sexually abused.[139] In early 1984, the McMartin Preschool closed. Shortly thereafter, seven defendants from the

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[132] See *infra* notes 133-77 and accompanying text (discussing some of the major cases).

[133] *See, e.g.*, Clyde Haberman, *Retro Report: The Trial That Unleashed Hysteria Over Child Abuse*, N.Y. TIMES (Mar. 9, 2014), https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html.

[134] Douglas O. Linder, *McMartin Preschool Abuse Trial*, FAMOUS TRIALS, https://www.famous-trials.com/mcmartin (last visited Oct. 24, 2020).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

school, including its seventy-six-year-old owner Virginia McMartin, were indicted on more than 100 counts of sexually abusing children.[140]

Although the seven-year investigation and adjudication of the McMartin Preschool trial took place in full view of the national media, the press was remarkably uncritical of the proceedings, even as the children's stories (following their CII interviews) became more and more bizarre:

> Children testified that sexual assaults took place on farms, in circus houses, in the homes of strangers, in car washes, in store rooms, and in a 'secret room' at McMartin accessible by a tunnel. One boy told of watching animal sacrifices performed by McMartin teachers wearing robes and masks in a candle-lit ceremony at St. Cross Episcopal Church. In response to a defense question, the boy added that the kids were forced to drink the blood of the sacrificed animals. Perhaps strangest of all, was the testimony of one boy who said that the McMartin teachers took students to a cemetery where the kids were forced to use pickaxes and shovels to dig up coffins. Once the coffins were removed from the ground, according to the child, they would be opened and the McMartin teachers would begin hacking the bodies with knives.[141]

The investigation quickly spread to other daycare centers in the area, a prelude to the nationwide panic that would shortly follow.[142] At one point, the media reported that more than 1,200 children in the Manhattan Beach area were potential victims of sexual abuse at their preschools.[143]

In early 1986, after several major hits to its credibility and its case, the prosecution admitted that it had insufficient evidence to proceed to trial

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[140] Linder, *supra* note 134 (Noting that lead prosecutor, Lael Rubin, later announced that the defendants were actually guilty of more than 500 child abuse offenses in the case).
[141] *Id.*
[142] *See, e .g.*, Haberman, *supra* note 133.
[143] *Id.*

against five of the seven McMartin defendants.[144] The state put the remaining two defendants, Ray Buckey and his mother Peggy (who had also been a teacher at the school) on trial, a proceeding that lasted two and a half years.[145] In January 1990, both defendants were acquitted.[146] By that point, Ray Buckey had spent five years in jail awaiting trial.[147]

Parents and many in the community were outraged at the acquittals. According to a television poll at the time, eighty-seven percent of respondents thought the defendants were guilty as charged.[148] Hundreds of people marched in the streets, demanding a new trial.[149] Some carried signs saying: "We Believe The Children."[150] The D.A. capitulated, proceeding to retry Ray Buckey on eight counts of abuse involving three children.[151] In July 1990, the second jury hung.[152] The criminal charges against Ray Buckey were finally dismissed.[153] After seven years and $15 million dollars—in a proceeding that was then the longest and most expensive in the nation's history—the McMartin case was over.[154]

Nationally, however, the daycare panic was in full swing. The state had failed to convict the McMartin defendants; other wrongfully charged

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[144] Linder, *supra* note 134 (Reporting that McMartin prosecutors withheld evidence from the defense that when Judy Johnson brought the original complainant, her son Billy, to the police station at the start of the case, Billy had been unable to identify Ray Buckey at a lineup. The prosecution also withheld information pertaining to Judy Johnson's reliability as a witness. Billy was taken out of the case after his mother died of alcohol poisoning in 1985 and his father refused to consent to Billy's further involvement. *Id.* Finally, in 1985 a group of parents, and subsequently an expert firm hired by the DA's office, began digging to find the underground tunnel and secret rooms which, according to many of the children, had been the sites of widespread sexual abuse of the students at the school. No such tunnel or room was ever found).

[145] *Id.*

[146] *Id.* (Reporting that Peggy Buckey was acquitted outright on all charges; Ray Buckey was acquitted outright on thirty-nine charges and the jury hung on the remaining thirteen charges.)

[147] *Id.*

[148] *See, e.g.*, Linder, *supra* note 134.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Linder, *supra* note 134.

defendants were not as fortunate. In New York, for example, ambitious prosecutor Mario Merola won convictions for rape, sodomy, and other sexual abuse against five daycare workers at preschools in the Bronx.[155] Investigators questioned dozens of children using "dolls, gentle words and a quiet approach."[156] The *Los Angeles Times* reported that "[a]t one point, one of [the allegedly abused children] identified the trial judge as his molester."[157] The defendants, who became known as "The Bronx Five", all eventually won acquittal after more than a dozen appeals and years in prison.[158] In a reversal that freed one of the Five, the Appellate division of the state Supreme Court issued this scathing assessment of the proceedings: "While the pernicious problem of child sexual abuse cries out for redress . . . that goal is irreparably damaged when an innocent person is denied a fair trial that results in a wrongful conviction, as appears here to be the case."[159] Upholding a lower-court ruling which had overturned the conviction of defendant Alberto Ramos, the court flatly concluded:

> The people's failure to fulfill their obligation to insure that a fair trial was had and justice done is inexcusable. As the motion court eloquently observed, "The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system."[160]

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[155] David Stout, *Conviction for Child Abuse Overturned 10 Years Later*, N.Y. TIMES (Sept. 30, 1997), https://www.nytimes.com/1997/09/30/nyregion/conviction-for-child-abuse-overturned-10-years-later.html.

[156] *Robert D. McFadden, Search For Witnesses Widens In Inquiry On Day-Care Center, N.Y. TIMES* (Aug. 5, 1984), https://www.nytimes.com/1984/08/05/nyregion/search-for-witnesses-widens-in-inquiry-on-day-care-center.html.

[157] Larry McShane, *For Wrongly Accused Day-Care Workers, Freedom Is No Panacea*, L.A. TIMES (Jan. 5, 1997), https://www.latimes.com/archives/la-xpm-1997-01-05-mn-15543-story.html.

[158] *Id.*

[159] Dennis Hevesi, *Overturning Conviction Is Upheld*, N.Y. TIMES (July 17, 1994), https://www.nytimes.com/1994/07/17/nyregion/overturning-conviction-is-upheld.html.

[160] *Id.*

Nathaniel Grady, a Methodist minister, was the last of the Bronx Five to be freed after serving more than ten years in prison.[161]

In Malden, Massachusetts, Gerald Amirault, and his mother Violet and sister Cheryl, were tried and convicted in 1986 for sexually abusing children at the Fells Acres Day Care Center where they worked.[162] Gerald was convicted of rape and other sexual abuse involving nine children and was sentenced to 30-45 years in prison. His mother and sister were convicted of sexual abuse and sentenced to 8-20 years in prison.[163] During the course of the investigation, the alleged victims offered accounts of events involving evil clowns, robots, a "magic room" and tortured animals.[164] Allegations were graphic and fantastical:

> Gerald, it was alleged, had plunged a wide-blade butcher knife into the rectum of a 4-year-old boy, which he then had trouble removing. When a teacher in the school saw him in action with the knife, she asked him what he was doing, and then told him not to do it again, a child said. On this testimony, Gerald was convicted of a rape which had, miraculously, left no mark or other injury.[165]

Journalist Dorothy Rabinowitz reviewed the court records of the trial and concluded, "no sane person reading the transcripts of these interrogations can doubt the wholesale fabrications of evidence on which this case was built."[166] In 1997, a decade after their convictions, a new trial was granted to Violet and Cheryl Amirault.[167] Violet died before that could

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[161] Hevesi, *supra* note 59.
[162] *Id.*
[163] *Id.*
[164] Commonwealth v. Amirault, 424 Mass. 618 (1997).
[165] Dorothy Rabinowitz, *Martha Coakley's Convictions*, WALL ST. JOURNAL (Jan. 14, 2010, 10:25 PM), https://www.wsj.com/articles/SB10001424052748704281204575003341640657862 [hereinafter Coakley's Convictions].
[166] Dorothy Rabinowitz, *A Darkness in Massachusetts*, WALL ST. JOURNAL (July 9, 2001, 12:01 AM), https://web.archive.org/web/20090303131406/http://www.opinionjournal.com/extra/?id=95000779.
[167] Coakley's Convictions, *supra* note 165.

happen;[168] Cheryl was eventually released from prisonafter her sentence was reduced to time served.[169]

A post-trial hearing into the case produced findings that all the children's testimony had been corrupted by the methods used to produce charges against the defendants.[170] The judge who presided at the hearing concluded, "[e]very trick in the book had been used to get the children to say what the investigators wanted."[171] In 2001, the Massachusetts Governor's Board of Pardons, after a nine-month investigation, recommended that Gerald Amirault's sentence be commuted; a majority of the board signed a statement citing the "extraordinary if not bizarre allegations" on which the Amiraults had been convicted.[172] In 2004 Gerald Amirault was released on parole, having served 18 years in prison.[173] Justice Isaac Borenstein, one of the judges in the case, declared: "The Amirault family was targeted in this investigation from the outset in a climate of fear and panic chronicled in pervasive and substantial media . . . coverage. Law enforcement officials had decided from the start that the Amiraults had committed these crimes."[174]

In Austin Texas, Frances and Dan Keller, who ran Fran's Daycare in the neighborhood of Oak Hill, were convicted of aggravated sexual abuse of a child in their care and sentenced to forty-eight years in prison.[175] Following the first allegations, some parents of children who attended the daycare

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[168] *Id.*
[169] *Id.*
[171] *Id.*
[171] *Id.*
[172] Coakley's Convictions, *supra* note 165.
[173] *Id.*
[174] RABINOWITZ, *supra* note 18, at 133-134.
[176] *See, e.g.*, Avi Selk, *Falsely Accused of Satanic Horrors, a Couple Spent 21 Years in Prison. Now They're Owed Millions*, THE WASHINGTON POST (August 25, 2017, 12:45 AM), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/24/accused-of-satanism-they-spent-21-years-in-prison-they-were-just-declared-innocent-and-were-paid-millions/?utm_term=.0ae35f74f6f4.

