

Common Juror Misconceptions: When Psychological Experts are Essential

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There are several areas in criminal trials where psychological experts are essential because most jurors have mistaken beliefs. This includes the nature and reliability of memory and how it relates to child witness interviews, claims of traumatic amnesia and recovered memories, and eyewitness identification. Experts are also essential in false confession cases. The research in these areas is generally accepted in the scientific community but not known by most lay people.

The Nature and Reliability of Memory

Erroneous beliefs about the nature of memory can have large implications in the legal system. Studies document the pervasiveness of these mistaken beliefs in the general public, which includes jury pools. In a trial, this can easily lead to flawed analyses of testimony that involves memory. Therefore, in trials that involve issues relating to memory, such as eyewitness identification, the relationship between witness confidence and accuracy, claims of recovered memories, and what is disclosed by children in a forensic interview, it is essential to have an expert.

The popular view of memory is that it operates like a tape recorder or video camera in which everything that happens to us is accurately recorded and stored in our brain, waiting for the correct playback button so the memory can be retrieved. But this view of memory is mistaken. In reality, what we remember is a combination of the original encoding of the event, intervening events that happen to us since the original event, new information we receive, and our current beliefs and feelings. Memory is a process of reconstruction. Memories of events can include distorted versions of the original event. The reconstructed memory can sometimes include highly detailed but inaccurate and even completely fabricated versions of an event.

A crucial factor in the way human memory works is that talking about, thinking about, or imagining an erroneous account can result in people coming to a

subjective belief that a false memory is a real experience. They may confuse information they thought about, talked about, or imagined with something that happened to them personally. Psychotherapy is a learning process. When the therapy consists of helping the person recall details and express feelings about an alleged traumatic event, the person may develop strongly held but unreliable and inaccurate memories.

When a person talks to others about an alleged event, especially if the other person believes it happened, the person is vulnerable to making what is known as a “source monitoring error.” This refers to situations where the source of the information is recalled erroneously. The person confuses information they thought about, talked about, or fantasized about with something that actually happened. Although young children are most vulnerable to this type of error, older children and adults can also confuse something they talked about or just imagined with something that actually happened.

It is difficult to tell from the nature of witnesses’ narratives or demeanor whether they are providing reliable testimony. Experts in the areas of child psychiatry, clinical psychology, law enforcement, and social services watching videotaped interviews of children relating either real events or fictitious events do no better than chance at judging which are accurate. Surveys of potential jurors indicate they generally misunderstand the reliability of eyewitness identification and don’t understand how memory works.

Lilienfeld et al. (2010) summarize the research on the nature of memory:

These studies demolish the popular belief that our memories are etched indelibly into a permanent mental record. Rather than viewing our memory as a tape recorder or DVD, we can more aptly describe our memory as an ever-changing medium that highlights our remarkable ability to create fluid narratives of our past and present experiences (p. 69).

Forensic Interviews of Children

In the 1980s there were many high profile cases where people were alleged to have sexually abused children in bizarre rituals. This resulted in prolific research on suggestibility and interviewing. There is now a robust body of literature about

suggestibility and how to conduct reliable and forensically useful interviews. This information isn't clearly understood by the general public.

Psychologists may be asked to review a taped interview of a child in terms of how suggestive it is and whether it is characterized by confirmatory bias (seeing what we expect to see). Such a review involves the nature of memory and how biased and suggestive interviews can not only result in inaccurate statements, but can cause the child to develop a false but subjectively real memory for an event that never happened.

Several professionals and professional groups have developed guidelines as to how investigations and interviews must be conducted to obtain accurate and reliable information. These guidelines show strong agreement among experienced professionals. I summarized the general consensus in the scientific community of the guidelines for interviewing children in a presentation to the ACFP and paper in the *American Journal of Forensic Psychology* in 2006.

The most important principle underlying the guidelines is that the interviewer must go into the interview without a pre-existing bias as to what happened and should explore alternative hypotheses. Confirmatory bias is the overarching factor in interviews that produce unreliable information. That the person was abused as alleged is only one hypothesis; others should be explored in the interview.

Another critical factor is that all investigatory interviews should be videotaped, or at a minimum, audiotaped. Without an electronic record of the interview, there is no way to know exactly what transpired. Research shows that even experienced interviewers don't accurately recall the interview.

The controversial anatomically detailed dolls are used less often today, but it is common to see interviews using anatomical drawings where the child is asked to label body parts followed by conversations about good and bad touches. Neither the dolls nor the anatomically detailed drawings should be used. They are suggestive, especially when used early in the interview, and they focus the child's attention on the genitals. They lead to unreliable and false statements, particularly in younger children.

It isn't enough to only review a taped interview because questioning by parents and other adults can affect the responses of children in the formal interview. This can happen with a single suggestive interview or conversations with a parent, therapy sessions in which the therapist assumes the abuse is true, or

even by overhearing others talk about an alleged event. Even if a forensic interview is done skillfully and properly, this may be insufficient to overcome the effects of prior interviews and conversations. Judgments about the accuracy of statements in formal interviews and court testimony must consider the possibility of prior exposure to misinformation. Therefore, at the end of the interview, as part of exploring alternative hypotheses, children should be questioned in detail about everyone they have talked to about the alleged abuse.