center consulted the organization "Believe the Children," which had been formed by parents involved in the McMartin case.[176]

> Children from their day-care center accused them – variously - of serving blood-laced Kool Aid; wearing white robes; cutting the heart out of a baby; flying children to Mexico to be raped by soldiers; using Satan's arm as a paintbrush; burying children alive with animals; throwing them in a swimming pool with sharks; shooting them; and resurrecting them after they had been shot.[177]

Both of the Kellers spent twenty-one years in prison before being declared actually innocent in 2017, "after years of work by journalists and lawyers to expose what proved to be a baseless case against them."[178] Late that year they received $3.4 million in compensation from the state for their wrongful convictions and prison terms.[179]

In 1985, Margaret Kelly Michaels was indicted on more than 200 criminal charges involving the sexual abuse of children at the Wee Care Nursery School in Maplewood, New Jersey.[180] The allegations were nothing short of incredible:

> The children told of games where both they and Kelly took off their clothes and, according to varying accounts, laid on each other, licked each other and Kelly, including applying and licking off peanut butter and/or jelly, had "intercourse" with Kelly while she apparently was having her menstrual period, defecated on the floor, ate "pee and poop," and performed cunnilingus on her.[181]

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] Lona Manning, *Nightmare at the Day Care: The Wee Care Case*, CRIME MAGAZINE (Jan. 14, 2007), http://www.crimemagazine.com/nightmare-day-care-wee-care-case.
[181] State v. Michaels, 264 N.J.Super. 579, 592 (N.J. Super. Ct. App. Div. 1993).

Dorothy Rabinowitz reported that "[o]ne five-year-old boy informed the court that Kelly had turned him into a mouse while he was in an airplane on the way to visit his grandmother."[182]

Somehow, Michaels' colleagues at the school had never witnessed any abusive behavior—let alone the horrific acts described by the children—by the defendant or at the school.[183] Nonetheless, in 1988 Michaels was convicted of 115 counts and sentenced to forty-seven years in prison.[184] She served five years before being released, following a ruling by the New Jersey Supreme Court which declared, "the interviews of the children were highly improper and utilized coercive and unduly suggestive methods."[185]

In Wenatchee, Washington, forty-three adults were arrested in 1994-1995 and charged with 29,726 counts involving the sexual abuse of children.[186] The case began when thirteen-year-old Donna Perez told her father, police detective Robert Perez, who also served as chief investigator in the case, that she and other children she knew had been raped or otherwise molested by the defendants.[187] In all, Donna Perez named almost ninety people as perpetrators.[188] Critics noted that many of the defendants were "perfect patsies – vulnerable people united by poverty, alcohol, illiteracy and IQs so low they're functionally retarded."[189] Prosecutors obtained twenty-

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[182] Rabinowitz, supra note 18, at 13.

[183] *See, e.g.*, Douglas Linder, *The Kelly Michaels Case*, FAMOUS TRIALS, https://www.famous-trials.com/mcmartin/907-michaelscase (last visited Oct. 4, 2020).

[184] *Id.*

[185] State v. Michaels, 136 N.J. 299, 315 (N.J. 1994).

[186] Mike Barber & Larry Lange, *Jury Finds City, County Negligent in Child Sex-Ring Case*, SEATTLE POST-INTELLIGENCER (July 31, 2001), https://www.seatlepi.com/local/article/jury-finds-city-county-negligent-in-child-sex-1061384.php.

[187] *Id.*

[188] *Id.*

[189] Todd Foster, *Sex Case a 'Wenatchee Witch Hunt': Some Incidents of Incest Were Uncovered But There's Been No Proof Of Group Child Abuse*, THE SPOKESMAN-REVIEW (Oct. 22, 1995), http://www.spokesman.com/stories/1995/oct/22/sex-case-a-wenatchee-witch-hunt-some-incidents-of/. *See also* Rabinowitz, *supra* note 18 at 96 ("Of those charged, most were poor and indigent. Few could afford an attorney, and all would see their children taken from them."); *id.* at 101 ("Within the first few months of investigation, more than forty people were arrested on similar charges—several charged with 2,400 and more

five convictions in the case, sending many of the defendants to prison—though no defendant who hired their own attorney (as opposed to a public defender) was convicted.[190] After local pastor Robert Roberson protested the innocence of an accused couple in his congregation, he and his wife were arrested and charged with eleven counts of child sex abuse.[191] "Overall," notes Rabinowitz, "the state prosecutors did not conceal their view that the social class to which the pastor and the congregants of this church belonged bore a direct relation to their crimes. . . . [M]ost [congregants were] welfare clients, without education, and in other ways at the lowest rungs of the social ladder."[192]

The Robersons were subsequently acquitted on all counts.[193] The prosecution failed to uncover any significant physical evidence supporting the charges.[194] Nonetheless, five convicted defendants served their full terms in the case.[195] Some defendants lost their parental rights.[196] Others were freed by appellate courts or pled down to lesser charges.[197] In 2001, a jury found the city and county to have been negligent and awarded $3 million in damages to a couple who had been wrongly charged in the case.[198]

According to Dr. Phillip Esplin, a forensic psychologist for the Child Witness Project at the National Institutes of Health: "Wenatchee may be the worst example ever of mental health services being abused by a state . . . to control and manage children who have been frightened and coerced into

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counts of sex abuse. One woman was charged with 3,200 counts of child rape. . . . Within months, Child Protective Services placed fifty children of the accused in foster care.").

[190] RABINOWITZ, *supra* note 18, at 116-17 (reporting on the Wenatchee defendants who went to prison).

[191] *Id.*

[192] *Id.* at 113.

[193] Mike Barber & Larry Lange, *Jury Finds City, County Negligent in Child Sex-Ring Case,* SEATTLE POST-INTELLIGENCER (July 31, 2001), https://www.seattlepi.com/local/article/Jury-finds-city-county-ngeligent-in-child-sex-1061384.php.

[194] *Id.*

[195] Kim Murphy, *Wenatchee: Sex Probe Tests Truth and Trust,* L.A. TIMES (June 14, 1998), https://web.archive.org/web/200506191323/https://www.latimes.com/archives/la-xpm-1998-jun-14-mn-59973-story-html.

[196] *Id.*

[197] Barber & Lange, *supra* note 193.

[198] *Id.*

falsely accusing their parents and neighbors of the most heinous of crimes."[199]

C. *Training Programs Spread the Panic*

The wave of daycare cases alleging satanic ritual abuse prompted the creation of new training programs for police and other legally-empowered personnel (for example, social workers in government child-services roles), to educate them in approved techniques of detecting and pursuing satanic cults.[200] In her 1998 book *Satan's Silence*, journalist Debbie Nathan wrote about law enforcement policy in El Paso, Texas, where police "were promptly dispatched to 'ritual crime' seminars, classes aimed at law enforcement authorities and taught mostly by other cops, therapists, preachers and by born again Christians claiming to be former high priests or escapees from unspeakably sadistic ritual-torture cults."[201] According to Lawrence Wright, "[s]oon dozens of police workshops around the country were discussing the phenomenon [of SRA]."[202]

In *Remembering Trauma*, psychologist Richard McNally wondered how, with so little evidence to support the cases, the myth of Satanic Ritual Abuse gained such a strong foothold in the mental health profession.[203] Dr. McNally discussed the work of Sherrill Mulhern, an anthropologist who studied the problem and then wrote about it. Dr. Mulhern, McNally, wrote,

> attended 14 continuing education seminars designed to teach professionals how to diagnose and treat survivors of ritual abuse. The proselytizing presenters exhorted, threatened, and admonished attendees to believe in the reality of satanic

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[199] Andrew Schneider, *Wenatchee Abuses Attacked Nationally*, SEATTLE POST-INTELLIGENCER (May 28, 1998), https://web.archive.org/web/20040920085807/http://seattlepi.nwsource.com/powertoharm/after13.html.

[200] *See* Romano, *supra* note 127.

[201] *Id.* (quoting DEBBIE NATHAN, *SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCHHUNT* (1995)).

[202] WRIGHT, *supra* note 12, at 85.

[203] MCNALLY, *supra* note 4, at 244.

> cults. Questioning survivors' memories of sexual torture, ritual murder, cannibalism, and mind-control programming, they said, was tantamount to repeating the grievous error of the past when professionals denied the reality of sexual abuse. To convince attendees of the reality of the satanic cults, they wove together bits and pieces of information from diverse sources, including drawings done by patients featuring satanic symbols (such as pentagrams), album covers from heavy metal rock groups, historical folklore about devil-worshipping cults, and photographs of mutilated animals. . . . Presenters stressed the importance of memory recovery work for healing. Never did they warn attendees about the risks of fostering illusory memories of trauma. Seminars like these provided fertile ground for the rapid dissemination of urban legends about the cult.[204]

As proof of the existence of Satanic Ritual Abuse, therapists frequently noted that many children who initially presented as normal, developed symptoms of Post-Traumatic Stress Disorder (PTSD) during the course of their interrogations by authorities.[205] Few recognized the possibility that the interrogation process itself might have caused those symptoms.[206]

As in recovered memory cases involving adults, some in the mental health profession expressed skepticism about the process of "refreshing" children's memories of abuse in the daycare cases. For example, Dr. Paul McHugh, director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins, explained that "most severe traumas are not blocked out

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[204] *Id.*

[205] *Id.* at 247.

[206] *Id.* ("Therapists were impressed by how well-adjusted these children first appeared to be in spite of the horrors they had so recently experienced. . . . Although they rarely exhibited dramatic psychiatric symptoms before disclosing the abuse, their clinical decompensation following disclosure seemed to confirm suspicions that they had been severely traumatized....Noting that children seldom disclose ritual abuse until well into evaluation or treatment, these authors also mentioned that PTSD symptoms erupt when memories of ritualistic abuse become conscious. These observations strongly suggest that the treatment itself is causing the PTSD.")

by children but are remembered all too well."[207] Children suffering from PTSD benefit from psychotherapy "not to bring out forgotten material that was repressed, but to help them move away from a constant ruminative preoccupation with the experience."[208] "In Salem," stated Dr. McHugh, "the conviction depended on how judges thought witches behaved. In our day, the conviction depends on how some therapists think a child's memory for trauma works."[209]

For far too long, the skeptics' concerns failed to stop convictions based on allegedly "recovered" or "refreshed" memories of sexual trauma.[210] On the contrary: Prosecutors were able to persuade factfinders that the grotesque stories of abuse being reported by the children proved defendants' guilt beyond a reasonable doubt. In *No Crueler Tyrannies*, journalist Dorothy Rabinowitz reported:

> Jurors had to be given a reason to believe that four year olds could be raped with butcher knives that left them uninjured, could be tied naked to trees and raped in broad daylight in front of a school facing the street and before the entire school population, as Violet Amirault would be accused and convicted of having done. The state's solution lay with their experts—witnesses who could explain and render such mysteries comprehensible.[211]

A typical approach was to convert behaviors or statements by the children which might reasonably give rise to skepticism about the abuse claim into evidence that helped to *prove* the claim.[212] Rabinowitz cites the textimony of one expert, who explained to a jury in the Kelly Michaels case:

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[207] WRIGHT, *supra* note 12, at 165.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] RABINOWITZ, *supra* note 18, at 11; *see also id.* at 36 ("That these stories were a kind that would normally have caused an examiner to harbor the gravest doubts about the witnesses' credibility was of no particular consequence to the prosecutors. . . . They knew that whatever happened on the stand, the jury would make allowances: the witnesses were innocent children.").
[212] *Id.* at 15.

"A child's emphatic denial that anything had happened was *in fact* proof that the child had been victimized."[213] This was known as child abuse accommodation syndrome,[214] and it justified convictions even when children denied experiencing abuse: "If children gave a succession of 'no' answers when asked if they had been abused, that was, [the expert] explained, 'proof of the suppression stage.'"[215]

Another source of unreliable testimony, often coming from law enforcement, purported to interpret an alleged victim's body language in non-intuitive ways that supported the prosecution's case. The 1997 case of John Carroll illustrates the power of biased "expert" testimony in such cases.[216] Carroll's 13-year-old stepdaughter had a dream that a young male cousin had touched her sexually.[217] At first the girl insisted that the dream was just that—a dream—but after questioning by Carroll's ex-wife, she became convinced that the dream was real and that her abuser was her stepfather.[218] The police set up a taped phone call in which the girl accused Carroll of abusing her and he vigorously and unequivocally denied it.[219] At trial, the jury heard evidence showing Carroll's warm and supportive relationship with his stepdaughter.[220] The prosecution's expert "explained, as she had at the [Kelly] Michaels trial, that kindness, affection, and expressions of friendship were all part of the abuser's typical behavior."[221]

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[213] *Id.* at 14.

[214] The "child sexual abuse accommodation syndrome," or CSAAS, was first proposed by psychiatrist Roland C. Summit in 1983. According to the theory, children who are subject to ongoing sexual abuse, and perceive no way of escaping it, may find ways of accommodating their situation, such as delaying disclosure of the abuse or retracting allegations of abuse. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Dr. Summit later lamented that CSAAS had been misused in legal settings, including the setting of the day-care abuse cases. Roland C. Summit, *Abuse of the Child Sexual Abuse Accommodation Syndrome*, 1 J. OF CHILD SEX ABUSE 183 (2008).

[215] RABINOWITZ, *supra* note 18, at 14.

[216] *Id.* at 210-18.

[217] *Id.*

[218] *Id.* at 211.

[219] *Id.* at 212-13.

[220] *Id.* at 216.

[221] RABINOWITZ, *supra* note 18, at 216

How, then, could the jury distinguish a genuinely loving stepfather from a sexual predator?

Two law enforcement officers, Weber and Girtler, were called as experts to testify as to defendant Carroll's damning body language and the meaning of his words.[222] For example, with respect to the police-taped phone call in which Carroll had completely denied any wrongdoing,

> Girtler informed the jury [that] there were signs—red flags—of guilt that an untrained person would never notice. True, he conceded, Carroll had denied the accusations, but he had done so in ways that only proved his guilt. For example, he had responded to the stepdaughter's accusation by saying he had never touched her in a bad or sexual way. This, Girtler said, indicated the mind-set of a child molester. Weber explained that Carroll used words and phrases in that call such as "no," "gee whiz," "oh God!" By his reference to a higher power, Weber told the jury, he was admitting guilt.[223]

At another point in his testimony, Girtler told the jurors that during his interrogation by police, Carroll "sat himself turning somewhat and 'facing the door a little bit' – an indicator [that] he wanted to get out. Carroll's body language, [Girtler said], indicated he was concerned and blocking admissions."[224] In case of any skeptical jurors, Weber warned that "[e]xpertise in this field was not easily come by....It was not written; 'it is something you observe. It is not something you speak. It is something you have to observe with a keen eye."[225] In her closing argument to the jury, "the prosecutor cited the importance of Girtler's testimony: that of a trained investigator who knew that the defendant's denials of guilt were actually admissions."[226]

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[222] *Id.*
[223] *Id.* at 217.
[224] *Id.*
[225] *Id.*
[226] *Id.* at 218.

"In all, the two experts informed jurors, the phone call showed Carroll making 'admission by denial.' It was Girtler's view that all of Carroll's denials were evidence of his guilt."[227] In January 2001, John Carroll was convicted and sentenced to ten to twenty years in prison.[228]

In short, "prosecutors' propensity to believe in the guilt of anyone accused of the crime of child sex abuse was overwhelming."[229] And their legal strategy worked. Factfinders, encouraged to rely on expert opinion and reluctant to suggest that the children were lying, convicted innocent defendants in case after case.[230] One judge in Massachusetts later recalled, "[T]here were *no* acquittals in cases of this kind—involving children—for years."[231]

II. A PERFECT STORM UPENDS THE CRIMINAL PROCESS

How were the normal processes of criminal investigation and adjudication so thoroughly disabled as to produce convictions, and long prison terms, based on such fantastic allegations? In retrospect, three factors coincided to create this perfect storm: (1) the repression theory of traumatic memory, (2) a failure of the rules of evidence, and (3) a moral panic fueled by political ideology.

A. *The Repression Theory of Traumatic Memory*

A major source of the problem lay in the concept of emotional trauma as envisioned by advocates of Recovered Memory Therapy. For purposes of the criminal law, the theory's two most important elements are (1) the claim that unlike normal memory, memory of sexual trauma can be buried

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[227] RABINOWITZ, *supra* note 18, at 217.
[228] *Id.* at 218.
[229] *Id.* at 229.
[230] *Id.* at 230-31 ("How jurors could have believed child witnesses who had given clearly fantastic testimony...was easier to answer. The state's expert witnesses, the psychologists and the abuse specialists, were on hand precisely to provide the explanation for such testimony. Some...traveled from trial to trial validating charges of abuse....Jurors were little inclined to doubt the experts. And there was the fact that the children had given specific descriptions of their abuse. How such claims came to be made [through highly leading and suggestive interviews with the children] the jurors did not know.").
[231] *Id.* at 81.

beneath the surface of the victim's consciousness and thus lost to conscious recall, often for years or even decades;[232] and (2) the claim that such memories are retrievable, accurate and intact, by the therapeutic technique of RMT.[233]

Consider these two claims separately. The first claim draws a picture of how the mind can react to terrifying events. Based on the belief in repression, the mind buries the memory of a traumatic event, thus "hiding" it from the victim's conscious awareness to protect itself from overwhelming fear. The event is banished from conscious recall as an act of self-defense, which preserves the victim's ability to function in the world at the cost of "forgetting" an overwhelming trauma.[234]

By itself, this claim does not mandate any special dispensation from the criminal law. In fact, the contrary might well be true: Without more, criminal allegations that suddenly emerge after being completely forgotten for years or decades may inspire heightened skepticism from impartial investigators and prosecutors. Even assuming such allegations are made in good faith and that the victim believes them, skepticism about their completeness and accuracy would be entirely rational. After all, memory science demonstrates that the mere passage of time typically erodes memory and makes it vulnerable to contamination.[235] In cases where years or longer have passed since the recalled trauma, investigation and corroboration of factual claims typically becomes much more difficult.[236] And the very nature of the "recovered memory" claim itself—that the relevant memory has been buried beneath the level of conscious recall—raises the obvious question of whether, and to what extent, such memories can be retrieved with the high level of accuracy required to prove a criminal allegation beyond a reasonable doubt.[237] Common sense argues that memories buried for long periods of

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[232] *E.g.*, MCNALLY, *supra* note 4, at 190 (discussing this claim).
[233] *E.g.*, *id.* at 3 (defending use of the term "recovered memory therapy").
[234] *See id.*
[235] *E.g.*, *id.* at 4; Loftus & Davis, *supra* note 12.
[238] Otgaar et. al., *The Return of the Repressed: The Persistent and Problematic Claims of Long-Forgotten Trauma*, PERSPECT PSYCHOL. SCI. 1072, 1072-95 (Nov. 14, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6826861/.
[239] *See* Loftus & Davis *supra* note 12, at 489-93.

time would be less, rather than more, likely to be complete and accurate enough to support a criminal charge.

This is where the second claim comes in. It asserts, as a matter of clinical experience and expertise, that memories recovered in psychotherapy, using techniques such as hypnosis, can be complete, accurate, and therefore a proper evidentiary basis—even without corroborating evidence—for making criminal allegations.[238] The second claim, in effect, inserted the authority of recovered memory theory to answer questions that otherwise would have raised serious doubts, from the beginning, about the reliability of the memories that formed the basis for so many charges and convictions.