Since even a good forensic interview may be unable to undo the influence of prior conversations by parents and others, it is essential to get as much information as possible about previous conversations about the alleged abuse. Review the entire file and note all conversations prior to the formal interview.

Early Memories and Memories for Documented Trauma

Adults have little or no recall for events before ages three or four because of the phenomena of childhood amnesia. Even though very young children can talk about things that happened to them several months earlier, children's age at the time of their earliest memories derives from a later age as children get older. This levels off somewhere around age seven to eight. Therefore memories dating from infancy or early toddlerhood in older children and adults should be treated with suspicion because they date from an age so much earlier than people can remember.

There is no support for the claim that it is common for people to block out memories for traumatic events only to remember them years later. If a person is past the age of childhood amnesia (ages three or four) experiences a traumatic or highly stressful event, they recall the event when they are older. They don't forget it unless it wasn't traumatic or stressful. This is a consistent finding in studies of children with documented traumas, such as fires, serious accidents, airplane crashes, or seeing a parent murdered.

The Myth of Repressed Memory

The height of the recovered repressed memory craze was in the early 90s and began to decline by the turn of the century. A major factor in the changing attitudes was the lawsuits against therapists brought by lawyers such as Christopher Barden, who is also a psychologist. Memory experts such as Elizabeth Loftus and Richard Ofshe wrote books and appeared on talk shows. There were high profile cases involving falsely accused parents, retractors, and others such as priests.

But despite this, the false beliefs about the validity of recovered repressed memories haven't disappeared. The last civil lawsuit against therapists I was involved in was in 2011. However, in 2017 I consulted in a case in which an 18-year-old girl accused her father of vaginally raping her when she was 9. She said she had repressed the event until recently and it only came back to her after her mother died.

The Boston priest, Paul Shanley, was convicted in 2005 of repeatedly raping a young boy in the '80s in a case involving recovered repressed memories. The boy said he was regularly assaulted over three years beginning when he was 6 but that each assault instantly erased his memory of what just happened so when it happened the following week it was as if it were the first time. It all came back to him when he was in his 20s. The state experts testified in Shanley's 2005 trial that such massive repression is consistent with dissociative amnesia and that this is generally accepted in the psychological community. The prosecutor told the jury to use "your common sense" and believe the experts and the victim. Paul Shanley was released from prison in 2017 but his life is difficult due to the fact most people believe he is a dangerous sex offender.

In a 2014 survey by Lawrence Patihis et al., 81% of college students and 83.9% of the general public agreed that "traumatic memories are often repressed." When compared to beliefs in the 1990s, both undergraduates and mainstream psychotherapists showed increased skepticism over time, but a substantial proportion of non-researchers continued to endorse the validity of repressed memories to some degree.

In his 2017 book about repressed memory Mark Pendergrast notes that although the overt practice of recovered memory therapy has lessened, the mindset behind it has never disappeared. He discusses current surveys that indicate not only do many therapists, but members of the general public accept this myth. In 2017, shortly before his book went to press, he surveyed over 2,000 people. Of those who had therapy, 20% reported that the therapist had discussed "the possibility you might have been abused but had repressed the memories." Over 11% said that during therapy they had recovered memories of childhood abuse. Pendergrast concludes that although the epidemic of repressed memories had peaked in the early '90s, it still takes place.

False and Coerced Confessions

Police are taught that obtaining confessions is a crucial objective since most criminal cases are solved by a confession. The goal of police interrogations is to outsmart the suspect, overcome his resistance, obtain his compliance, and get a confession. Although the assumption underlying police interrogations is that innocent people rarely confess, there is increasing evidence they do when the conditions are right. This isn't generally known by lay people who assume innocent people rarely confess and don't understand how a false confession can occur. Mock jury research shows that people find it hard to believe that anyone would confess to a crime they didn't commit.

People make false confessions for various reasons. They must decide what to do based on their perceptions of the short- and long-term consequences. They may want to escape a stressful situation. They may be influenced by threats and inducements, stated or implied. They may see their situation as hopeless and when police communicate to them that things will go better for them if they confess, they go along with it. The methods used by the police can be very persuasive. The research concerning this was published in the journal of *Law and Human Behavior* as a "white paper" by the American Psychology-Law Association, a division of the American Psychological Association (AP-LS) in 2010.

The Innocence Project has exonerated over 350 men based on DNA. They see this as the tip of the iceberg since most cases don't involve DNA. In a quarter of the cases where people were exonerated by DNA, the wrongful conviction was the result of a false confession.

People will make a confession, including a false confession, for various reasons. They must decide what to do based on their perceptions of the short- and long-term consequences. They may want to escape a stressful situation. They may be influenced by threats and inducements, stated or implied. They may be influenced by false or exaggerated evidence given by the police and see their situation as hopeless. When the police then communicate to them that things will go better for them if they confess, they go along with it.