In this way, the norms of the criminal process—which prize impartiality, factual accuracy, and evidence-based adjudication—were effectively disabled. The criminal process relies upon the accumulation of verifiable evidence; the sifting of that evidence for sense, credibility, and coherence; and the requirement that such evidence meet the highest legal standard of proof, beyond a reasonable doubt, as a way of minimizing the chance that innocent defendants will be charged or (much worse) convicted of a crime. Had police and prosecutors adhered to these standards and taught them to juries, the wrongful convictions in these cases never could have happened. Many of the accounts of SRA and child abuse, which led to convictions, were at odds with common sense and rationality. Yet prosecutors accepted, and juries convicted, based on assurances from activists in the recovered memory movement, and testimony from "experts" in RMT, that those stories were verifiable and accurate.[239] Thus, the functional result of Claim #2 was to vault over rational skepticism and replace it with assertions that explained apparently incredible events as both possible and consistent with clinical experience.[240] In addition, "experts" in

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[238] *E.g.*, MCNALLY, *supra* note 4, at 190 (describing claim by believers in repressed memory that, "a significant minority of survivors have no memory whatsoever for their traumatic experiences, but then later retrieve these memories more or less intact.").

[239] *E.g.*, RABINOWITZ, *supra* note 18, at 16.

[240] MCNALLY, *supra* note 4, at 7 ("Also addressing a lay audience, the clinical psychologist Renee Fredrickson asserted that 'profound disbelief is an indication that memories are real,' noting that second thoughts about memories' authenticity merely reflect attempts to repress them once again."); *see, e.g.*, Loftus & Davis, *supra* note 12, at 470-71 (describing the conflict between memory scientists and clinicians in the "memory wars" in psychology).

body language—often police officers who had become advocates for the theory of recovered memory—interpreted suspects' phraseology and body language in ways that cast suspicion upon remarks and movements that, in retrospect, were entirely innocent.[241]

In short, the particular structure of RMT—a structure which married claims about the effect of sexual trauma on memory to claims about the accuracy and completeness of the memories as retrieved[242]—had the effect of preempting the normal processes of investigation, criminal charges, and adjudication. The very behaviors and responses that would naturally raise concerns about the veracity of complainants' allegations—for example, the initial denials of many children that they had been abused by their supervisors at daycare; the inconsistent, often wildly improbable accounts of abuse by satanic cults; and the morphing of those accounts over time to include ever-more defendants and ever-more outlandish claims about how they had abused complainants—were converted for juries into symptoms of the alleged trauma, facts which did not call the abuse into question but were instead presented as proof of its existence.[243]

B. *The Rules of Evidence Failed to Protect Defendants*

Somehow, prosecutors across the country convinced trial judges to admit allegations of sexual atrocities that (1) were wildly improbable on their

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[241] Roediger & Bergman, *supra* note 26, at 1104 ("[E]ven assuming memories of trauma were somehow poorly encoded in kinesthetic body memories and dissociated from one's personal narrative of the self, this would seem all the more reason to question the recovery of those memories. Memories poorly encoded cannot be recovered in a more accurate narrative form 20-30 years later. No matter how great the power of retrieval cues, such cues cannot arouse memories that were not encoded well in the first place."); *see, e.g.*, RABINOWITZ, *supra* note 18, at 216-18 (indictating that the testimony of two police officers regarding defendant's body language suggested his guilt in the 2001 sex abuse trial of John Carroll in New York).

[242] MCNALLY, *supra* note 4, at 4-7.

[243] *See, e.g.*, RABINOWITZ, *supra* note 18, at 14 ("Prosecution expert Eileen Treacy explained. A child's emphatic denial that anything had happened was *in fact* proof that the child had been victimized, she informed the jury. Citing the theory of the child abuse accommodation syndrome, she described its various phases. If children gave a succession of 'no' answers when asked if they had been abused, that was, Treacy explained, 'proof of the suppression stage.'").

face and (2) conflicted with scientifically grounded theories of traumatic memory. This suggests a major failure of the legal rules for admitting expert testimony and scientific evidence in criminal proceedings.

State rules concerning the admissibility of evidence vary, but for most of the relevant period, the applicable standard for admissibility of scientific evidence was the so-called *Frye* standard[244], or "general acceptance" test, according to which the test for admissibility of such evidence was whether or not it is "generally accepted" in the relevant scientific community.[245] Formally, *Frye* governed only the admissibility of "scientific" evidence and did not apply to other kinds of expert testimony.[246] Moreover, the *Frye* standard was so accommodating that under it, "testimony from mental health and social science experts was largely unregulated by the legal system."[247] According to one analysis, *Frye* set

> a very lenient standard; experts can always be found who will swear that a theory is "generally accepted." Under *Frye*, the expert is not required to substantiate the scientific soundness of the theory by reference to proper research documenting other hallmarks of a reliable theory, such as the theory's survival of Popperian risky tests, survival of peer review, or calculable error rates. Moreover, "general acceptance" itself is usually established by the expert's say-so (subject to the finder of fact's judgment about the expert's credibility); citation of survey studies that document such acceptance are usually not required. Hence, testimony by mental health professionals regarding all sorts of

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[244] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (articulating the "general acceptance" test for the admissibility of scientific evidence in court), *superseded by statute*, FED. R. EVID. 702.

[245] Matthiesen, Wickert & Lehrer, S.C., *Admissibility of Expert Testimony in All 50 States*, https://www.mwl-law.com/wp-content/uploads/2018/02/ADMISSIBILITY-OF-EXPERT-TESTIMONY.pdf (last updated Oct. 24, 2019).

[246] *Id.*

[247] William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Admissibility of Testimony From Mental Health Experts Under Daubert/Kumho Analyses*, 5 PSYCHOL., PUB. POL'Y, & L. 224, 224 (1999).

> controversial theories and methods has very often been admitted under *Frye*.[248]

Since the mid-to-late 1990s, after the Supreme Court developed the *Daubert* "reliability" standard in a line of cases dealing with the Federal Rules of Evidence,[249] most states have replaced *Frye* with *Daubert*, which under *Kumho Tire* applies not only to scientific testimony but to all expert testimony.[250] Under *Daubert,* judges are required to make an assessment of whether expert testimony is relevant and reliable and whether any particular expert is qualified to testify.[251] Judges retain significant discretion to determine admissibility under *Daubert*,[252] and it is unclear whether *Daubert*—which in practice has been memorably described as "*Frye* in drag"—offers significantly greater procedural protection in cases of traumatic memory than did *Frye*.[253] It is also important to remember that although ourts must do their part in evaluating evidence and assessing expert testimony, police and prosecutors also have significant discretion to choose methods of investigating cases and to weigh the evidence before making charging decisions. Thus, the failure to question the factual basis of some "recovered" memory accounts happened at several levels.

Ultimately it is clear that evidentiary standards did not prevent recovered memory theory from spreading to all stages of criminal adjudication, from the initial investigation of sexual assault complaints to the conviction of accused defendants.[254]

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[248] *Id.*

[249] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[250] Grove & Barden et al., *supra* note 249, at 225.

[251] *Id.*

[252] *Id.*

[253] *See, e.g.*, Grove & Barden, *supra* note 249, at 238-39 (arguing that Daubert factors should exclude certain mental health testimony); Paul R. Rice, *Peer Dialogue*: *The Quagmire of Scientific Expert Testimony: Crumping the Supreme Court's Style*, 68 MISSOURI L. REV. 53, 62 (2003) ("[M)ore often than not, in its practical application, Daubert will be little more than Frye in drag.").

[254] *See, e.g.*, RABINOWITZ, *supra* note 18, at 81 ("[H]ow many lawyers were up to the job of defending clients like these? It was a question. Judge [John Paul] Sullivan [who presided

C. *A Moral Panic Fueled by Political Ideology*

It is striking that so many allegations of satanic and other sexual abuse, based solely on claims derived from scientifically-disputed theories of memory and of psychotherapy,[255] should so completely disarm the normal criminal process. Indeed, it took a third factor—political activism—to create this perfect storm. A nationwide panic over sexual and satanic abuse produced a powerful political movement to "Believe the Children" and "Believe Victims", often irrespective of the strength of their claims.[256] It seems clear that the criminal process would not have been so completely upended without the social and political pressure that caused most states to amend their statutes of limitations in cases of recovered memories of sexual assault;[257] without a sustained effort to teach police and prosecutors about the supposed danger of Satanic Ritual Abuse;[258] and without public

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over the Violet and Cheryl Amirault trial in Massachusetts] recalled the atmosphere of the times and the statistics. 'You can see that there were *no* acquittals in cases of this kind—involving children—for years.'").

[255] *See, e.g.*, Loftus & Davis, *supra* note 12, at 470-71 (describing the combatants in psychology's "Memory Wars").

[256] *Moral Panic*, ONLINE DICTIONARY OF THE SOC. SCI., http://bitbucket.icaap.org/dict.pl?term=MORAL%20PANIC ("[A] panic or overreaction to forms of deviance or wrong doing believed to be threats to the moral order. Moral panics are usually fanned by the media and led by community leaders or groups intent on changing laws or practices. Sociologists are less interested in the validity of the claims made during moral panics than they are with the dynamics of social change and the organizational strategies of moral entrepreneurs. Moral panics gather converts because they touch on people's fears and because they also use specific events or problems as symbols of what many feel to represent "all that is wrong with the nation."); *see also* MCNALLY, *supra* note 4, at 4-5 (citing rising concern in the mid-to-late 20th Century about the physical and sexual abuse of children as well as domestic violence and rape more generally).

[257] *See, e.g.*, Lipton, *supra* note 66 (describing changes to statutes of limitations in sexual assault cases).

[258] *See e.g.*, WRIGHT, *supra* note 12, at 86 ("word circulated in the police workshops that satanic cults were sacrificing between fifty and sixty thousand people every year in the United States, although the annual national total of homicides averaged less than twenty-five thousand.")

demonstrations, uncritical media exposure, the quashing of dissent and the dismissal of skeptics as bigots.[259]

In fact, recovered memory theory "fit" a powerful political narrative which attached the very real issues of domestic violence and sexual assault to the Bogeyman of satanic ritual abuse, insisting that to question the latter was to oppose the interests of sexual assault victims.[260] Journalist Dorothy Rabinowitz, who chronicled some of the most egregious charges of child abuse during this period, concluded:

> In the late 1980s . . . there was a school of advanced political opinion of the view that to take up for those falsely accused of sex abuse charges was to undermine the battle against child abuse; it was to betray children and all other victims of sexual predators. To succeed in reversing the convictions in such cases was to send a discouraging message to the victims and to encourage predators . . . the facts of a case were simply irrelevant. What mattered was the message—that such crimes were uniquely abhorrent and must be punished accordingly.[261]

For some of the legal actors in these cases, just the charge of child abuse—no matter how reluctantly extracted from the victim[262] —seemed to justify punishing the accused.[263] Regarding the charges of injustice toward

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[259] *See e.g.*, *MCNALLY*, *supra* note 4 ("The social worker E. Sue Blume (1995) likened the skeptics to Holocaust deniers, and [psychiatrist Colin] Ross wondered whether skeptics were merely struggling to deny their own histories of abuse.").

[260] *See* RABINOWITZ, *supra* note 18, at 18.

[261] *Id.*

[262] Dorothy Rabinowitz, *A Darkness in Massachusetts II*, WALL ST. J., Mar. 14, 1995, at A14 ("At the district attorney's seminar on Fells Acres, Malden Police Inspector John Rivers . . . told the assemblage that interviewing the children was 'like getting blood from a stone.'").

[263] *See, e.g.*, RABINOWITZ, *supra* note 18, at 133-134 (quoting from a an appellate opinion in the Amirault case by Judge Isaac Borenstein: "The Amirault family was targeted in this investigation from the outset in a climate of fear and panic chronicled in pervasive and substantial media . . . coverage. Law enforcement officials had decided from the start that the Amiraults had committed these crimes.").

the defendants in the Fells Acre case, Massachusetts prosecutor Lawrence Hardoon seemed to speak for many prosecutors of that era when he asked: "Should not society . . . be 'willing to trade off a couple of situations that are really unfair, in exchange for being sure that hundreds of children are protected?'"[264] Of course, false charges of abuse protect no one. But for those caught up in the criminal cases produced by the Satanic Panic, that reality took far too long to sink in.

III. THE PANIC RECEDES, BUT THE PROBLEM REMAINS

A. *Memory Science Advances*

Even as some of the above cases were being adjudicated, scientists and researchers who study trauma and memory were raising questions about recovered memory theory and therapy.[265] In their 2006 account of this history, Elizabeth Loftus and Deborah Davis described the research on memory that disputed the existence of massive repression of traumatic events and also disputed the efficacy of the methods being used by clinicians to treat it.[266]

As early as 1992, psychiatrist George K. Ganaway, an expert in dissociative disorders, predicted that

> the most common likely cause of cult-related memories may very well turn out to be a mutual deception between the patient and the therapist. . . . Once reinforced by the therapist, this belief system may become fixed and highly elaborated, sometimes with tragic consequences. In these cases the common denominator in the satanic ritual abuse

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[264] *Id.* at 81.

[265] Some, like Elizabeth Loftus, had long been using scientific methods to study memory. *See, e.g.*, LOFTUS & KETCHAM, *supra* note 22, at 3 (describing her own research). *See also* MCNALLY, *supra* 4 at 14-17 (describing the rise of scientific concerns about recovered memory theory and therapy).

[266] Loftus & Davis, *supra* note 12, at 476-81.

> phenomenon may very well turn out to be the therapists themselves.[267]

Meanwhile, research in memory science suggested (1) that memory is much more susceptible to distortion and deterioration than had been previously supposed;[268] (2) that, in addition, memory is vulnerable to iatrogenic influences;[269] (3) that false memories can be created and then experienced by people as things which actually happened to them;[270] and (4) that *traumatic* events, rather than being banished from consciousness, tend to be remembered *more* clearly than non-traumatic ones.[271]

In the law, this counterattack from science gained credence as criminal and civil judgments against defendants collapsed because the "recovered memories" that had produced them proved false.[272] Scientific research into memory more generally deepened concerns about memory's

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[267] WRIGHT, *supra* note 12, at 77.

[268] *See* LOFTUS & KETCHAM, *supra* note 23, at 73-101 (describing scientific memory research and contrasting it with results in cases of recovered memory therapy); *see also* MCNALLY, *supra* note 4, at 77 ("[A]utobiographical memory is reconstructive; it does not operate like a videorecorder.").

[269] *See generally* Loftus & Davis, *supra* note 12 (describing therapeutic practices which "coerced" patients into reporting memories of abuse).

[270] LOFTUS & KETCHAM, *supra* note 23, at 88-101 (describing origins of her famous "Lost in a Shopping Mall" experiment demonstrating that implantation of false memories is possible).

[271] *See, e.g.*, MCNALLY, *supra* note 4, at 2 ("[P]eople remember horrific experiences all too well. Victims are seldom incapable of remembering their trauma.").

[272] *See, e.g.*, *id.* at 17 (explaining that in the wake of widespread critique of recovered memory theory, "the number of lawsuits against alleged abusers filed on the basis of recovered memories plummeted after 1994, having peaked the previous year. [citation omitted]. By the late 1990s most such lawsuits were being dismissed, and most appellate courts have prohibited tolling of statute of limitations and have refused to admit testimony based on recovered memories." In addition, as McNally recounts, "increasing numbers of patients began to question the authenticity of their recovered memories, and some of these 'retractors'sued their former therapists for malpractice. They accused their therapists of having negligently 'implanted' false memories of abuse, causing them psychological harm and damaging their family relationships." Plaintiffs in these cases sometimes won big settlements. Finally, "[b]y 1998, 152 malpractice suits had been filed by third parties [family members or interested persons other than the patient] against therapists.").

use in criminal proceedings.[273] Research examining the nature, neurological substrata, and functional capacity of memory suggested that, far from preserving a perfect record of events, our ability to recall the past is extremely vulnerable not only to the influence of deliberate suggestion, but also to stress, involuntary blending and synthesis with subsequent experience, as well as simple deterioration over time.[274] As this research found its way into the legal sphere, concerns about the fragility of memory emerged as an important theme in the literature and case law concerning the reliability of eyewitness testimony.[275] Though studies indicate that jurors (and other court personnel) often assign special importance to the testimony of eyewitnesses, recent research emphasizes that the memory of good-faith eyewitnesses is vulnerable to corruption by the passage of time, the inherent imperfections of human observational capacities, stressful or traumatic circumstances occurring at the same time a witness observes an actionable event, and deliberate or unintentional suggestion or coaching from players in the legal system such as attorneys and police.[276] The weight of informed

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[273] *Id.*

[274] *Id.* at 27-77 (reviewing the science on memory and its vulnerabilities); Adam Liptak, *34 Years Later, Supreme Court Will Revisit Eyewitness Ids*, N.Y. TIMES (Aug. 22, 2011), https://www.nytimes.com/2011/08/23/us/23bar.html (citing 2,000 published studies since 1980 which "collectively show . . . that it is perilous to to base a conviction on a witness's identification of a stranger," and stating that of the 75,000 eyewitness identifications which occur annually, about one-third are wrong).

[275] As Professor McNally points out, this research is relevant to traumatic memory because victims of sexual assault are often the only eyewitnesses to the assault. MCNALLY *supra* note 4, at 66 ("Survivors of combat, automobile accidents, sexual abuse, and other traumatic events are also eyewitnesses to the events. Accordingly, research on how people remember – or misremember – witnessed events bear directly on memory for trauma."). *See also* Perry v. New Hampshire, 565 U.S. 228 (2012) (rejecting the defendant's argument that Due Process requires judicial prescreening of any eyewitness identification which occurs under suggestive circumstances (whether or not those circumstances were orchestrated by the police), but acknowledging, in dicta, myriad problems with eyewitness testimony). *E.g.*, *id.* at 243-44 ("many other factors bear on the 'likelihood of misidentification,...for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness."); *see also id.* at 249 (Sotomayor, J., dissenting) (arguing that such problems should have produced a different holding in the case).

[276] According to the Innocence Project, 69 percent of exonerated defendants—defendants who were ultimately wrongly convicted of crimes—were initially convicted due at least in

opinion now favors skepticism toward the accuracy of memory and strongly suggests caution before using eyewitness memory in a criminal case.[277]

In addition, the work of Elizabeth Loftus, Gary Wells, and others demonstrated that subjects could create false memories and then experience those memories as real events.[278] Indeed, recent research clearly indicates that a person can store false memories of events, such as fabricated memories of committing serious crimes, and then perceive those false memories as true .[279] Some studies also indicate that trauma sufferers may be more vulnerable to false memory creation than non-sufferers,[280] while other research suggests

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part to the erroneous testimony of eyewitnesses. *Eyewitness Identification Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/eyewitness-identification-reform/ (last visited Sept. 19, 2020). *See also 60 Minutes: Eyewitness Testimony*, (CBS News television broadcast Mar. 6, 2009) (focusing on the case of Jennifer Thompson-Cannino, who incorrectly identified Ronald Cotton as her rapist, and using the case to demonstrate the frailties of memory).