The methods used by the police can be very persuasive. They routinely use deception, trickery, and psychologically coercive methods of interrogation. Although trial judges may exclude evidence elicited by *explicit* threats and promises, they often admit into evidence prompted by *implicit* threats and promises. I have seen cases where a suspect is told he failed a poorly administered polygraph and the person believes the machine has somehow tapped into his subconscious so that even if he has no memory of committing the crime he must have done it.

Experimental studies suggest many factors contribute to false confessions. Kasson observes that innocence itself may put innocents at risk for making a false confession. They may believe truth and justice will prevail and they cooperate with the police believing eventually the truth will come out.

Situational factors include the interrogation process, over-zealousness of police officers, and police tactics designed to get confessions. In the United States, police are permitted to bolster their accusations by presenting suspects with false evidence. Police tactics include three major things: isolating the suspect which increases his anxiety and desire to escape; confronting the suspect with exaggerated or false evidence; and minimization, in which a sympathetic interrogator morally justifies or minimizes the crime and leads the suspect to expect leniency if he confesses.

Police officers are often trained in what is known as the *Reid Technique*. This technique, which is often used in police interrogations, was developed by John E. Reid and his associates. The Reid technique is broadly based on two processes: breaking down denials and resistance and increasing the suspect's desire to confess. The technique is based on the assumption police will only use it on guilty suspects in order to close the case. Although the Reid technique is based on deception and manipulation, proponents have sometimes claimed the methods won't make an innocent suspect confess.

Sex Offender Recidivism

Contrary to popular belief, FBI official statistics indicate sexual crimes have been steadily decreasing over the past 20 years. Sexual offenders have lower recidivism rates than do many other offenders; the vast majority of individuals

convicted of sex crimes will not recidivate. If a sexual offender does commit another crime, it is most likely to be a nonsexual offense.

Various studies put the overall sexual recidivism of all sexual offenders at from approximately 4% to 15%, which is far lower than most people believe. DeClue and Rice's 2016 study found that sexual offenders judged to be of sufficiently high risk as to be classified as sexually violent predators, when released, had a five-year sexual recidivism rate of 9.2% and a ten-year sexual recidivism rate of 13.1%. Significantly, these rates of recidivism in the first and second deciles are nearly the reverse of public opinion, which would place them in the eighth or ninth decile.

Research indicates most people who have committed sexual offenses desist from further sexual offending. The risk for sexual recidivism reduces over time, declining with the offender's age, and is lowered when treatment and appropriate social supports are available. Research on sexual offender recidivism contradicts the popular perception that risk levels associated with sex offending are stable and high. In reality, recidivism rates for sex crimes is low in comparison to other types of offending. The recidivism rate of older sex offenders when they are released from custody is extremely low and there is a large literature demonstrating that sex crimes, along with crimes in general, decrease with age. Barbaree and Blanchard (2008) state, "The best description of the age function is a gradual linear decrease in recidivism rates from age 25 to age 70, at which point the estimated recidivism rate is near zero."

Although adolescent sex offenders are believed to be at a very high risk to continue offending as adults, adolescent sexual offenders are more similar to juvenile offenders in non-sexual areas, but are quite distinct from adult sexual offenders. There are significant developmental changes occurring in adolescent sex offenders, and the overwhelming majority of youthful sex offenders desist from further sex offending behavior as they become mature. Only a small minority of adolescent sexual offenders go on to commit sexual offenses as adults. If these adolescent sexual offenders are re-arrested it is most often to be for a nonsexual offense. In a recent review of 106 international recidivism studies involving more than 33,000 juveniles who have sexually offended, Caldwell (2016) determined

that the mean 5-year recidivism rate was less than 5%. In examining only the 33 studies between 2000 and 2015, he found a current mean sexual recidivism rate for juveniles of 2.75%. He concluded this suggests the most current sexual recidivism rate is likely to be below 3%.

The popular belief that sex offenders rarely change and remain at high risk to reoffend throughout their lives is not supported by research. In a 2014 study, Hanson and his colleagues examined the extent to which sex offenders present an enduring risk during a 20-year follow-up period. The highest risk was during the first few years after release, but then decreased substantially the longer the individual remained offense free in the community.

Recidivism risk is often asserted to be much higher than the research findings indicate. This is based on the claim that recidivism is underestimated because most sexual assaults are not reported, a conclusion that derives from retrospective surveys of adult women who say they were abused but had never reported the sexual offense. However, in order to be relevant to the question of sexually violent recidivism, the subjects would have had to have been sexually assaulted by a recidivist who had been previously charged with a sex offense. There is no scientific evidence for the notion retrospective victims, unlike contemporary victims, are more likely to have been assaulted by recidivists. Sandler, Freeman, and Socia (2008) documented that the great majority of sexual offenses are committed by first-time offenders, not by recidivists. They examined all arrests for sexual offenses from January 1986 to 2006 in New York State, a total of over 170,000 sexual offense arrests, and found that over 95% of all sexual offenses were committed by first-time sexual offenders.

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