[277] *See, e.g.*, Patihis et al., *supra* note 14, at 528 (among the findings: Only 27 percent of experimental psychologists agreed that "traumatic memories are often repressed," though much higher percentages of psychoanalysts and "alternative therapists" believed that statement); *see also* CHRIS R. BREWIN, POSTTRAUMATIC STRESS DISORDER: MALADY OR MYTH? 94 (Yale Univ. Press 2007) ("By the end of the 1980s, impressed with [the evidence,] more than three-quarters of a sample of sixty-three experts on eyewitness testimony agreed that the evidence favored the idea that very high levels of stress would impair the accuracy of memory. Moreover, 71 percent of the experts agreed that the statement 'very high levels of stress impair the accuracy of eyewitness testimony' was sufficiently reliable to offer as evidence in court." Brewin writes, "Support for this view has been obtained from studies of actual crime victims. [In one such study,] [r]obbery victims were able to provide more detailed accounts than rape and assault victims, and uninjured victims provided more details than injured victims, whatever the crime.").

[278] *See, e.g.*, Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720, 720 (1995) (describing "lost in a shopping mall" experiment demonstrating possibility of implanting false memories.); *see also* Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOLOGICAL SCIENCE 291, 298 (2015) (Reporting highly detailed, but false, memories of committing serious crimes, and stating that "imagined memory elements regarding what something *could* have been like can turn into elements of what it *would* have been like, which can become elements of what it *was* like").

[279] *See generally* Shaw & Porter, *supra* note 268.

[280] *E.g.*, Roediger & Bergman, *supra* note 26, at 1096 (citing evidence that psychiatric patients reporting childhood sexual abuse score high on the Dissociative Experiences Scale (DES) and that "recent studies have independently shown that individuals scoring high on

that traumatic memories are not more fragmented or less coherent than other memories,[281] and indeed that trauma—rather than banishing memory from consciousness—actually *enhances* a victim's ongoing memory for the central aspects of a terrifying and injurious event.[282]

B. *The Law Becomes More Skeptical*

By the late 1990s, the tide of panic had receded and the law had begun to regain its balance. For example, courts began to admit claims by patients and their families for redress from therapists accused of committing malpractice by "implanting" false memories into their patients.[283] Richard McNally reports: "[I]ncreasing numbers of patients began to question the authenticity of their recovered memories, and some of these 'retractors' sued their former therapists for malpractice. They accused their therapists of

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the DES are more prone to develop false memories in experimental paradigms. . . . Assuming this pattern holds in further research, the DES seems to predict not only loss of traumatic memory, but also proneness to create false memories. This constitutes a third reason to be skeptical of delayed or recovered memories in people who score high on the DES.").

[281] *E.g.*, Iris M. Engelhard et al., *Retrieving and Modifying Traumatic Memories: Recent Research Relevant to Three Controversies*, 28 CURRENT DIRECTIONS IN PSYCH. SCI. 91, 92 (2019) (Discussing a 2016 study of trauma-exposed adults and concluding: "Most measures indicated that trauma memories were as coherent as very positive and very important memories, and participants with PTSD had no less coherent memories than did trauma-exposed participants without PTSD. . . . Taken together, these data counter the claim that trauma memories are characterized by a lack of narrative coherence, especially in individuals with PTSD.").

[282] *See, e.g.*, MCNALLY, *supra* note 4, at 18 ("[P]eople remember horrific experiences all too well. Victims are seldom incapable of remembering their trauma."); *see also* Yoffe *supra* note 6 ("Notably, survivors of recent horrific events–the Aurora movie-theater massacre, the San Bernardino terror attack, the Orlando-nightclub mass murder—have at trial or in interviews given narrative accounts of their ordeals that are chronological, coherent, detailed, and lucid.")

[283] *See, e.g.*, MCNALLY, *supra* note 4, at 17 ("[T]he number of lawsuits against alleged abusers filed on the basis of recovered memories plummeted after 1994, having peaked the previous year. By the late 1990s most such lawsuits were being dismissed, and most appellate courts have prohibited tolling of the statute of limitations and have refused to admit testimony based on recovered memories.") (citations omitted).

having negligently 'implanted' false memories of abuse, causing them psychological harm and damaging their family relationships."[284]

In addition, "[b]y 1998, 152 malpractice suits had been filed by third parties against therapists. Instead of the patient filing a malpractice claim against the therapist for implanting false memories, the relatives of the patient are doing so on the grounds that they have been damaged by false allegations."[285] Slowly but surely, it also became politically permissible to acknowledge that "recovered" memories had produced many wrongful convictions, and the courts began to apply a more skeptical lens to claims of recovered memory and satanic abuse.[286] In addition, forensic interview techniques were amended to make questioning less leading and suggestive in order to reduce the chance of inadvertently creating a false account of abuse.[287]

What did *not* happen is a more general assessment of the role that theories of "traumatic memory" had played in producing wrongful convictions, or a systematic evaluation of the usefulness of that theory in the criminal law. Thus, while recovered memory theory itself gradually faded from view in the legal setting, the criminal law remained vulnerable to a reboot of the underlying structural claims which had made RMT so perversely powerful in the courtroom.

Several of hose claims have now reappeared, this time dressed in the fashionable garb of neuroscience, as the "Neurobiology of Trauma" and the "Trauma-Informed" approach to investigating and prosecuting sexual assault.

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[284] *Id.*

[285] *Id.* (citation omitted).

[286] *See, e.g., id.* at 17 ("By the late 1990s most [recovered] lawsuits were being dismissed, and most appellate courts have prohibited tolling of the statute of limitations and have refused to admit testimony based on recovered memories.").

[287] *See, infra* Section V.

IV. TRAUMATIC MEMORY RESURFACES: THE "TRAUMA-INFORMED" APPROACH TO SEXUAL ASSAULT

Once again, "traumatic memory" has been pressed into use as a legal concept, and once again that development was preceded by a shift in the political narrative about sexual assault. During his second term in office, President Barack Obama created a White House task force to study the subject of sexual assault on campus, igniting a nationwide debate about the causes, incidence, and proper legal approach to sexual assault and sexual harassment more generally.[288] Under pressure from the federal government, colleges and universities rapidly reformed their misconduct codes to provide for stricter enforcement of the rules governing sexual misconduct.[289] In the larger society, the #MeToo movement followed, announcing a zero-tolerance approach to sexual harassment in the workplace.[290] Of course preventing sexual assault and sexual harassment is a laudable goal. What concerns some legal scholars, including feminist legal scholars, is that—as in the 1980s and 1990s—political pressure to identify and punish perpetrators of sexual misconduct may erode core protections in the criminal

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[288] *See, e.g.*, Zerlina Maxwell, *Rape Culture is Real*, TIME MAGAZINE (Mar. 27, 2014 2:01 PM), https://time.com/40110/rape-culture-is-real/ (arguing one side of the debate); *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr., 2014), https://www.justice.gov/archives/ovw/page/file/905942/download.

[291] *See, e.g.*, Caroline Kitchener, *Two Ways to Fix How Colleges Respond to Sexual Assault,* THE ATLANTIC (Jan. 29, 2014), https://www.theatlantic.com/education/archive/2014/01/two-ways-to-fix-how-colleges-respond-to-sexual-assault/283438/ ("[M]any schools (including Columbia and Barnard) have begun requiring faculty and staff report all sexual misconduct to the administration . . . [a]nother popular move by college administrators is to make expulsion the standard punishment for all perpetrators found guilty of sexual assault.")

[292] *See, e.g.*, Stefanie K. Johnson et al., *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARVARD BUS. R. (July 18, 2019), https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo ("Within organizations, human resource departments need to maintain [preventing sexual harassment] as a priority, by offering bystander intervention training, having clear zero-tolerance policies on sexual harassment, and responding dutifully to complaints.").

law that require accusers to prove their case and which offer the accused a fair chance to defend themselves.[291]

In the context of prosecuting sexual assault, these concerns about the "Trauma-Informed" approach are uncomfortably familiar.

A. *The "Neurobiology of Trauma"*

Unlike Recovered Memory Theory, "Trauma-informed" Investigation (TII) is not based upon the concept of repression. TII's conception of traumatic memory rests upon different substantive claims about how the brain reacts to experiences which generate intense fear.[292] The theory instructs legal personnel—law enforcement, prosecutors, and judges[293]—as to (1) the "neurobiology" of sexual trauma, (2) its possible

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[291] I have written about this issue in the context of adjudicating sexual assault on campus. *See* Cynthia V. Ward, *Restoring Fairness to Campus Sex Tribunals*, 85 TENN. L. REV. 1073, 1136 (2018).

[292] *See* Campbell, *supra* note 7 and accompanying text (describing trauma-informed theory in context of sexual assault).

[293] *See, e.g.*, *What Every Judge Needs to Know about Trauma: Essential Components of Trauma-Informed Judicial Practice*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf (last visited Oct. 25, 2020); *Office for Victims of Crime Training and Technical Assistance Center*, TRAUMA INFORMED COURTS, https://www.ovcttac.gov/taskforceguide/eguide/6-the-role-of-courts/63-trauma-informed-courts/ (last visited Oct. 25, 2020); *Essential Components of Trauma-Informed Judicial Practice*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINSITRATION https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf. (last visited Oct. 25, 2020); Hon. Peggy Rora (Ret.), *The Trauma-Informed Courtroom*, JUSTICE SPEAKERS INSTITUTE (July 31, 2018), http://justicespeakersinstitute.com/the-trauma-informed-courtroom/; *Pre-Conference Training: Trauma-Informed Investigations and Prosecutions*, END VIOLENCE AGAINST WOMEN INTERNATIONAL, http://www.ncdsv.org/images/EVAWI_Pre-conference-training-trauma-informed-investigations-and-prosecutions_4-6-2015.pdf (last visited Oct. 25, 2020) (A "one day course . . . designed for law enoforcement personnel, prosecutors, and others involved in the criminal justice and community response to sexual assault.").

effect on a complainant's memory for the traumatic event, and (3) how investigators and the court system should accommodate these factors.[294]

Among the prominent advocates of TII in the mental health profession is Dr. Rebecca Campbell, a community psychologist and professor at Michigan State University, whose talk "The Neurobiology of Sexual Assault" became an important element in the trauma-informed training of campus and community police nationwide.[295] In her talk, Dr. Campbell explained that during and after a terrifying event such as sexual assault, fear-related hormones flood the brain and can shatter the memory of the assault into fragments.[296] This hormonal flooding can interfere with the victim's ability to accurately recall the event and to give a coherent account of it to legal personnel.[297] Nonetheless, Dr. Campbell argues, the traumatic memory can be accurately pieced back together in the presence of "trauma-informed" techniques employed by mental health professionals, police, and other legal personnel who come into contact with the complainant.[298]

Thus, the theory of Trauma-Informed Investigation (TII) argues that: (1) traumatic memory is processed differently by the brain than "normal" memory, (2) trauma can disarrange memory for the traumatic event, but (3) memory can be accurately reassembled via trauma-informed techniques of questioning and investigation.[299]

Like recovered memory theory during the 1980s and 1990s, the trauma-informed approach has spread quickly through the ranks of police, prosecutors, and judges, forming the basis for government programs, seminars, and talks exhorting legal personnel to become trained in the "neurobiology of trauma" as they deal with cases of sexual assault.[300]

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[294] *Id.*

[295] Campbell, *supra* note 7; *see also* Lisak, *supra* note 9 (articulating the same theory).

[296] Campbell, *supra* note 7 and accompanying text.

[297] *Id.*

[298] *Id.* ("[W]hat we know from the research," says Campbell, "is that the laying down of that memory is accurate and the recall of it is accurate. So what gets written on the post-it notes—accurate. The storage of it is disorganized and fragmented.")

[302] *Id.*

[300] *See, e.g.*, Lisak, *supra* note 9.

Also like recovered memory theory, the trauma-informed approach has acquired vocal critics within psychology. According to a view which has received wide exposure through the work of Harvard psychologist Richard McNally, trauma—rather than shattering the memory of the traumatic event—actually *enhances* the victim's memory for its central aspects.[301] Dr. McNally has argued that "[i]t makes sense for natural selection to favor the memory of trauma. If you remember life-threatening situations, you're more likely to avoid them."[302] According to McNally, the best scientific research indicates that traumatic memory is no more scattered or fragmented than other memory[303] and that traumatic memory is *not* significantly different from "normal" memory in terms of how it is processed and stored by the brain.[304] Finally, recent research reaffirms the main findings of memory science over the past three decades: "The brain is not a videotape machine. All of our memories are reconstructed. All of our memories are incomplete in that sense."[305] Memory, including traumatic memory, can be changed by time, by subsequent events, and even by the process and circumstances of recall.[306]

Advocates of the trauma-informed approach argue that the "neurobiological theory of trauma" should influence police investigations of crime, both on campus and in the larger community.[307] In 2016, the Institute on Domestic Violence and Sexual Assault at the University of Texas at Austin partnered with the University's Director of Police to produce *The Blueprint for Campus Police: Responding to Sexual Assault*.[308] The

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[301] *See, e.g.*, MCNALLY, *supra* note 4, at 2; Yoffe, *supra* note 6 (interview with Dr. McNally).

[302] Yoffe, *supra* note 6.

[303] *See, e.g.*, MCNALLY, *supra* note 4, at 92.

[304] Yoffe, *supra* note 6.

[305] *Id.*

[306] Recent research into trauma suffered by military personnel indicate that, under conditions of maximum stress, hormonal flooding may interfere with memory, causing problems with recall. But this does not necessarily support the view that the memories thus lost are recoverable and, when recovered, are accurate and intact. *See, e.g.*, *id.*

[307] *See, e.g.*, *What Every Judge Needs to Know about Trauma: Essential Components of Trauma-Informed Judicial Practice*, *supra* note 296.

[308] *Blueprint*, *supra* note 2 at 64 ("The current science on the neurobiology of trauma challenges investigators to reconsider some of the more traditional interviewing techniques

Blueprint contains detailed advice for campus police about the trauma-informed approach to investigating sexual assault on campus.[309] Trauma-informed theory has since migrated to community police departments, prosecutors, and judges across the country.[310] In both the campus and community contexts, the theory teaches the "neurobiological" account of trauma to police and court personnel as established fact,[311] and recommends consequent modifications in investigatory, prosecutorial, and adjudicatorial procedure. For example, the *Blueprint* discusses its model for a "victim-centered, trauma-focused interview."[312] While interviewing victims, the *Blueprint* states, "it is important that the investigator is using a trauma-informed protocol".[313] The *Blueprint* cautions that "the victim is likely to be in crisis and experiencing post-trauma related symptoms and behaviors;"[314] claims that "[i]nconsistencies and vagueness can . . . lend support to the case as they can be a sign of trauma";[315] and urges police investigators to focus not on "cognitive evidence" (such as the victim's narrative account of who, what, and when) but on interpreting "psychophysiological evidence" issuing from more emotional or "primitive" parts of the brain.[316] The *Blueprint* also informs investigators of the paramount importance to complainants of

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used in criminal investigations. Interviewing sexual assault victims calls for relearning and developing trauma-informed techniques").

[309] *Id.*

[310] *See generally id.*

[311] *See generally* Campbell, *supra* note 7; Lisak, *supra* note 9.

[312] *Id.* at 298.

[313] *Id.* at 62.

[314] *Id.* at 63.

[315] *Id.* at 64.

[316] *Id.*; *see also* Russell W. Strand, *The Forensic Experiential Trauma Interview (FETI)*, UNITED STATES ARMY POLICE SCHOOL 1-2, https://www.mncasa.org/wp-content/uploads/2018/07/FETI-Public-Description.pdf (last visited Oct. 25, 2020) ("When trauma occurs, the prefrontal cortex will frequently shut down leaving the less advanced portions of the brain to experience and record the event. . . . Most interview techniques have been developed to interview the more advanced portion of the brain (prefrontal cortex) and obtain specific detail/peripheral information such as the color of shirt, description of the suspect, time frame, and other important information. Some victims are in fact capable of providing this information in a limited fashion. Most trauma victims however are not only unable to accurately provide this type of information, but when asked to do soften inadvertently provide inaccurate information and details which frequently causes the fact-finder to become suspicious of the information provided . . . the FETI process was developed and implemented as proven methods to properly interview the more primitive portions of the brain.").

feeling *believed* by the investigator, whether or not the accusation has been proved.[317]

In writing reports of interviews with complainants, the *Blueprint* advises investigating officers to "[a]nticipate likely defense strategies and include [in their written reports of the incident] the information to counter them".[318] For example, when reporting on subsequent interviews with the parties, investigating officers are advised to avoid writing detailed accounts of prior interviews in order to forestall impeachment challenges by the defense.[319] Officers are instructed that "[t]rauma victims often omit, exaggerate, or make up information when trying to make sense of what happened to them or to fill gaps in memory. This does not mean that the sexual assault did not occur."[320] Common sense suggests that omissions, exaggerations, and falsehoods in a witness's account of *any* crime should generate follow-up questions and investigation. The *Blueprint*, on the other hand, advises that gaps or fabrications by a sexual assault complainant might actually be proof that the assault *did* happen.[321]

In terms of the methodology to be used in trauma-informed complainant interviews, the *Blueprint* recommends the Forensic Experiential Trauma Interview (FETI), developed by consultant and former military police official Russell Strand for use by military police investigating cases of sexual assault.[322] The FETI deploys the neurobiological theory of trauma in the context of interviewing sexual assault complainants.[323] In particular, it emphasizes the differences between traumatic and non-traumatic memory, and the importance of involving evidence such as body language and

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[317] *Blueprint*, *supra* note 2, at 90.
[318] *Id.* at 68.
[319] *Id.*
[320] *Id.* at 90.
[321] *Id.*; *see, e.g*, Russell Strand, *supra* note 320 at 2 ("In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.").
[322] *Blueprint*, *supra* note 2; Strand, *supra* note 320.
[327] Strand, *supra* note 320, at 1.

"primitive brain" activity, in the investigation of a complaint.[324] According to Strand:

> The FETI interview enhances the investigative process by taking a one-dimensional traditional investigation and turning it into a three-dimensional, offense-centric investigation, including subjective experiences indicative of trauma-based brain states. Traumatic memories are often encoded and retrieved differently than non-traumatic memories, so they have that dimension of the experience, and then presenting the fullness - and limitations - of the victim's memories, including the fragmented sensations and emotions, lack of narrative and sequencing, etc., which are then critical facts of their own.[325]

Indeed, Russell Strand goes so far as to claim that "research clearly shows the cognitive is not generally involved in experiencing or recording the traumatic incident. What are needed are methods to properly interview the portions of the brain that actually recorded the experience."[326] It is unclear how victims of traumatic events can offer any verbal account of the event at all unless the "cognitive brain" has stored, can retrieve, and can recount the information.[327] The FETI seeks to "interview the brainstem" which, Strand argues, records the traumatic experience via emotions and physical sensations.[328] One sexual investigator lauded the FETI, saying:

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[328] *Id.* at 1-2.

[325] *Id.* at 2 ("In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm," they can also be a hallmark of the effects of stress and trauma. "What many in the criminal justice field have been educated to believe people do when they lie (e.g., changes in body language, affect, ah-filled pauses, lack of eye contact, etc.) actually occur naturally when human beings are highly stressed or traumatized.").

[326] Russell Strand, *Shifting the Paradigm for Investigating Trauma Victimization*, National Resource Center on Domestic Violence, BATTERED WOMEN JUSTICE PROJECT, https://responsesystemspanel.whs.mil/public/docs/meetings/20130627/01_Victim_Overview/Rumburg_FETI_Related_Articles.pdf (last visited Oct. 25, 2020) [hereinafter *Shifting the Paradigm*].

[327] *See, e.g.*, Yoffe, *supra* note 6 (noting that survivors of trauma often recollect, accurately and in detail, the traumatic event and are able to recount it in court).

[328] *Shifting the Paradigm*, *supra* note 330.

"One of the biggest blessings in FETI has been being able to take forward an investigation with no tangible evidence. . . . I have the ability to take this to my supervisor and say, 'This is what the victim is articulating, these were the things she felt her body doing . . . and he saw her doing what she was doing.'"[329]

From the perspective of criminal law, the history of procedural abuse in the Recovered Memory cases offers cause for concern about the premises of today's "trauma-informed" approach. That history highlights the danger of cherry-picking from controversial psychology theories to support allegations of sexual assault. It also urges the importance of adhering strictly to legal norms that press for the fullest possible inquiry into the facts and seek to protect accused perpetrators (of any crime) from mistaken, unfair, or unsupported accusations and charges. Such norms include the necessity of an impartial investigation, which acknowledges the frailty of memory, vigorously probes gaps and distortions in witnesses' recall, and insists that expert testimony and other "proof" of an accusation be logically sound and consistent with the best science on relevant issues.

The trauma-informed approach, by contrast, makes claims about traumatic memory that are disputed in the field. It urges investigators and other legal actors to sympathize with the victim over an impartial search for truth. It directs investigators to pitch their interviews with witnesses and their written reports toward defeating foreseeable defense arguments. It encourages law enforcement and prosecutors to view witness behaviors such as distorting or falsifying facts as possible proof that the assault occurred, rather than as cause for further inquiry. It embraces theories such as *interviewing the primitive brain*, which attempt to sidestep cognitive recall in favor of body language and other non-verbal physical behaviors, behaviors which—as we know from the testimony of self-styled "experts" in body language during the recovered memory era—are extremely vulnerable to errors of interpretation. And it attempts to shelter all these arguments under the authority of neuroscience while ignoring both the history and the contemporary challenges and counter-claims as to what the science shows and how, if at all, it ought to inform criminal prosecutions. In short, the

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[329] *Id.* ("Training aims to improve how military sexual assaults are investigated.").

theory and methods of TII appears to repeat some of the same mistakes that produced the injustices of the recovered memory era. And they do this in a political environment in which, once again, the call to "Believe Victims" is generating pressure on the criminal justice system to prioritize accusations over accuracy.

V. THE ROLE AND FUNCTION OF "TRAUMATIC MEMORY" IN SEXUAL ASSAULT CASES

It is past time for an in-depth review of the concept of emotional trauma and its usefulness to criminal prosecutions of sexual assault. Whatever role and function the concept may have in the diagnosis and treatment of mental disorder, it has not proved to be a reliable basis upon which to charge, convict, or punish a criminal defendant. At the very least, the burden of proof should be on trauma-informed theories to demonstrate that they offer important insights to the investigation and prosecution of sexual assault without detracting from its core mission—the impartial probing of allegations and, where a charge is justified, the impartial adjudication of that charge. No theory that undermines the impartiality or thoroughness of that process is a legitimate basis on which to convict someone of a crime..

That is particularly true when more effective and more rationally defensible means exist for accomplishing justice. With respect to investigating charges of sexual assault, at least one such method may exist. Known as the Cognitive Interview, it relies on extensively-studied and validated psychological premises, and it has a demonstrable record of success.

A. *Reforming Police Interviewing Techniques: The Cognitive Interview*

In 2014, two psychologists and memory experts, R. Edward Geiselman and Ronald P. Fisher, affirmed that "forensic research scientists have known for a while how to conduct [witness] interviews effectively."[330]

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[330] R. Edward Geiselman & Ronald P. Fisher, *Interviewing Witnesses and Victims*, *in* INVESTIGATIVE INTERVIEWING: THE ESSENTIALS 29 (Michel St. Yves, 2014).

Geiselman & Fisher have particular expertise in the Cognitive Interview of witnesses, which they cite as one of several methods that "have generally been found to (a) increase the amount of information gathered, and/or (b) decrease the likelihood of recalling an event incorrectly."[331] The Cognitive Interview contains "core elements, including (a) developing rapport with the witness, (b) asking open-ended questions primarily, (c) asking neutral questions and avoiding leading or suggestive questions, and (d) funneling the interview, beginning with broader questions and narrowing down to more specific questions."[332]

Geiselman & Fisher developed the Cognitive Interview (CI) in the 1980s and 1990s, and the CI is used by police around the world to interview witnesses in all types of criminal cases, including sexual assault cases.[333] They describe the Cognitive Interview as a "witness-centered" approach which prioritizes an understanding attitude toward witnesses while at the same time holding fast to the basic requirements of police investigation—obtaining the most detailed, and most accurate, information possible from each witness, including victims of crime. As opposed to the interviewer driving the interview with a predetermined list of questions for the witness, the CI's "witness-centered" approach instructs the interviewer to "transfer control" to the witness who is allowed to tell their story in the fashion and in the order that makes sense to them.[334] "[T]he interviewer must interact with the victim not merely as a source of evidence that can be applied toward solving the crime," write Geiselman and Fisher. "Rather, the interviewer should express their concern about the victim's plight, as a person who has undergone a potentially life-altering experience."[335]

Nonetheless, the CI interviewer emphasizes the need for adherence to the truth: "To promote high accuracy in recall, interviewers should explicitly instruct witnesses not to guess, and to indicate that they 'don't

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[331] *Id.* ("Of these techniques, the most prominent are the Cognitive Interview, Conversation Management, the Memorandum of Good Practice, and the Step-wise method.").
[332] *Id.* at 2.
[333] *Id.*
[334] *Id.* at 5 ("Tell me in your own words what happened in detail from beginning to end.").
[335] *Id.*

know' or 'don't recall' when that is the case."[336] As aids to memory, the interviewer should help the complainant to "reinstatement of the context" of the assault, since "[r]etrieving information from memory is most efficient when the context of the original event is recreated at the time of recall."[337] Interviewers, therefore, should

> instruct witnesses to mentally recreate the external factors (weather), emotional factors (mood, fear), and cognitive factors (thoughts) that existed at the time of the original event. Sights, sounds, and smells are relevant as well as the witness's state of mind leading up to the event. The interviewer will give the witness the time necessary to recreate the period of time leading up to the target event.[338]

These techniques, write the authors, will enhance the likelihood that the witness will remember more, and "also can help circumvent any additions or contaminations to the witness's memory record that may have occurred subsequent to the event."[339]

In short, the CI protocol is designed to (a) maximize accurate memory retrieval; (b) emphasize to the witness that it is okay not to remember and that the witness should *not* guess or fabricate details; and (c) minimize the chance of contamination of the witness's memory by subsequent events, by subsequent conversations with others, or by imperfections in the victim's own recall. While the witness is telling their story, the interviewer is instructed not to interrupt, saving any follow-up questions or clarifications until after the witness's first account is finished.[340] At that point only, "the CI interviewer will guide the witness to the richest sources of information (scenes or 'mental images') and thoroughly exhaust

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[336] Geiselman & Fisher, *supra* note 334, at 4.
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.*

these sources of their contents" by asking open-ended (as opposed to leading) questions.[341]

In addition, the CI protocol recommends probing for information "out of chronological order"—asking the witness, for example, to tell the story backwards – as well as enlisting the victim's senses in memory retrieval: "[M]ultiple searches of memory should lead to more finds, but only if different access routes are explored".[342] For example,

> Instead of asking, "Tell me more about his appearance" multiple times, ask about the intruder in different ways, e.g., "Did the intruder remind you of anyone you know?" For objects, instead of asking "Tell me more about the objects" multiple times, ask about different properties of the objects, e.g., "How much did it weigh; what kind of material was it made of?"[343]

And so forth. The interviewer remains focused, and helps the witness to remain focused, on retrieving as much accurate information as possible, while also making clear their respect for the witness and the desire that the witness tell the story of the target event in his own way and in his own time. Finally, when closing the interview, the CI interviewer should thank the witness and encourage the witness to contact the interviewer if the witness recalls further details of the event. "Extending the life of the interview is important, given the likelihood of delayed recollections, especially following incidents that were emotionally arousing for the witness."[344]

Geiselman and Fisher source the CI in "well-founded principles of cognitive psychology" and write that the method has been rigorously tested

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[341] *Id.* (citing Endel Tulving & Donald M. Thomson, *Encoding Specificity and Retrieval Processes in Episodic Memory*, 80 Psychol. R. 352, 352, 373 (1973)).

[342] Geiselman & Fisher, *supra* note 334, at 4.

[343] *Id.* at 6.

[344] *Id.* (citing RONALD P. FISHER, NEIL BREWER & GREGORY MITCHELL, *The Relation Between Consistency and Accuracy of Eyeqitness Testimony: Legal Versus Cognitive Explanations, in* HANDBOOK OF PSYCHOLOGY INVESTIGATIVE INTERVIEWING: CURRENT DEVELOPMENTS AND FUTURE DIRECTIONS 121, 121 (T. Williamson et al. eds. 2009)).

and "typically elicited between 25%-50% more correct statements than did the control interview".[345]

The CI is only one example, though an important one, of how investigation of sexual assault can treat complainants with the respect they deserve while also protecting the thoroughness and impartiality of criminal investigation. It offers an empathic and witness-centered method that relies on tried and tested psychological research and does not commit itself to controversial conceptions of trauma and memory.

VI. CONCLUSION: A CAUTIOUS APPROACH TO TRAUMA THEORY IN PROSECUTING SEXUAL ASSAULT

Can the concerns of criminal justice—respecting all parties, accumulating all available facts, and seeking to understand the truth about what happened—find satisfaction by means that are less problematic than trauma-informed procedures? In the wake of its multiple failures to meet standards of coherence, logic, and accuracy, "trauma-informed" process should be viewed with skepticism. If we have learned anything from history, it is this: In the criminal context, the argument that traumatic memory is importantly different from "normal" memory, and that the criminal process must be modified accordingly, should be treated with extreme caution. That argument lacks convincing scientific backing, is structurally vulnerable to abuse, and may well be unnecessary to achieve the goals of justice. It is long past time that the criminal law called theories of "traumatic memory" to account.

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[345] *Id.* at 4 ("[CI] has been tested rigorously in more than 100 laboratory experiments, most of which were conducted in the United States, England, German or Australia.").